



Production and Disclosure

Defence

ACTION	NA	DATE DUE	DATE DONE	Notes
1. Preliminary Matters <ul style="list-style-type: none"> • Review with your client areas that may require disclosure: <ul style="list-style-type: none"> • Right to counsel. 				
<ul style="list-style-type: none"> • Conversations with police upon arrest or detention. 				
<ul style="list-style-type: none"> • Statements to all people in authority. 				
<ul style="list-style-type: none"> • Samples that may have been taken of breath, blood, hair, etc., from the accused. 				
<ul style="list-style-type: none"> • Existence of any search warrants and informations to obtain search warrants. 				
<ul style="list-style-type: none"> • Any photographs that may have been taken that are relevant to the case. 				
<ul style="list-style-type: none"> • Names of any potential co-accused and/or witnesses. 				
<ul style="list-style-type: none"> • Prepare and send 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 of Initial Disclosure Received <ul style="list-style-type: none"> • Make arrangements for client to review disclosure in your office. 				
<ul style="list-style-type: none"> • Contact the Crown regarding release of disclosure to the client, if necessary. 				
<ul style="list-style-type: none"> • It is inappropriate for anyone, defence counsel or even the accused, to give this disclosure material to the public. Counsel should, if possible, maintain custody over this material (<i>R v Lucas</i>, 1996 CanLII 4926 [CA]). The same principle applies to unrepresented accused (<i>R v Muirhead</i>, 1995 CanLII 4064.) 				

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Counsel should seek the permission of the Crown to release this material or make an application to the court.				
<ul style="list-style-type: none"> • Review materials for possible further disclosure and diarize file to potential disclosure date for information such as: <ul style="list-style-type: none"> • Lab reports. 				
<ul style="list-style-type: none"> • Expert opinion. 				
<ul style="list-style-type: none"> • Police follow-up, if anticipated. 				
<ul style="list-style-type: none"> • Review disclosure for information that has not been sent to you that should have been, according to information provided to you by your client. 				
<ul style="list-style-type: none"> • If written disclosure mentions video or tape recorded statements, make arrangements to get copies or a review of them. 				
<p>3. Continuing Duty to Disclose</p> <ul style="list-style-type: none"> • Prior to preliminary inquiry <ul style="list-style-type: none"> • Make written request for further information if required. 				
<ul style="list-style-type: none"> • 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. 				
<ul style="list-style-type: none"> • After the preliminary inquiry <ul style="list-style-type: none"> • Write to the Crown and ask if the witness interviews produced any further relevant information that should be disclosed 				
<ul style="list-style-type: none"> • If you have received an inventory of materials that the Crown is choosing not to disclose, consider if you require this information or not. If you do need the information, an application must be made to the appropriate court. <ul style="list-style-type: none"> ○ What information is being withheld, and how does it affect your client’s right to make full answer and defence? 				

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<ul style="list-style-type: none"> ○ If you decide that the information does affect the case, make application with notice of application and affidavits. 				
<ul style="list-style-type: none"> • Consider if an application will have to be made to third parties for the release of relevant information, concerning witnesses (<i>R v O'Connor</i>, 1995 CanLII 51). <ul style="list-style-type: none"> ○ Applicant must demonstrate that the information contained in the record is likely relevant to the issues in the case or the testimonial competence of a witness. The applicant need not demonstrate the specific use to which he or she might put the information contained in the record. 				
<ul style="list-style-type: none"> ○ If the applicant demonstrates likely relevance, the record is produced to the trial judge for review. In this second stage, the trial judge examines the record to decide whether the information will be produced to the applicant, and the extent of the disclosure. Competing interests are the extent to which the record is necessary for the accused to make full answer and defence, the probative value of the record and the nature and extent of the reasonable expectation of privacy vested in the record. 				
<ul style="list-style-type: none"> • In the case of sexual offences, an application is governed by section 278.2 of the <i>Criminal Code</i>, RSC 1985, c C-46. Sections 278.1 to 278.9 of the <i>Criminal Code</i> were enacted in response to <i>O'Connor</i>. These sections are triggered by an application by the accused charged with a sexual offence for disclosure or production of records as defined in section 278.1. These are records held by a third party for which there is a reasonable expectation of privacy. The application is a two-stage process. <ul style="list-style-type: none"> ○ In the first stage, the accused must establish that the record sought is likely relevant to an issue at trial or the competence of the witness to testify and the production of the record is necessary in the interests of justice. The 				

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<p>foundation for the application may be based on disclosure, cross-examination of witnesses at the preliminary inquiry, or expert witnesses. It may be important to lay the evidentiary basis at this hearing.</p>				
<ul style="list-style-type: none"> ○ If the defence establishes the first stage, the record is produced to the judge for his review. After reviewing the record the judge may order production to the accused, if the record is likely relevant to an issue at trial or the competence of a witness to testify and production is necessary in the interests of justice. 				
<p>4. Considerations</p> <ul style="list-style-type: none"> • Defence counsel has a responsibility to protect disclosure materials from dissemination. In <i>R v Lucas</i>, 1996 CanLII 4926 (CA), the court implicitly approved of this practice when they adopted the following passage from The Martin Committee Report: <p style="margin-left: 40px;">The Committee is of the opinion that it is inappropriate for any counsel to give disclosure materials to the public. Counsel would not be acting responsibly as an officer of the court if he or she did so.</p> <p style="margin-left: 40px;">The Committee is of the opinion that defence counsel should maintain custody or control over disclosure materials, so that copies of such materials are not improperly disseminated. Special arrangements may be made between defence and Crown counsel, with respect to maintaining control over disclosure materials where an accused is in custody, and the volume of material disclosed makes it impractical for defence counsel to be present while the material is reviewed.</p> 				

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