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SOME STATISTICS ON THE PRELIMINARY INQUIRY IN CANADA

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SOME STATISTICS

ON THE

PRELIMINARY INQUIRY IN CANADA

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FOREWORD

This research was undertaken by the Research and Statistics Section for, and with the assistance of, the Criminal Law Review Section of the Federal Department of Justice.

Attorneys General Departments from across Canada cooperated in the collection of data, often at some expense to themselves. Their assistance is greatly appreciated.

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The views expressed in this report are the authors' and do not necessarily represent those of the Department of Justice.

TABLE OF CONTENTS

Chapter Four: Duration of Preliminary Inquiries

Chapter Five: Outcome of Preliminary Inquiries

Chapter Six: Conclusions

LIST OF TABLES

EXECUTIVE SUMMARY

The preliminary inquiry in Canada has recently become the subject of considerable controversy. Using oral testimony to establish a prima facie case has been described as outmoded and a cause of undue court delay, witness hardship and other problems. Alternative models of pre-trial procedure, some of them based on current practices in foreign jurisdictions, have been suggested.

Survey Purpose

To inform the discussion of policy issues, the Department of Justice, in co-operation with provincial Attorneys General Departments, conducted this statistical survey during the summer and fall of 1982.* Its purpose was to gather needed empirical evidence on the current Canadian practice, specifically regarding time delays, number of witnesses, outcomes of preliminaries and related matters.

The Sample

Data were gathered from 13 courts across Canada, in large and medium-sized cities (Table 1.1). A census was taken of every case proceeded on by indictment during the first three months of 1980. This procedure resulted in a cohort of 7219 cases, pursuant to Criminal Code sections 427, 429.1, 464/484, 485 and 495, which were entitled to a preliminary (Table 3.2).Of these cases, only 30% (2174 cases) actually availed themselves of the procedure (Table 3.1).

The Results

Five key questions were answered in this survey.

Question #1: How long do preliminary inquiries take?

Eighty percent of preliminaires took one day or less of court time, and only 39 cases out of 2174 (two percent) occupied six or more court days (Table 4.1). Out-of-court time averaged 61 days from first court appearance to preliminary (Table 4.9) and 82 days from preliminary to trial commencement (Table 4.10).

* All provinces except Alberta were able to provide data within this time frame.

The total elapsed time from first appearance to trial verdict was 177 days for cases with a preliminary, 42 days for indictable cases proceeding directly to magistrate's court (Table 4.11). In-court trial time also averaged one day or less for all indictable cases (Table 4.5).

Question #2: How many witnesses are called?

In the cases where witness information was recalled by the court administrator, only about half of all preliminaries heard witness testimony. Furthermore, in those cases, few witnesses were heard: two or three was the average and these were almost invariably crown witnesses (Table 3.8). Roughly half of the preliminaries were consensual, with fully contested preliminaries amounting to only five percent of all cases (Table 3.6). It can be inferred from these findings that crown disclosure must be reasonably adequate.

Question #3: How many cases are screened out at the preliminary?

Preliminaries resulted in complete case screening (all charges dropped, withdrawn or stayed) in 10 percent of the cases (Table 5.1). An additional seven percent of the 2174 cases committed for trial were dropped out of court before the trial started, perhaps as an indirect result of the preliminary (Table 5.8). A further two percent were stayed or withdrawn at the trial itself, leaving 12% to be acquitted on all charges(Table 5.8). However, the majority of case screening took place at the first court appearance (Table 5.3). Therefore, the preliminary per se is only one part of the pre-trial case screening process that begins with the first appearance and carries on within and outside the courtroom.

Question #4: How many cases had their charges amended as a result of the preliminary?

Committal on some of the original charges or the lesser or included offences occurred in nine percent of the preliminaires examined (Table 5.1).

A large number of additional cases had their charges amended following the preliminary in connection with pleas of guilty to reduced charges (Question #5).

Question #5: How often does a guilty plea follow the preliminary inquiry?

Following committal on all or some charges, 34 percent of the 1800 cases going to trial entered pleas of guilty to some charges and 37 percent plead guilty to all charges (Table 5.4). These pleas were generally but not always associated with re-elections (Table 5.6). Another 11% of cases with a preliminary plead not guilty but were eventually convicted on all or some charges (Tables 5.5 and 5.7, reworked).

An additional finding concerned the rates of conviction for indictable offences. Upon charges being laid, the probability of being convicted was 0.58 (Table 3.10). However, the probability of being formally acquitted in a court of law was only 0.06. The remainder, or 2570 out of 7219 cases, were disposed of in other, less formal ways. This underscores the importance of pre-trial procedure.

The Conclusion

The preliminary inquiry is a seemingly effective but not terribly efficient method of pre-trial procedure. It takes a long time for cases to be resolved, and most of that time is spent out of court. It is obvious that most pre-trial activity is informal, out-of-court action rather than a formal hearing of evidence. Undoubtedly a formal committal to trial has a part to play in plea bargaining and plea decisions. But since there currently are no checks and balances on how long this process can take, lengthy delays frequently occur.

CHAPTER ONE

INTRODUCTION

Background

Delays and inefficiencies in the court system and resulting problems associated with witness hardships and high court costs have been of great concern to judges, crown and defence counsel, federal and provincial governments and the general public. There has been, among these groups, a general recognition of the need to reassess the laws, legal procedures and governmental policies related to the court process in general and, more specifically, the procedure for getting to trial, wherein most of the delay appears to occur. For these reasons, pre-trial procedure, specifically the preliminary inquiry, was singled out as one of the areas in need of reassessment and possible reform within the context of the overall Criminal Law Review.

The original purpose of the preliminary inquiry was to speed the overall court process and to spare innocent accused the expense and delay of a full trial. Historically, a judicial officer determined the sufficiency of the evidence and screened out non prima facie cases through the vehicle of the preliminary inquiry. The obviously innocent (those against whom no cogent evidence could be marshalled) could be discharged, the probably guilty committed, and the in-between cases focused, clarified, and shortened.

But there seem to be problems. Pre-trial procedure may fail to screen defendants, may take as long as or longer than a trial, and may be as formal as a trial. The main criticism of the preliminary inquiry is that, although the original concept may be valid, the process may have degenerated into a meaningless ritual of repetition in which the defendant is in effect tried twice.

Against this background of criticism was the unsettling recognition that almost no reliable statistics were available to document the nature and extent of possible problems, let alone provide an adequate information base to guide the review process. No systematic study had even been undertaken to specifically examine pre-trial procedure in Canada. More generally, Canada is one of the few developed countries without national court statistics that could be used to help improve the administration of justice or even to provide accountability to the public. Hence, before any

serious discussion of policy issues could take place, it was necessary for the Department of Justice, in cooperation with the Provincial Attorneys General Departments, to conduct the basic empirical research reported herein.

Objectives

Primarily on the basis of experts' experience, potential problems in pre-trial procedure were identified. Research questions were devised to address the following two points regarding each problem thus identified:

1. Has the problem been accurately identified? That is, does current pre-trial procedure actually cause this problem?

2. Is the problem significant? That is, does the problem occur frequently enough or severely enough to warrant corrective action via legislative reform?

Research Questions

The principal issues examined in this study are defined by the following five questions. The first two deal with the operation, or working nature, of the preliminary inquiry, the last three with its effectiveness. These two aspects are obviously interrelated and ultimately will have to be dealt with that way.

1. How long do preliminaries take?

   Pre-trial delays are the major concern of this study. Data on the length of preliminary inquiries, comparisons with other stages of the court process, and some indication of possible reasons for delay are essential to understanding whether undue delay occurs and, if so, what might be done about it.

2. How many witnesses are called?

   Witnesses called to testify at a preliminary inquiry must repeat their testimony at the trial. This repetition can inconvenience witnesses, especially if there are numerous court appearances and remands or long lapses of time between appearances.

3. How many cases are screened out (discharged, stayed, withdrawn) at the preliminary?

   The preliminary inquiry can serve as a substitute for the trial, securing the discharge of individuals who

would otherwise have to undergo the expense of a full trial. The extent to which preliminaries serve or fail to serve a useful purpose is a companion issue to the determination of how much time they take.

4. In how many cases are charges amended as a result of the preliminary?

   Preliminary inquiries can also result in some charges being dropped or changed to lesser and included offences. The trial is thereby shortened and focused, leading to an overall saving in time and effort.

5. How often does a guilty plea follow the preliminary?

   Although preliminaries may secure the freedom of some individuals, the disclosure of evidence may evoke guilty pleas from others. Such pleas obviate the need for long and costly trials.

Methodology

To answer these questions so that informed discussions of policy issues could take place, data were gathered from 13 courts across Canada, in large and medium-sized cities (see Table 1.1). Court records were the main source of information, supplemented as required by crown briefs and police records. With the cooperation and assistance of Provincial Departments of the Attorney General, law students and junior lawyers were hired in each locale to collect data during the late summer and early fall of 1982.[1]

The objective was total coverage of the population at risk for a preliminary inquiry. By selecting all serious cases that proceeded by indictment, the survey captured every case that could have had a preliminary -- including cases in which the accused waived his right to one by electing trial by magistrate.[2] Included in the study were all indictable offences under the Criminal Code, Narcotic Control Act and Food and Drugs Act that proceeded pursuant to Criminal Code sections 427, 429.1, 464/484, 485, 495 and 498. The following cases were not surveyed:

(1) violations of provincial statutes;

(2) summary conviction trials;

(3) minor indictable offences falling under the absolute jurisdiction of a provincial court judge, pursuant to Criminal Code section 483, that were not ordered to proceed to a higher court pursuant to Criminal Code section 485.

TABLE 1.1

COURTS INCLUDED IN THE SURVEY		
Court Location	Number of Cases	Percent of Cases
St. John's, Nfld.	70	(1.0)
Prince Edward Island	90	(1.2)
Halifax, N.S.	321	(4.4)
Fredericton, N.B.	107	(1.5)
Montreal, Que.	1886	(26.1)
Oshawa, Ont.	255	(3.5)
Old City Hall, Toronto, Ont.	1101	(15.3)
College Park, Toronto, Ont.	392	(5.4)
Windsor, Ont.	350	(4.8)
Winnipeg, Man.	701	(9.7)
Regina, Sask.	252	(3.5)
Saskatoon, Sask.	242	(3.4)
Edmonton, Alta*	-	-
Vancouver, B.C.	1452	(20.1)
TOTAL	7219	(100.0)

*Alberta was unable to provide data.

Researchers searched files for relevant cases, recording information on a pre-formatted data collection form. No direct observation took place in court, and no interviewing of key actors about cases was possible, except to have missing information filled in. Accordingly, the information that could be gathered was limited to that recorded in official files and administrative archives.

A census was taken of every case in the 13 courts that proceeded by indictment during the first three months of 1980. That is, the first appearance in court occurred during those three months. The cohort thus formed was tracked to completion, regardless of when the case finished.

The unit of analysis in this study was the person. One statistical case, or record, consisted of all the charges heard against one person at one time. Multiple charges dealt with by the courts as part of one court case were treated in this study as one research case even though the charges may have been registered on separate police informations. Likewise, co-accused tried together were treated as separate research cases.

The Scope of the Study

First, this study was designed as a description of current pre-trial procedure in Canada. Few attempts were made to analyse empirically why certain events occur, and recommended changes in policy were not evaluated.

Second, only key features of pre-trial procedure, together with such related descriptive material as was required, have been examined. For example, this report does not contain all the data collected, such as offence-specific information. Although of interest, such detail is too specific to warrant inclusion in this report. Rather, charges have been categorized according to their respective jurisdiction and procedure.

Third, the survey was designed to provide general, panprovincial information. Although results about some elements of the preliminary in particular provinces are described, no in-depth description and assessment of the preliminary inquiry in one province or group of provinces is presented.

Finally, this study is not a rigorous evaluation of the preliminary, nor could it be. Because there are no generally practiced alternatives in Canada to the preliminary inquiry, there are no defensible empirical criteria with which to make comparisons and evaluative

judgements. What the statistics indicate about the workings of current pre-trial practice becomes, in the final analysis, a matter of informed judgement and interpretation.

CHAPTER TWO

THE PRELIMINARY INQUIRY IN CONTEXT

This chapter provides background for the statistical analysis that follows and covers some of the history of the preliminary inquiry and some of the issues in the current controversy. A short description of proposed alternatives to the present committal system is also presented.

History

The Canadian rules of criminal procedure for the preliminary inquiry originate in English criminal law. The concept of a state-sanctioned inquiry into alleged criminal acts can be traced to the twelfth century, at which time alleged offences of public importance were inquired into by the Privy Council, while casesof alleged common offences may have been the object of a coroner's inquest.[1] There is evidence that, upon the establishment of the Office of Justice of the Peace in 1324, such justices began to develop the practice of holding inquiries into alleged offences.

Such inquiries were given statutory authority in 1554 through an act requiring a justice to examine the prisoner and witnesses as to all the circumstances of the alleged offence and to record their depositions before arresting and possibly granting bail to an alleged offender. This inquiry was essentially meant to examine the accused, with the justice acting as a public prosecutor. The accused was not entitled to copies of the depositions, nor even to their perusal.

The law was reformed in the mid-nineteenth century. Statutes were enacted requiring that witnesses be examined in the presence of the accused, with the accused having the right of cross- examination. Depositions were no longer withheld from the accused. Moreover, the accused was not required to make a statement, although he could do so after having been properly cautioned that it might be taken down and might be given in evidence against him.[2] In addition, the role of the justice fundamentally changed. Rather than examining the accused with the intent to prove guilt, the justice assumed the basic judicial position as we now know it. His duty was to inquire into the alleged offence to determine whether or not there was sufficient evidence to commit the accused to trial.

Current Practice

The raison d'être of the preliminary inquiry, as outlined in the Criminal Code and as confirmed by the Supreme Court of Canada, is still to determine whether or not there is sufficient evidence to put the accused on trial.[3]

The preliminary is not a trial of an accused. Rather, it is a judicial investigation into the circumstances of alleged offences. As such, certain traditional procedures apply. Evidence given at a preliminary inquiry must be taken under oath in the presence of the accused.[4] The defence has the right to cross-examine crown witnesses, but the crown is not obliged to call any particular witness.[5] The defence may be entitled to view all the notes of a police officer who is testifying.[6]

Where the evidence is taken down in the form of a deposition, it must be read to the witness in the presence of the accused and then signed by the witness and the magistrate.[7] The justice may adjourn the inquiry or change its location if he has sufficient reason to believe that it is desirable to do so.[8] The justice may remand the accused for a period of not more than 30 days for mental examination.[9]

After the crown's evidence has been given, the justice will address the accused and ask him whether or not he wishes to make a statement in answer to the charge. The accused is not bound to say anything, but anything that the accused does say will be taken down as evidence and may be used at the trial if the accused is committed.[10] The accused will then be asked whether he wishes to give testimony on his own behalf. Witnesses called by the defence must be sworn and may be cross-examined by the crown. Evidence will be recorded in the same manner as for crown witnesses.[11]

Prima Facie Cases

Once evidence has been taken, the magistrate will either commit the accused for trial or discharge him.[12] In determining whether there is sufficient evidence to put the accused on trial, the magistrate must be of the belief that the crown has made a prima facie case. This means that there must be more than a mere possibility or suspicion that the accused is guilty.[13] There must be admissible evidence upon which, if believed, a reasonable jury could convict. Salhany[14] has explained the test for committal this way:

> The most practical test which has been suggested in several Canadian decisions is that the Magistrate

> should put himself in the position of the trial judge. Thus, if he is of the opinion that the evidence is such as would justify him, as trial judge, in withdrawing the case from a jury, he ought to discharge the accused. On the other hand, if he would submit the matter to a jury, then he should commit the accused.

