

Public Prosecutions New Brunswick	DISCLOSURE	DPP Guideline 12 March 10, 2003
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Introduction

The Supreme Court in *Stinchcombe* elevated the duty of the Crown to disclose to a constitutional right enshrined in the right of an accused to make full answer and defence pursuant to section 7 of the *Canadian Charter of Rights and Freedoms*. The Court held, with certain exceptions, that the results of police investigations which have led to the laying of charges are not exclusively the property of the Crown and that Crown Prosecutors have a duty to make disclosure to the accused to ensure that justice is done.

Courts in subsequent cases have to a degree clarified the parameters and scope of the duty to disclose as well as the remedies for non-disclosure. However, it must be realized that not all aspects of disclosure have been fully defined. New fact situations are continually before the courts which raise issues about its nature and scope.

R. v. *Stinchcombe*, [1991] 3 S.C.R. 326

Purpose and Benefits of Disclosure

The purpose of disclosure by the Crown is to assist in guaranteeing the common law and constitutional rights of an accused to a fair trial by enabling the individual to make full answer and defence.

Other benefits of disclosure for the accused and for the administration of justice are:

- the resolution of non-contentious and time-consuming issues at an early stage of proceedings which ensures the most efficient use of court time,
- early resolution of cases including, where appropriate, the entry of pleas of guilty or the withdrawal of charges.

General Scope of Disclosure

Subject to exceptions noted in Section D, the Crown is required to produce to the defence all information in its possession or under its control, whether or not the Crown intends to introduce it into evidence and whether it is inculpatory or exculpatory. The information need not be credible or capable of becoming evidence itself.

The obligation to disclose is triggered by a request by or on behalf of the accused. When no request has been received from an unrepresented accused the Crown has a duty to provide full disclosure. Initial disclosure should occur before the accused is called upon for election or plea.

When a Crown Prosecutor has made disclosure, the fact that it has been provided and the extent of the disclosure should be recorded. See **Appendix C Disclosure Check List.**

Information in the possession of the investigative agency is considered to be in the possession of the Crown. Effective disclosure by the Crown is dependent upon and requires full and timely disclosure by the agency to the Crown Prosecutor. The investigator must be made aware of the duty of the Crown to disclose all relevant information to the defence and to cooperate with the Crown in order that full and timely disclosure to the defence can be made. The investigator must bring to the attention of the Crown Prosecutor confidentiality concerns of which the investigator is aware.

The Crown must disclose statements made by witnesses, whether or not the Crown Prosecutor proposes to call those witnesses. Where there are no statements but simply notes taken by an investigator, the notes should be disclosed. If notes do not exist then a “will say” statement summarizing all information in possession of the prosecution should be supplied.

Where there is some indication that the investigating agency has other relevant information that has not been forwarded, reasonable inquiries should be made of that agency to ensure that all disclosable information is obtained and provided to the defence.

There is no duty on a Crown Prosecutor to seek out and provide information not in possession of the Crown or of the investigative agency. However, it should be noted that the New Brunswick Court of Appeal has included information held by other Crown agencies or departments that could reasonably be considered to be in possession of evidence to be in possession of the Crown for purpose of disclosure.

R .v.Arsenault, 153 N.B.R. (2d) 81

R.v. Blyth, 117 N.B.R. (2d)119

On a request for information where the Crown is not in possession of the information, the Crown Prosecutor should advise the accused in writing in a timely manner so that the defence may take alternative steps.

Where a Crown Prosecutor withholds relevant or privileged information, or any information relating to an informer, or an investigation, the defence should be advised in writing of the type of information being withheld and the reason for withholding it.

Disclosure requirements and responsibilities continue throughout the prosecution of an offence. When potentially exculpatory materials come to the attention of the Crown post-conviction, whether or not the trial is concluded or an appeal is pending, there is a continuing obligation to disclose the same to the accused.

General Exceptions

The Crown has a discretion (reviewable by the trial judge) to withhold information that is irrelevant or may be subject to privilege.

On review :-

- the Crown may justify its refusal to disclose irrelevant information on the basis that there is no reasonable possibility that withholding of the information will impair the constitutional right of the accused to make full answer and defence.
- privilege will fall if the defence can demonstrate that recognition of the privilege constitutes an unreasonable limit on the constitutional right of the accused to make full answer and defence.

Specific Topics

The following specific topics, which are not meant to be exhaustive, are in addition to the material contained in the general scope of disclosure and general exception sections noted above. The release or withholding of information in particular situations must be considered on a case by case basis, considering relevancy, privilege, legislation, and case law. To ensure consistency of approach Crown Prosecutors should consult with their Regional Crown Prosecutor where a complex disclosure issue arises.

Informer Privilege

In *Liepert* the Supreme Court of Canada articulated the importance of informer privilege as being developed to protect citizens who assist in law enforcement and to encourage others to do the same. The privilege belongs to the Crown but a Crown Prosecutor cannot waive informer privilege without the consent of the informer. The privilege prevents not only disclosure of the name of the informer, but of any information which implicitly reveal his or her identity. Absent exceptional circumstances, a “tip” sheet is subject to privilege. Courts have acknowledged that even the smallest details can be sufficient to reveal identity.

