ADVOCACY CONFERENCE 2001

*EMERGENT DISCLOSURE ISSUES**

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TABLE OF CONTENTS

I. BASIC PRINCIPLES OF DISCLOSURE 1

A. Relevance 2

B. Privilege as a Limitation 3

C. Timeliness 3

II. CENTRALITY OF THE INVESTIGATIVE FILE 5

A. Importance of the Administrative File in Complex Prosecutions 6

B. Police Notes 7

C. Witness Statements 8

III. PRIVILEGE "CLAIMS": THEIR MANY VARIANTS 9

A. "Work-Product" Privilege 9

B. Solicitor-Client Privilege 10

C. Informer Privilege 16

D. Expert Opinions 17

E. Public Interest Immunity – Section 37 of the *Canada Evidence Act* 18

F. National Security – Section 38 of the *Canada Evidence Act* 20

G. Cabinet Confidentiality – Section 39 of the *Canada Evidence Act* 20

IV. OTHER CURRENT ISSUES 22

A. Records of Other Law Enforcement Agencies 22

B. Jailhouse Informants 23

C. Crown Witnesses Receiving "State Benefits" 25

D. Electronic Disclosure 27

V. CONCLUSION 29

EMERGENT DISCLOSURE ISSUES[*]

I. BASIC PRINCIPLES OF DISCLOSURE

First principles of disclosure for the purpose of contemporary criminal proceedings in Canada can be found in the case of *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.). In this decision, Mr. Justice Sopinka emphatically dispelled any notion that the Crown is not categorically obliged to disclose *all* relevant information to defence counsel or accused persons: *Stinchcombe*, *supra*, at 7. For Mr. Justice Sopinka, an accused person is entitled to such information as a matter of constitutional right: *Stinchcombe*, *supra*, at 9. His Lordship also emphasized that "the fruits of the investigation which are in the possession of counsel for the Crown...are the property of the public to ensure that justice is done": *Stinchcombe*, *supra*, at 7. Subject to the applicability of an established rule of privilege, unless the information in question is "clearly irrelevant", it must therefore be disclosed: *Stinchcombe*, *supra*, at 11; see also *R. v. Girimonte* (1998), 121 C.C.C. (3d) 33 (Ont. C.A.) at 41-42. Indeed, Mr. Justice Sopinka made plain that, once it has decided that information is relevant to the prosecution at hand, the Crown has no discretion in the matter except as to "the timing and manner of disclosure": *Stinchcombe*, *supra*, at 11. So, for example, the Crown may elect to delay disclosure of the identity of a police informant or whereabouts of a material witness whose safety could be jeopardized by early disclosure of such information.

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A. Relevance

Mr. Justice Sopinka also articulated a broad, working principle for determining whether information held by the Crown is sufficiently "relevant" for disclosure purposes. The guiding principle is that "information out 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": *Stinchcombe*, *supra*, at 12. Implicit in this formulation of the rule is that any evidence which is favourable to the defence is categorically relevant, so relevance must be determined in relation to the use of evidence by the defence: *Stinchcombe*, *supra*, at 12; *R. v. Chaplin* (1995), 96 C.C.C. (3d) 225 (S.C.C.) at 233. Mr. Justice Doherty of the Ontario Court of Appeal explained that, according to the terms of *Stinchcombe* and its progeny, an accused person's right to make full answer and defence "encompasses the right to meet the case presented by the prosecution, advance a case for the defence, and make informed decisions on procedural and other matters which affect the conduct of the defence": *Girimonte*, *supra,* at 41-42. In its most succinct formulation, "Relevance means that there is a reasonable possibility of being useful to the accused in making full answer and defence": *Chaplin*, *supra*, at 236.

Relevance is obviously related to the scope and substance of the proceedings against the accused. In *R. v. Castro*, 2001 BCCA 507, the British Columbia Court of Appeal considered a situation in which the accused had sought, and been denied, disclosure to support an abuse of process argument. The genesis of the abuse of process was an illegal police undercover operation. Although the investigation of the accused was only

derivative of the police illegality, the court found at para. 26 that if "the illegal police activity is directed at the class of persons ultimately charged, then the reason for staying proceedings in order to discourage such activity is no less compelling than if the transactions were made directly with the accused." The court ruled, at para. 28, "that there is a sufficiently close link between the illegal operation and these prosecutions to found an argument for a stay and that the appellants are entitled to have the legal opinions considered in the disposition of their claim."

B. Privilege as a Limitation

Even when a recognized privilege applies to certain information that is relevant to criminal proceedings, that privilege can be curtailed if its application will unconstitutionally restrict an accused person's right to make full answer and defence: *Stinchcombe*, *supra*, at 12. This paper will discuss, *infra*, how at least two very well-established privileges, that of informer privilege and solicitor-client privilege, have been curtailed in some situations, in order to ensure that an accused person be able to make full answer and defence.

