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

William B. Stinchcombe *Appellant*

v.

Her Majesty The Queen *Respondent*

Indexed as: R. *v.* Stinchcombe

File No.: 21904.

1991: May 2; 1991: November 7.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

on appeal from the court of appeal for alberta

Criminal law -- Evidence -- Crown's obligation to make disclosure to defence -- Witness favourable to accused interviewed by police -- Crown not calling witness and refusing to produce statements obtained -- Whether Crown obliged to disclose statements.

The accused, a lawyer, was charged with breach of trust, theft and fraud. A former secretary of his was a Crown witness at the preliminary inquiry, where she gave evidence apparently favourable to the defence. After the preliminary inquiry but prior to trial, the witness was interviewed by an RCMP officer and a

tape-recorded statement was taken. Later, during the course of the trial, the witness was again interviewed by a police officer and a written statement taken. Defence counsel was informed of the existence but not of the content of the statements. His requests for disclosure were refused. During the trial defence counsel learned conclusively that the witness would not be called by the Crown and sought an order that the witness be called or that the Crown disclose the contents of the statements to the defence. The trial judge dismissed the application. The trial proceeded and the accused was convicted of breach of trust and fraud. Conditional stays were entered with respect to the theft counts. The Court of Appeal affirmed the convictions without giving reasons.

Held: The appeal should be allowed and a new trial ordered.

The Crown has a legal duty to disclose all relevant information to the defence. The fruits of the investigation which are in its possession 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. The obligation to disclose is subject to a discretion with respect to the withholding of information and to the timing and manner of disclosure. Crown counsel has a duty to respect the rules of privilege and to protect the identity of informers. A discretion must also be exercised with respect to the relevance of information. The Crown's discretion is reviewable by the trial judge, who should be guided by the general principle that information should not be withheld if there is a reasonable possibility that this will impair the right of the accused to make full answer and defence. The absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of

a legal privilege which excludes the information from disclosure. This privilege is reviewable, however, on the ground that it is not a reasonable limit on the right to make full answer and defence in a particular case.

Counsel for the accused must bring to the trial judge's attention at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. This will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial.

Initial disclosure should occur before the accused is called upon to elect the mode of trial or plead. Subject to the Crown's discretion, all relevant information must be disclosed, both that which the Crown intends to introduce into evidence and that which it does not, and whether the evidence is inculpatory or exculpatory. All statements obtained from persons who have provided relevant information to the authorities should be produced, even if they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced. If there are no notes, all information in the prosecution's possession relating to any relevant evidence the person could give should be supplied.

Crown counsel was not justified in refusing disclosure here on the ground that the witness was not worthy of credit: whether the witness is credible is for the trial judge to determine after hearing the evidence. The trial judge ought to have examined the statements. Since the information withheld might have affected the outcome of the trial, the failure to disclose impaired the right to make full answer and defence. There should be a new trial at which the statements are produced.

Cases Cited

Referred to: *Cunliffe v. Law Society of British Columbia* (1984), 40 C.R. (3d) 67; *Savion v. The Queen* (1980), 13 C.R. (3d) 259; *R. v. Bourget* (1987), 56 C.R. (3d) 97; *Boucher v. The Queen*, [1955] S.C.R. 16; *Marks v. Beyfus* (1890), 25 Q.B.D. 494; *R. v. Scott*, [1990] 3 S.C.R. 979; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)*, [1981] 2 S.C.R. 494; *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505; *Lemay v. The King*, [1952] 1 S.C.R. 232; *R. v. C. (M.H.)*, [1991] 1 S.C.R. 763, aff'g (1988), 46 C.C.C. (3d) 142; *Caccamo v. The Queen*, [1976] 1 S.C.R. 786; *Piché v. The Queen*, [1971] S.C.R. 23; *Rothman v. The Queen*, [1981] 1 S.C.R. 640; *McInroy v. The Queen*, [1979] 1 S.C.R. 588; *R. v. Mannion*, [1986] 2 S.C.R. 272.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 7.

Criminal Code, R.S.C. 1970, c. C-34, ss. 294(*a*), 296, 338(1)(*a*).

Criminal Code, R.S.C., 1985, c. C-46, ss. 334(*a*), 336, 380(1)(*a*), 482, 603.

Criminal Justice Act 1967 (U.K.), 1967, c. 80.

