DISCLOSURE

> *"In theory, there is no difference between theory and practice. But in practice, there is.'*
>
> - Yogi Berra

Introduction

In the leading case on the Crown's disclosure obligations, *R. v. Stinchcombe*[1], the following was accepted as a correct statement of the law:

> … there is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it.

The judgment went on to note that the obligation is not absolute, but is subject to Crown counsel's discretion with respect to both the timing of disclosure and withholding information for valid purposes, such as the protection of police informers.

There is a duty on the Crown to make full and timely disclosure to the defence of all relevant[2] information known to the investigator and the Crown Attorney. This obligation applies to both inculpatory and exculpatory information.

The obligation is also subject to the limitation that the accused has no right to information that would distort the truth-seeking process[3]. This policy seeks to describe Crown counsel's responsibilities with respect to disclosure.

Statement of Policy

Counsel appearing for the Attorney General of Newfoundland and Labrador in a criminal matter shall, on request, disclose to the accused, or counsel for the accused, the evidence on which the Crown intends to rely at trial as well as any information which may assist the accused, whether intended to be adduced or not.[4]

In all cases, whether a request has been received or not, Crown counsel shall disclose any information tending to show that the accused may not have

committed the offence charged. With respect to this narrow category of disclosure, the obligation is mandatory.

The purpose of disclosure is two-fold:

a. to ensure that the accused knows the case to be met, and is able to make full answer and defence; and
b. to encourage the resolution of facts in issue including, where appropriate, the entering of guilty pleas at an early stage in the proceedings.

The information to be disclosed need not qualify as evidence, i.e., pass all of the tests concerning admissibility[5]. It is sufficient if the information is relevant, reliable and not subject to some form of privilege. Second-hand information that is unconfirmed may or may not be disclosed, depending on counsel's assessment of the issues in the case.

Information “which may assist the accused" is not always easily recognizable. It is difficult to provide clear guidelines respecting disclosure of the "unused" side of the Crown's file. Crown Attorneys are expected to exercise good judgment and consult with Senior Crown Attorneys in assessing what should and what need not be disclosed. The purpose of this requirement is to avoid a miscarriage of justice on the basis of non-disclosure of helpful information. The key question is relevance and "while the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant"[6].

This policy assumes that the accused is before a court in Canada charged with an offence in a domestic criminal proceeding.[7] If charges were laid but the accused fled Canada or for some other reason is not before a Canadian court, there is no obligation to provide full disclosure. It may, however, be appropriate to provide counsel with a brief summary of the case. Where an accused absconds during a preliminary hearing or trial, and the hearing is continued in his absence pursuant to ss. 475 and 544 of the *Criminal Code*, the obligation to make disclosure to his counsel continues if counsel continues to act.

Subject to the exceptions outlined in this Guide Book, Crown Attorneys have a *continuing* obligation to disclose in accordance with this policy, the evidence on which the Crown intends to rely at trial, and any information which may assist the accused, whether intended to be adduced or not. This

obligation relates to information that comes to the attention of or into the possession of Crown counsel and continues after conviction, including after appeals have been decided or the time of appeal has elapsed.[8]

Mandatory Inclusions

On receiving a request, Crown Attorneys shall, as soon as reasonably practicable[9], provide disclosure in accordance with the principles outlined in this Guide Book. In most cases, this will mean that the defence will be given at least the following:[10]

1. Charging Document

A copy of the information or indictment[11].

2. Particulars of the Offence

Particulars[12] of the circumstances surrounding the offence.

3. Witness Statements

Copies of the text[13]of all written statements concerning the offence which have been made by a person with relevant information to give[14]; where the person has not provided a written statement, a copy or transcription[15] of any notes that were taken by investigators when interviewing the witness; if there are no notes, a "will-say" or summary of the anticipated evidence of the witness[16]. This requirement includes statements provided by persons whether or not Crown counsel proposes to call them as witnesses.

4. Audio or Video Evidence Statements by Witnesses

An appropriate opportunity[17] to view and listen to, in private, the original or a copy of any audio or video recording of any statements made by a witness other than the accused to a person in authority[18]. This does not preclude a Crown Attorney, in his or her discretion, from providing copies of any video or audio recording or a transcript, where available and appropriate, but only after obtaining appropriate undertakings[19] that take into account any privacy interests[20]. Where defence counsel is unwilling to accept the terms and conditions of an appropriate undertaking, Crown counsel should apply to the trial judge for directions.

5. Statements by the Accused

A copy of all written, audio or video recorded statements concerning the offence which have been made by the accused to a person in authority; in the case of oral statements, a verbatim account, where available, including any notes of the statement taken by investigators during the interview; if a verbatim account is not available, an account or description of the statement (whether the statement, in whatever form, is intended to be adduced or not); and a reasonable opportunity to view and listen to, any original audio or video recorded statement of the accused to a person in authority. Copies of all such statements or access thereto should be provided whether or not they are intended to be relied upon by the Crown[21].

6. Accused's Criminal Record

Particulars of the accused's and any co-accused's criminal record[22].

7. Expert Witness Reports

As soon as available, copies of all expert witness reports[23] in the possession of Crown counsel relating to the offence, except to the extent that they may contain clearly irrelevant or privileged information. Expert reports relating to the offence should be disclosed, whether helpful to the Crown or not[24]. Counsel should pay close attention to the provisions in s.657.3 of the *Criminal Code*, which require notice to be given where an expert is to be called as a witness at trial.

8. Documentary and Other Evidence

Where reasonably capable of reproduction, copies of all documents, photographs, audio or video recordings of anything other than a statement of a person, that Crown counsel intends to introduce into evidence during the case-in-chief for the prosecution[25]. Where there exists a reasonable privacy or security interest of any victim(s) or witness(es) that cannot be satisfied by an appropriate undertaking from defence counsel, Crown Attorneys should seek directions from the trial judge[26].

9. Exhibits

An appropriate opportunity[27] to inspect any case exhibits[28], i.e., items seized or acquired during the investigation of the offence which are relevant to the

charges against the accused, whether or not Crown counsel intends to introduce them as exhibits[29].

10. Search Warrants

A copy of any search warrant relied on by the Crown and, subject to the limitations in this Guide Book.[30], the information in support unless it has been sealed pursuant to a court order[31], and a list of the items seized there under, if any.

11. Authorizations to Intercept Private Communications

If intercepted private communications will be tendered, a copy of the judicial authorization or written consent under which the private communications were intercepted[32].

12. Similar Fact Evidence

Particulars of similar fact evidence that Crown counsel intends to rely on at trial[33].

13. Identification Evidence

Particulars of any procedures used outside court to identify the accused[34].

