

PRODUCTION AND DISCLOSURE

This checklist is divided into two components: one for prosecuting counsels and one for defence counsels. When using the checklist, please make sure you are referring to the relevant section.

INTRODUCTION

This checklist is provided as a guide to matters that should be considered. How much of it will actually apply in any given case will depend on the complexity of the case. A copy of the checklist, together with the completed Schedules, should be kept on each file.

Prosecutors should note the effect of section 278.1 and 278.2 of the *Criminal Code*, which restricts the process for disclosure of any record containing personal information of the complainant or witness in cases involving the listed offences. Section 287.1 defines personal information to be information for which there is a reasonable expectation of privacy and sets out a number of specific examples. Even if this information is in the possession of the police or the prosecutor, it cannot be disclosed to the defendant without the express consent of the complainant or witness. Section 278.3 sets out the process the defendant must follow to receive disclosure in cases where consent of the complainant or witness is not available. The duty of the prosecutor, in cases where consent is not forthcoming, is set out in subsection 278.2(3). The prosecutor must notify the accused of the existence of this record but not disclose its contents.

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LIST OF AUTHORITIES

Baker v. Slavutych, [1976] 1 S.C.R. 254 (general principles respecting privilege attaching to communications)

Chaplin v. R., [1995] 1 S.C.R. 727 (procedure to be followed when defence applies for court-ordered disclosure)

Lucas and Lucas v. R., 12 January 1996, Nos. 6672 & 6673 (Unreported) (Sask. C.A.) (duty to maintain confidentiality of disclosure materials)

Muirhead v. R., 27 September 1995, Jackson J.A. (Unreported) (Sask. C.A. Chambers), 10 November 1995, No. 6623 (Sask. C.A.)

O'Connor v. R., [1995] 4 S.C.R. 411 (procedure to obtain disclosure of information in third party hands)

R v. Carosella, [1997] 1 S.C.R. 80 (slight modification to the test to be employed to determine if such information should be disclosed)

Stinchcombe v. R., [1991] 3 S.C.R. 326 (general duty of The Crown to disclose to defence or the defendant).

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(Please note, the above Schedules can be found at the end of the Defence component of this checklist.)

PROSECUTION CHECKLIST

A. PRELIMINARY MATTERS

1. Is the prosecution file complete?
 - 1.1 Is more information expected from police?
 - 1.1.1 What else is expected? See Schedule A (C-2-SA-1).
2. Date of initial demand for disclosure.
 - 2.1 If the defendant is unrepresented, has he or she been informed of right to disclosure prior to plea or election?
 - 2.2 Have police provided any disclosure directly to the defendant?
 - 2.2.1 What was provided? See Schedule A.
 - 2.3 Are there co-the defendants or accomplices charged and to whom should this file be cross-indexed for disclosure purposes?
3. Does the police report to the prosecutor indicate all relevant information known to police?
 - 3.1 Have steps been taken to ensure the prosecution is fully informed about all relevant information in possession of the police?
 - 3.1.1 What steps have been taken? See Schedule A.

B. INITIAL DISCLOSURE

1. Does the defendant have a lawyer to whom disclosure can be sent?
 - 1.1 Given the nature of the disclosure material, should a trust conditions letter be sent?
 - 1.2 If the defendant is unrepresented, should disclosure material be protected by *Muirhead* order?

Muirhead v. R., 10 November 1995, No. 6623 (Sask. C.A.).

R. v. Guess (2000), 148 C.C.C.(3d) 321 (B.C.C.A.) indicating that the court can attach conditions to the defence counsel's access to disclosure materials.

R. v. O.(W.A.) (2001), 154 C.C.C. (3d) 357 (Sask.C.A.) setting out that in the appropriate cases, there is no need for the Crown to provide copies of the disclosure material and that disclosure can be made by providing the defence counsel with the opportunity to access and review the materials.

- 1.3 Has initial disclosure been made by the R.C.M.P. to the defendant or defence counsel? If so, are you sure of what has been disclosed and what has been withheld?
2. Name of the prosecutor providing initial disclosure.
3. Date initial disclosure was made.
4. Prepare inventory of materials disclosed to the defence. See Schedule B (C-2-SB-1).
5. Prepare inventory of materials not disclosed to the defence. See Schedule C (C-2-SC-1).
 - 5.1 Date defence counsel was notified of what was being withheld and why it was being withheld.
 - 5.2 Is defence counsel disputing any non-disclosure?
 - 5.3 Has a date for the *Stinchcombe* disclosure application been set?