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Nova Scotia. *Royal Commission on the Donald Marshall, Jr., Prosecution*, Vol. 1, *Findings and Recommendations*. Halifax: The Commission, 1989.

APPEAL from a judgment of the Alberta Court of Appeal affirming the judgment of Brennan J. sitting without a jury convicting the appellant of breach of trust and fraud. Appeal allowed.

William E. Code, Q.C., and *John Kingman Phillips,* for the appellant.

Daniel M. McDonald, Q.C., and *Bruce R. Fraser, Q.C.*, for the respondent.

//*Sopinka J.*//

The judgment of the Court was delivered by

SOPINKA J. -- This appeal raises the issue of the Crown's obligation to make disclosure to the defence. A witness who gave evidence at the preliminary inquiry favourable to the accused was subsequently interviewed by agents for the Crown. Crown counsel decided not to call the witness and would not produce the statements obtained at the interview. The trial judge refused an application by the defence for disclosure on the ground that there was no obligation on the Crown to disclose the statements. The Court of Appeal affirmed the judgment at trial and the case is here with leave of this Court.

1. Facts

The appellant was a Calgary lawyer charged with appropriating certain financial instruments from a client, one Jack Abrams. The indictment charged thirteen counts of criminal breach of trust contrary to s. 296 of the *Criminal Code*, R.S.C. 1970, c. C-34 (now s. 336), thirteen counts of theft contrary to s. 294(*a*) (now s. 334(*a*)) of the *Code*, and one count of fraud contrary to s. 338(1)(*a*) (now s. 380(1)(*a*)) of the *Code*. The trial in the Alberta Court of Queen's Bench was before Brennan J. without a jury.

The Crown alleged that the appellant had wrongfully appropriated property which he held in trust for Abrams. The defence did not contest the receipt of funds by the appellant. The defence did contend, however, that despite Stinchcombe's formal status as trustee of the property, Abrams had in fact made Stinchcombe his business partner. Under this theory, Stinchcombe had acted as he was legally entitled to act. At issue therefore was the actual, as opposed to the formal, nature of the relationship between the two men.

Patricia Lineham is a former secretary of Mr. Stinchcombe. She was a Crown witness at the preliminary inquiry. There, she gave evidence which was, apparently, very favourable to the defence regarding the conduct of Abrams. The precise content of this testimony was not before the trial judge and is not in the record. Lineham was not listed on the indictment, but was subpoenaed by the Crown.

After the preliminary inquiry but prior to the trial, Lineham was interviewed by an RCMP officer. A tape-recorded statement was taken. Crown counsel informed defence counsel of the existence but not the content of this statement. A request for disclosure was refused. Later, during the course of the trial, Lineham was again interviewed by a police officer and a written statement taken. Again, though defence counsel was advised of the existence of the statement, a request for disclosure was refused. Crown counsel also indicated that he would not be calling Lineham as she was not worthy of credit.

It was not until the third day of the trial that defence counsel learned conclusively that Lineham would not be called by the Crown. At this time, he moved before the trial judge for an order that (i) the Crown call the witness, or (ii) the Court call the witness, or (iii) the Crown disclose the contents of the statements to the defence. A review of the record makes it clear that defence counsel was pressing for access to, or production of, both the tape-recorded and written statements and was not pressing the alternative requests. In support of this motion, counsel for the defendant indicated that Ms. Lineham refused to speak to him or his staff when they attempted to interview her about the contents of the statements. Crown counsel did not provide any basis for resisting production other than to say that in his view the potential witness was not worthy of credit.

The trial judge dismissed the application. Brennan J. ruled that under the circumstances there was no obligation on the Crown to call the witness and that there was no obligation on the Crown to disclose the contents of the statements. The trial proceeded, and the accused was found guilty of all twenty-seven counts charged. A

conditional stay was entered with respect to the thirteen theft counts. The Alberta Court of Appeal dismissed the appeal from conviction without issuing reasons. Leave to appeal to this Court was granted on the disclosure issue.

During argument before this Court, an application was made by the Crown to adduce the statements and the tape as fresh evidence. This application was rejected. The principal basis for the rejection was that at this stage it would be impossible to determine whether the statements would have been material to the defence if produced at trial.