14. Witnesses' Criminal Records

Upon request, information regarding criminal records[35] of material Crown or defence witnesses that is relevant to credibility[36]. There is no obligation to do a criminal record check on all Crown witnesses[37]. Special care must be taken with police agents and other potentially disreputable witnesses. A reliable copy[38] of the person's criminal record, and relevant information[39] relating to any outstanding criminal charges against the witness, must be disclosed. Crown Attorneys must request such information in writing from the relevant police authority[40] and place the letter and response on the file. Such information should be adduced by the Crown in the examination-in-chief of the witness.

If, at any point in the proceedings, it becomes apparent that the complete criminal record or the relevant information on outstanding charges was not disclosed, or the witness did not testify truthfully about those matters,

defence counsel must be advised and Crown Attorneys must make immediate efforts to determine the reasons for the non-disclosure or misleading disclosure. Such efforts will include a written request for an explanation to the police officer "handling" the witness and his or her superior officer, and a request that the witness and "handler" be made available to testify on the issue, should the need arise.

15. Police Misconduct Materials

These materials are defined as copies of police records that document findings or allegations of police misconduct that relate to the subject matter of the offence for which the accused is charged, and records that document findings or allegations of serious misconduct that could reasonably bear on the case against the accused. These records are referred to as first party disclosure.[41] These materials will be provided by the relevant police agency in a sealed package pursuant to the police agency obligation to provide this information to the Crown Attorney as part of their initial disclosure package.[42]

The Crown Attorney is to review these records and, after allowing the affected police officer to make written submissions regarding the disclosure of the material,[43] disclose that material which is likely relevant to the defence by following the rules enunciated in *Stinchcombe*. A final decision on disclosure lies within the discretion of the Crown Attorney guided by the principles of both *Stinchcombe* and *McNeil*.[44] The police agency should be advised of which materials were disclosed. Undisclosed materials will be kept in a separate envelope and reviewed periodically as part of the ongoing critical analysis of the file to determine relevance.[45]

Certain materials will not generally form part of disclosure and these include records of misconduct that are findings exclusive to the employer-employee relationship, such as findings pertaining to trade union activities; political activities; improper dress; and leaving work without an excuse. Relevance will always be the guide for disclosure.[46]

The Crown Attorney should be aware that some or all of this material may be considered a third party record in which case, it will be subject to an application for third party production by the defence in the process defined in *McNeil*.[47] The Crown obligation with regard to such third party records shall be to advise defence of the existence of the materials.

This disclosure will be provided to unrepresented accused only by way of a viewing to be arranged at the office of the Crown Attorney. An unrepresented accused will not be permitted to photocopy or take away any portion of these records.[48]

There is a positive duty on the Crown to seek out such records and to make reasonable enquiries of police agencies on this issue. A proactive approach is necessary. [49]

16. Material Relevant to the Case-in-Chief

Particulars of any other evidence on which Crown counsel intends to rely at trial.

17. Impeachment Material

Any information in the possession of Crown counsel which the defence may use to impeach the credibility of a Crown witness in respect of the facts in issue in the case[50].

18. Information Obtained During Witness Interviews[51]

Crown Attorneys have an obligation to disclose any additional relevant information received from a Crown witness during an interview conducted by Crown counsel in preparation for trial[52]. Additional relevant information includes information inconsistent with any prior statement(s) provided to the investigative agency, i.e., recantations. Such information should be promptly disclosed to the defence or an unrepresented accused, subject to any limitations contemplated by this policy. To avoid the possibility of Crown counsel being called as a witness, interviews should be conducted in the presence of a police officer or other appropriate third person, where practical to do so[53].

19. Other Material

Additional disclosure beyond that outlined may be made at the discretion of the Crown Attorney[54]. In exercising this discretion, Crown counsel shall balance the principle of fair and full disclosure, described above with the need, in appropriate circumstances, to limit the extent of disclosure, as discussed below.

Role of the Investigator

Effective disclosure by the Crown to the defence is dependent upon and requires full and timely disclosure by the investigator to the Crown Attorney. It is incumbent upon the investigator to be aware of the duty of the Crown to disclose all relevant factual information to the defence and to cooperate with the Crown Attorney in order that full and timely disclosure can be provided to the defence. Crown Attorneys should make investigators aware of their obligations in this regard particularly where investigators may be inexperienced or employed by an agency or government department unused to prosecutions.[55] As well the investigator must bring to the attention of the Crown Attorney confidentiality concerns.

Exceptional Situations

Third Party Information

Information in the possession of third parties such as boards, social agencies, other government departments[56], rape crisis centres, women's shelters, doctors' offices and mental health and counseling services, is not in the possession[57] of Crown Attorneys or the investigative agency for disclosure purposes[58]. Where Crown counsel receives a request for information not in their possession or the possession of the investigative agency, the defence should be so advised in a timely manner in order that they may take such steps to obtain the information as they see fit. Even where such records are physically in the possession of the Crown, disclosure is not automatic. Unless the person to whom the information pertains has waived his or her rights, that person still has a privacy interest in the records[59].

Protecting Witnesses Against Interference

If the defence seeks information concerning the identity or location of a witness, four considerations are pre-eminent: First, the right of an accused to a fair trial and to make full answer and defence; second, the principle that there is no property in a witness[60]; third, the right of a witness to privacy and to be left alone until required by subpoena to testify in court; fourth, the need for the criminal justice system to prevent intimidation or harassment of witnesses or their families, danger to their lives or safety, or other interference with the administration of justice[61].

Consent by Person at Risk

Where the witness does not object to the release of this information, and there exists no reasonable basis to believe that the disclosure will lead to interference with the witness or with the administration of justice as described above, the information may be provided to the accused without court order.

Witnesses refusing to be interviewed

Where a witness does not wish to be interviewed by or on behalf of an accused[62], or where there is a reasonable basis to believe that the fourth consideration referred to above (interference with witnesses or their families, etc.) may arise on the facts of the case[63], Crown Attorneys may reserve information concerning the identity or location of the witness unless a court of competent jurisdiction orders its disclosure[64].

Controlled Interviews

Where a witness is willing to be interviewed, but there nonetheless exists a reasonable basis to believe that the disclosure of information concerning the identity or location of the witness may lead to interference with the witness or with the administration of justice as described above, including situations where the witness is under a Witness Protection Program, Crown Attorneys may decide to arrange for an interview by defence counsel at a location and under circumstances that will ensure the continued protection of the witness[65]. If the witness is protected under a Witness Protection Program, the agreement of the police agency administering the program will be required.