This test was defined by the Supreme Court of Canada in United States of America v. Sheppard[15] as follows:

> The duty imposed upon a justice under s.475(1) is the same as that which governs a trial judge sitting with a jury in deciding whether the evidence is 'sufficient' to justify him in withdrawing the case from the jury and this is to be determined according to whether or not there is any evidence upon which a reasonable jury property instructed could return a 'verdict of guilty'. The 'justice' in accordance with this principle is in my opinion required to commit an accused person for trial in any case in which there is admissible evidence which could if it were believed result in a conviction.

Clearly, the obligation is on the crown to establish a sufficient case to justify putting the accused to his trial. In those cases where the evidence is insufficient, the accused must be discharged.

The logic of establishing a prima facie case implies that those who are manifestly innocent are to be spared the aggravation, hardship and expense of a full trial. The preliminary inquiry is meant to protect the human and civil rights of the manifestly innocent citizen; these persons are not to have their freedom encroached upon by a prosecution based on unfounded allegations.

Case Screening, Case Clarification

The basic purpose of the preliminary inquiry is to screen prima facie from non-prima facie cases before trial. In some instances, cases are screened out by being discharged or stayed or by having the charges withdrawn by the crown. A relevant question is whether the screening function is effective in sending on to trial only those cases warranting it. Are there improper committals that should have resulted in discharges at the preliminary? These concerns are delicate and will be addressed in chapter five.

The preliminary inquiry also serves to clarify the type of case under judicial review. If the crown cannot establish a

prima facie case against the accused, the charges originally proffered may be altered to others upon which a prima facie case can be made.

Moreover, even following a preliminary inquiry resulting in a committal, the crown has the option of withdrawing or altering charges before trial. There could be many reasons for such action, not the least of which is the belief that the case is truly insufficient to establish at trial guilt beyond a reasonable doubt. Because of their broad discretionary power, crown activities are generally focused on proceeding with only those cases truly worthy of adjudication.

Plea Clarification

As for the defence, the preliminary inquiry allows the accused to clarify his plea. As Wilkins[16] expressed matters:

> Defence Counsel, who are in a position to know, are familiar with a transformation occurring to accused when the evidence against them emerges in a preliminary hearing. Whether out of a new awareness of reality, fear or whatever mechanism, a decision to plead guilty commonly replaces a determined resistance.

In other words, the preliminary inquiry serves the purpose of informing the accused whether or not the crown has a sufficient case to prove guilt beyond a reasonable doubt at trial. If the accused is led to believe that the crown's case is of this calibre, then it is reasonable to assume that he would opt for a plea of guilty. By thus resolving the matter, he would perhaps gain a lighter sentence or ease the financial burden of a contested trial. Clarifying pleas also helps conserve judicial time for only those cases in which the accused demands a full trial to determine guilt or innocence.

Disclosure

It follows from these dynamics of case and plea clarification that an important role of the preliminary inquiry is to facilitate disclosure of the crown's case. Because there are no formalized, compulsory procedures for disclosure in the Criminal Code or at common law, the preliminary inquiry has become the conventionally accepted means of obtaining disclosure. Although other methods of

disclosure exist, some would argue that the preliminary provides defence with the best opportunity to observe and corss-examine crown evidence.

This current function of the preliminary is important. Only through some form of disclosure can defence be provided with the opportunity to understand the true nature of the crown's case, to assess its strength and, possibly, to search for additional evidence. Ultimately, through disclosure, the defence is able to decide upon strategy. If the case against the defence is strong, a plea of guilty to the offence charged or to some lesser offence is indicated. If the crown's case is deemed surmountable by the defence, the accused will probably decide to stand trial but will be in a better position to know what tactics to take in cross-examination, what admissions to make and whether to call evidence.

Moreover, disclosure may benefit the crown. The defence's cross-examination at the preliminary inquiry permits the crown to observe the strength of both its own evidence and the case for the defence. This information may influence the crown to exercise its options to withdraw or reduce the charges.

The efficiency of the court also stands to benefit from disclosure. Should the accused be committed to trial, some of the evidence and issues will be already clarified.

There are, though, a number of arguments critical of disclosure. One is that the pursuit of full disclosure greatly increases the duration of preliminary inquiries without any corresponding decrease in the length of the trial. A thorough examination and cross-examination of witnesses at the preliminary may result in a "trial before the trial". A protracted proceeding of this kind, it is argued, is an unnecessary burden on the court as well as a cause of delay in the overall criminal justice system.

Other criticisms are that disclosure may lead to harassment or intimidation of crown witnesses and that the defence can "tailor" its evidence to meet the crown's case at trial.

Other Functions

The preliminary inquiry also provides a forum wherein the advocacy skills of counsel, especially junior counsel, can be practised. Such a forum also allows counsel to test lines of cross-examination with little or no risk to the ultimate outcome of a trial, if there is one.

A further important purpose of the preliminary inquiry, to a certain number of defence counsel, is the element of delay as a trial tactic. The passage of time may improve the accused's chances of acquittal. Witnesses may become frustrated by undue delay and refuse to testify. At the very least, the clarity of a witness's memory may seriously deteriorate with the passage of time. And, it must not be forgotten, a protracted period between the lodging of a charge and the trial also allows an accused to initiate a process of self-rehabilitation, such as by establishing gainful employment or a stable family life. Should the accused be found guilty, rehabilitation can serve as a mitigating factor in sentencing.

Finally, the preliminary permits an element of "judge shopping". It may be used as a means of avoiding a "harsh" judge in favour of a "soft" one through the exercise of elections and re-elections.

Critical Issues

The preliminary inquiry process is an important element of the current criminal justice system. However, recent arguments about the preliminary's role and utility have led to it coming under close scrutiny.

Case screening is rarely questioned as the primary function of the preliminary inquiry. The legal rights of the accused must be protected by requiring that he only be put to his defence following a judicial determination that there is sufficient evidence to warrant a trial. In addition, it is not cost effective to conduct a full trial when crown evidence, even when taken at face value, is insufficient to support conviction.

Although lacking formal sanctioning in law, pre-trial discovery is a second objective that is ~~rare~~ly questioned. Disclosure protects the rights of the accused by providing an opportunity to comprehend the case that must be met. Disclosure also provides an opportunity for both parties to agree at the earliest possible date on elements of evidence (admissions), thereby shortening and focusing the trial.

Although these two primary objectives of pre-trial procedure are seldom at issue, the best method of achieving them generates considerable controversy. A review of foreign jurisdictions indicates that several (England, Scotland, Israel, most American states) have moved to a different type of pre-trial procedure. For example, in England, written statements, "the packet system", are presented in lieu of

viva voce evidence, still used in Canada. The advantages are argued to be increased timeliness and efficiency and decreased witness hardship. (The witnesses called for a preliminary must repeat their appearances and testimony at a trial.)

Many of those in Canada calling for reform of Canadian pre-trial procedure claim that the peliminary can cause delay, inefficiency and witness hardship. The best known of these criticisms is the 1982 majority report of the Special Committee on Preliminary Hearings, established by the Ministry of the Attorney General of Ontario under the chairmanship of the Honourable Mr. Justice G. A. Martin.[17]

However, a minority of members of this special committee concluded that there is a dearth of accurate information onpreliminary inquiries and that without such information no decisions about whether preliminaries were working properly could reasonably be made.[18]

Following the release of the special committee report, the Criminal Lawyers' Association engaged Professor James L. Wilkins to analyse the available statistical features of the preliminary inquiry. In his report, Wilkins asserted that preliminary inquiries are held in only a small proportion of criminal cases and that the extent of discharges alone may justify the preliminary's very existence. Wilkins also noted the paucity of information concerning the preliminary inquiry process.[19]

Before the publication of the report of the special committee and the Wilkins study, the Department of Justice had concluded that additional empirical information about the operation of the preliminary across Canada was required. Hence this study was undertaken.

Alternatives

Advocates of the current system argue that fundamental principles would be compromised if changes were made such that written statements and exhibits were the sole basis of committal for trial or defence had to petition a magistrate for the right to examine witnesses under oath while the crown had an automatic right to do so. There are, however, any number of alternatives, some of which are itemized below. Certain of these take into account the call for some form of official disclosure procedure.[20]

One alternative is to retain the present system and to require compulsory, comprehensive disclosure by the crown.

The rationale behind this proposal is that full disclosure by the crown in all cases would make the present system function more efficiently.

A second alternative is that of a Pro Forma hearing. This hearing is judicially supervised and precedes the preliminary inquiry. Its purpose is to force the crown and defence to review the evidence. The crown discloses its case at an early stage. Through disclosure and assessment, the parties may reach agreement on whether there is sufficient evidence to proceed. They may agree on elements of evidence; the crown may consider altering the counts or reducing the charges to lesser and included ones, or the parties may agree to resolve the case at an early stage through a plea of guilty. All agreements reached by counsel are formalized and are a matter of record. Judicial intervention to resolve any issues between counsel is an important element. The result may be committal by consent, but the absolute right to a full preliminary for the accused is in no way interfered with.

A third alternative is the English packet system, in which there is committal on written material only if both parties concur with the material and consent to the committal. The material would be provided to each party before the committal proceedings. However, should the accused object to the written material, a full preliminary inquiry would be held, with the accused having the absolute right to hear and cross-examine any witness.

A fourth alternative is the modified English system, in which a judicial officer screens witnesses' statements filed by the crown, treating them as he would oral evidence. These statements would be given to the parties before the committal proceedings, and on the basis of these statements the judicial officer could commit to trial. Not filing the written statement of a particular witness would entitle the crown to call that witness. The defence would have to apply to the presiding judge for permission to call any witnesses. Compulsory, comprehensive disclosure by the crown would be required. This alternative is the major thrust of the majority report of the Special Committee on Preliminary Hearings (Ontario).

A fifth alternative is maintaining the present preliminary inquiry system for the most serious offences, while adopting the modified English system for all others.

A sixth alternative is to maintain the present system but to impose time limits, for example, six months from the first court appearance to the start of the trial. Provision would be made to extend the time if necessary.

A seventh alternative is retaining the present system but abolishing the right of the accused to call evidence at the preliminary (except for alibi cases).

An eighth alternative is to adopt a partial paper committal system so that statements of a certain class of witness and of a certain category of offence. For example, owners of property and property offences would be filed at the committal proceedings only, to establish ownership and value of the property. If ownership were an issue, the presiding magistrate could order the witness to attend court. The present system would be preserved for all other offences and all other types of evidence.

Conclusion

The history and current practice of pre-trial procedures, as well as its issues and alternatives, could consume volumes. In this principally statistical report, these matters have been mentioned only in passing. The issues have yet to be completely analysed, the alternatives fully explored, the options finalized. In leaving these for future work, it might nonetheless be useful to note four key themes that tend to emerge in the analysis of current Canadian practice and its alternatives:

(1) What are the primary and secondary objectives of pre-trial procedure and the balance or trade-offs between them?

(2) What are the legal and human rights of the accused and the distinction between these?

(3) To what degree should one emphasize effectiveness and efficiency in judicial process, and what is the appropriate balance between them?

(4) What is the relationship between one part of the court system and others, and what would be the impact of change on the entire system if the preliminary were replaced or modified?

CHAPTER THREE

INITIAL STATISTICS

The paucity of statistical information on the preliminary inquiry extends to such basic considerations as the number held, their type and the number of witnesses called. Some information available from other studies is reviewed here, as is information gathered in this study.

Crime Rates

Official crime statistics offer a convenient starting point for contextualizing preliminary inquiries. It is known, for example, that during the last 10 years for which figures are available, reported Criminal Code offences increased by 86%.[1] These figures from the Uniform Crime Reporting System, supported by police forces across Canada, reveal that there were 2,168,201 reported incidents involving one or more Criminal Code offences in 1981, compared with 1,167,211 in 1971. Historically, crime rate increases are, on average, of this general magnitude, although they may fluctuate slightly from year to year.

Indictable/Summary Offences

The origin and nature of this growth in crime made known to the police has been the source of much speculation. One report sheds some light on the matter by indicating that almost all of the increase is attributable to offences punishable on summary conviction.[2] Since the turn of the century, indictable offences have increased in number, but only in keeping with the growth in Canada's population. The number of summary offences, on the other hand, has skyrocketed, increasing almost exponentially even when taking into account overall population growth.

Increase in Preliminary Inquiries

Because only cases that proceeded by indictment can result in a preliminary inquiry, it would appear to follow that the number of magistrate court (including traffic court) hearings and trials must have increased tremendously, whereas the number of preliminaries has not. However, such inferences do not always follow. The problem is compounded by the lack of national court statistics.

Some data reworked from the report of the Special Committee on Preliminary Hearings (Ontario)[3] indicate that the Ontario provincial court workload, composed of Criminal Code trials and preliminaries, was 372,685 cases in 1980-1981. Of this, trials accounted for 94.8% and preliminaries 5.2% - up from 3.4% in 1976-77. Preliminaries could therefore be described as a small but growing proportion of the workload in this jurisdiction and presumably in others as well.

Surveyed Cases

The number of summary cases was not determined in this study. However, it did examine 7219 indictable cases, or every one that occurred in the 13 selected courts during the first three months of 1980. Of these cases, only one in three had a preliminary inquiry (Table 3.1). In the others, the accused opted for trial before a provincial court judge.

Table 3.1 also indicates some distinct provincial variations in the proportion of indictable cases with a preliminary inquiry. The figures range from a low of nine percent in New Brunswick to a high of 44% in Quebec. Also notable is the rarity with which preliminaries, and presumably high court trials, occur in some provinces.

Jurisdiction and Procedure

The maximum frequency of preliminary inquiries is determined by the nature of charges laid and, in the instance of hybrid offences, the further crown discretion as to how to proceed. There are three general types of indictable (and hybrid) offences.