2. Crown's Obligation to Disclose

The circumstances which give rise to this case are testimony to the fact that the law with respect to the duty of the Crown to disclose is not settled. A number of cases have addressed some aspects of the subject. See, for example, *Cunliffe v. Law Society of British Columbia* (1984), 40 C.R. (3d) 67 (B.C.C.A.); *Savion v. The Queen* (1980), 13 C.R. (3d) 259 (Ont. C.A.); *R. v. Bourget* (1987), 56 C.R. (3d) 97 (Sask. C.A.). No case in this Court has made a comprehensive examination of the subject. The Law Reform Commission of Canada, in a 1974 working paper titled *Criminal Procedure: Discovery* (the "1974 Working Paper") and a 1984 report titled *Disclosure by the Prosecution* (the "1984 Report"), recommended comprehensive schemes regulating disclosure by the Crown but no legislative action has been taken implementing the proposals. Apart from the limited legislative response contained in s. 603 of the *Criminal Code*, R.S.C., 1985, c. C-46, enacted in the 1953-54 overhaul of the *Code* (which itself condensed pre-existing provisions),

legislators have been content to leave the development of the law in this area to the courts.

Production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. This applied to both criminal and civil proceedings. Significantly, in civil proceedings this aspect of the adversary process has long since disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice. This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met. Surprisingly, in criminal cases in which the liberty of the subject is usually at stake, this aspect of the adversary system has lingered on. While the prosecution bar has generally co-operated in making disclosure on a voluntary basis, there has been considerable resistance to the enactment of comprehensive rules which would make the practice mandatory. This may be attributed to the fact that proposals for reform in this regard do not provide for reciprocal disclosure by the defence (see 1974 Working Paper at pp. 29-31; 1984 Report at pp. 13-15; Marshall Commission Report, *infra,* Vol. 1, at pp. 242-44).

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.

Other grounds advanced by advocates of the absence of a general duty to disclose all relevant information are that it would impose onerous new obligations on the Crown prosecutors resulting in increased delays in bringing accused persons to trial. This ground is not supported by the material in the record. As I have already observed, disclosure is presently being made on a voluntary basis. The extent of disclosure varies from province to province, from jurisdiction to

jurisdiction and from prosecutor to prosecutor. The adoption of uniform, comprehensive rules for disclosure by the Crown would add to the work-load of some Crown counsel but this would be offset by the time saved which is now spent resolving disputes such as this one surrounding the extent of the Crown's obligation and dealing with matters that take the defence by surprise. In the latter case an adjournment is frequently the result of non-disclosure or more time is taken by a defence counsel who is not prepared. There is also compelling evidence that much time would be saved and therefore delays reduced by reason of the increase in guilty pleas, withdrawal of charges and shortening or waiver of preliminary hearings. The 1984 Report (at pp. 6-9) refers to several experimental projects which were established after the publication of the 1974 Working Paper in order to test the viability of pre-trial disclosure. The result of these experiments, and in particular the Montreal experiment, which was the most exhaustively evaluated, was that there was a significant increase in the number of cases settled and pleas of guilty entered or charges withdrawn.

In England, under the provisions of the *Criminal Justice Act 1967* (U.K.), 1967, c. 80, a "packet" of material is furnished to defence counsel. The provision of such material has led to a reduction in the length and number of preliminary hearings in that jurisdiction: *Report of the Special Committee on Preliminary Hearings*, Bench and Bar Council of Ontario (1982), at pp. 12-15.

Refusal to disclose is also justified on the ground that the material will be used to enable the defence to tailor its evidence to conform with information in the Crown's possession. For example, a witness may change his or her testimony to

conform with a previous statement given to the police or counsel for the Crown. I am not impressed with this submission. All forms of discovery are subject to this criticism. There is surely nothing wrong in a witness refreshing his or her memory from a previous statement or document. The witness may even change his or her evidence as a result. This may rob the cross-examiner of a substantial advantage but fairness to the witness may require that a trap not be laid by allowing the witness to testify without the benefit of seeing contradictory writings which the prosecutor holds close to the vest. The principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all relevant material.