Unrepresented Accused[66]

If the accused is not represented by counsel, Crown Attorneys shall arrange to have the accused informed that disclosure is available under this policy[67], and shall determine how disclosure can best be provided. The accused should be advised of the right to disclosure and how to obtain it as soon as he or she indicates an intention to proceed unrepresented. Because of the need to maintain an arms-length relationship with the accused, it will in most instances be preferable to give the accused disclosure in writing.

This requirement *does not preclude* a guilty plea without disclosure, including situations where the accused simply wishes to dispose of the charge as quickly as possible. In other words, disclosure does not form a condition precedent to the entry of a guilty plea. However, an unrepresented accused must clearly indicate that he or she does not wish disclosure before a guilty plea is entered.

If an unrepresented accused indicates an intention to plead guilty to an offence for which there will likely be a significant jail term, counsel should suggest to the presiding judge that an adjournment may be in order to permit disclosure to the accused. However, that is not required as a matter of law and much will depend on the circumstances of each case, including whether the accused is in custody.

An unrepresented accused is entitled to the same disclosure as a represented accused. However, the precise means by which disclosure is provided to an unrepresented accused is left to the discretion of Crown Attorneys based on the facts of the case. If there are reasonable grounds for concern that leaving disclosure materials with an unrepresented accused would jeopardize the safety, security, privacy interests, or result in the harassment of any person, Crown counsel may provide disclosure by means of controlled and supervised, yet adequate and private, *access* to the disclosure materials. Special care may be required where an unrepresented accused personally seeks access to evidence where the integrity of that evidence may be placed in issue at trial.

Special care may also be required where an unrepresented accused is incarcerated. Incarcerated unrepresented accused persons are entitled to adequate and private access to disclosure materials under the control and supervision of custodial officials[68].

Counsel should consider where disclosure is made to an unrepresented accused, the inclusion of a written explanation of the appropriate uses and limits upon the use of disclosure material.

It is generally a good practice to place an endorsement on the file concerning the nature, extent and timing of disclosure to an unrepresented accused. This is especially important given the prospects of a *Stinchcombe* review of the decisions made by Crown counsel on the issue of disclosure.

Exclusions

The Crown's obligation to disclose is not absolute: only relevant information need be disclosed, and a withholding of information which is relevant to the defence may be justified on the basis of the existence of a legal privilege[69].

Where Crown Attorneys decide not to disclose information, defence counsel should be advised of the refusal, the basis of the refusal (i.e. type of privilege alleged) and the general nature of the information withheld to the extent possible. However, in some circumstances, even the acknowledgement that information exists (i.e. information regarding a police informer or an ongoing police investigation) would be injurious to the information sought to be protected. In such circumstances, counsel are expected to exercise good judgment and consult with Senior Crown Attorneys and ultimately the DPP, to assess what is an appropriate course of action on a case-by-case basis.

Where disclosure of information is delayed to protect the safety or security of witnesses or to complete an investigation, Crown Attorneys must disclose the information as soon as the justification for the delay in disclosure no longer exists. The fact that some disclosure is being delayed should be communicated to the defence without jeopardizing the reason for the delay.

Reply Evidence

Pre-trial disclosure is not required of reply evidence tendered by the Crown in response to issues raised by the accused at trial, where the relevance of that evidence first becomes apparent during the course of the trial itself[70]. However, during trial, Crown Attorneys must disclose any undisclosed information in Crown counsel's possession, as soon as reasonably possible after it becomes apparent that the information is relevant.

For example, Crown counsel is not generally required to disclose evidence in his or her possession regarding the accused's bad character. However, if the accused indicates that reliance will be placed on good character evidence in support of the defence advanced and the Crown becomes aware of information either rebutting or confirming the defence, the information must be promptly disclosed to the defence[71]. There is a general obligation to disclose any relevant information resulting from an investigation prompted by an accused's pre-trial disclosure of a defence.

Police Informers

Disclosure is not required of information that may tend to identify a confidential police informer[72]. The Crown Attorney, (like the Court) is under an obligation to protect the identity of a confidential police informer. This obligation is not limited to protecting the name of the informer: it extends to any information that may tend to reveal the person who provided information to the police[73]. The police informer privilege is subject to only one exception: where the information is needed to establish the innocence of the accused[74].

On-going Investigations

Information that may prejudice an ongoing police investigation should not be disclosed. It is important to note that the Crown may *delay* disclosure for this purpose but cannot *refuse* it, i.e. withhold disclosure for an indefinite period[75]. Any delays in disclosure to complete an investigation should, however, be rare.

Investigative Techniques

Information that may reveal confidential investigative techniques used by the police is generally protected from disclosure[76].

Cabinet Confidences

Information that may be considered a confidence of the Queen's Privy Council for Newfoundland and Labrador such as Cabinet documents, communications between Ministers of the Crown and other documents described in s. 39(2) of the *Canada Evidence Act*[77] must be protected.

International Relations/National Security

Information cannot lawfully be disclosed that would be "injurious to international relations or national defence or security"[78].

Solicitor-client Privilege

Information protected by solicitor-client privilege[79] is not subject to disclosure.

Work Product Privilege[80]

This privilege protects information or documents obtained or prepared for the purpose of litigation, either anticipated or actual. Thus, Crown Attorneys generally need not disclose any internal notes, memoranda, correspondence or other materials generated by the Crown in preparation of the case for trial unless the work product contains "material inconsistencies or additional facts not already disclosed to the defence[81]." As a general rule, work product applies to matters of opinion as opposed to matters of fact[82]. This privilege does not exempt disclosure of medical, scientific, and other experts' reports[83].

Disclosure Costs

An accused person or his or her counsel shall not be charged a fee for "basic disclosure" materials[84].

"Basic disclosure" materials include the court brief, if one has been prepared, and copies of documents, photographs, etc. that Crown counsel intends to introduce as exhibits in the Crown's case. In a simple case, e.g., impaired driving, where no court brief has been prepared, basic disclosure will consist of copies of witness statements, a synopsis, the information, an occurrence report, or an alcohol influence report and blood alcohol certificate[85].

Each accused is entitled to one copy of "basic disclosure" materials. Where an accused person requests an additional copy or copies (e.g., because the original materials have been lost), the accused may be charged a reasonable fee for this service[86].

Costs associated with the preparation of copies of materials that are not part of "basic disclosure", e.g., photographs that will not be introduced as exhibits by Crown Attorneys, should be considered on a case-by-case basis. In instances of unfocused or unreasonable requests involving substantial numbers of documents, it may be appropriate to shift the resource burden to the defence, by requiring that the costs be borne by the accused[87]. Failing agreement, simple access without copies may be provided.