The first category covers offences under the absolute jurisdiction of a magistrate. Enumerated under section 483 of the Criminal Code, these are the least serious indictable offences, including theft under $200, obtaining goods under the value of $200 by false pretence and driving while disqualified. (The survey did not capture data pertaining to these cases, for they are ineligible for a preliminary inquiry.)

The second category covers offences that fall under the absolute jurisdiction of a superior court judge and jury. These, enumerated under section 427, are the most serious indictable offences, including murder, conspiracy to commit murder, and treason. Only 30 cases in the survey (0.4%) were of this type (Table 3.2).

TABLE 3.1

Proportion of Cases with a Preliminary Inquiry by Province

Province	Number of Indictable Cases	Cases with a Preliminary	
		Number	Percent
Newfoundland	70	7	(10.0)
Prince Edward Island	90	11	(12.2)
Nova Scotia	321	92	(28.7)
New Brunswick	107	10	(9.3)
Quebec	1886	835	(44.3)
Ontario	2098	670	(31.9)
Manitoba	701	147	(20.9)
Saskatchewan	494	82	(16.6)
Alberta*	-	-	-
British Columbia	1452	320	(22.0)
TOTAL	7219	2174	(30.1)

*Alberta was unable to provide data.

The third category covers the remaining offences, which fall under the absolute jurisdiction of neither a magistrate nor a judge (and jury) of superior jurisdiction. Offences of this type are quite numerous and include sexual assault, break and enter, robbery, theft over $200 and forgery. Nearly all the cases in the survey (98 percent) were of this type (see Table 3.2).

In cases falling within this third category, the accused is given the right to elect a trial mode pursuant to sections 464 and 484 of the Criminal Code. The election can be to trial by magistrate, by judge alone or by judge and jury. Should the accused refuse to elect, the court will deem that he elected judge and jury (section 495).

The right to election, though, is not absolute. Under section 498, the attorney general may require the accused to stand trial before a judge and jury, notwithstanding an election to magistrate or judge alone, if the alleged offence is one punishable by imprisonment for five years or more. No instances of an exercise of authority under section 498 were discovered in this survey.

Section 464 offences require a further comment regarding those of a more serious nature, as enumerated in section 429(1) (sexual assault, attempted murder, etc.). Should the accused elect trial by judge and jury, he can further stipulate whether the jurisdiction of the court will be superior or non-superior (county or district). This provision, however, is applicable only in Ontario and British Columbia, for only these provinces have courts presided over by a judge and jury at the county or district court level. A total of 119 cases (1.7%) had at least one charge within the section 429(1) category (see Table 3.2).

A further procedural variable to note is section 485. Where an accused is before a magistrate and the magistrate deems that the charge should be prosecuted by indictment, he may, before the accused enters upon his defence, decide not to adjudicate and stipulate that the case go to a higher court. Also, where an accused charged with an offence enumerated under section 483 is before a magistrate and the evidence indicates before adjudication that the value of property stolen, obtained or possessed exceeded $200, the magistrate may put the accused to his election pursuant to section 484. Only nine cases of this type were identified in the survey (see Table 3.2), and all of them accompanied other, presumably more serious charges under section 464. These findings indicate that proceeding by indictment and holding a preliminary inquiry almost invariably involved a section 464 offence. Other types of charges, such as ones

TABLE 3.2

Jurisdiction and Procedure of Cases			
Jurisdiction and Procedure	Number of Cases	Percent of All Cases	Percent of Known Cases
S. 427	30	(0.4)	(0.4)
S. 429.1	119*	(1.6)	(1.7)
S. 464	6889	(95.4)	(97.8)
S. 485	9	(0.1)	(0.1)
Unknown	172	(2.4)	-
TOTAL	7219	(100.0)	(100.0)

Number of cases, excluding unknowns: 7046.

*Includes one case that combined sections 429.1, 464 and 485.

so serious that no election was available, are statistically minute. Therefore, most preliminaries occur because the accused wants one.

Elections

Table 3.3 displays the elections made as part of the first court appearance (that is, excluding re-elections). The details of a substantial proportion of elections, one in four, could not be ascertained from the court records examined. Of the known elections, about equal proportions elected trial by magistrate and trial by judge and jury. About 15% elected trial by judge alone; a few others refused to elect and were deemed to have done so or were automatic high court judge and jury cases (s. 427).

It is interesting to note that a substantial proportion of known cases (42 percent) consciously eschewed the preliminary inquiry as a course of action when first put to an election, opting instead for trial by magistrate. Still, the remainder, 58 percent, opted for the preliminary by choosing trial by judge alone or judge and jury. As we know from Table 3.1, some of these must have later changed their strategy, for only 30 percent eventually went through with the preliminary. Even among cases that did undergo a preliminary inquiry, the interest in trial by judge and jury was a temporary phenomenon; as discussed shortly, few cases were actually tried in this manner, even if they did start by having a preliminary (see Table 3.9).

Table 3.4 contains the same information on elections as Table 3.3, but broken down by geographic region of the courts selected for study. Types of elections variedconsiderably from one jurisdiction to another. In the Atlantic region, most elections (69 percent) were to magistrate's court, whereas in Quebec most (81 percent) were to trial by judge and jury. The other regions tended not to display a preponderance of one type of election or another. (Note as well that British Columbia had a large proportion of undetermined cases because its computer records do not directly record this type of information.)

Termination and Other Outcomes

Some cases electing trial by judge alone or judge and jury never reached the preliminary stage of procedures. Cases may terminate for various reasons at various stages of the court process. An accused may fail to appear and, even though a bench warrant is issued, may never be found. Cases

TABLE 3.3

Type of Election			
Election	Number of Cases	Percent of All Cases	Percentage of Known Cases
Magistrate	2276	(31.5)	(42.5)
Judge Alone	829	(11.5)	(15.5)
Judge and Jury	2233	(30.9)	(41.7)
Deemed Election	3	-	(0.1)
Automatic - No Election	10	(0.1)	(0.2)
Unknown	1868	(25.9)	-
TOTAL	7219	(100.0)	(100.0)

Number of cases, excluding unknowns: 5351.

TABLE 3.4

Type of Election by Geographic Region

ographic egion		Magis-trate	Judge Alone	Judge & Jury	Deemeed Election	No Election	Unknown	Total
lantic	No.	408	108	52	0	0	20	588
	(%)	(69.4)	(18.4)	(8.8)	-	-	(3.4)	(100.0)
ebec	No.	159	179	1524	1	5	18	1886
	(%)	(8.4)	(9.5)	(80.8)	(0.1)	(0.3)	(1.0)	(100.0)
tario	No.	821	121	566	1	4	585	2098
	(%)	(39.1)	(5.8)	(27.0)	-	(0.2)	(27.9)	(100.0)
airies	No.	494	214	38	1	1	447	1195
	(%)	(41.3)	(17.9)	(3.2)	(0.1)	(0.1)	(37.4)	(100.0)
itish lumbia	No.	394	207	53	0	0	798	1452
	(%)	(27.1)	(14.3)	(3.7)	-	-	(55.0)	(100.0)
TAL	No.	2276	829	2233	3	10	1868	7219
	(%)	(31.5)	(11.5)	(30.9)	-	(0.1)	(25.9)	(100.0)

may be withdrawn or stayed for any number of reasons; this may occur at the first appearance in court or subsequently out of court, before the preliminary or magistrate's trial commences. In Montreal, stays or withdrawals may also occur at the special Discovery Court convened to expedite cases.

Alternatively, jurisdiction for the case can be lost, in both the legal and functional sense. Cases can be transferred to other courts. Charges can be reduced to summary offences or changed to offences under the Juvenile Delinquents Act (thereby falling outside the purview of this study). Jurisdiction of the criminal court can also be "lost" through the death of the accused.

These various outcomes are shown in Table 3.5. Although 30 percent of the 7219 indictable cases had a preliminary inquiry and 43 percent were tried in magistrate's court (held in lieu of a preliminary), the remaining 27 percent followed different routes through the court system.

That is, about one indictable case in four did not terminate in textbook fashion. Substantial proportions of known cases were dropped at first appearance (10 percent) or subsequently out of court (eight percent).

Types of Preliminaries

For the 2174 cases in this study that did proceed to a preliminary inquiry, the nature of proceedings was examined and classified into one of four categories. Not all preliminaries are the same, and these differences in nature often condition the length of time they take and the way in which they conclude. Four categories were identified, as shown in Table 3.6: consensual, contested, partial-crown option and partial-defence option. About 19 percent of cases could not be categorized.

The first type of preliminary, which accounted for 52 percent of the known cases, is referred to as a consensual preliminary, pursuant to section 476. The accused is committed for trial on the consent of crown and defence. In so doing, defence admits that a prima facie case against the accused exists and agrees that a full or partial preliminary inquiry would be superfluous.

Consent may occur at the first court appearance or before the completion of the preliminary. That is, following the introduction of certain evidence, but without the necessity of fully proving a prima facie case, the defence may consent to committal.

TABLE 3.5

Termination and Other Outcomes			
Outcome	Number of Cases	Percent of All Cases	Percent of Known Cases
Preliminary Inquiry	2174	(30.1)	(30.4)
Magistrate's Trial	3087	(42.8)	(43.4)
Dropped at First Appearance	750	(10.4)	(10.5)
Dropped out of Court	555	(7.7)	(7.8)
Dropped at Discovery Court	54	(0.7)	(0.8)
Jurisdiction Lost	413	(5.7)	(5.8)
Unexecuted Bench Warrant	126	(1.7)	(1.8)
Incomplete Court Record	60	(0.8)	-
TOTAL	7219	(100.0)	(100.0)

Number of cases, excluding unknowns: 7159.

TABLE 3.6

Type of Preliminary Inquiry			
Type	Number of Cases	Percent of All Cases	Percent of Known Cases
Consensual	920	(42.3)	(52.2)
Contested	111	(5.1)	(6.3)
Partial-Crown	709	(32.6)	(40.2)
Partial-Defence	23	(1.1)	(1.3)
Unknown	411	(18.9)	-
TOTAL	2174	(100.0)	(100.0)

Number of cases, excluding unknowns: 1763.

The second category is referred to as a fully contested preliminary. This type involves both counsel placing all respective elements of evidence in issue; there are no agreements or admissions respecting evidence; everything is contested. Only six percent of known cases were of this type.

The third and fourth types are referred to as partial preliminaries. These involve both counsel agreeing that witnesses need to be called. A partial preliminary with a crown option involves the crown moving to place certain evidence on the record, whereas a partial preliminary with a defence option is one in which the defence moves to place such evidence on the record. Almost none of the known preliminaries were partial-defence options (1.3 percent). However, partial-crown options were quite frequent (40 percent of known cases).

Thus, half of the preliminaries that could be classified were consensual, and most of the remainder were partial-crown options, with defence admitting some but not all of the crown's case. Since consensual preliminaries automatically result in committal for trial, the pre-trial procedure cannot perform any screening function in these cases. Defence may be using the procedure in these instances as a delaying tactic while remaining non-committal on the question of guilt or innocence.

Table 3.7 illustrates differences between jurisdictions in the types of preliminaries held. The Atlantic region, for example, seemed higher than the overall total in consensual preliminaries (65 percent vs. 42 percent), but lower in terms of partial-crown options (five percent vs. 33 percent). Ontario was like the Atlantic: higher in consensuals (61 percent) and lower in partial-crown options (12 percent). The Prairies and British Columbia had a much larger proportion of undetermined cases than other areas.

Number of Witnesses

It is said that few things can be more frustrating than being tied up in court for long periods of time, waiting to give testimony. Often the testimony has to be repeated for a second or even third time; sometimes a scheduled appearance may be postponed several times; occasionally, the evidence is perceived by the witness as merely incidental to the case. Ultimately, public support for and co-operation with the criminal justice system can be undermined.

TABLE 3.7

Type of Preliminary Inquiry by Geographic Region

Geographic Region		Consensual	Contested	Partial-Crown Option	Partial-Defence Option	Unknown	Tot
Atlantic	No.	78	12	6	0	24	1
	(%)	(65.0)	(10.0)	(5.0)	-	(20.0)	(100
Quebec	No.	353	32	379	7	64	8
	(%)	(42.3)	(3.8)	(45.4)	(0.8)	(7.7)	(100
Ontario	No.	407	52	81	15	115	6
	(%)	(60.7)	(7.8)	(12.1)	(2.2)	(17.2)	(100
Prairies	No.	57	15	50	1	106	2
	(%)	(24.9)	(6.6)	(21.8)	(0.4)	(46.3)	(10(
British Columbia	No.	25	0	193	0	102	3
	(%)	(7.8)	-	(60.3)	-	(31.9)	(10(
TOTAL	No.	920	111	709	23	411	21
	(%)	(42.3)	(5.1)	(32.6)	(1.1)	(18.9)	(10(

One of the issues that has been raised is whether the tradition of giving oral testimony should be maintained. This is not to deny the importance of witness testimony. Obviously, there are valid reasons for wanting to hear some testimony: at the preliminary, oral testimony provides an opportunity to get something on the record, to tie a witness down, to test his credibility. The best and most complete disclosure may be obtained from oral testimony with an opportunity to cross-examine. However, other methods of disclosure that interfere less with the daily lives of witnesses exist in other jurisdictions.

This survey attempted to obtain what data it could on witness appearances at preliminaries. Since this information is not always maintained in preliminary inquiry records, the principal source of data for this study, only limited results were obtained. For example, it is not known how many witnesses waited in attendance at a preliminary, only to find that their testimony was not needed after all. Consequently, the data cannot address this most crucial aspect of witness inconvenience.

Even for witnesses who were heard in court, data were not uniformly available in all court records. Some clerks systematically recorded witness appearances but others did not. As a result, a record without witness notations could mean either that no witnesses were heard or that witnesses just weren't recorded as being heard.

With these cautions in mind, it is still useful to review the data. Although the number of witnesses could not be ascertained in 54 percent of the preliminaries examined, the remainder of preliminaries (46 percent) heard one or more witnesses (Table 3.8). Thus, it is probably safe to infer that at least half of all preliminaries heard witnesses.

It can also be seen from Table 3.8 that, excluding the unknown cases, approximately one-quarter of preliminaries heard only one witness. A further quarter heard only two. The median number of witnesses heard at preliminaries, excluding unknown cases, was 2.6.[4]

These figures fail to confirm the criticism that large numbers of witnesses appear at preliminaries. Although some preliminaries heard several witnesses, most did not. It should also be noted that, in those instances where testimony was required at a preliminary, the minimum number of witnesses was generally two: the arresting officer and victim.

