

Disclosure of Instrument Maintenance and Calibration Records:

Duty to Disclose

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Impaired Driving – The Changing Landscape

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Duty to Disclose

1. In *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) the SCC described the duty to disclose as follows:

It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour, are, in my view, overwhelming. The suggestion that the duty should be reciprocal may deserve consideration by this Court in the future but is not a valid reason for absolving the Crown of its duty. The contrary contention fails to take account of the fundamental difference in the respective roles of the prosecution and the defence. In *Boucher v. The Queen*, [1955] S.C.R. 16, Rand J. states, at pp. 23-24:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role. (at para 11-12)

2. The Court went on to explain that there are situations where the Crown may exercise their discretion to not disclose materials. However, the exercise of that discretion is reviewable by the trial judge:

The discretion of Crown counsel is, however, reviewable by the trial judge. Counsel for the defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion. On a review the Crown must justify its refusal to disclose. Inasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule.

The trial judge on a review should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege. (at para 21-22, emphasis added)

3. The SCC addressed the issue of disclosure again in *R. v. McNeil* 2009 SCC 3 (SCC). The Court noted both that the duty upon the Crown to disclose all relevant evidence extends to police agencies and that failure of police to provide information does not provide an acceptable excuse for non-disclosure (para 23-24). In describing the duty to disclose **all relevant evidence**, the Court stated:

As we have seen, likely relevance for disclosure purposes has a wide and generous connotation and includes information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence. In considering the ambit of the information that can assist in the trial, regard must be given to the particular issue in the case and to the governing rules of evidence and procedure. This does not mean that only material that would be admissible at trial should be produced. Material that would not, on its own, be admissible may nonetheless be of use to the defence, for example, in cross-examining a witness on matters of credibility or in pursuing other avenues of investigation. (at paragraph 44, *McNeil*, emphasis added)

4. The Court continued:

The Crown is not an ordinary litigant. As a minister of justice, the Crown's undivided loyalty is to the proper administration of justice. As such, Crown counsel who is 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. (at para 49)

5. Similarly, there is a duty upon the investigating agency to produce to the Crown any relevant evidence in its possession.

We have already seen that the police have a corollary duty to disclose to the prosecuting Crown all material pertaining to the investigation of an accused. This disclosure obligation accords with police codes of conduct enacted in many jurisdictions across the country (para 52)

6. The Court concluded that the right of disclosure is so fundamental that where disclosure is clearly relevant, even if it is in the hands of another agency, it should properly form part of the **first party** obligation of the Crown.

...Indeed, as discussed earlier, the disclosure of relevant material, whether it be for or against an accused, is part of the police corollary duty to participate in the disclosure process. Where the information is obviously relevant to the accused's case, it should form part of the first party disclosure package to the Crown *without prompting*....(para 59, emphasis in original)