Form of Disclosure[88]

Crown Attorneys may provide the defence with copies of documents that fall within the scope of "basic disclosure" materials as defined above in either a paper format (e.g., photocopies) or an electronic format (e.g., by CD-ROM)[89]. Where the accused is unrepresented, Crown Attorneys should generally provide copies of such documents in a paper format[90].

Delaying or Limiting of Disclosure[91]

Disclosure may only be delayed or limited to the extent necessary:

(a) to comply with the rules of privilege, including informer privilege;

(b) to prevent the endangerment of the life or safety of witnesses, or their intimidation or harassment; or

(c) to prevent other interference with the administration of justice.

Where a Crown Attorney limits disclosure to comply with the rules of privilege, the Crown Attorney shall so advise the defence.

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[1] (1991), 68 C.C.C. (3d) 1 (S.C.C.).

[2] One measure of the relevance of information is its usefulness to the defence. If it is of some use, it is relevant and should be disclosed. Accordingly, information is relevant if it can reasonably be used by the defence either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence, see *R. v. Egger (1993), 82 C.C.C. (3d) 193 at 204 (S.C.C.); R v. Ryan 2004 NLCA No.2; 233 Nfld & PEIR 51.*

[3] *R. v. Mills* (1999), 139 C.C.C.(3d) 321 (S.C.C.)

[4] Refer as well to **Directive #25** in the section of this Guide Book on "Conduct of Criminal Litigation".

[5] *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.) at 20.

[6] *R. v. Stinchcombe*, note 1, at 11. See also *R. v. Egger* (1993), 82 C.C.C. (3d) 193 (S.C.C.) at 204; *R. v. Chaplin* (1995), 96 CC.C. (3d) 225 (S.C.C.) at 236; *R. v. Dixon* (1998), 122 C.C.C. (3d) 1 (S.C.C.) at 11-12.

[7] In extradition proceedings, the requesting partner need only disclose the materials on which it is relying to establish its *prima facie* case. See *United States of America* v. *Dynar* (1997), 115 C.C.C. (3d) 481 (S.C.C.) at 525.

[8] *R. v. Stinchcombe*, note 1, at 14. See also the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*, Queen's Printer for Ontario, 1993 (hereinafter referred to as the Martin Committee Report), at 206-208. The purpose of this section is to underscore the proposition that disclosure is not a "one-shot" deal.

[9] The phrase "as soon as reasonably practicable" is intended to provide a degree of flexibility based on the facts in individual cases. The right to disclosure is triggered by a disclosure request made by or on behalf of the accused. Where there has been a timely request, disclosure should be made before plea or election or any resolution discussions: *Stinchcombe*, note 1. Where the request is not timely, disclosure must be made as soon as reasonably practicable and in any event before trial. See the provisions regarding unrepresented accused. Usually, disclosure will occur after the investigators have given Crown counsel the details of the case. In view of the respective roles played by investigators and Crown Attorneys in the criminal justice system, the investigative agency is in a unique, if not an exclusive, position to give Crown counsel the information required to be disclosed under this policy. If the agency fails to do so, Crown Attorneys may need to assess the extent to which the accused is able to have a fair trial and decide whether, in the circumstances, an adjournment, termination of proceedings or other remedy is required or appropriate. The investigative agency, although operating independently of Crown counsel, has a duty to disclose to Crown Attorneys, all relevant information uncovered during the investigation of a crime, including information which assists the accused: *Martin Committee Report*, note 8, at 167. See also *R. v. T. (L.A.)* (1993), 84 C.C.C. (3d) 90 (Ont. C.A.) at 94; *R. v. V.(W.J.)* (1992), 72 C.C.C. (3d) 97 (Nfld. C.A.) at 109.

[10] The "shopping list" of information set out in this section is information that would normally be disclosed in a given case. Subject to the limitations in above, it is more in the nature of a minimal statement of disclosure on behalf of the Attorney General of Newfoundland and Labrador. It is not intended to be exhaustive – see above regarding other material. Counsel should take into account the disclosure requirements described by The Court of Appeal and the Supreme Court of Canada when assessing the scope of disclosure required in any given case.

[11] Section 603 of the *Criminal Code* provides that an accused has the right to inspect and obtain a copy of the charge.

[12] "Particulars" is not intended in the sense that it is used in s. 587 of the *Criminal Code*. Rather, it contemplates the provision of details or information concerning the circumstances surrounding the offence.

[13] Use of the word "text" is not intended to preclude counsel from producing a full copy of a statement taken by investigators, where that seems appropriate. In some situations, however, it may be appropriate only to produce the *text* of the statement, editing out personal information concerning the whereabouts of a witness – see specific provisions regarding protecting witnesses against interference.

[14] This section contemplates disclosure of statements made by or provided to an investigator or person in authority. The Crown, of course, cannot be held accountable for a failure to disclose the private notes of a civilian witness if that witness chooses not to make the Crown aware of the existence of such notes. See the provisions in this Guide Book regarding third party information.

[15] *R. v. Stinchcombe,* note 1, contemplates disclosure of the investigator's notes or copies of notes concerning the interview of a witness. In some instances, it may be helpful to provide a transcription, although that is not required as a matter of law. Additionally, a notebook may contain many references to different investigations. Only those notes relating to the interview should be produced.

[16] Three forms of statements are contemplated: where a written statement was taken, the text should be provided; where the investigators only took notes, those should be provided; where neither a statement nor notes were made, a summary of the witness's anticipated evidence should be provided.

[17] This section is intended to provide counsel for the accused with an opportunity to listen to an audio recorded statement of a witness, or watch a videotaped statement of a witness. The phrase "appropriate opportunity" was selected to ensure that access to the recording, or a copy of it, is provided in controlled circumstances. In most instances, it will be appropriate to provide this access under the supervision of an investigator or the Crown Attorney. Where access is being provided to the original recording, particular care must be taken to ensure that the integrity of the tape is maintained, and continuity of possession is not lost. Where it is the accused and not counsel who seeks access, extra particular care should be exercised in this regard.

[18] This section was not intended to require full access to, for instance, intercepted private communications made between co-conspirators, one of whom has now agreed to testify on behalf of the Crown. With respect to intercepted private communications generally, see the provisions in the Guide Book.

[19] Crown Attorneys will, in most cases, be satisfied by an undertaking by defence counsel that a copy of an audio or video tape will be retained in the possession of defence counsel and returned to Crown Attorneys at the conclusion of the retainer: *Martin Committee Report,* note 8, at 182, and 226.

[20] See *Lucas* v. *The Queen* (1996), 104 C.C.C.(3d) 550 (Sask. C.A.); *Muirhead* v. *The Queen* (1995), 148 Sask. R. 244 (C.A.); *Smith* v. *The Queen* (1994), 146 Sask. R. 202 (Q.B.).