Finally, it is suggested that disclosure may put at risk the security and safety of persons who have provided the prosecution with information. No doubt measures must occasionally be taken to protect the identity of witnesses and informers. Protection of the identity of informers is covered by the rules relating to informer privilege and exceptions thereto (see *Marks v. Beyfus* (1890), 25 Q.B.D. 494 (C.A.); *R. v. Scott*, [1990] 3 S.C.R. 979), and any rules with respect to disclosure would be subject to this and other rules of privilege. With respect to witnesses, persons who have information that may be evidence favourable to the accused will have to have their identity disclosed sooner or later. Even the identity of an informer is subject to this fact of life by virtue of the "innocence exception" to the informer privilege rule (*Marks v. Beyfus*, *supra*, at pp. 498-99; *R. v. Scott*, *supra*, at p. 996; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at p. 93; *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)*, [1981] 2 S.C.R. 494). It will, therefore, be a matter of the timing of the disclosure rather than whether disclosure should be made at all. The prosecutor must retain a degree of discretion in respect

of these matters. The discretion, which will be subject to review, should extend to such matters as excluding what is clearly irrelevant, withholding the identity of persons to protect them from harassment or injury, or to enforce the privilege relating to informers. The discretion would also extend to the timing of disclosure in order to complete an investigation. I shall return to this subject later in these reasons.

This review of the pros and cons with respect to disclosure by the Crown shows that there is no valid practical reason to support the position of the opponents of a broad duty of disclosure. Apart from the practical advantages to which I have referred, there is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s. 7 of the *Canadian Charter of Rights and Freedoms* as one of the principles of fundamental justice. (See *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505, at p. 1514.) The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person. In the *Royal Commission on the Donald Marshall, Jr., Prosecution*, Vol. 1: *Findings and Recommendations* (1989) (the "Marshall Commission Report"), the Commissioners found that prior inconsistent statements were not disclosed to the defence. This was an important contributing factor in the miscarriage of justice which occurred and led the Commission to state that "anything less than complete disclosure by the Crown falls short of decency and fair play" (Vol. 1 at p. 238). The Commission

recommended an extensive regime of disclosure of which the key provisions are as follows (Vol. 1 at p. 243):

> **2(1)** *Without request, the accused is entitled, before being called upon to elect the mode of trial or to plead to the charge of an indictable offence, whichever comes first, and thereafter:*
>
> **(a)** *to receive a copy of his criminal record;*
>
> **(b)** *to receive a copy of any statement made by him to a person in authority and recorded in writing or to inspect such a statement if it has been recorded by electronic means; and to be informed of the nature and content of any verbal statement alleged to have been made by the accused to a person in authority and to be supplied with any memoranda in existence pertaining thereto;*
>
> **(c)** *to inspect anything that the prosecutor proposes to introduce as an exhibit and, where practicable, receive copies thereof;*
>
> **(d)** *to receive a copy of any statement made by a person whom the prosecutor proposes to call as a witness or anyone who may be called as a witness, and recorded in writing or, in the absence of a statement, a written summary of the anticipated testimony of the proposed witness, or anyone who may be called as a witness;*
>
> **(e)** *to receive any other material or information known to the Crown and which tends to mitigate or negate the defendant's guilt as to the offence charged, or which would tend to reduce his punishment therefor, notwithstanding that the Crown does not intend to introduce such material or information as evidence;*
>
> **(f)** *to inspect the electronic recording of any statement made by a person whom the prosecutor proposes to call as a witness;*
>
> **(g)** *to receive a copy of the criminal record of any proposed witness; and*
>
> **(h)** *to receive, where not protected from disclosure by the law, the name and address of any other person who may have information useful to the accused, or other details enabling that person to be identified.*
>
> **2(2)** *The disclosure contemplated in subsection (1), paragraphs (d), (e) and (h) shall be provided by the Crown and may be limited only where, upon an inter partes application by the prosecutor, supported by evidence showing a likelihood that such disclosure will endanger the life or safety*

> *of such person or interfere with the administration of justice, a justice having jurisdiction in the matter deems it just and proper.*

In my opinion there is a wholly natural evolution of the law in favour of disclosure by the Crown of all relevant material. As long ago as 1951, Cartwright J. stated in *Lemay v. The King*, [1952] 1 S.C.R. 232, at p. 257:

> I wish to make it perfectly clear that I do not intend to say anything which might be regarded as lessening the duty which rests upon counsel for the Crown to bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise.... [Emphasis added.]

This statement may have been in reference to the obligation resting on counsel for the Crown to call evidence rather than to disclose the material to the defence, but I see no reason why this obligation should not be discharged by disclosing the material to the defence rather than obliging the Crown to make it part of the Crown's case. Indeed, some of the information will be in a form that cannot be put in evidence by the Crown but can be used by the defence in cross-examination or otherwise. Production to the defence is then the only way in which the injunction of Cartwright J. can be obeyed.