C. CONTINUING DUTY TO DISCLOSE

1. Dates on which this file has been reviewed to ensure full disclosure has been made. See Schedule A.
2. Has new information been received since date original disclosure was sent out? (A separate entry should be made for each occasion something new is received).
 - 2.1 Has that material been disclosed?
 - 2.1.1 Dates of subsequent disclosure.
 - 2.2 Prepare inventory of materials acquired subsequent to initial disclosure and since disclosed. See Schedule B.
 - 2.3 Prepare inventory of materials acquired subsequent to initial disclosure and not disclosed. See Schedule C.
 - 2.4 Date defence counsel was notified of what was being withheld and why it was being withheld.
 - 2.5 Is the defence counsel disputing non-disclosure?

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- 2.6 Has a date for the *Stinchcombe* disclosure application hearing been set?
- 3. Did witness interviews by the prosecutor produce any new relevant information?
 - 3.1 Has this new information been disclosed?
 - 3.1.1 When was disclosure made and how? See “Schedule B: Disclosed Materials” or “Schedule C: Undisclosed Materials in Possession of Prosecution.”

D. ETHICAL CONSIDERATIONS

It is the duty of the prosecution counsel to respond to demands for disclosure in a fair, frank and timely fashion, disclosing all relevant information in the possession of the prosecution (which includes the police). This duty is subject only to a discretion to withhold irrelevant or privileged information, or to delay disclosure when necessary in the interests of justice. If information is withheld, there is a duty to inform the defendant or defence counsel that information is being withheld in order to allow the defence to consider bringing an application to trial court to get these materials reviewed by the Court. Thereafter, the duty to disclose continues and any new and relevant information coming into the possession of the Crown must be disclosed in a timely fashion:

Stinchcombe v. R., [1991] 3 S.C.R. 326 setting out the general duty of the Crown to disclose.

Baker v. Slavutych, [1976] 1 S.C.R. 254, dealing with the general principles relating to confidential communications and claims for privilege.

R. v. Shirose (1999), 133 C.C.C.(93d) 257 (S.C.C.), while the solicitor client privilege does protect communications between the Crown and the police when the latter are seeking legal advice, the Crown Counsel must be careful to ensure that any relevant information in those communications is disclosed in some other form.

The prosecution counsel must keep in mind that this duty to disclose covers any confidential reports or files (medical reports, psycho-therapeutic reports and files, etc.) in the hands of the prosecution. The subject of this type of report, file, etc., is entitled to claim confidentiality and require an *O'Connor* hearing only if such reports, etc., have not been disclosed to the police or the prosecution. Once these reports, etc., are disclosed to the police (even if they are only read and nothing is copied or taken from them) or the prosecution, the limited confidentiality privilege is lost (see *O'Connor v. R.*, [1995] 4 S.C.R. 411).

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PRODUCTION AND DISCLOSURE: DEFENCE

INTRODUCTION

This checklist is provided only as a guide to matters that should be considered. The complexity of the case will determine what actually applies or not. It is hoped that a checklist such as this could be attached to each file. Please note that *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 requires the prosecutor to disclose in a frank and timely fashion all relevant information in the prosecutor's possession and in police possession. The Crown has a discretion to withhold irrelevant or privileged information or to delay disclosure when necessary in the interests of justice; but the Crown should err on the side of disclosure.

However, it is essential, where information is withheld, that an inventory of that information be sent to the defence. As well, there is a continuing duty on the prosecutor and the police to disclose information that comes into the possession of the prosecutor in a timely fashion as the case proceeds. Courts have the jurisdiction to review a failure of the Crown to disclose and to grant a remedy.

In *R. v. Dixon*, [1998] 1 S.C.R. 244, the Supreme Court determined that the appropriate remedy for non-disclosure is a new trial. They also set out the appropriate test for determining whether the Crown's inadvertent failure to disclose relevant material violated an accused's right to disclosure and, therefore, resulted in a new trial. The Supreme Court also set out the test to determine whether the constitutional right to make full answer and defence was impaired. Defence counsels should be aware that they have an obligation to pursue disclosure in a timely manner and the failure to do so can result in an inference that the defence made a strategic decision not to pursue disclosure. If this inference is drawn, it can have a very serious impact on any remedies that are available to the defence. Not all disclosure violations will result in a remedy, and if a remedy is granted, it must cure the impairment of the accused's Section 7 interests without going any farther than absolutely necessary. *Stinchcombe* (supra) must be read along with *Dixon* (supra) to appreciate the remedy for non-disclosure.