[21] Absent unusual circumstances, recordings made by a potential Crown witness through an electronic body pack should be disclosed. Special considerations may apply where counsel for the accused seeks access to intercepted private communications involving the accused. *R. v. Stinchcombe* requires disclosure of notes prepared during a custodial interview. Absent unusual circumstances, copies of undercover notes outlining conversations involving the accused should similarly be provided.

[22] The purpose of this section is to require disclosure of the full criminal record of the accused's and any co-accused's convictions registered in Canada. Foreign convictions, if known, should also be disclosed. In some instances, they may be available through the Interpol office at RCMP Headquarters. In the case of foreign convictions, however, special care must be taken to confirm the proper identity of the person convicted. Concerning the criminal records of Crown witnesses, see the policy outlined in the Guide Book above.

[23] For example, forensic, medical, laboratory, and other scientific reports.

[24] This section is not intended to require mandatory disclosure of reports or analyses prepared by in-house employees, such as historians. Nor should it be construed so as to require the police to create an expert witness report in cases where a police investigator may be called as an expert witness at the trial. Whether and to what extent such reports or analyses should be disclosed ought to be assessed by Crown Attorneys in consultation with Senior Crown Attorneys. This section contemplates disclosure of expert witness reports commissioned by or on behalf of Crown Attorneys or the investigative agency. Requests for disclosure of reports not possessed by Crown counsel or the investigative agency, or which were prepared privately, are governed by the policies in this Guide Book regarding third party information.

[25] See *Martin Committee Report*, note 8, at 234.

[26] See *R. v. Blencowe* (1997), 118 C.C.C. (3d) 529 (Ont. Ct. (Gen.Div.).

[27] As in the case of recorded statements of a witness, steps should be taken to ensure that access is provided under controlled circumstances which preserve the integrity of the exhibit. How this can be achieved will depend on the circumstances in each case, although it may be appropriate to provide access only under the supervision of an investigator.

[28] Where a case exhibit is detained by police pursuant to a court order, counsel for the accused may, depending on the circumstances, be required to obtain an order under subsection 490(15) of the *Criminal Code* before it can be examined.

[29] In some types of cases, the sheer volume of case exhibits available, but not intended to be relied on by the Crown, may require Crown Attorneys to exercise some discretion when providing disclosure. Examples include cases involving a substantial number of documents, files or intercepted private communications. Crown Attorneys should respond to requests for disclosure in these types of situations case-by-case, in consultation with Senior Crown Attorneys and the investigators. If appropriate, Crown Attorneys should ask counsel for the accused to define as precisely as possible the type or class of documents, tapes or other exhibits sought for examination. Access to existing indices or intercept logs may, in some cases, help the defence narrow its request to items relevant to the defence of the accused.

[30] Note that the law of privilege is not a closed set of categories. Examples of the type of information that should not be disclosed in the public interest are set out in the Guide Book.

[31] Requests for production of the information in support of a search warrant that has been sealed pursuant to a court order under s. 487.3 of the *Criminal Code* will be governed by the substantive law and procedure set out in that section, and the case law as it is developing in this area.

[32] The purpose of this requirement is to provide a copy of all judicial authorizations that led to the acquisition of evidence in the case. To be producible, there must be some nexus to the facts of the case or the investigation. Investigators should be asked to provide Crown Attorneys with advice on any judicial authorizations or consents that were obtained during the course of the investigation, as they relate to the accused. There is, however, no obligation to check with every police agency in the province or Canada on the off chance that they may have had some contact with the accused: *Chaplin*, note 6. Concerning the extent to which access may be provided to the tapes themselves, see the specific provisions in this Guide Book above and accompanying footnotes. Requests for production of the affidavit in support of a wiretap application will be governed by the substantive law and procedure set out in Part VI of the *Criminal Code*, and the case law as it is developing.

[33] The purpose of this requirement is to ensure that similar fact evidence intended to be relied upon by the Crown is disclosed to the accused – even though, strictly speaking, such evidence is not connected with the offence itself. Similar fact evidence intended to be relied upon at trial should be disclosed even though it was not led at the preliminary inquiry. When considering the admissibility of similar fact evidence, counsel may wish to refer to: *R. v. Arp* (1998), 129 C.C.C.(3d) 321 (S.C.C.); *R. v. Green* (1988), 40 C.C.C. (3d) 333 (S.C.C.); *R. v. D.* (1989), 50 C.C.C. (3d) 142 (S.C.C.); *R. v. B. (F.F.)* (1993), 79 C.C.C. (3d) 112 (S.C.C.) and *R. v. Moore* (1994), 92 C.C.C. (3d) 281 (Ont. C.A.).

[34] This is especially important in undercover cases: disclosure should be made of any identification evidence such as license plate numbers, business cards, the post-operation

"roundup", etc. Evidence or information of this nature often is not included in the court brief. Counsel should, therefore, ask the investigators to provide a briefing on the means by which the person arrested was identified as the person involved in the impugned transaction. See note 9 concerning the reliance placed by Crown Attorneys upon investigators in the disclosure process.

[35] Information taken from a CPIC (Canadian Police Information Centre) printout or maintained by the records office of the Royal Newfoundland Constabulary will generally meet the requirements of this section. However, it cannot be assumed that a CPIC printout is a fail safe "criminal record" of the person to whom it apparently pertains, absent fingerprint comparisons. A truly accurate "criminal record" can only be obtained by obtaining the fingerprints of the proposed witness. See sections 570(4) and 667 of the *Criminal Code* and s. 12 of the *Canada Evidence Act* which contain specific and detailed statutory requirements to be satisfied before a criminal record can be regarded as proven.

[36] Crown Attorneys have a discretion (reviewable by the trial judge) to determine whether information regarding a criminal record of a proposed witness is relevant to that witness's credibility. For example, Crown counsel may wish to exercise some discretion when assessing whether to disclose old criminal convictions or convictions for offences which could not really assist in the impeachment process. For instance, a criminal conviction for impaired driving 10 years ago could hardly assist in impeaching the credibility of a witness in a theft trial. On the other hand, convictions for offences of dishonesty will almost always be relevant, regardless of when they were entered. The balance to be struck on this issue centers around the privacy interests of the witness, as measured against the right to test the Crown's case. See the *Martin Committee Report*, note 8, at 238 – 244; *R. v. Bahinipaty* (1987), 56 Sask. R. 7 (C.A.) at 22.

[37] This obligation is limited to material witnesses whose credibility is in issue. See the Martin Committee Report, note 8, at 243.