TABLE 3.8

Number of Witnesses at Preliminary Inquiries			
Number of Witnesses	Number of Cases	Percent of All Cases	Percent of Known Cases
1	238	(10.9)	(23.9)
2	246	(11.3)	(24.7)
3	155	(7.1)	(15.6)
4	113	(5.2)	(11.3)
5	81	(3.7)	(8.1)
6 or more	163	(7.5)	(16.4)
Unknown	1178	(54.2)	-
TOTAL	2174	(100.0)	(100.0)

Number of cases, excluding unknowns: 996.

Median number of witnesses (excluding unknowns): 2.6.

At a preliminary inquiry, very few witnesses testify for the defence. In the court records examined, only 65 cases could be identified as having heard the accused testify, whereas 108 cases heard other defence testimony (data not shown). Of these 108 cases, 87 involved the testimony of one defence witness alone. Therefore, witnesses called to preliminaries were almost exclusively crown witnesses.

This information should not be surprising, considering that defence cannot counter a prima facie case by introducing other evidence. It is fair to speculate that, in practice, there are only two reasons for defence to call witnesses at a preliminary: to obtain information from potential crown witnesses whom the crown did not call and to put the crown on notice regarding alibi testimony.

Type of Trial

It was mentioned in the section on elections that few high court trials took place, despite their popularity as an initial election mode. Even for those cases committed for trial at a preliminary inquiry, re-elections to other trial types were notably frequent. Table 3.9 illustrates this point by comparing elections made before the preliminary with trials occurring afterwards. Only cases with both a preliminary and a trial are shown.

Note the striking difference in elections to judge and jury. Although 71 percent originally chose this type of trial, only eight percent were actually tried this way. The remainder re-elected down to judge alone or magistrate following the preliminary inquiry.

About equal proportions of final elections consisted of trial by judge alone and trial by magistrate. (For reasons explained below, Montreal cases tried by county judge alone have been grouped with magistrate trials. Of course, the table excludes data on 3087 cases tried by magistrate without first having a preliminary inquiry.

These findings indicate that elections are a feature of pre-trial procedure that might profitably be examined in more detail. The reasons for these re-elections and the aims they serve could be clarified. Their utility as a defence strategy is reasonably obvious: they are a way of obtaining pre-trial disclosure before entering a plea. The resulting question is equally obvious: is it possible to provide disclosure directly without resorting to the fiction of original elections?

TABLE 3.9

Type of Trial by Election for Cases with a Preliminary Inquiry

Type of Trial		Original Election	Final Election
Judge and Jury	No.	1277*	152
	(%)	(70.9)	(8.4)
Judge Alone	No.	492	789
	(%)	(27.3)	(43.8)
Magistrate	No.	**	839+
	(%)	-	(46.6)
Unknown	No.	31	20
	(%)	(1.7)	(1.1)
TOTAL	No.	1800	1800
	(%)	(100.0)	(100.0)

*Includes seven cases under sections 485 and 427.

+Includes 589 Montreal cases tried by county judge alone.

**Data on cases choosing trial by magistrate alone as an original election are excluded from this table.

Acquittal Rates

Of 7219 indictable cases brought to court, only 472 cases, or six percent, were acquitted at trial (Table 3.10). A further 58 percent were convicted on all or some charges. About 10 percent more were cases with a loss of jurisdiction, an unexecuted bench warrant, or an unknown outcome. Fourteen cases resulted in other types of adjudicated findings, seven of these being not guilty by reason of insanity. The remaining 25 percent had the charges withdrawn or stayed by the crown.

Stays and withdrawals occurred at various stages of the court process: at first appearance (750), in Montreal Discovery Court (54), at the preliminary inquiry (213), out of court before trial (716) or at the trial itself (104). It is noteworthy that about four times as many cases were dropped in this way as were formally acquitted. Even when percentages are calculated using as the base the number of cases that actually went to trial, the acquittal rate increases to only 10 percent (from six percent).

A Note on Montreal

Quebec is unique within the Canadian judicial system. It has a distinct local legal culture and historic tradition. These are significantly reflected in a special criminal trial procedure currently operating in Montreal and nowhere else: the Discovery Court. Because 26 percent of all the indictable cases in this survey came from Montreal, the nature of this procedure deserves special note.

The Discovery Court is a judicially supervised forum wherein disclosure problems are resolved and agreements of counsel recorded. As its name implies, it is a disclosure session. It was originally initiated, under the name of the Pro Forma Court, as a pilot project to explore alternatives to the preliminary inquiry.

The Discovery Court is used to expedite cases that were taking or might take a long time to reach resolution. Disclosure itself takes place between counsel in one of three ante-chambers. Counsel then appear before the presiding judge to submit their admissions and agreements. Both admissions and agreements are strongly encouraged by the bench. It should be made clear that participation is voluntary, not mandatory.

Although still used as an alternative to the preliminary inquiry, the Discovery Court has become a court in which to

TABLE 3.10

Rates of Acquittal and Conviction for Indictable Offences			
Outcome of Cases	Number of Cases	Percent of All Cases	Percent of Cases Tried
Found Not Guilty	472	(6.5)	(9.7)
Found Guilty	4177	(57.9)	(85.5)
Other Finding	14	(0.2)	(0.3)
Stay/Withdrawal	1837	(25.4)	-
Other	539	(7.5)	-
Unknown	180	(2.5)	-
TOTAL	7219	(100.0)	(100.0)

Number of cases tried: 4887.

*Figures do not add to 100% because of in-court stays and withdrawa
(2.1%) and unknown outcomes (2.5%).

resolve most matters that could benefit from disclosure and co-operation. It can be used as a substitute for the preliminary or as a complement to it, with cases being transferred to the Discovery Court before, during or even after a preliminary takes place. Cases can also be transferred before the show cause hearing or after the verdict, to facilitate agreements at the time of a pre-sentence report. The court acts as a conduit of enhanced discovery for the preliminary in particular and the court process in general.

The Discovery Court can also accept pleas and re-elections, as required, because of the unique nature of the Quebec judiciary. In that province, a judge of non-superior jurisdiction exercises authority as both a magistrate and a judge of the court of the sessions of the peace. The presiding magistrate can thus accept consents to trial under section 476 and then proceed to try the case as a judge sitting alone.

Table 3.11 displays the jurisdiction and procedure of cases that appeared in Discovery Court. Note that, of the 1886 cases from Montreal (see Table 3.1), 1408 (75 percent) made at least one appearance in this court before being terminated in one way or another in one court or another.

Outcomes of the cases in Discovery Court per se are shown in Table 3.12. About 41 percent of known cases were committed for trial on consent, another 28 percent went on to have a preliminary inquiry, either partial or complete. About one case in three was terminated within the Discovery Court itself, either with pleas of guilty to all or some charges (26 percent) or with a complete withdrawal or dismissal of charges (four percent).

It should also be noted that trial elections in Montreal are completely atypical of those in the rest of Canada. In Quebec, 81 percent were to judge and jury, only eight percent to magistrate. Although illustrated in Table 3.4, this point needs further comment. What these figures indicate is a strong propensity to undertake a preliminary inquiry or to appear in Discovery Court. That this court does exist might encourage elections to judge and jury; for with judicial intervention at an early stage, the defence is able to get full disclosure of the crown's case (most of these cases later re-elected down).

TABLE 3.11

Jurisdiction and Procedure of Cases with a Discovery Court Session in Montreal

Jurisdiction and Procedure	Number of Cases	Percent of All Cases	Percent of Known Cases
S.427	7	(0.5)	(0.5)
S.429.1	24	(1.7)	(1.7)
S.464	1376	(97.7)	(97.8)
Unknown	1	(0.1)	-
TOTAL	1408	(100.0)	(100.0)

Number of cases, excluding unknowns: 1407.

TABLE 3.12

Outcomes in Montreal Discovery Court			
Outcome	Number of Cases	Percent of All Cases	Percent of Known Cases
Committed for Trial (on consent)	565	(40.1)	(40.7)
Committed to Preliminary Inquiry (complete)	156	(11.1)	(11.2)
Committed to Preliminary Inquiry (partial)	229	(16.3)	(16.5)
Plead Guilty (all)	274	(19.5)	(19.7)
Plead Guilty (some)	88	(6.3)	(6.3)
Charges Dropped (all)	54	(3.8)	(3.9)
Charges Dropped (some)	22	(1.6)	(1.6)
Unknown	20	(1.4)	-
TOTAL	1408	(100.0)	(100.0)

Number of cases, excluding unknowns: 1388.

Conclusion

This chapter has reviewed general statistical information related to the preliminary inquiry. These data enable us to place the preliminary in context and describe its nature.

Preliminary inquiries amounted to only a small proportion of the provincial court workload and, although increasing, will probably never amount to more than a fraction of summary offence cases. Nevertheless, the preliminary's significance is determined by the seriousness of the alleged offences, not by the number of preliminaries.

In this survey of 7219 indictable cases, one in three underwent a preliminary inquiry. Almost all of the surveyed cases (98 percent) were classified as section 464 offences; section 427 and 429.1 offences were rare.

About equal proportions of the surveyed cases elected trial by magistrate and trial by judge and jury. Montreal was unique in that 81 percent of its cases originally elected judge and jury; consequently, the percentage of its cases having a preliminary inquiry was, at 44 percent, quite high.

About one indictable case in four did not terminate in textbook fashion. Instead, cases were screened out at the first court appearance (10 percent of known cases); dropped before the preliminary or trial took place (eight percent); or transferred, lost or otherwise terminated (six percent).

Of the 2174 preliminary inquiries that actually took place, half of the known cases were consensual. Partial preliminaries with a crown option made up most of the remainder, with completely contested preliminaries accounting for only six percent. Partial preliminaries with a defence option were rare.

The presence or absence of witnesses could not be determined in half the court records examined. In those cases where the use of witnesses could be ascertained, few witnesses two or three on average -- testified, and these were almost invariably crown witnesses.

Of the 7219 indictable cases surveyed, 3087 originally elected and were tried by a magistrate; 2174 cases elected trial by judge and jury or judge alone and underwent a preliminary inquiry. Re-elections subsequent to a preliminary were common. Of 1800 cases tried following committal, 71 percent had originally elected trial by judge and jury, but only eight percent were actually tried this way.

Whereas six percent of the 7219 indictable cases brought to court were acquitted formally, 25 percent were stayed or withdrawn. The conviction rate was 58 percent based on the total number of cases (7219) and 85 percent based on the number actually tried (4887).

Montreal courts are unique. A special Discovery Court operates there to facilitate disclosure and expedite admissions and agreements. One-fourth of the indictable cases in this survey, or 1886 cases, were from Montreal, and 75 percent of these (1408 cases) were processed in part or whole by the Discovery Court. For the 1408 cases appearing in this court, pleas of guilty were accepted in 26 percent of cases and charges completely dropped in four percent. The remaining cases were committed to trial on consent (41 percent) or were rescheduled for a preliminary inquiry (28 percent).

The nature of pre-trial procedure can be seen much more clearly now that we have these statistics. Instead of the preliminary inquiry being <u>the</u> formal procedure for case screening, the preliminary can be more correctly viewed as part of a process that begins with the first court appearance and continues informally out of court and even into the trial. Preliminaries themselves are mainly consensual, with few witnesses called, and are typically followed by re-elections down to magistrate's court. The informal process is at least as important as the formal one.

CHAPTER FOUR

DURATION OF PRELIMINARY INQUIRIES

The essential criticism of the preliminary inquiry procedure is that it is excessively protracted, thus imposing a burden on the judicial system and its participants. This fundamental criticism is addressed in this chapter.

The duration of preliminary inquiries was analysed in terms of both actual in-court time and elapsed time. Actual court time refers to the passage of actual court days (or parts thereof) occupied by the preliminary inquiry; elapsed time refers to the passage of calendar days between the start and finish date of preliminary inquiries. Thus, should a preliminary inquiry start on a Monday and be disposed of the following Monday, with only those two court days (or part days) being used, the actual duration would be two days while the elapsed duration would be eight days.

Actual Court Time of Preliminaries

Table 4.1 displays the survey results for the 2174 cases that actually had a preliminary inquiry. Of these, the duration of 80 cases could not be ascertained. Number of court days was categorized from one to five days, with six or more days being grouped together.

As can be clearly discerned, the great majority, 77 percent, of all preliminaries were disposed of in one court day or part thereof. It can be reasonably assumed that most of these 1670 preliminaries would not have occupied one entire court day.

A further 11 percent of all cases were disposed of in two court days, followed by another four percent being disposed of in three court days or parts thereof. Thus, fully 90 percent of all preliminaries were disposed of within three court days or less.

Preliminaries taking longer than three days were a statistically small proportion, with only two percent of the known total lasting six days or more. Even if all the undetermined cases were presumed to fall within the six or more category (an unlikely event), we would still be talking about less than six percent, or roughly one case in 17, taking a week or more of court time.

TABLE 4.1

Actual Court Time of Preliminary Inquiries			
Number of Court Days	Number of Cases	Percent of All Cases	Percent of Known Cases
1	1670	(76.8)	(79.8)
2	248	(11.4)	(11.8)
3	84	(3.9)	(4.0)
4	37	(1.7)	(1.8)
5	16	(0.7)	(0.8)
6 or more	39	(1.8)	(1.9)
Unknown	80	(3.7)	-
TOTAL	2174	(100.0)	(100.0)

Number of cases, excluding unknowns: 2094.

Median court time: one day.

The average court time, listed at the bottom of Table 4.1, was one day. Because of the extremely skewed nature of the distribution, the median rather than the mean was used to calculate the average.

These results were, frankly, surprising. It had been expected that preliminaries would take take much longer, given the claims and controversy. Two or three days might have been considered a short duration for a preliminary -- there were certainly no data from other studies to indicate otherwise. In fact, it has become a commonplace that pre-trial procedures take a long time. Witness this assertion from a recent textbook:

> Traditionally, the preliminary has been used in indictable cases by defence counsel as a kind of pre-trial discovery. This is a ponderous and time-consuming method of disclosure... The criminal bar tenaciously defends the preliminary hearing; both defence and crown counsel argue that they may wish to tie a witness down to statements before trial. But considering the enormous cost and delay involved, can we any longer afford this brand of justice?[1]

Elapsed Time of Preliminaries

There is, however, another side to the duration of preliminary inquiries. Although most preliminaries may take only a few court days, these court appearances might extend over many calendar days. For instance, a preliminary might start on one day, then be remanded over for a considerable time before concluding. For this reason, the elapsed time was also ascertained.

Table 4.2 displays these results. Elapsed time was categorized into groupings of one day, two to three days, four to seven days, eight to fourteen days, fifteen to twenty-eight days, twenty-nine to sixty days, and sixty-one days or more.

Fully 75 percent of all preliminary inquiries had an elapsed time of one day (differences between Tables 4.1 and 4.2 are due to unknown cases). A further five percent of preliminaries were disposed of in two through seven calendar days. Only five percent of all cases had elapsed times of 61 days or more. The median elapsed time of preliminary inquiries was only one day.