In *R. v. C. (M.H.)* (1988), 46 C.C.C. (3d) 142 (B.C.C.A.), at p. 155, McEachern C.J.B.C. after a review of the authorities stated what I respectfully accept as a correct statement of the law. He said that: "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". This passage was cited with approval by McLachlin J. in her reasons on behalf

of the Court ([1991] 1 S.C.R. 763). She went on to add: "This Court has previously stated that the Crown is under a duty at common law to disclose to the defence all material evidence whether favourable to the accused or not" (p. 774).

As indicated earlier, however, this obligation to disclose is not absolute. It is subject to the discretion of counsel for the Crown. This discretion extends both to the withholding of information and to the timing of disclosure. For example, counsel for the Crown has a duty to respect the rules of privilege. In the case of informers the Crown has a duty to protect their identity. In some cases serious prejudice or even harm may result to a person who has supplied evidence or information to the investigation. While it is a harsh reality of justice that ultimately any person with relevant evidence must appear to testify, the discretion extends to the timing and manner of disclosure in such circumstances. A discretion must also be exercised with respect to the relevance of information. While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant. The experience to be gained from the civil side of the practice is that counsel, as officers of the court and acting responsibly, can be relied upon not to withhold pertinent information. Transgressions with respect to this duty constitute a very serious breach of legal ethics. The initial obligation to separate "the wheat from the chaff" must therefore rest with Crown counsel. There may also be situations in which early disclosure may impede completion of an investigation. Delayed disclosure on this account is not to be encouraged and should be rare. Completion of the investigation before proceeding with the prosecution of a charge or charges is very much within the control of the Crown. Nevertheless, it is not always possible to predict events

which may require an investigation to be re-opened and the Crown must have some discretion to delay disclosure in these circumstances.

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. The trial judge might also, in certain circumstances, conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege. The trial judge may also review the decision of the Crown to withhold or delay production of information by reason of concern for the security or safety of witnesses or persons who have supplied information to the investigation. In such circumstances, while much leeway must be accorded to the exercise of the discretion of the counsel for the Crown with respect to the manner and timing of the disclosure, the absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure.

The trial judge may also review the Crown's exercise of discretion as to relevance and interference with the investigation to ensure that the right to make full answer and defence is not violated. I am confident that disputes over disclosure will arise infrequently when it is made clear that counsel for the Crown is under a general duty to disclose all relevant information. The tradition of Crown counsel in this country in carrying out their role as "ministers of justice" and not as adversaries has generally been very high. Given this fact, and the obligation on defence counsel as officers of the court to act responsibly, these matters will usually be resolved without the intervention of the trial judge. When they do arise, the trial judge must resolve them. This may require not only submissions but the inspection of statements and other documents and indeed, in some cases, *viva voce* evidence. A *voir dire* will frequently be the appropriate procedure in which to deal with these matters.

Counsel for the accused must bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. Observance of this rule will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial. See *Caccamo v. The Queen*, [1976] 1 S.C.R. 786. Failure to do so by counsel for the defence will be an important factor in determining on appeal whether a new trial should be ordered.

These are the general principles that govern the duty of the Crown to make disclosure to the defence. There are many details with respect to their application that remain to be worked out in the context of concrete situations. It would be neither possible nor appropriate to attempt to lay down precise rules here.

Although the basic principles of disclosure will apply across the country, the details may vary from province to province and even within a province by reason of special local conditions and practices. It would, therefore, be useful if the under-utilized power conferred by s. 482 of the *Criminal Code* which empowers superior courts and courts of criminal jurisdiction to enact rules were employed to provide further details with respect to the procedural aspects of disclosure.

The general principles referred to herein arise in the context of indictable offences. While it may be argued that the duty of disclosure extends to all offences, many of the factors which I have canvassed may not apply at all or may apply with less impact in summary conviction offences. Moreover, the content of the right to make full answer and defence entrenched in s. 7 of the *Charter* may be of a more limited nature. A decision as to the extent to which the general principles of disclosure extend to summary conviction offences should be left to a case in which the issue arises in such proceedings. In view of the number and variety of statutes which create such offences, consideration would have to be given as to where to draw the line. Pending a decision on that issue, the voluntary disclosure which has been taking place through the co-operation of Crown counsel will no doubt continue. Continuation and extension of this practice may eliminate the necessity for a decision on the issue by this Court.