[38] In Canada, this means a printout of the record held by the Canadian Police Information Centre (CPIC); for foreign witnesses, this means the CPIC equivalent. While this issue will seldom arise in Newfoundland and Labrador Crown Attorneys should be aware of it.

[39] "Relevant information" means the nature of the charges, the court, and the status of the proceedings.

[40] "Relevant police authority" means the investigative agency which has been the primary contact with the witness in relation to the information at issue. For example, where the witness is being "handled" by a foreign investigative agency, the request should be made directly to that agency, and copied to the Canadian investigative agency in charge of the Canadian investigation.

[41] Records related to findings of serious misconduct by police officers involved in the investigation against the accused properly fall within the scope of the "first party"

disclosure package due to the Crown, where police misconduct is either related to the investigation, or the finding of misconduct could reasonably impact on the case against the accused. The Crown, in turn, must provide disclosure to the accused in accordance with its obligations under *Stinchcombe*. See *R. v. McNeil*, [2009] 1 S.C.R. 66 at paragraph 15.

[42] See also in this Guidebook "Relationship Between Crown Attorneys and the Police – Disclosure Procedures

[43] See *R. v. McNeil*, [2009] 1 S.C.R. 66 at paragraph 15 and the Ferguson Report.

[44] "While the *Stinchcombe* automatic disclosure obligation is not absolute, it admits of few exceptions. Unless the information is clearly irrelevant, privileged, or its disclosure is otherwise governed by law, the Crown must disclose to the accused all material in its possession. The Crown retains discretion as to the manner and timing of disclosure where the circumstances are such that disclosure in the usual course may result in harm to anyone or prejudice to the public interest. The Crown's exercise of discretion in fulfilling its obligation to disclose is reviewable by a court." (*McNeil*, paragraph 18)

[45] See also in this Guidebook "Critical Analysis".

[46] Ontario Crown Policy, section vi(B)(i)

[47] a) The accused first obtains a subpoena *duces tecum* under ss.698(1) and 700(1) of the *Criminal Code* and serves it on the third party record holder. The subpoena compels the person to whom it is directed to attend court with the targeted records or materials. b) The accused also brings an application, supported by appropriate affidavit evidence, showing that the records sought are likely to be relevant in his or her trial. Notice of the application is given to the prosecuting Crown Attorney, the person who is the subject of the records and any other person who may have a privacy interest in the records targeted for production. c) The O'Connor application is brought before the judge seized with the trial, although it may be heard before the trial commences. If production is unopposed, of course, the application for production becomes moot and there is no need for a hearing. d) If the record holder or some other interested person advances a well-founded claim that the targeted documents are privileged, in all but the rarest cases where the accused's innocence is at stake, the existence of privilege will effectively bar the accused's application for production of the targeted documents, regardless of their relevance. Issues of privilege are therefore best resolved at the outset of the O'Connor process. e) Where privilege is not in question, the judge determines whether production should be compelled in accordance with the two-stage test established in O'Connor. At the first stage, if satisfied that the record is likely relevant to the proceeding against the accused, the judge may order production of the record for the court's inspection. At the next stage, with the records in hand, the judge determines whether, and to what extent, production should be ordered to the accused. See *R. v. McNeil*, [2009] 1 S.C.R. 66 at paragraph 27

[48] See also in this Guidebook "Disclosure – Unrepresented Accused"

[49] All state authorities do not constitute a single entity and in order to fulfill its *Stinchcombe* disclosure obligation, the prosecuting Crown Attorney does not have to inquire of every department of the provincial government, every department of the federal government, and every police force whether they are in possession of material relevant to the accused's case. However, this does not mean that, regardless of the circumstances, the Crown is simply a passive recipient of relevant information with no obligation of its own to seek out and obtain relevant material. Crown Attorneys who are put on notice of the existence of relevant information cannot simply disregard the matter. Unless the notice appears unfounded, Crown counsel will not be able to fully assess the merits of the case and fulfill its duty as an officer of the court without inquiring further and obtaining the information if it is reasonably feasible to do so. See *McNeil* at paragraphs 48 and 49 and *R. v. Arsenault* (1994), 153 N.B.R. (2d) 81 (C.A).

[50] This is a "catch-all" provision, intended to require disclosure of (a) any other evidence forming part of the Crown's case and (b) information that could be helpful for impeachment purposes. Counsel is expected to exercise careful judgment in assessing the extent to which background information concerning a witness need necessarily be disclosed. For production to be required, impeachment information must be capable of affecting the credibility of the witness with respect to some fact in issue in the case. Some information may be very invasive of privacy rights, e.g., information concerning a mental disorder which may bear upon the capacity of a witness to be sworn. Disclosure of records containing personal information in the possession of Crown Attorneys for which there is a reasonable expectation of privacy is governed by ss. 278.1 to 278.9 of the *Criminal Code* unless the witness to whom the record relates has expressly waived the application of those sections. In most instances, this section will require disclosure of the basic terms of the arrangement between the Crown and any co-operating accomplice expected to testify on behalf of the Crown, subject to the limitations in this Guide Book for information regarding criminal records of material Crown or defence witnesses.

[51] This paragraph does not require the disclosure of information protected by work product privilege. Notes made by Crown Attorneys during the course of witness interviews relating to trial strategy or the examination (or cross-examination) of witnesses are exempt from disclosure under the work product doctrine: *Martin Committee Report,* note 8, at 252. But see *R. v. Regan* (1997), 174 N.S.R. (2d) 72 (N.S.S.C.) where the court held that interview notes made by Crown counsel during a pre-charge, fact finding interview were not protected by work product privilege.

[52] See the *Martin Committee Report*, note 8, at 253.

[53] Thus, if any new information comes to light, the officer or other third person can make notes to facilitate disclosure, and give whatever testimony may be necessary at trial in relation to that information. See *R. v. Johnson* (unreported, June 12, 1998, Québec Superior Court) for an interesting example of how prosecutors may expose themselves to the possibility of being removed from a case and called as a witness regarding witness interviews.

[54] The list in this Guide Book is not intended to be an exhaustive enumeration of those items that should be disclosed. This section contemplates additional disclosure where on the facts of individual cases it is warranted or necessary. It is important that Crown Attorneys be familiar with developments in this area of law.

[55] Police forces such as the RNC or RCMP should be familiar with their obligations in this regard.

[56] *R. v. Gingras* (1992), 71 C.C.C. (3d) 53 (Alta. C.A.); *R. v. W. (D.D.)* (1997), 114 C.C.C. (3d) 506 (B.C.C.A.), affd by SCC on issues other than the "indivisibility of the Crown". But see: *R. v. Arsenault* (1994), 93 C.C.C. (3d) 111 (N.B.C.A.); *R. v. Blyth* (1996), 105 C.C.C. (3d) 378 (N.B.C.A.). See also *R. v. O'Connor*, (1995), 103 C.C.C. (3d) 1 (S.C.C.), note 5, at 50 (per L'Heureux-Dubé J.).