Therefore, both the actual length and elapsed times of preliminary inquiries were notably short. Clearly, the

TABLE 4.2

Elapsed Time of Preliminary Inquiries			
Number of Calendar Days	Number of Cases	Percent of All Cases	Percent of Known Cases
1	1642	(75.5)	(78.6)
2-3	60	(2.8)	(2.9)
4-7	47	(2.2)	(2.2)
8-14	76	(3.5)	(3.6)
15-28	54	(2.5)	(2.6)
29-60	94	(4.3)	(4.5)
61 or more	117	(5.4)	(5.6)
Unknown	84	(3.9)	-
TOTAL	2174	(100.0)	(100.0)

Number of cases, excluding unknowns: 2090.

Median elapsed time: one day.

great majority of cases were disposed of in one day. Remands during a preliminary were few, notwithstanding some cases remanded over for long periods of time. About one case in ten took one month or more of elapsed time. While this is a long time, such cases were rare. And there could be reasons for delay, such as psychiatric assessments and failures to appear. These reasons could be investigated, as could the general factors influencing duration (type of preliminary, number of witnesses, number of co-accused, etc.). But, given the overwhelming tendencies in the data, the conclusion is clear: the issues dealt with at preliminary inquiries were usually resolved in a matter of hours.

Jurisdictional Variations

To resolve the question of whether there might be particular jurisdictions in Canada with lengthy preliminaries, notwithstanding the overall results, the surveyed court locations were cross-tabulated by actual and elapsed duration. Because many of the resulting cell frequencies were too small to support statistical analysis, the jurisdictions were collapsed into geographic regions. The results are presented in Table 4.3 (actual court time) and Table 4.4 (elapsed time).

The percentage of preliminaries disposed of in one court day or less ranged from a high of 90 percent in Ontario to a low of 63 percent in British Columbia (Table 4.3). For the six day or more category, British Columbia was again the highest, at six percent. Even in British Columbia, durations were not high. Ninety percent of its preliminaries took four or fewer days. In sum, no geographic region, including British Columbia and especially not Ontario, expended a large amount of court time on preliminary inquiries.

The findings for elapsed times paralleled those for actual court days (Table 4.4): Ontario was the most expeditious region, British Columbia the least. There could be cause for concern over the results for British Columbia (specifically, Vancouver Provincial Court), in that 25% of its preliminaries took one month or more to complete. But, given that the actual number of court days involved was not excessive, there could not have been a substantially greater number of remands taking place. Rather, there must have been more cases with long remands. Specific investigation would be required to determine the reasons for this.

TABLE 4.3

Actual Court Time of Preliminary Inquiries
by Geographic Region

Number of Court Days		Atlantic	Quebec	Ontario	Prairies	British Columbia	Total
1	No.	81	618	601	169	201	1670
	(%)	(67.5)	(74.0)	(89.7)	(73.8)	(62.8)	(76.8)
2	No.	5	127	34	27	55	248
	(%)	(4.2)	(15.2)	(5.1)	(11.8)	(17.2)	(11.4)
3	No.	1	41	15	1	26	84
	(%)	(0.8)	(4.9)	(2.2)	(0.4)	(8.1)	(3.9)
4	No.	4	18	5	2	8	37
	(%)	(3.3)	(2.2)	(0.7)	(0.9)	(2.5)	(1.7)
5	No.	0	4	2	0	10	16
	(%)	-	(0.5)	(0.3)	-	(3.1)	(0.7)
6 or more	No.	0	15	3	2	19	39
	(%)	-	(1.8)	(0.4)	(0.9)	(5.9)	(1.8)
Unknown	No.	29	12	10	28	1	80
	(%)	(24.2)	(1.4)	(1.5)	(12.2)	(0.3)	(3.7)
TOTAL	No.	120	835	670	229	320	2174
	(%)	(100.0)	(100.0)	(100.0)	(100.0)	(100.0)	(100.0)

TABLE 4.4

Elapsed Time of Preliminary Inquiries by Geographic Region

Number of Calendar Days		Atlantic	Quebec	Ontario	Prairies	British Columbia	Total
1	No.	82	587	595	179	199	1642
	(%)	(68.3)	(70.3)	(88.8)	(78.2)	(62.2)	(75.5)
2-3	No.	1	20	16	3	20	60
	(%)	(0.8)	(2.4)	(2.4)	(1.3)	(6.3)	(2.8)
4-7	No.	0	33	9	0	5	47
	(%)	-	(4.0)	(1.3)	-	(1.6)	(2.2)
8-14	No.	2	47	13	2	12	76
	(%)	(1.7)	(5.6)	(1.9)	(0.9)	(3.8)	(3.5)
15-28	No.	2	40	6	3	3	54
	(%)	(1.7)	(4.8)	(0.9)	(1.3)	(0.9)	(2.5)
29-60	No.	4	51	7	9	23	94
	(%)	(3.3)	(6.1)	(1.0)	(3.9)	(7.2)	(4.3)
61 or more	No.	0	44	13	4	56	117
	(%)	-	(5.3)	(1.9)	(1.7)	(17.5)	(5.4)
Unknown	No.	29	13	11	29	2	84
	(%)	(24.2)	(1.6)	(1.6)	(12.7)	(0.6)	(3.9)
TOTAL	No.	120	835	670	229	320	2174
	(%)	(100.0)	(100.0)	(100.0)	(100.0)	(100.0)	(100.0)

The Length of Trials

The actual and elapsed times of trials were calculated and compared with the time taken by preliminary inquiries. The results were remarkably similar.

For all indictable cases in the survey resulting in a trial (N=4887), an average of one court day was occupied by the trial per se (Table 4.5). Preliminary inquiries took the same average time. The proportion of known cases disposed of in one court day or less was even greater for trials than for preliminaries (87.3 percent, compared to 79.8 percent).

Elapsed times for trials were calculated using the dates of plea and verdict as the starting and finishing dates. Table 4.6 shows that elapsed times for trials also averaged one day.

The results in Tables 4.5 and 4.6 were derived for all court types combined - magistrate, judge alone and judge and jury. Tables 4.7 and 4.8 distinguish among trial types. As expected, judge and jury trials took longer than the other types. However, the differences were less than might be expected. Furthermore, judge and jury trials were relatively infrequent, making their impact on the whole rather small. It is also interesting to note that magistrate's trials, so-called "speedy trials", took about the same amount of time as trials by judge alone (which in turn averaged the same amount of time as preliminaries).

Non-court Time

Preliminary inquiries per se may not take a long time. However, nothing has yet been said about that portion of time falling between the first appearance and the start of the preliminary inquiry. Likewise, the time between preliminary inquiry conclusion and trial start, assuming a committal, deserves scrutiny. To quote Professors Millar and Baar once more:

> In some jurisdictions, a preliminary hearing may not come on for hearing for three or four months and there may be a further period of six weeks to three months before the transcript is available. A further delay occurs at the interface between the provincial court where the preliminary hearing was held and the county or superior court, because of a time lag in the framing of the indictment following the committal for trial. Many months may then follow before a trial date is fixed.[2]

TABLE 4.5

Actual Court Time of Trials			
Number of Court Days	Number of Cases	Percent of All Cases	Percent of Known Cases
1	3966	(81.2)	(87.3)
2	333	(6.8)	(7.3)
3	101	(2.1)	(2.2)
4	51	(1.0)	(1.1)
5	35	(0.7)	(0.8)
6 or more	57	(1.2)	(1.3)
Unknown	344	(7.0)	-
TOTAL	4887	(100.0)	(100.0)

Number of cases, excluding unknowns: 4543.

Median court time: one day.

TABLE 4.6

Elapsed Time of Trials			
Number of Calendar Days	Number of Cases	Percent of All Cases	Percent of Known Cases
1	3919	(80.2)	(86.9)
2-3	99	(2.0)	(2.2)
4-7	60	(1.2)	(1.3)
8-14	64	(1.3)	(1.4)
15-28	91	(1.9)	(2.0)
29-60	112	(2.3)	(2.5)
61 or more	165	(3.4)	(3.7)
Unknown	377	(7.8)	-
TOTAL	4887	(100.0)	(100.0)

Number of cases, excluding unknowns: 4510.

Median elapsed time: one day.

TABLE 4.7

Actual Court Time by Type of Trial

Number of Court Days		Magis-trate*	Judge Alone (county)	Judge Alone (super-ior	Judge & Jury (county)	Judge & Jury (super-ior)	Unknown	Total
1	No.	3239	647	19	37	20	4	3966
	(%)	(82.5)	(84.2)	(90.5)	(43.5)	(29.9)	(20.0)	(81.2)
2	No.	247	64	1	6	13	2	333
	(%)	(6.3)	(8.3)	(4.8)	(7.1)	(19.4)	(10.0)	(6.8)
3	No.	75	12	0	5	9	0	101
	(%)	(1.9)	(1.6)	-	(5.9)	(13.4)	-	(2.1)
4	No.	32	8	0	4	7	0	51
	(%)	(0.8)	(1.0)	-	(4.7)	(10.4)	-	(1.0)
5	No.	20	7	0	5	3	0	35
	(%)	(0.5)	(0.9)	-	(5.9)	(4.5)	-	(0.7)
6 or more	No.	34	10	0	0	11	2	57
	(%)	(0.9)	(1.3)	-	-	(16.4)	(10.0)	(1.2)
Unknown	No	279	20	1	28	4	12	344
	(%)	(7.1)	(2.6)	(4.8)	(32.9)	(6.0)	(60.0)	(7.0)
TOTAL	No.	3926	768	21	85	67	20	4887
	(%)	(100.0)	(100.0)	(100.0)	(100.0)	(100.0)	(100.0)	(100.0)

*Includes 589 Montreal cases tried by county judge alone.

TABLE 4.8

Elapsed Time of Trials
by Type of Trial

Number of Calendar Days		Magis-trate*	Judge Alone (county)	Judge Alone (super-ior)	Judge & Jury (county)	Judge & Jury (super-ior)	Unknown	Total
1	No.	3185	651	19	40	21	3	3919
	(%)	(81.1)	(84.8)	(90.5)	(47.1)	(31.3)	(15.0)	(80.2)
2-3	No.	32	41	0	6	20	0	99
	(%)	(0.8)	(5.3)	-	(7.1)	(29.9)	-	(2.0)
4-7	No.	32	8	1	4	14	1	60
	(%)	(0.8)	(1.0)	(4.8)	(4.7)	(20.9)	(5.0)	(1.2)
8-14	No.	54	7	0	1	2	0	84
	(%)	(1.4)	(0.9)	-	(1.2)	(3.0)	-	(1.3)
15-28	No.	73	9	0	2	1	0	91
	(%)	(1.9)	(1.2)	-	(2.4)	(1.5)	-	(1.9)
29-60	No.	97	12	0	2	1	0	165
	(%)	(2.5)	(1.6)	-	(2.4)	(1.5)	-	(3.4)
61 or more	No.	147	12	0	3	3	0	165
	(%)	(3.7)	(1.6)	-	(3.5)	(4.5)	-	(3.4)
Unknown	No.	306	28	1	27	2	13	377
	(%)	(7.8)	(3.6)	(4.8)	(31.8)	(3.0)	(65.0)	(7.7)
TOTAL	No.	3926	768	21	85	67	20	4887
	(%)	(100.0)	(100.0)	(100.0)	(100.0)	(100.0)	(100.0)	(100.0)

*Includes 587 Montreal cases tried by county judge alone.

Table 4.9 displays the elapsed time between the first appearance and the start of the preliminary inquiry. The average time taken was 61 calendar days. That is, two months lapsed, for the average case, before the preliminary began. Many cases took much longer. Almost 25 percent of all cases took three to six months to start; almost 10 percent took more than six months. At the other end of the scale, 15 percent of cases took two weeks or less, indicating that not all cases required a long time before commencing their preliminary.

An interesting perspective can be added to these findings by considering the results of a computer simulation model of the court system, based on data from 20,000 cases.[3] It was found that increasing the number of indictable cases coming to court by 10 or even 25 percent would have no appreciable effect on court delays. Cases would take as long to process as they do now, but no longer, despite the accepted belief that increased volume creates backlogs and delay. Not so for the courts. Rather, it was found that the cause of delay is the frequency of adjournments. Reduce these by 15 percent, and the average time to process a case would be cut in half, even if the case load increased by 10 percent.

Table 4.10 illustrates elapsed durations for the time between committal and plea. (Only cases with trials following preliminaries are shown.) This post-preliminary elapsed time was even longer than for the pre-preliminary stage: 82 days on average. Almost 25 percent of all cases took longer than six months to get to trial. Another 20 percent took three to six months.

Clearly, then, the bulk of time for court cases was consumed by non-court procedures. A person making a first appearance in court for an indictable offence waited an average of two months for his one-day preliminary inquiry. He then waited another two and one-half months, on average, for his one-day trial. Court preparation, scheduling and various other matters, not the actual procedures within court, accounted for nearly all of the time taken.

Thus arguments that have, as their central tenet, the position that preliminary inquiries are the source of protracted delays in the justice system require some clarification. The seeming fascination with in-court procedure should be eschewed in favour of focusing greater attention on the activites that precede court appearances and the duration of these activities.

TABLE 4.9

Elapsed Time between First Appearance and Preliminary Inquiry			
Number of Calendar Days	Number of Cases	Percent of All Cases	Percent of Known Cases
1	51	(2.4)	(2.4)
2-3	21	(1.0)	(1.0)
4-7	50	(2.3)	(2.4)
8-14	209	(9.6)	(9.8)
15-28	305	(14.0)	(14.4)
29-60	422	(19.4)	(19.9)
61-90	330	(15.2)	(15.5)
91-120	233	(10.7)	(11.0)
121-180	295	(13.6)	(13.9)
181-365	180	(8.3)	(8.5)
Over 365	27	(1.2)	(1.3)
Unknown	51	(2.3)	-
TOTAL	2174	(100.0)	(100.0)

Number of cases, excluding unknowns: 2123.

Median elapsed time: 61 days.

TABLE 4.10

Elapsed Time between Preliminary Inquiry and Trial			
Number of Calendar Days	Number of Cases	Percent of All Cases	Percent of Known Cases
1	152	(8.4)	(9.1)
2-3	10	(0.6)	(0.6)
4-7	36	(2.0)	(2.2)
8-14	58	(3.2)	(3.5)
15-28	129	(7.2)	(7.7)
29-60	303	(16.8)	(18.2)
61-90	187	(10.4)	(11.2)
91-120	142	(7.9)	(8.5)
121-180	215	(11.9)	(12.9)
181-365	321	(17.8)	(19.2)
Over 365	116	(6.4)	(7.0)
Unknown	131	(7.3)	-
TOTAL	1800	(100.0)	(100.0)

Number of cases, excluding unknowns: 1669.

Median elapsed time: 82 days.