There are, however, two additional matters which require further elaboration of the general principles of disclosure outlined above. They are: (1) the timing of disclosure, and (2) what should be disclosed. Some detail with respect to these issues is essential if the duty to disclose is to be meaningful. Moreover, with

respect to the second matter, resolution of the dispute over disclosure in this case requires a closer examination of the issue.

With respect to timing, I agree with the recommendation of the Law Reform Commission of Canada in both of its reports that initial disclosure should occur before the accused is called upon to elect the mode of trial or to plead. These are crucial steps which the accused must take which affect his or her rights in a fundamental way. It will be of great assistance to the accused to know what are the strengths and weaknesses of the Crown's case before committing on these issues. As I have pointed out above, the system will also profit from early disclosure as it will foster the resolution of many charges without trial, through increased numbers of withdrawals and pleas of guilty. The obligation to disclose will be triggered by a request by or on behalf of the accused. Such a request may be made at any time after the charge. Provided the request for disclosure has been timely, it should be complied with so as to enable the accused sufficient time before election or plea to consider the information. In the rare cases in which the accused is unrepresented, Crown counsel should advise the accused of the right to disclosure and a plea should not be taken unless the trial judge is satisfied that this has been done. At this stage, the Crown's brief will often not be complete and disclosure will be limited by this fact. Nevertheless, the obligation to disclose is a continuing one and disclosure must be completed when additional information is received.

With respect to what should be disclosed, the general principle to which I have referred is that all relevant information must be disclosed subject to the reviewable discretion of the Crown. The material must include not only that which

the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence. The attempt to make this distinction in connection with the confession rule proved to be unworkable and was eventually discarded by this Court. See *Piché v. The Queen*, [1971] S.C.R. 23, at p. 36; *Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 645. To re-introduce the distinction here would lead to interminable controversy at trial that should be avoided. The Crown must, therefore, disclose relevant material whether it is inculpatory or exculpatory.

A special problem arises in respect to witness statements and is specifically raised in this case. There is virtually no disagreement that statements in the possession of the Crown obtained from witnesses it proposes to call should be produced. In some cases the statement will simply be recorded in notes taken by an investigator, usually a police officer. The notes or copies should be produced. If notes do not exist then a "will say" statement, summarizing the anticipated evidence of the witness, should be produced based on the information in the Crown's possession. A more difficult issue is posed with respect to witnesses and other persons whom the Crown does not propose to call. In its 1974 Working Paper, the Law Reform Commission of Canada recommended disclosure of not only the names, addresses and occupations of all "persons who have provided information to investigation or prosecution authorities" (p. 41), but the statements obtained or, if these did not exist, "a summary of the information provided by those persons not intended to be called at trial, along with a statement of the manner in which the information in each summary has been obtained..." (p. 41). In its 1984 Report, the Commission seemed to have changed its mind. It stated (at pp. 27-28):

> With respect to potential witnesses we do not recommend, on a mandatory basis, the type of thorough disclosure that we recommend with respect to proposed witnesses. Complete disclosure would entail not only the identification of such persons, but the disclosure of any statement they made and in some cases their criminal records. In our view a recommendation to this effect would be excessive and disproportionate to the needs of the defence. In many instances these people are of no use, or of marginal use, to the case for either side. Their statements are not evidence, although they may be effectively used by the prosecution for purposes of impeachment in cross-examination in the event the witness is called by the accused. Prosecutors are understandably reluctant to disclose these statements because to do so would imperil their principal utility. It is our view that the interests of the defence are adequately served by the mandatory disclosure of the identity of such persons, although we would not wish our comments to discourage prosecutors from disclosing statements and other relevant information on a voluntary basis.

The Marshall Commission Report recommended disclosure of "any statement made by a person whom the prosecutor proposes to call as a witness or anyone who may be called as a witness". Although not entirely clear, this recommendation appears to extend to anyone who has relevant information and who is either compellable or prepared to testify whether proposed to be called by the Crown or not.

This Court, in *R. v. C. (M.H.)*, *supra*, dealt with the failure to disclose either the identity or statement of a person who provided relevant information to the police but who was not called as a witness. McLachlin J., speaking for the Court, indicated that failure to disclose in such cases could impair the fairness of the trial.