LIST OF AUTHORITIES

A review of the developments in disclosure is available in papers presented at the 2002 National Criminal Law Program (a criminal law conference presented annually by the Federation of Law Societies of Canada). The cite for the following materials is *National Criminal Law Program, 2002, Volume 1, Part I, Sections 1.1, 1.2, 1.3, 1.4*:

- D. Murray Brown, Q.C., *Disclosure Developments Since Stinchcombe: The Positive Obligation to Disclose*
- Jocelyn Speyer, *When Can the Crown Delay or Withhold Disclosure?*
- Madam Justice Elizabeth Bennett, *Remedies for Non-Disclosure*
- David Bright, Q.C., *Disclosure Developments: Disclosure Concerning Defence Experts.*

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DEFENCE CHECKLIST

A. PRELIMINARY MATTERS

1. Letter to the prosecutor's office and/or the RCMP court officer advising that you are acting as the lawyer for a particular accused and requesting that complete disclosure be sent to you.
2. Review with your client areas that may require disclosure:
 - 2.1 Right to counsel.
 - 2.2 Conversations with police upon arrest or detention.
 - 2.3 Statements to all people in authority.
 - 2.4 Samples that may have been taken of breath, blood, hair, etc. from the accused.
 - 2.5 Existence of any search warrants and informations to obtain search warrants.
 - 2.6 Any photographs that may have been taken that are relevant to the case.
 - 2.7 Names of any potential co-accused and/or witnesses.

B. REVIEW OF INTIAL DISCLOSURE RECEIVED

1. Contact the Crown re release of disclosure to the client, if necessary.
2. Review for possible further disclosure and diarize file to potential disclosure date for information such as:
 - 2.1 Lab reports.
 - 2.2 Expert opinion.
 - 2.3 Police follow-up, if anticipated.
3. Review disclosure for information that has not been sent to you that should have been, according to information provided to you by your client.

Please note that it is inappropriate for anyone, defence counsel or even the accused, to give this disclosure material to the public. Counsels should, if possible, maintain custody over this material (*Lucas and Lucas v R.*, 12 January 1996, Nos. 6672 & 6673 (Unreported) (Sask. C.A.)). If a problem arises, seek the permission of the Crown to release this material or make an application to the Court. This even applies to unrepresented accused (*Muirhead v. R.*, 27 September 1995, Jackson J.A. (Unreported) (Sask. C.A. Chambers); 10 November 1995, No. 6623 (Sask. C.A.)).

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C. CONTINUING DUTY TO DISCLOSE

In the case of *Spencer Dixon v. Her Majesty the Queen*, [1998] 1 S.C.R. 244, the Supreme Court indicated that a court may well find an accused's *Charter* right to disclosure has been breached and yet deny the remedy of a new trial. The right to full disclosure is just one component of the right to make full answer and defence. In considering the overall fairness of the trial process, defence counsel's diligence in pursuing disclosure from the Crown must be taken into account. A lack of diligence is a significant factor in determining whether the Crown's non-disclosure affected the fairness of the trial process. When counsel becomes, or ought to become, aware, from other relevant material produced by the Crown, of a failure to disclose further material, he or she must not remain passive. Rather, counsel must diligently pursue disclosure.

1. Make written request for further information if required and make written request for a list (inventory) of any material in possession of the Crown or police that the Crown is choosing not to disclose, if any.
 - 1.1 Is there possible, relevant information that the Crown has not disclosed?
 - 1.2 If there is, make application to the Court following the procedure set out in *Chaplin v. R.*, [1995] 1 S.C.R. 727.
2. If you receive an inventory, consider if you require this information or not. If you do, an application must be made to the appropriate court for this information.
 - 2.1 Should application be made?
 - 2.2 Make application with Notice of Motion and Affidavits.
3. Consider if an application will have to be made to third parties for the release of relevant information, concerning witnesses (*R. v. O'Connor*, [1995] 4 S.C.R. 411). Sections 278.1 to 278.9 of the *Criminal Code* were enacted in response to *O'Connor*. These sections are triggered by an application by the accused charged with a sexual offence for disclosure or production of records as defined in s. 278.1. These are records held by a third party for which there is a reasonable expectation of privacy.
 - 3.1 Make an application with Notice of Motion and Affidavits.
4. After the preliminary inquiry, write to the Crown and ask if the witness interviews produced any further relevant information that should be disclosed.
5. If written disclosure mentions video or tape recorded statements, make arrangements to get copies or a review.

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**SCHEDULE A:
PRELIMINARY MATTERS/CONTINUING DUTY TO DISCLOSE**

A. PRELIMINARY MATTERS

1. Additional material expected from police.

2. Disclosure provided by police to the defendant.

3. Steps taken to ensure the prosecution is fully informed of all relevant information in police possession.

B. CONTINUING DUTY TO DISCLOSE

1. Dates file has been reviewed to ensure full disclosure is made.

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