Total Case/Time

Data on the total time taken to process an indictable case are presented in Table 4.11. Calculations were based on the dates of first court appearance and verdict (end of trial) and are shown for cases with and without a preliminary inquiry. Only cases that eventually had a trial were considered, to the exclusion of those dropped before trial. (Note that medians shown in Table 4.9 and 4.10 cannot be aggregated to these figures.)

The average (median) time was 177 calendar days for cases with a preliminary, 42 days for those without one. Preliminary inquiry cases took more than four times as long as cases going straight to trial. Roughly one in five cases with a preliminary took over a year, whereas roughly one in five "speedy" trials took a week or less. These figures speak eloquently for the delays associated with preliminary inquiries.

Conclusion

Preliminary inquiries per se did not take a lot of time - one day or less in most cases. However, pre- and post-preliminary activities consumed months and months:
61 days on average between first appearance and preliminary;
82 days on average between preliminary and trial.
Indictable cases with a preliminary generally lasted more than four times as long as those without one.

Whether six months is a long time or not is a matter of individual viewpoint. For those conditioned to expect lengthy court procedures for serious matters, six months on average is not long. For others, it is. Certainly those hoping to decrease inefficiencies now know where to look: pre-trial court procedures, case scheduling, transcript preparation and so on.

However, it is not entirely clear whether the preliminary inquiry procedure is at fault. Two questions need to be answered. First, what would be the impact on out-of-court procedures if the preliminary were abolished? For example, would the case preparation time expand to offset savings in transcript preparation? Second, what would happen if another procedure were substituted for the preliminary inquiry? For example, if examining witnesses during a preliminary is obviously not a cause of delay, would a paper committal system be more expeditious where it matters: out of court?

TABLE 4.11

Total Elapsed Case Time			
Number of Calendar Days		Cases with Preliminary	Cases without Preliminary
1	No.	4	383
	(%)	(0.2)	(12.4)
2-3	No.	5	99
	(%)	(0.3)	(3.2)
4-7	No.	8	117
	(%)	(0.4)	(3.8)
8-14	No.	39	260
	(%)	(2.2)	(8.4)
15-28	No.	85	382
	(%)	(4.7)	(12.4)
29-60	No.	232	543
	(%)	(12.9)	(17.6)
61-120	No.	185	347
	(%)	(10.3)	(11.2)
91-120	No.	165	261
	(%)	(9.2)	(8.5)
121-180	No.	164	279
	(%)	(9.1)	(9.0)
181-365	No.	556	258
	(%)	(30.9)	(8.4)
Over 365	No.	312	68
	(%)	(17.3)	(2.2)
Unknown	No.	45	90
	(%)	(2.5)	(2.9)
TOTAL	No.	1800	3887
	(%)	(100.0)	(100.0)

Median elapsed time, cases with a preliminary: 177 days.
Median elapsed time, cases without a preliminary: 42 days.

CHAPTER FIVE

OUTCOME OF PRELIMINARY INQUIRIES

The impact of the preliminary inquiry on subsequent court events, its outcomes, is one consideration in determining whether the procedure is working properly or not. How well it works and whether it is working well enough or not are matters of judgement. Statistics cannot substitute for decisions, but they can provide the basic information upon which to base decisions. This chapter examines results of preliminary inquiries in relation to their basic objectives.

There are two fundamental objectives of the preliminary inquiry: case screening and case clarification. Case screening refers to the separation of prima facie cases from those that are not, as indicated by a committal for trial. Where there was no committal, the case was, in this study, considered to have been completely screened out. This distinction avoids the confusion that could arise over cases that were partially screened in and partially screened out.

Case clarification, the second objective, could have several meanings. In a sense, all cases are clarified by some form of pre-trial procedure. In this study, however, the concept of clarification was operationalized in terms of cases being committed for trial on some charges, discharged on some charges or withdrawn or stayed on some charges. Also included were cases having a reduction or amendment to original charges. All these results imply a committal for trial on some charges, based upon an alteration of some kind to the original ones. That is, although a prima facie case may not be made on all original charges, judicial proceedings may continue on the basis of fewer counts or lesser and included offences.

A third objective of preliminary inquiries, or perhaps more correctly pre-trial disclosure, is to clarify pleas. Plea clarification is measured by the extent to which guilty pleas follow preliminary inquiries. Clarification is significant because judicial time should not be consumed by contested trials in which accused persons who face an impregnable crown case lack a full understanding of the strength of the crown's case and proceed to try to "beat the system".

A fourth objective, discovery, cannot in itself be analysed in this study. No data were collected that would indicate either the extent or quality of disclosure within the

preliminary or the impact this disclosure had. However, it may be inferred from the high incidence of consensual committals that disclosure by the crown is generally satisfactory, in terms of both quality and quantity.

Case Screening and Case Clarification

Table 5.1 indicates the basic results of the preliminary inquiry in terms of both case screening and case clarification. Although 81 percent of the known results were committals for trial on all charges, nine percent had the charges clarified in some way, for committals were made on modifications to the original charges. Another 10 percent of known cases were completely screened out from further judicial consideration.

That fully 19 percent, almost one in five, of preliminary inquiries resulted in either case screening or case clarification indicates that the procedure is by no means an empty exercise. The preliminary does indeed assess the quality of charges faced by an accused.

In comparison, it appears that the English paper committal system is not as effective in screening out cases. Of roughly 86,000 defendants nationally, just over two percent were discharged at the committal stage for lack of evidence.[1] In 40% of the cases sent to the Crown Court, judges either ordered acquittal before putting matters to the jury or directed the jury to acquit.[2] According to McConville and Baldwin,

> We conclude that the main problem is not that the weak case will never be identified, the hopeless hived-off, the ill-conceived weeded out. The problem is that identification and final disposition are unnecessarily delayed, that thin cases are needlessly protracted. Cases perish by slow torture when what is required is a swift and early application of the executioner's axe. . . . Weak cases ought not to be committed for trial in the first place. They get through because committal proceedings do not provide anything approaching an effective screening procedure.[3]

It should also be noted that the operation of any committal system depends upon the quality of cases brought before it. Because 81 percent of Canadian cases in our survey were committed for trial as originally charged, it is reasonable to infer that the police and crown attorney's offices are doing their jobs reasonably well.

TABLE 5.1

Outcome of Preliminary Inquiries			
Outcome	Number of Cases	Percent of All Cases	Percent of Known Cases
Committed for Trial (all charges)	1679	(77.2)	(80.6)
Committed for Trial (some charges)	192	(8.8)	(9.2)
No Committal for Trial	213	(9.8)	(10.2)
Unknown	90	(4.1)	-
TOTAL	2174	(100.0)	(100.0)

Number of cases, excluding unknowns: 2084.

However, the major questions are whether the nine percent of cases changed or the 10 percent not committed for trial should be considered high or low proportions. These are questions that cannot be fully answered here. Nonetheless, these are questions that must be answered at some time, if only implicitly.

For those who would try, the following issues may be considered. Judgements of the efficacy of the preliminary depend upon the quality of cases brought before the court; the quality of advocates and judiciary; and the individual values and underlying ethical philosophies that one brings to bear. Judgements further depend upon the effectiveness, actual or supposed, of alternatives with which to supplant the preliminary. Assessments of the preliminary also depend upon how changed cases fare once they reach trial and upon the results of cases not changed; this point will be examined later in this chapter.

Jurisdictional Variations

The outcomes of preliminaries varied markedly from one geographic region to another (Table 5.2). This variation was not due just to local legal cultures regarding the preferred use of nolle prosequi (stays) and withdrawals. The committal rate on all charges ranged between a low of 44 percent in the Prairies to a high of 87 percent in Ontario. Conversely, case screening and clarification were highest in the Prairies and lowest in Ontario and the Atlantic provinces.

Interpreting these results is difficult without further information. Do these figures reflect differences in police charging practices and the policies and procedures of attorneys general? Or differences in the way provincial court judges conduct preliminary inquiries? Is, for example, Ontario doing well to commit so many cases - or doing poorly to screen out so few? At this juncture, we simply do not know.

Other Screening

Pre-trial screening occurs at stages other than the preliminary inquiry. Cases may also be dropped at the first court appearance or while awaiting trial following the preliminary inquiry. Examining this pre- and post-preliminary screening places the operation of preliminaries in an overall context.

TABLE 5.2

Outcome of Preliminary Inquiries by Geographic Region

Region		Committed for Trial (all)	Committed for Trial (some)	No Committal for Trial	Unknown	Total
Atlantic	No.	104	4	7	5	120
	(%)	(86.7)	(3.3)	(5.8)	(4.2)	(100.0)
Quebec	No.	661	78	54	42	835
	(%)	(79.2)	(9.3)	(6.5)	(5.0)	(100.0)
Ontario	No.	586	48	32	4	670
	(%)	(87.5)	(7.2)	(4.8)	(0.6)	(100.0)
Prairies	No.	101	42	84	2	229
	(%)	(44.1)	(18.3)	(36.7)	(0.9)	(100.0)
B.C.	No.	227	20	36	37	320
	(%)	(70.9)	(6.3)	(11.3)	(11.6)	(100.0)
TOTAL	No.	1679	192	213	90	2174
	(%)	(77.2)	(8.8)	(9.8)	(4.1)	(100.0)

Table 5.3 shows that, while 213 cases were screened out at the preliminary, a further 161 cases were dropped by the crown between committal and plea. However, the greatest amount of case screening, 750 cases, took place at the first court appearance. Of all the pre-trial case screening combined, 67 percent occurred at the first appearance, 19 percent at the preliminary and 14 percent after the preliminary. (Not shown are 54 cases screened out at the Montreal Discovery Court and 555 cases dropped between election to magistrate and the start of trial. See Table 3.5.)

The initial impression left by these figures is that almost four times as much case screening occurred at the first appearance as at the preliminary. In this context, the preliminary inquiry may appear rather ineffective as a case screening procedure. However, it should be borne in mind that the preliminary is screening out cases that had already been screened at the first appearance. It is a second-stage operation that continues and further refines the process of case screening initiated at the first court appearance. As such, the preliminary is operating with a different universe of cases from those that first appear in court. Comparisons of case screening effectiveness at the preliminary and first appearance, although instructive, cannot be made in a direct manner.

Plea Clarification

The resolution of pleas is another of the fundamental objectives of pre-trial procedure. The logic of plea decision making can be somewhat complex. Therefore, plea clarification, within the context of this study, refers to the decision of an accused to enter a plea of guilty to some or all charges.

Of interest is the plea clarification occurring after undertaking a preliminary inquiry. In these cases, the accused did not admit guilt at the first available opportunity, that is, the first appearance. Instead, he consciously delayed making a plea by engaging in a preliminary inquiry. By such action, the defence is quite definitely testing the case of the crown to determine (a) whether or not the case is of a prima facie nature and (b) whether it is also of sufficient calibre to probably prove guilt beyond a reasonable doubt at trial.

Table 5.4 displays the pleas entered at trial for cases that first had a preliminary inquiry. Note that the base

TABLE 5.3

Pre-trial Screening by Stage of Discontinuation		
Stage	Number of Cases Discontinued	Percent of All Cases Discontinued
At First Appearance	750	(66.7)
At Preliminary Inquiry	213	(19.0)
After Preliminary Inquiry	161	(14.3)
TOTAL	1124	(100.0)

TABLE 5.4

Final Plea at Trial
for Cases Involving a Preliminary Inquiry

Final Plea	Number of Cases	Percent of All Cases	Percent of Known Cases
Not Guilty	496	(27.6)	(27.9)
Guilty of All	674	(37.4)	(37.9)
Guilty of Some	606	(33.7)	(34.1)
Special Plea	2	(0.1)	(0.1)
Unknown	22	(1.2)	-
TOTAL	1800	(100.0)	(100.0)

Number of cases, excluding unknowns: 1778.

number in this table is 1800 cases, down from the 2174 that started a preliminary inquiry and the 1871 known to have been committed for trial on all or some charges.

Of these 1800 cases, not guilty pleas were known to have been entered 28 percent of the time. Although this was a substantial proportion, it is logical that the innocent accused would tend to opt for courses of legal action involving a preliminary inquiry and, should a prima facie case be made, to enter a plea of not guilty. This percentage, therefore, is not necessarily an indication of how frequently plea clarification failed to take place.

A further 38 percent of known cases entered pleas of guilty to all charges, whereas pleas of guilty to fewer counts and lesser and included offences occured 34 percent of the time. That is, convictions on all or some charges were assured by the entry of guilty pleas in 72 percent of the known cases.

These results are interesting in that they indicate what could be interpreted as a high degree of plea clarification. Preliminaries appear to have a strong tendency to be followed by pleas of guilty to all or some charges at trial. But does this necessarily mean that the preliminary is working well?

The answer is yes and no. If the preliminary inquiry directly resulted in the decision to plead guilty, without the intervention of other, overriding factors, one might conclude that the current system of pre-trial disclosure effectively saves the expense of a major trial in a decidedly high proportion of cases.

On the other hand, one might also infer from these findings a tendency on the part of some defence counsel to employ delaying tactics.[4] At present, the guilty client and his lawyer certainly have little to lose by deliberately testing the crown's case by way of the preliminary inquiry. The question this raises is whether and to what extent checks and balances should be instigated in the system.

Magistrate's Court Pleas

To give some perspective to these figures, pleas following a preliminary were compared with those entered in magistrate's court, held in lieu of a preliminary inquiry. Of course, direct comparisons cannot be made because the nature and quality of cases are generally not equivalent. Nevertheless, such a comparison can be instructive, but not definitive.

The traditional view is that these so-called "speedy trials" usually entail guilty pleas. Therefore, that 18 percent plead not guilty (Table 5.5) could be viewed as a surprisingly high proportion rather than a surprisingly low one. At any rate, the percentage was certainly lower than the 28 percent pleading not guilty following a preliminary inquiry's committal for trial.

Findings regarding guilty pleas are also noteworthy. While guilty pleas to all or some charges were more likely to occur in speedy trials than in trials following preliminary inquiries, the differences were not that great: 80 percent vs. 71 percent. Recall also that cases with a preliminary took over four times as long as those without (Table 4.11). Therefore, the two roads through the judicial system, though substantially different in their nature and length of time taken, ended up in nearly the same place. These similar tendencies to plead guilty indicate, to the extent that comparisons can be made, that the preliminary inquiry's impact on plea decisions is neither unique nor profound.

A further consideration is the marked distinction between types of guilty pleas. Of those cases that did not involve a preliminary inquiry, 52 percent plead guilty to all charges while 28 percent plead guilty to some. Compare this to the nearly equal proportions (37 percent and 34 percent) for cases with a preliminary.

These figures could indicate differences in the resolution of plea-making decisions as well as differences in the nature of cases. Certainly it is reasonable to assume that the preliminary inquiry provides a heightened understanding of the case and that this understanding affects plea decisions.