[57] The concept of possession, in law, requires control. Without control there is no duty to disclose on the part of Crown counsel or the police. Records held by U.S. law enforcement agencies are not in the possession or control of the Crown for disclosure purposes. A Canadian court has no jurisdiction to order anyone in the United States to disclose anything to the RCMP, the Crown or an accused directly: *R. v. Lore* (1997), 7 C.R. (5th) 190 (Qué.C.A.) at 200.

[58] Disclosure of information that contains personal information for which there is a reasonable expectation of privacy, including medical, psychiatric, therapeutic, counseling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information protected by other statutes, in sexual assault proceedings is governed by ss. 278.2 to 278.9 of the *Criminal Code*, as interpreted by the Supreme Court of Canada in *R. v. Mills*, note 3. Disclosure of third party information that does not fall within s. 278.1 of the *Criminal Code* is governed by the common law and procedural rules in *O'Connor*, (note 5), as interpreted by the Supreme Court of Canada in *R. v. Mills*, (note 3).

[59] *R. v. Mills*, (note 3).

[60] See *R. v. Gibbons* (1947), 86 C.C.C. 20 (Ont. C.A.) at 28.

[61] The Supreme Court of Canada has recognized the right of an individual to be left alone and the appropriateness of preventing the unnecessary invasion of witnesses' privacy: *R. v. Duarte* (1990), 53 C.C.C. (3d) 1 at 11 and 15; *R. v. Wong* (1990), 60 C.C.C. (3d) 460, esp. at 483; *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 at 387; *Stinchcombe*, note 1, at 8-9. The Supreme Court of Canada has also recognized that Crown witnesses are not the property of the Crown whom Crown counsel can control and produce for examination by the defence: *R. v. Khela* (1995), 102 C.C.C. (3d) 1, at 10.

[62] While Crown counsel and the investigators may wish to ask if a witness wants to be interviewed by the defence, care should be taken to ensure that the witness understands

that he or she is fully entitled to be interviewed or not to be interviewed. It should not be suggested (directly or indirectly) that it would be better not to be interviewed.

[63] There is a two-pronged test for determining whether information concerning whereabouts or identity should be withheld: first, has the witness expressed a desire not to be interviewed by the defence? Second, is there a reasonable basis to believe that the witness may be interfered with? The basis for the belief in a potential witness must be real, not imagined. The information available in each case should be examined carefully. Wherever reasonably practicable, Crown Attorneys should request a written threat assessment from the investigators where limits on disclosure are being considered on this basis. An adjournment may be necessary in these circumstances to ensure a fair trial. The threat assessment may, itself, be the subject of a disclosure request. Absent extraordinary circumstances, disclosure of this assessment should be resisted on the basis that confidential information is necessary in order to ensure that the discretion to produce or withhold is exercised properly. If the defence press with this request, counsel should consult with the Senior Crown Attorney or ultimately the DPP. In some instances, resort may have to be made to s. 37 of the *Canada Evidence Ac*t to protect the confidential nature of this information.

[64] An adjournment may be necessary in these circumstances to ensure a fair trial.

[65] In Newfoundland and Labrador this is the program administered by the RCMP. It is sometimes referred to as the Source/Witness Protection Program or "SWP". The purpose of this section is to provide for a "controlled interview" by the defence in circumstances where the witness is willing to be interviewed, but there exists some concern for the safety of the witness. In some instances, a controlled interview will provide the necessary balance between the right of the accused to full answer and defence and the need to protect the witness against interference or threats. This approach will be especially helpful in situations where the witness is in a Witness Protection Program. The circumstances surrounding the interview should be agreed upon by Crown Attorneys and the investigators in advance of the interview. This could, in some situations, permit the presence of counsel for the witness or Crown counsel, and include a method of recording the interview. Where the witness is under a Witness Protection Program, the consent and co-operation of the police administering the program will, for purely practical reasons, be required. Note, however, that Crown counsel is not *required* to produce its own witnesses for pre-trial, oral discovery by the defence.: *R. v. Khela*, (1995), 102 C.C.C. (3d) 1 (S.C.C.), note 52, at 10 (per Sopinka and Iacobucci J.J., for the majority) and 17 (per L'Heureux-Dubé J., dissenting on other grounds but concurring with the majority on this point). See also *R. v. Girimonte* (1997), 121 C.C.C. (3d) 33 (Ont.C.A.) at 48.

[66] See the *Martin Committee Report*, note 8, at 218-220.

[67] The precise method by which the accused is informed of the availability of disclosure may vary. Crown Attorneys may wish to provide the accused with a written or oral

notification in court. In some regions, such as St. John's, the judge presiding at all first appearances may tell an unrepresented accused that disclosure is available from the Crown.

[68] See the *Martin Committee Report,* note 8, at 219. Consultation with custodial officials regarding the manner of disclosure may be necessary in these circumstances.

[69] See *Stinchcombe,* note 1, at 11.

[70] *Martin Committee Report,* note 8, at 202. In general, the Crown's obligation is to adduce evidence that is relevant to an element of the offence that the Crown must prove, and not adduce evidence in chief to challenge a defence that an accused might possibly raise: *R. v. Chalk* (1990), 62 C.C.C. (3d) 193 (S.C.C.), at 237 *et seq.* Crown Attorneys cannot be expected to disclose information relevant to an issue not reasonably anticipated before trial. See also *R. v. Wilson* (1994), 87 C.C.C. (3d) 115 (Ont. C.A.).

[71] See *R. v. Hutter* (1993), 86 C.C.C. (3d) 81 (Ont.C.A.) at 89-90, leave to appeal to the S.C.C. refused and *Martin Committee Report*, note 8, at p. 206.

[72] See materials in this Guide Book on "Informer Privilege".

[73] *R. v. Scott (*1990), 61 C.C.C. (3d) 300 (S.C.C.); *R. v. Stinchcombe,* note 1, at 11.

[74] *R. v. Leipert* (1997), 112 C.C.C. (3d) 385 (S.C.C.). For the procedure which governs an application for disclosure of information on the basis of the "innocence at stake" exception, see *Leipert, supra,* at 398. This procedure may be conducted *in camera* and the judge may inspect the material in private: *R. v. Chaplin*, note 6, at 237; *R. v. Fisk* (1996), 108 C.C.C. (3d) 63 (B.C.C.A.) at 78.