Informer privilege is subject only to the innocence at stake exception.

R. v. Liepert, [1997] 1 S.C.R. 281

It is noted that informer privilege does not apply to the situations covered in **DPP Guideline Public Interest Agreements.**

Sexual Offences

Where an accused is charged with sexual offences the *Criminal Code* in sections 278.1 to 278.91 prohibits the production to the accused, without a court order, of specified personal information records, whether in possession of the Crown or of third parties. The Crown's disclosure obligation with respect to such documents is limited to notifying the accused that the record is in the Crown's possession, but without disclosing its content.

The legislation (section 278.1) defines "record" to mean :-

“any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counseling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.” (emphasis added)

The defence may apply to the trial judge for an order of production of the record. The judge, in reviewing the record by means of an in camera hearing will determine whether :-

- the defence has established that the record is likely to be relevant to an issue at trial or the competence of a witness, and that
- the production of the record is necessary in the interest of justice.

In determining these issues the judge is required to consider the accused's right to make full answer and defence as well as the privacy and equality rights of the complainant, witness or other person to whom the record relates. Section 278.5 provides eight factors to be taken into account in the weighing of this issue that focus not only on evidence and the privacy interest of any person, but broader societal concerns such as the interest in encouraging complainants to report sexual offences and to obtain treatment. The judge must give reasons for the decision.

These requirements can be waived by the complainant or the witness to whom the record relates. Crown Prosecutors are advised not to give advice to anyone concerning waiver of these provisions. The complainant or witness should seek independent legal advice in this regard. See **Appendix A Section 278.2 (2) Criminal Code Waiver**.

Reference should be made to *Criminal Code* sections 278.1 to 278.91 which are complete in substance and procedure on this topic.

Other Third Party Applications

It is not the function of the Crown to conduct investigations for the defence. Therefore Crown Prosecutors should not seek information solely because defence counsel requests it. Private information from third parties which has not been obtained by the investigative agency can be obtained in appropriate circumstances by the defence in cases which do not involve sexual offences by means of an application pursuant to O'Connor. In these cases the defence must convince the court that the record sought is likely relevant to an issue at trial or the competence of a witness. If the first test is met, the court will then consider the salutary and deleterious effects of the determination on the accused's right to make full answer and defence on the right to privacy and equality of the complainant, witness or other person to whom the record relates.

R. v. O'Connor, [1995] 4 S.C.R. 411

Intercepted Private Communications

Subject to certain exceptions, section 193(2) of the Criminal Code makes it an indictable offence to wilfully disclose intercepted private communications, their existence or their substance without the express consent of the originator or of the person intended by the originator to receive the same. Therefore, a Crown Prosecutor should not disclose the existence or substance of any intercepted communications that are clearly irrelevant. The existence of such irrelevant interceptions should be communicated to the defence without providing any information that could identify the communication or the parties involved.

Video Tapes

In the case of video tapes prepared in the course of an investigation arrangements may be made for an accused to view them as required.

Where an accused is represented by counsel, upon request, a copy may be provided for counsel to view same in preparation for trial or for consideration by an expert upon receipt of an undertaking not to provide the accused or others with a copy of the tape (to restrict viewing to the accused, defence counsel and qualified experts), and to return it to the Crown Prosecutor upon conclusion of the trial and appeal period. See **Appendix B Form Video Undertaking and Acknowledgement**

Youth Criminal Justice Act

The disclosure provisions of the *Youth Criminal Justice Act* must be considered together with the *Canada Evidence Act*.

Delay of Disclosure

The Crown has a discretion to delay disclosure of relevant information where a reasonable belief exists that it is necessary to do so in order to:-

- preserve an evidentiary privilege,
- comply with a court order
- prevent prejudice to an ongoing investigation or reveal ongoing investigative techniques used by the investigative agency,
- respect a constitutional, common law or statutory right,
- protect the safety or security (including protection from harassment or threats) of any person, or
- seek judicial review of a request for disclosure by the defence.

Before a Crown delays disclosure of any relevant information the Crown Prosecutor will:-

- advise the Regional Crown Prosecutor concerning the information being withheld and the reason for delaying disclosure of that information,
- obtain approval from the Regional Crown to delay disclosure, and
- advise the defence in writing of the general nature of the undisclosed information as well as any steps the prosecution is prepared to take in order to prevent or minimize prejudice to the defence in its ability to make full answer and defence.

Subsequent steps as are necessary must be taken by the Crown Prosecutor to facilitate judicial review of the delaying of disclosure where the review is initiated by the defence, or, in the opinion of the Crown Prosecutor is otherwise desirable.

It follows that disclosure of relevant evidence that has been delayed will be made available to the defence forthwith where the reason for delay no longer exists and, in any event, before trial.

Non Disclosure

Permanent non disclosure of relevant information will only be justified when:-

- a court orders, or on judicial review, a court approves the Crown's exercise of discretion not to disclose,

- disclosure has been delayed in accordance with this guideline, the defence has been so informed, the conditions justifying non-disclosure continue to exist and there is no application for judicial review of the prosecution's withholding of disclosure.