There is undoubtedly another dynamic operating here as well. The preliminary provides increased opportunities for both crown-defence consultations and increased bargaining leverage, often leading to an exchange of charge reductions for reduced pleas. Case clarification and plea clarification sometimes go hand in hand under the common rubric of plea bargaining or plea negotiation.

Plea bargainning is thus composed of two elements, plea clarification and case clarification, existing in particular combination. These elements may occur alone or together. But since they are both objectives of pre-trial procedure, one would have to conclude that plea bargaining is as well. Preliminary inquiries are a formally sanctioned procedure, whereas plea bargaining is an informal one sometimes frowned upon. Nevertheless, they both exist for a reason. Each

TABLE 5.5

Final Plea at Trial for Indictable Cases with and without a Preliminary Inquiry

Final Plea		Cases with A Preliminary	Cases without A Preliminary
Not Guilty of All	No.	496	548
	(%)	(27.6)	(17.8)
Guilty of All	No.	674	1600
	(%)	(37.4)	(51.8)
Guilty of Some	No.	606	875
	(%)	(33.7)	(28.3)
Special Plea	No.	2	5
	(%)	(0.1)	(0.2)
Unknown	No.	22	59
	(%)	(1.2)	(1.9)
TOTAL	No.	1800	3087
	(%)	(100.0)	(100.0)

serves a useful function in bringing cases to an expeditious conclusion. Functionally speaking, plea bargaining is nothing more than the continuation of formal procedure on informal grounds.

Re-election and Plea

The nature of re-election, as a vehicle for pleas, deserves mention. The conventionally accepted sequence of events is that an accused is committed for trial, decides to plead guilty and, as a result of that, re-elects "down" to a judge alone to expedite matters.

As shown in Table 5.6, this conventional wisdom is generally correct. Fully 67 percent of all trial cases having a preliminary inquiry re-elected down to magistrate (or county judge alone). Only four cases out of 1800 re-elected up from judge alone to judge and jury, and all of these cases plead not guilty. This function of the preliminary inquiry to bring about re-elections must, in itself, save the high courts considerable time (assuming, of course, that the initial election was an expression of valid intent).

When the dynamics of plea making and re-election are combined, however, the results are less categorical. Although it is true that most (70 percent) pleas of guilty to all charges as well as most (75 percent) pleas of guilty to some charges were linked with re-elections, substantial proportions of these cases (27 percent and 24 percent, respectively) did not re-elect. Instead, they waited for the high court trial to begin and at that point plead guilty. This appears to be a matter of delaying the inevitable. Of course, the defence is under no compulsion to re-elect, and it is often advantageous to postpone events for several months. The efficiency of the justice system, especially at the expense of his client, is not the mandated concern of defence counsel.

Also of interest in this table is the proportion of re-elections following the decision to plead not guilty. There were similar proportions of cases with no re-election and re-election down, 55% and 43%. Why defence would re-elect down and plead not guilty is not immediately evident, unless of course there is a benefit to the accused in having his case proceed more expeditiously before a judge alone as opposed to a judge and jury. Here one may also encounter the phenomenon of "judge shopping".

TABLE 5.6

Final Plea at Trial by Type of Re-election following a Preliminary Inquiry

Final Plea		Type of Re-election				
		Re-elect Down	Re-elect Up	No Re-election	Unknown	Total
Not Guilty	No.	271	4	215	6	496
	(%)	(54.6)	(0.8)	(43.3)	(3.4)	(100.0)
Guilty of All	No.	490	0	184	0	674
	(%)	(70.5)	-	(27.3)	-	(100.0)
Guilty of Some	No.	452	0	148	6	606
	(%)	(74.6)	-	(24.4)	(1.0)	(100.0)
Special Plea	No.	2	0	0	0	2
	(%)	(100.0)	-	-	-	(100.0)
TOTAL	No.	1215	4	547	12	1800*
	(%)	(67.5)	(0.2)	(30.4)	(0.7)	(100.0)

*Includes 22 cases wherein the type of plea was unknown.

Trial Verdicts

The relationship between preliminary inquiry results and final verdicts at trial rounds out the analysis of procedural impact. Ideally, this relationship is such that the manifestly innocent accused has his case screened out before trial, with the result that adjudicated acquittal should be rare. At least this is how the theory works.

In practice, matters are not quite so simple. Witnesses can change their testimony between the preliminary and trial, new evidence can be found, witnesses can disappear, evidence can be called into question, and a host of other factors can intervene. As well, a preliminary is not a trial. Instead of a prima facie case with doubt being resolved in favour of committal, guilt must be proven beyond a reasonable doubt.

For these reasons, a direct, simplistic comparison between case screening and trial verdicts cannot be made. The same is true for the other measures of preliminary inquiry impact, case clarification, and plea clarification. Nevertheless, an attempt must be made, however cautious and qualified. The only way of determining whether the preliminary inquiry is working properly is to examine how cases subsequently fare in court.

Table 5.7 indicates that 43 percent of all cases were convicted of all charges, 39 percent on fewer counts or lesser and included offences (versus those originally laid). Eighty-two percent of all cases going to trial following a preliminary inquiry terminated in findings of guilt on all or some charges.

These percentages seem to indicate that the pre-trial and trial components of the criminal justice system are working quite effectively. While there might always be some room for improvement, an 82 percent conviction rate is not a bad track record for serious indictable offences. Let us now review the process a little more closely.

Roughly 71 percent of all trial cases that first had a preliminary inquiry plead guilty to all or some charges (Table 5.4), while 82 percent were found guilty on all or some charges, (Table 5.7). That is, only another 11 percent were convicted over and above those who plead guilty at the start of the trial. One of the inferences from this finding is that preliminaries are quite effective at clarifying pleas, thereby saving the expense of major trials. This effectiveness is no doubt due to the high quality and quantity of disclosure that takes place.

TABLE 5.7

Final Verdicts at Trial for Cases involving a Preliminary Inquiry

Final Verdict	Number of Cases	Percent of All Cases	Percent of Known Cases
Not Guilty of All	253	(14.1)	(14.2)
Guilty of All	773	(42.9)	(43.4)
Guilty of Some	709	(39.4)	(39.8)
Other Outcomes	45*	(2.5)	(2.5)
Unknown	20	(1.1)	-
TOTAL	1800	(100.0)	(100.0)

Number of cases excluding unknowns: 1780.

*Includes 38 cases stayed or withdrawn at trial, three cases found not guilty by reason of insanity and four cases with other adjudicated outcomes.

If case clarification is subjected to the same type of analysis as plea clarification, however, it appears not to fare so well. One hundred and ninety-two cases were "clarified" at the preliminary, in that committals were made on the basis of only some of the original charges (Table 5.1). Compare this to 606 cases that plead guilty to some charges (Table 5.4) and 709 found guilty on some (Table 5.7) In other words, the preliminary did not clarify a lot of cases (that is, amend or reduce charges) which were later clarified at the plea or verdict stage. Charges were laid, committals were made on these charges, but convictions on only some of these charges subsequently followed.

However, matters are not quite that simple. Out-of-court dynamics and the psychology of committal undoubtedly play a large part in explaining these findings. The point is not that committals on individual charges are being indiscriminately made. Rather, it appears that the judicial finding of sufficient evidence for committal prompts defence to seek a compromise. The accused agrees to plead guilty to reduced charges rather than face the full slate for which he was committed. The crown prosecutor accepts the offer in the interests of efficiency, his operating assumptions being that time and money are thereby saved, a bird in the hand is better than none, and a conviction on fewer counts or lesser and included offences can be just as good, depending on sentencing negotiations. Therefore, although case clarification may occur only nine percent of the time within the formalized context of the preliminary inquiry (Table 5.1), the procedure indirectly results in considerably more case clarification between the preliminary's conclusion and the start of the trial.

Case screening is the third aspect of preliminary inquiry effectiveness to be examined here. Recall that, of the 2174 preliminary inquiries examined in this study, 81 percent were known to have resulted in committals for trial on all charges. This is a high committal rate. Only 10 percent of the cases (that is, 213) were directly screened out by the preliminary. Another seven percent (161 cases) were dropped before trial, perhaps as an indirect result of the preliminary inquiry.

Another 12 percent (253 cases of 2174) might conceivably have been screened out pre-trial, for they were eventually adjudicated to be not guilty on all charges. A further two percent were withdrawn or stayed at the trial itself (38 cases). In sum, the preliminary inquiry could potentially have screened out 31% of all cases. With 10% of cases

actually screened out, the preliminary screened out only about one-third of the cases it potentially could have, assuming all things to be equal.

Let us review these figures (see Table 5.8). Of the 2174 cases with a preliminary inquiry, 31 percent (665 cases) were eventually flushed from the system in one way or another. This 31 percent was made up of the following components: 10 percent screened out pre-trial; seven percent dropped before trial; two percent dropped at trial; twelve percent acquitted. The theoretical upper limit on pre-trial case screening would be reached if all the screening took place at the preliminary, leaving no cases to be acquitted at trial.

It is, however, absurd to think that all case screening could possibly occur at the preliminary; this 31% of cases eventually not resulting in conviction is a theoretical upper limit, not a practical one. Therefore, the figures do not so much answer the question of effectiveness of case screening as cause us to pose another one: what do we mean by effectiveness? If 10 percent case screening is considered insufficient and 31 percent unrealistic, what should be, according to the procedure's critics, the practical benchmark with which to measure the effectiveness of the preliminary inquiry (or indeed its alternatives)?

Criticisms of the effectiveness of the preliminary must be fully and adequately grounded in reality before it is concluded that the procedure is working improperly. It would be presumptuous of this study to do more than provide the range within which the - necessarily consensual - benchmarks must fall.

Magistrate's Court Verdicts

Comparisons with verdicts in speedy trials (that is, those not involving a preliminary) complete the assessment of the preliminary's effect on trial activity. As with similar comparisons made for pleas, differences in the nature of cases preclude anything more rigorous than qualitative comparisons.

Table 5.9 shows that cases with a preliminary were twice as likely as those without one to result in not guilty verdicts (14 percent vs. seven percent). Instead of being a commentary on pre-trial procedural effectiveness, this finding probably reflects a tendency for truly innocent accused to undertake a full contestation, including resorting to the preliminary inquiry.

TABLE 5.8

Court Outcomes for Cases Involving a Preliminary Inquiry		
Court Outcomes	Number of Cases	Percent of Cases
Dropped at Preliminary	213	(9.8)
Dropped before Trial	161	(7.4)
Dropped at Trial	38	(1.7)
Acquitted at Trial	253	(11.6)
Convicted at Trial	1482	(68.2)
Other Trial Outcomes	7	(0.3)
Unknown	20	(0.9)
TOTAL	2174	(100.0)

TABLE 5.9

Final Verdict at Trial for Indictable Cases with and without a Preliminary Inquiry

Final Verdict		Cases with a Preliminary	Cases without a Preliminary
Not Guilty	No.	253	219
	(%)	(14.1)	(7.1)
Guilty of All	No.	773	1719
	(%)	(42.9)	(55.7)
Guilty of Some	No.	709	976
	(%)	(39.4)	(31.6)
Other Outcome	No.	45	73*
	(%)	(2.5)	(2.4)
Unknown	No.	20	100
	(%)	(1.1)	(3.2)
TOTAL	No.	1800	3087
	(%)	(100.0)	(100.0)

*Includes 66 cases stayed or withdrawn, four cases found not guilty reason of insanity, and three cases with other adjudicated findings.

One can, however, observe a tendency for the two procedures to differ in their types of guilty verdicts. Trials not preceded by a preliminary inquiry were more likely than those that were to result in convictions on all original charges (56 percent vs. 43 percent) and, conversely, were somewhat less likely to result in convictions on reduced charges (32 percent vs. 39 percent).

These findings no doubt reflect both differences in the nature of cases and the case/plea clarification that occurs during and after a preliminary inquiry. This comparison of procedures further confirms that clarification takes place but does not permit us to quantify its degree or extent.

Jurisdictional Variations In Trial Activity

Data on differences in pleas and verdicts by geographic region are presented in Table 5.10. To avoid over-complicating matters, the 4887 trials examined in this study were analysed without reference to the presence or absence of preliminary inquiries.

Note that the types of pleas entered at trial in British Columbia were dramatically different from those entered in other regions. Instead of the usual 15 to 20 percent, 51 percent of indictable cases in British Columbia entered pleas of not guilty. These pleas seemed to make little difference to trial verdicts though, for the acquittal rate of 14 percent was only nominally higher than that in other regions (Table 5.11).

Wide variations also occurred in the percentage of guilty pleas. In the Atlantic and Prairie provinces, the proportion pleading guilty to all charges (64 percent and 57 percent, respectively), tended to be higher than for the country as a whole, whereas proportions in Ontario and British Columbia were lower (38 percent and 40 percent respectively). Only Quebec came close to the overall average of 46 percent.

It therefore follows that pleas of guilty to some charges (fewer counts or lesser and included offences) also varied by region. Ranked from lowest to highest, the proportions in each region were nine percent in British Columbia, 17 percent in the Atlantic provinces, 23 percent in the Prairies, 35 percent in Quebec and 42 percent in Ontario.

Differences in acquittal rates for the five regions were too slight to merit much comment (see Table 5.11). However, the proportions of convictions on reduced charges were

TABLE 5.10

Final Plea at Trial by Geographic Region							
Geographic Region		Not Guilty	Guilty (all)	Guilty (some)	Special Plea	Unknown	Total
Atlantic	No.	98	339	90	0	0	527
	(%)	(18.6)	(64.3)	(17.1)	-	-	(100.0)
Quebec	No.	299	796	611	6	17	1729
	(%)	(17.3)	(46.0)	(35.3)	(0.3)	(1.0)	(100.0)
Ontario	No.	225	536	578	1	51	1391
	(%)	(16.2)	(38.5)	(41.6)	(0.1)	(3.7)	(100.0)
Prairies	No.	109	359	146	1	12	626
	(%)	(17.4)	(57.3)	(23.3)	-	(1.9)	(100.0)
B.C.	No.	313	244	56	0	1	614
	(%)	(51.0)	(39.7)	(9.1)	-	(0.2)	(100.0)
TOTAL	No.	1044	2274	1481	7	81	4887
	(%)	(21.4)	(46.5)	(30.3)	(0.1)	(1.7)	(100.0)

TABLE 5.11

Final Verdict at Trial by Geographic Region

Geographic Region		Not Guilty	Guilty (all)	Guilty (some)	Other Outcome	Unknown	Total
Atlantic	No.	45	362	96	20	48	527
	(%)	(8.5)	(68.7)	(18.2)	(3.8)	(0.8)	(100.0)
Quebec	No.	136	871	683	18	21	1729
	(%)	(7.9)	(50.4)	(39.5)	(1.0)	(1.2)	(100.0)
Ontario	No.	54	561	636	25	15	1391
	(%)	(11.1)	(40.3)	(45.7)	(1.8)	(1.1)	(100.0)
Prairies	No.	48	357	171	41	9	626
	(%)	(7.7)	(57.0)	(27.3)	(6.5)	(1.4)	(100.0)
B.C.	No.	89	341	99	14	71	614
	(%)	(14.5)	(55.5)	(16.1)	(2.3)	(11.6)	(100.0)
TOTAL	No.	472	2492	1685	118*	120	4887
	(%)	(9.7)	(51.0)	(34.5)	(2.4)	(2.5)	(100.0)

*Includes 104 cases stayed or withdrawn, seven cases found not guilty by reason of insanity and seven cases with other adjudicated outcomes.

noteworthy: lows of 16 percent in British Columbia and 18 percent in the Atlantic, highs of 39 percent and 46 percent in Quebec and Ontario. In general, these figures paralleled the proportions of reduced pleas in each region. Although there could be many reasons for these differences, it is possible that they were in part attributable to differences in the amount of case and plea clarification from one region to another.