[75] *R. v. Stinchcombe*, note 1, at 9, and 12; *Martin Committee Report*, note 8, at 214. Thus, in certain circumstances, Crown Attorneys may have to consider terminating proceedings in order to avoid the disclosure of information that would prejudice an ongoing investigation.

[76] See: *R. v. Playford* (1987), 40 C.C.C. (3d) 142 (Ont.C.A.), at 183; *R. v. Finlay* (1985), 23 C.C.C. (3d) 48 (Ont.C.A.) at 76, leave to appeal to the S.C.C. reused 50 C.R. (3d) xxv; *R. v. Durette* (1994), 88 C.C.C. (3d) 1 (S.C.C.), at 54 (per Sopinka J.) and at 29 (per L'Heureux-Dubé J., dissenting); *R. v. Richards* (1997), 115 C.C.C. (3d) 377 (Ont.C.A.); *R. v. Rankine* (1986), 83 Cr. App.R. 18 (C.A.A.); *R. v. Brown* (1988), 87 Cr.App.R. 52 (C.C.A); *R. v Johnson* (1989), 88 Cr. App. R. 131 (C.C.A.); *R. v. Hewitt* (1992), 95 Cr.App.R. 81 (C.C.A.).

[77] Attempts by the defence to compel this information into evidence may require a certificate under section 39 of the *Canada Evidence Act.* This would seldom arise.

[78] Sections 37 and 38 of the *Canada Evidence Act* deal with the disclosure in court of this type of information. Any objection based on these grounds can only be reviewed by the Chief Justice of the Federal Court or a Justice of that Court designated by the Chief Justice (see s. 38 of the *Canada Evidence Act*). In such a case it is imperative that the DPP be notified.

[79]See *R. v. Shirose* (1999), 133 C.C.C. (3d) 257 (S.C.C.). See generally *Smith* v. *Jones*, [1999] 1 S.C.R. 455; *Descôteaux* v *Mierzwinski* (1982), 70 C.C.C (2d) 385 (S.C.C.); *Solosky* v. *The Queen* (1980), 50 C.C.C (2d) 495 (S.C.C.); *Idziak* v. Canada, [1992] 3 S.C.R 631; *R. Creswell*, [1998] B.C.J. No. 1090 (Q.L.). Note that solicitor-client privilege is waived where the police or the Crown rely on confidential legal advice to defend an abuse of process application even in circumstances where only the existence, and not the contents, of the advice is disclosed: *Shirose, supra*.

[80] Also referred to as "litigation privilege". See Watson, D. and Au, F., *Solicitor-Client Privilege and Litigation Privilege in Civil Litigation* (1998), 77 Can. B. Rev 315 for a useful discussion of the differences between these related, yet distinct forms of privilege. See also materials above, regarding information obtained during witness interviews.

[81] *O'Connor*, note 5, at 45 (per L'Heureux-Dube J.) and at 86 (per Major J.). However, the Crown is obliged to turn over drawings and statements made by witnesses to the prosecution during pre-trial interviews, if they are new or contain new information. See also the *Martin Committee Report*, note 8, at 251; *R. v. Brennan Paving and Construction Ltd.*, [1998] O.J No 4855 (C.A.); *R. . Sungalia*, [1992] O.J. No 3718 (Ont.Ct.(Gen.Div.)); *R. v. Johal*, [1995] B.C.J. No. 1271 (Q.L.); *R. v. Willis* (1996), 38 C.R.R. (2d) 113 (Alta.Prov.Ct.).

[82] *Martin Committee Report*, note 8, at 252.

[83] *Martin Committee Report*, note 8, at 252. But see *R. v. Petersen* (1997), 155 Sask.R. 133 (Q.B.) where spreadsheets prepared by the police regarding different theories as to how the accused had committed a complex fraud were held to fall within the work product domain. See also *R. v. Stewart*, [1997] O.J. No. 924 (Q.L.) where the court recognized police and Crown work product in a database of electronic documents.

[84] *Report of the Criminal Justice Review Committee*, Queen's Printer for Ontario, February 1999, at 48. See also the *Martin Committee Report*, note 8, at 272; *R. v. Blencowe, supra note 26*, at 537. The rule here is two-pronged: documents and photographs that will form part of the Crown's case should be copied and provided to the accused at the expense of the government or the investigative agency. Documents the Crown does not intend to rely upon need not be copied, although upon request defence counsel should be provided with access to case exhibits not intended to be adduced at trial.

[85] *Martin Committee Report*, note 8, at 272.

[86] Where defence counsel withdraws from the case, there is a professional obligation to pass disclosure on to new counsel representing the accused. Accordingly, disclosure need not be repeated the second time. Unusual situations should be discussed with the Senior Crown Attorney or DPP.

[87] *Martin Committee Report*, note 8, at 273. No guidelines have been established in Newfoundland and Labrador for the payment of these costs since the issue has seldom arisen. Extraordinary costs can be assessed on a case by case basis.

[88] An accused is not entitled to insist upon a particular *form* of disclosure as a constitutional prerequisite: *R. v. Blencowe*, note 26, at 539. Nor does an accused have an absolute right to disclosure or production of original material: *R. v. Stinchcombe* (1995), 96 C.C.C. (3d) 318 (S.C.C.). However, where the original is within the possession of either Crown Attorneys or the investigative agency, there is an obligation to allow the defence inspection of, or access to, the original.

[89] But see *R. v. Hallstone Products Ltd.* (1999), 46 O.R. (3d) 382 (Ont. S.C.) where the court held that while the CD-ROMs and computer program were a helpful aid to disclosure, they were not a suitable substitute for hard copies. The judge found that the defence had established that accessing the documents through reliance on the CD-ROMs and computer program was problematic, e.g., not all documents in the computer program could be readily found and some, not at all. Nor had all of the seized documents been scanned into the program. *Hallstone* was applied and followed in *R. v. Felderhof*, [1999] O.J. No. 5107 (Ont.S.C.). See also *R. v. Amzallag* (February 19, 1999, Qué.Sup.Ct.); *R. v. Cazzetta* (October 26, 1998, Qué.Sup.Ct.); and *R. v. Obront* (March 25, 1998, Ont.Ct.(Prov.Div.)).

[90] In *R. v. Keeshig*, [1999] O.J. No. 1271 (Ont.Ct.(Gen.Div.)), March 31, 1999, the Court held that if the Crown provided CD-Rom disclosure to an unrepresented accused who is not computer literate or who does not have a computer or appropriate software, then the Crown must provide a hardcopy or the equipment and knowledge to allow access to the information on the CD-Rom.

[91] The discretion to delay disclosure is, of course, reviewable by the Court.