I am of the opinion that, subject to the discretion to which I have referred above, all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as

Crown witnesses. Where statements are not in existence, other information such as notes should be produced, and, if there are no notes, then in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give should be supplied. I do not find the comments of the Commission in its 1984 Report persuasive. If the information is of no use then presumably it is irrelevant and will be excluded in the exercise of the discretion of the Crown. If the information is of some use then it is relevant and the determination as to whether it is sufficiently useful to put into evidence should be made by the defence and not the prosecutor. Moreover, I do not understand the Commission's statement that "[t]heir statements are not evidence". That is true of all witness statements. They themselves are not evidence but are produced not because they will be put in evidence in that form but will enable the evidence to be called *viva voce*. That prosecutors are reluctant to disclose statements because use of them in cross-examination is thereby rendered less effective is understandable. That is an objection to all forms of discovery and disclosure. Tactical advantage must be sacrificed in the interests of fairness and the ascertainment of the true facts of the case.

3. Application to This Case

No request was made in this case for disclosure prior to pleading or electing the mode of trial and this issue does not, therefore, arise. A request for disclosure was made during the trial for the disclosure of two statements taken subsequent to the preliminary hearing. An application for disclosure was dismissed

by the trial judge on the ground that there was no obligation on the Crown to disclose the statements.

Applying the above principles, I conclude that the following errors were committed:

(1) Counsel for the Crown misconceived his obligation to disclose the statements;

(2) The explanation for refusal that the witness was not worthy of credit was completely inadequate to support the exercise of this discretion on the ground of irrelevance. Whether the witness is credible is for the trial judge to determine after hearing the evidence;

(3) The trial judge ought to have examined the statements. The suggestion that this would have prejudiced the trial judge is without merit. Trial judges are frequently apprised of evidence which is ruled inadmissible. One example is a confession that fails to meet the test of voluntariness. No one would suggest that knowledge of such evidence prejudices the trial judge. We operate on the principle that a judge trained to screen out inadmissible evidence will disabuse himself or herself of such evidence;

(4) The trial judge erred in his statement of the duty to disclose on the part of the Crown.

It was submitted that the appellant was not deprived of the opportunity to make full answer and defence because he could have:

(a) interviewed the witness and obtained his own statement;

(b) called the witness, and if her evidence proved adverse, cross-examined on the basis of the preliminary hearing transcript.

With respect to (a), counsel for the appellant pointed out that the witness refused to be interviewed. In any event, even if such an interview took place, what the witness said on two prior occasions could be very material to the defence.

As for (b), counsel for the defence is entitled to know whether the witness he/she is calling will give evidence that will assist the defence or whether the witness will be adverse and necessitate an application to cross-examine on the basis of a prior inconsistent statement. The latter usually creates an undesirable atmosphere at the trial and the most that can be achieved is to impeach or destroy the credibility of the witness. See *McInroy v. The Queen*, [1979] 1 S.C.R. 588, and *R. v. Mannion*, [1986] 2 S.C.R. 272, at pp. 277-78. Most counsel faced with this prospect would likely opt not to call the witness, a matter which bears on the right to make full answer and defence.

What are the legal consequences flowing from the failure to disclose? In my opinion, when a court of appeal is called upon to review a failure to disclose, it must consider whether such failure impaired the right to make full answer and

defence. This in turn depends on the nature of the information withheld and whether it might have affected the outcome. As McLachlin J. put it in *R. v. C. (M.H.)*, *supra*, at. p. 776:

> Had counsel for the appellant been aware of this statement, he might well have decided to use it in support of the defence that the evidence of the complainant was a fabrication. In my view, that evidence could conceivably have affected the jury's conclusions on the only real issue, the respective credibility of the complainant and the appellant.

In this case, we are told that the witness gave evidence at the preliminary hearing favourable to the defence. The subsequent statements were not produced and therefore we have no indication from the trial judge as to whether they were favourable or unfavourable. Examination of the statements, which were tendered as fresh evidence in this Court, should be carried out at trial so that counsel for the defence, in the context of the issues in the case and the other evidence, can explain what use might be made of them by the defence. In the circumstances, we must assume that non-production of the statements was an important factor in the decision not to call the witness. The absence of this evidence might very well have affected the outcome.

Accordingly, I would allow the appeal and direct a new trial at which the statements should be produced.

Appeal allowed.

Solicitors for the appellant: Code Hunter, Calgary.

Solicitor for the respondent: The Attorney General for Alberta, Calgary.