Conclusion

This chapter presented the outcomes of preliminary inquiries in terms of the procedure's objectives. The analysis was therefore in one sense an assessment of impact. However, there were too many unknowns to permit a formal evaluation. What follows, then, is a drawing together of findings and inferences in terms of case screening, case clarification, and plea clarification.

Case screening, the dropping of all charges, occurred at the preliminary inquiry in 10 percent of the 2174 cases (regional differences were notable). Some additional screening occurred between the preliminary and trial, but the bulk of case screening took place at first appearance. The preliminary inquiry, therefore, is a second-stage screening procedure, operating on those cases already screened at first appearance.

Of the cases with a preliminary inquiry, one case in three (31%) was eventually acquitted or otherwise dropped. The preliminary accounted directly for 10 percent of these cases and perhaps indirectly for another seven percent, leaving 14 percent to be acquitted, stayed, or withdrawn at trial. This information provides us with a rough measure of case screening effectiveness, indicating that the procedure is definitely working but raising the question of how much more effective it could become. The figures also implicitly raise the question of how much more or less effective an alternative procedure would be.

Case clarification, the reduction of charges to fewer counts or lesser and included offences, occurred at the preliminary in nine percent of cases. Although the amount of case clarification occurring strictly within the preliminary inquiry was minimal in comparison to that following, one could infer that the preliminary's aftermath was case clarification at the plea stage. However, data on pleas at magistrate's court, held in lieu of a preliminary, did little to confirm this position.

It would appear that no conclusions about case clarification can be safely made because plea bargaining, which occurs with and without a preliminary, confounds the findings.

Plea clarification can exist with or without case clarification. Plea clarification was defined as the resolution of the plea decision in favour of some form of guilty plea. Preliminary inquiries strongly tended to be followed by pleas of guilty to all or some charges, often in conjunction with re-election, and can therefore be said to clarify pleas.

However, the extent to which a formal pre-trial procedure was required to evoke these pleas is unclear. While direct comparisons cannot be made, guilty pleas in cases held before a magistrate were proportionately even higher. Could pleas following a preliminary have been entered at the first instance? Perhaps checks and balances are needed to curtail possible abuse of the system.

Finally, it is noteworthy that 82 percent of all cases going to trial following a preliminary inquiry terminated in some form of conviction.

CHAPTER SIX

CONCLUSIONS

Since the purpose of this study was to provide policy analysts with information, this chapter synthesizes the facts and highlights their implications. Material is organized in terms of descriptive statistics and evaluative commentary. Conclusions about the future of pre-trial procedure in Canada are properly left to the reader.

Statistics

Insufficient empirical information with which to properly assess the preliminary inquiry and criticisms of it gave rise to the need for this study. Generally, data were sought to describe how the procedure currently operates. No attempt was made to empirically explain why the procedure operates as it does. Some attempt was made to determine how well the procedure operates (see the section below on evaluation).

The basic findings can be summarized in the form of a typical case profile. Emphasis in this type of construct is placed upon that which usually occurs. Consequently, it can be a useful technique for conveying general impressions, bearing in mind that exceptions also occur.

A so-called average preliminary inquiry case would proceed as follows:

- Charges are laid for an indictable offence, such as break and enter;
- The accused elects trial by judge and jury at the first court appearance;
- Two months pass;
- The preliminary inquiry is convened, at which the accused consents to trial or is committed as originally charged following the testimony of two or three crown witnesses;
- The preliminary concludes on the same day it began, usually requiring less than a full day;
- Two or three months pass, during which the accused may re-elect down;

- The trial begins, the accused pleads guilty, and the verdict is rendered the same day, usually in a matter of hours.

The above profile accords with the general impression that the average case takes a long time to resolve. And we are talking here of run-of-the-mill cases, without forensic evidence, expert witness testimony or other types of complexities. Yet the process takes four or five months from beginning to end. Most of this is out-of-court time. The exceptional cases can and should take longer, but is it really necessary for the non-exceptional to take this long? Is a preliminary inquiry really necessary to resolve pleas? We will return to these questions shortly.

Another impression left by this so-called average case is that exceptions need to be carefully considered. But in what context should these exceptions be considered? Does one, for example, design a general system to deal with the general case, building in exceptions and safeguards as needed? Or does one state as an operating principle that every case is unique, no generalizations can be made, and no general rules can be devised - unless they are so broad they encompass everything? Setting the parameters on a system, defining its scope, is never easy. Nevertheless, the task is often made less difficult by explicitly considering the principles involved.

A further comment, on disclosure and consensual preliminaries, is required. Pursuant to section 476(1) of the Criminal Code, if the accused and prosecutor consent, a committal for trial can be made at any stage of the preliminary. Until this study, no statistics to indicate the frequency with which this section operates were available.

There is now evidence that consensual preliminaries represent 52 percent of all known cases; in most of these cases, neither side called witnesses. It can reasonably be inferred that both the quality and quantity of disclosure by the crown must be satisfactory in these cases. It is unlikely that an accused would waive hearing evidence and consent to committal if disclosure was either inadequate or absent altogether.

What about the broader picture, the incidence of consent committals? The proportion of pleas of guilty after the preliminary was higher (71 percent), and the proportion of pleas of guilty to indictable offences in magistrate's court, where there was no preliminary, even higher (80 percent). It can therefore be concluded that disclosure by the crown is apparently satisfactory.

Evaluation

Determining how well the preliminary inquiry operates is not a simple matter. This study cannot provide definitive answers of an evaluative nature, although the question is too important to ignore completely. An attempt was therefore made to measure both the extent to which outcomes meet objectives (effectiveness) and the timeliness (efficiency) with which this is done.

For measurement purposes, objectives were operationalized in terms of three concepts: case screening, case clarification, and plea clarification. A fourth concept, disclosure, could be measured only indirectly. Timeliness was measured in terms of actual court time and the elapsed time required to move a case from one stage of the court process to the next.

It was found that 10 percent of preliminary inquiries directly resulted in case screening, nine percent in case clarification. Plea clarification occurred in 71 percent of the cases going to trial after a preliminary. The preliminary inquiry took one court day or part thereof 80 percent of the time. However, an average of 61 days elapsed before the preliminary began, and an average of 82 days elapsed between its conclusion and the start of the trial (entering a plea).

The first difficulty in evaluation occurs in attributing cause and effect. Plea clarification, for example, occurs after the preliminary concludes and can only be assumed to result from those proceedings. Many other factors that have little or nothing to do with the preliminary inquiry itself could intervene. Likewise, there is no proof linking the preliminary inquiry either to the additional seven percent of case screening occurring between the committal for trial and plea or to the 34 percent of case clarification (charge reduction) seemingly occurring when the trial commences. Therefore, while outcomes can be described and possibly linked to the operation of preliminaries, no evidence exists to rule out alternative explanations.

A second difficulty arises in terms of interpreting these results. Figures never speak for themselves; they always require interpretation. For example, is two months a long time? Is 10 percent case screening sufficient?

Interpretive answers require a viewpoint, a stance. Sometimes an objective stance can be reached mechanically, as in determining whether performance criteria (for example,

a 70 percent acceptance rate) are met without questioning how realistic those criteria may be. For the preliminary inquiry, however, an approach falling somewhere between the extremes of the statistically mechanical and the intuitively subjective is required.

One solution is to ask, "Ineffective compared to what?" An evaluative criterion or benchmark can be determined by comparing the preliminary inquiry with alternatives (subject to the limits of comparability):

- The preliminary hearing screened out 10 percent of cases directly and an additional seven percent indirectly, as compared to a further 12 percent acquitted and two percent stayed or withdrawn at trial;

- Guilty pleas following a preliminary amounted to 71 percent of cases, as compared to 82 percent eventually convicted;

- Convictions on reduced charges occurred in 39 percent of the trials following a preliminary inquiry, as compared to 32 percent of the magistrate's trials, held in lieu of a preliminary;

- Court cases with a preliminary inquiry averaged 177 days from beginning to end, as compared to the average 42 days for indictable cases without a preliminary.

Within this comparative context, one could say that the preliminary seems reasonably effective in meeting its objectives, but not terribly efficient. It takes a long time for cases to reach their destination, so long in fact that one has to wonder whether this seemingly effective meeting of objectives is not a mirage.

Recall that it is not the mandated concern of defence counsel to increase the efficiency of the administration of justice at the expense of their client's interests. Recall as well that delaying tactics may well be legitimate in certain circumstances and that there are few if any safeguards against potential abuse of the system. If some defence counsel use the preliminary as a mechanism to prolong the inevitable guilty plea, then the observable statistical outcomes would be identical to those confronting us now: long delays coupled with consensual preliminaries, re-elections and seemingly "effective" resolution of pleas, often to lesser or included offences.

Of course, we have no evidence that this is the case. Many other explanations might apply, such as the known delays in court scheduling. Even if the so-called rehabilitative remand were being over-used, we do not know whether defence counsel or the accused themselves are the true source of delay. For these reasons, this study can describe only what events occur, providing abundant evidence of delay in the system, but without explaining why the delay occurs.

Nevertheless, these inferences from the data raise two questions. To what extent should the rehabilitative remand be a legitimate and hence recognized function of the court system? If, on the other hand, such a remand is not legitimate, what checks and balances should be imposed?

Trying to answer these questions leads ultimately to the fundamental issue of evaluation: who is to be served by the preliminary inquiry or its potential replacements? Is it the accused, the victim or the public at large? Only by answering this question can we say whether objectives are legitimate or durations too long.

Concluding Note

If figures never speak for themselves, if each answer raises more questions, if evaluation always entails value judgements, if policy making is always a matter of resolving an eternal conflict between ethical philosophies, then this report can have no conclusions. The best it can do is to offer rational choices. To the extent that it has provided useful information and suggested possibilities for what those choices might be, it has met its objectives. Thereafter begins the more complex process of developing recommendations for legal and policy reform.

FOOTNOTES

CHAPTER 1

1 All provinces except Alberta were able to provide data within this time frame. British Columbia provided data on tape, obviating the need for direct data acquisition.

2 Once the crown elects either to proceed by indictment on a hybrid offence or to pursue a purely indictable offence, most accused are permitted to choose the type of trial (judge and jury, judge alone, magistrate) and -- indirectly -- the type of court (superior, county, provincial).

CHAPTER 2

1 James Stephen, A History of the Criminal Law of England, volume 1, London, 1883, p. 219-221.

2 Ibid., p. 221.

3 Criminal Code, Section 475, C.C.C.: Patterson v. Queen (1970), S.C.R. 409 to 412; Caccamo v. Queen (1975), 21 C.C.C. (2d) 257 at 275.

4 Criminal Code, s.468(1)(a).

5 Ibid.

6 Re Nichols and the Queen (1977) 34 C.C.C. (2d) 153 (Ontario H.C.J.).

7 Criminal Code, s.468(2).

8 Ibid., s.465(1)(b).

9 Ibid., s.465(1)(c).

10 Ibid., s.470.

11 Ibid., s.469(4).

12 Ibid., s.475.

13 Regina v. Cowden (1947), 90 C.C.C. 101 (Ont. H.C.J.); and Regina v. Charette (1958), 122 C.C.C. 300 (Ont. H.C.J.).

14 Roger E. Salhany, Canadian Criminal Procedure, 3rd ed., Toronto, 1978, p. 115.

15 (1977) 2 S.C.R. 1067.

16 James L. Wilkins, Statistical Features of the Preliminary Hearing, in Criminal Lawyers' Association, The Preliminary Hearing, Toronto, n.d., p. 20.

17 Report of the Special Committee on Preliminary Hearings, Ministry of the Attorney General of Ontario, 1982.

18 Minority Report of the Special Committee on Preliminary Hearings, Attorney General of Ontario, 1982, p. 1-2.

19 James L. Wilkins, Statistical Features of the Preliminary Hearing, in Criminal Lawyers' Association, The Preliminary Hearing, Toronto, n.d., p. 17-21,

20 Roger E. Salhany, Canadian Criminal Procedure, 3rd ed., Toronto, 1978, p. 115.

CHAPTER 3

1 Statistics Canada, Catalogue Number 85-205.

2 Report of the Canadian Committee on Corrections, Ottawa, 1969, p. 24.

3 Report of the Special Committee on Preliminary Hearings, schedule "B". Note that figures for Narcotics Control Act and Food and Drugs Act offences were not included in the study.

4 These results correspond rather closely with the figures reported by Wilkins (op. cit., p. 21) from his detailed court observation: a finding that suggests that the information missing about this variable may not be too serious a shortcoming.

CHAPTER 4

1 Perry S. Millar and Carl Baar, Judicial Administration in Canada Montreal, 1981, p. 232.

3 Robert G. Hann and Lorne P. Salzman, "CANCOURT - I: A Computerized System Simulation Model to Support Plannin ir Court Systems", (Centre of Criminology, University of Toronto), 1976.

CHAPTER 5

1 Criminal Statistics 1978, Table 1 (a), cited in The Royal Commission on Criminal Procedure, London, 1981, p. 180.

2 Criminal Statistics 1978, Table B.7 (d), cited in The Royal Commission on Criminal Procedure, London, 1981,p. 181.

3 Michael McConville and John Baldwin, Courts, Prosecution and Convictions, Oxford, 1981, p. 93.

4 Compare, for example, the assessment by some crown prosecutors that legal aid lawyers tend to ". . . tie up the courts with not quilty pleas and (to contribute to) the rise in demands (sic) for preliminary hearings rather than (to resort to) informal disclosure . . ." James C. Hathaway and C. James Richardson, Legal Aid in New Brunswick: An Empirical Evaluation, Ottawa (Department of Justice, unpublished manuscript), 1982.