CANADA
PROVINCE OF NEW BRUNSWICK

IN THE PROVINCIAL COURT OF NEW BRUNSWICK
(or IN THE COURT OF QUEEN'S BENCH – TRIAL DIVISION)

BETWEEN: **HER MAJESTY THE QUEEN**

-and-

WAIVER

I, _____, being a person over the age of 14, hereby acknowledge that a record exists that contains personal knowledge about myself;

I acknowledge that I have been informed that this record is in the possession or control of a Crown prosecutor and that it is a record for which I have a reasonable expectation of privacy;

I acknowledge that I am under no obligation to agree to release this record to the accused and that the issue of production of this document can be determined by the trial judge assigned to this case;

Having given full consideration to the above, I hereby waive the application of section 278.1 to section 278.91 of the Criminal Code in relation to the records specifically enumerated below:

- (1)
- (2)
- (3)

Dated at the _____, this _____ day of _____, 2003

 Witness

 Signature

Appendix B

In the Matter of Her Majesty the Queen v. {PRIVATE }

Dans l'affaire de sa Majesté la Reine c.

Re: Offence Section(s):

Objet : Violation de l'article (des articles) :

UNDERTAKING AND ACKNOWLEDGEMENT

**VIDEOTAPED STATEMENT OF
ALLEGED SEXUAL ABUSE VICTIM**

I, _____ ,

counsel for

hereby acknowledge that I have been afforded disclosure of the videotaped statement of the alleged victim in this case by receiving a copy of said statement from the Crown Prosecutor's Office.

In accepting this videotape copy, I hereby undertake to comply with the following conditions:

1. This videotape will be retained by me and the contents will be revealed only to my client or to any person acting under my direction in preparation of the case for the defence (i.e. a potential expert witness);
2. This videotape will not be disclosed to anyone, except in accordance with paragraph 1 above, without the express and explicit consent of the Crown Prosecutor's Office;
3. Additional copies of this videotape will not be made by any person without the express and explicit consent of the Crown Prosecutor's Office; and
4. This videotape will be returned by me to the Crown Prosecutor's Office upon the termination of the solicitor-client relationship as it pertains to this proceeding and/or any withdrawal by me as counsel prior to the ultimate conclusion of the case against my client.

DATED at _____, New Brunswick

this ____ day of _____ A.D., 200 ____ .

ENGAGEMENT ET RECONNAISSANCE

**ENREGISTREMENT MAGNÉTOSCOPIQUE DE LA
DÉCLARATION DE LA PRÉSUMÉE VICTIME**

Je soussigné, _____, conseiller
juridique de _____,

atteste par la présente que le bureau du procureur de la Couronne m'a permis de prendre connaissance de la déclaration de la présumée victime dans cette affaire en me faisant parvenir une copie de la bande vidéo sur laquelle a été enregistrée la dite déclaration.

En acceptant cette copie, je m'engage par la présente à respecter les conditions suivantes :

1. Que la cassette vidéo reste en ma possession et que le contenu en soit révélé uniquement à mon client ou à toute personne me secondant dans la préparation de la défense de l'accusé dans la présente affaire, par exemple un témoin expert potentiel.
2. Que le contenu de cette cassette vidéo ne soit révélé à personne, sauf dans les conditions ci-dessus exprimées en 1, sans le consentement exprès et explicite du bureau du procureur de la Couronne.
3. Que des copies additionnelles de cette bande vidéo ne soient faites par personne sans le consentement exprès et explicite du bureau du procureur de la Couronne.
4. Que je retourne cette cassette vidéo au bureau du procureur de la Couronne au terme de l'affaire actuellement en cause ou, le cas échéant, à la suite de mon retrait de cette affaire à titre d'avocat avant la conclusion finale de cette poursuite contre mon client.

FAIT à _____, au Nouveau-

Brunswick, le _____ 200 ____ .

Disclosure Check List

Title _____

Case file number _____

	Type of Information	A/NA	Scope of Disclosure	Date of Disclosure	Provided to
1	Information or Indictment				
2	Investigating Agency Summary of Case				
3	Accused Written Statements				
4	Accused Verbal Statements				
5	Accused Criminal Record				
6	Police Interviewees Written Statements				
7	Accused Interviewees Verbal Statements				
8	Investigators Notes				
9	Audio or Video Recordings				
10	Accomplice Criminal Record				
11	Information that goes to legally impeaching the credibility of a Crown Witness including relevant Criminal Record				
12	Criminal Record of potential Defence witness where the Defence requests information				
13	Medical, Laboratory and other Expert Reports in Possession of the Crown				

14	Access to any Potential Exhibits or other Physical Evidence in the possession of the Crown for purpose of inspection				
15	Search Warrants and Information to Obtain Search Warrants relied to by the Crown				
16	Intercepted Private Communications Judicial Authorizations Log Books Audio Recordings Transcripts				
17	Other documents or notes in the investigation file				
18	Notice of any Evidence lost or destroyed with summary of circumstances prepared by Investigating Agency				
	Other				