C. Timeliness

Mr. Justice Sopinka proposed that, in general, disclosure be timely, and specifically, that "initial disclosure should occur before the accused is called upon to elect the mode of trial or to plead": *Stinchcombe*, *supra*, at 14. Timely disclosure enables accused persons or defence counsel to make intelligent decisions about the strength of the Crown's case, and in this sense, enables the proper exercise of the accused person's right to make full

and answer and defence. Mr. Justice Sopinka emphasized that the Crown's disclosure obligation is ongoing and that, when triggered by requests from defence counsel, it must be fulfilled in a timely way: *Stinchcombe*, *supra*, at 14. The Supreme Court of Canada has since urged that the Crown should disclose information that is relevant and necessary for the accused to make any decision which may affect his or her right to make full answer and defence: *R. v. Egger* (1993) 82 C.C.C. (3d) 193 (S.C.C.) at 204.

Just as Crown counsel has a duty to provide full disclosure in a timely manner, defence counsel has a duty to 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": *Stinchcombe*, *supra*, at 12. Very recently the Nova Scotia Court of Appeal took into account the inexplicable failure of an accused person and his defence counsel to request potentially relevant disclosure in a timely fashion, as part of its reasons for concluding that the accused person was not treated unfairly, even though he did not receive potentially relevant disclosure: see *R. v. Innocente (D.J.)* (2000), 185 N.S.R. (2d) 1 (N.S.C.A.), discussed below in the context of informer privilege.

The basic requirement that disclosure be timely is particularly important where an accused person or a suspect in a criminal investigation purports to have an alibi. An accused person who claims to have an alibi must give timely enough notice and sufficient particularity about the alibi to investigative authorities, to enable them to make meaningful inquiries regarding the alibi before the trial commences: *R. v. Cleghorn* (1995), 100 C.C.C. (3d) 393 (S.C.C.) at 396-97. If an accused person fails to disclose an

alibi properly, he or she risks having an adverse drawn against him or her by the trier of fact: *Russell v. The King* (1936), 67 C.C.C. 28 at 32; *Cleghorn*, *supra.*

II. CENTRALITY OF THE INVESTIGATIVE FILE

The Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions interprets the broad disclosure duty discussed in *Stinchcombe*, *supra*, as imposing a duty on the Crown to disclose any relevant information "uncovered by the prosecution during the course of investigating a criminal offence": The Honourable G. Arthur Martin, *The Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Ontario Ministry of the Attorney General, 1993), p.140 (hereinafter the "Martin Committee Report"). The Martin Committee Report concluded at pp.249-250 that

> Subject to Crown counsel's discretion as to relevance, which is reviewable by the trial judge, counsel on behalf of the accused or an unrepresented accused may, upon request, inspect the investigative agency's file in relation to the offence....The investigative agency will usually be the police but may, for example, be a person or persons acting on behalf of the relevant department of government. Many governmental departments or other agencies perform both routine and regulatory functions, and investigative and prosecutorial functions, where necessary....During a complex or unusually large investigation, relevant material uncovered should be sent to or collected at a central location where it constitutes the investigative agency's file. This practice may be particularly important in ensuring that nothing is overlooked for the benefit of either the Crown or the defence in a prosecution.

This distinctively broad imperative is rooted ethically in the fact that a Crown prosecutor acts as an agent for the Minister of Justice and in this respect has an overarching duty, not to a particular client, but to *justice* itself: *Stinchcombe*, *supra*, at 7.

A. Importance of the Administrative File in Complex Prosecutions

Since *Stinchcombe*, it has become more routine among dutiful Crown prosecutors to disclose *all* relevant aspects of the enforcement agency investigative files to defence counsel, including the administrative components associated with complex investigations, subject, of course, to established privileges and other meritorious policy considerations. Indeed, just after *Stinchcombe* was decided, Crown counsel objected to the disclosure of a probative conversation between police and the prosecution regarding a reverse-sting operation: see *R. v. Gray* (1992), 74 C.C.C. (3d) 267 (B.C.S.C.). The Crown argued that the conversation was immune from disclosure by solicitor-client privilege, but Mr. Justice Oppal ordered the release of the undercover operational plan as being necessary for the accused person to make full answer and defence. In effect, *Gray* established the basic materiality of operational plans to prosecutions involving undercover or covert investigative tactics. A few years later, after the publication of the Martin Committee Report, Justice Zilinski wrote in regard to contentious discussions between a police officer and a "head Crown" in Brampton, Ontario:

> On the basis of experience and anecdotal discussion, many of the most responsible, experienced and knowledgeable Crown attorneys have a reputation as always being prepared to "open up their entire file" to defence counsel....It is my belief that Crowns who follow some form of the above practices do so appropriately, on the

> basis of their perception of the functions of their office, and that they are not concerned with the concepts of real or implied waiver: *R. v. Nesbeth*, [1996] O.J. 4710 at pp.47-48.

In British Columbia, Provincial Court Justice Baird Ellan (as she was then) ordered the disclosure of correspondence, opinions and memoranda in the possession of the Criminal Justice Branch of the Ministry of the Attorney General, which consisted largely of legal opinions and requests for advice relating to a decision to prosecute persons for selling foreign lottery tickets: see transcripts of disclosure ruling in *R. v. Stromberg et al.* (11 February 1997), Vancouver Registry No. 04417DC (B.C. Prov. Ct.). Her Honour found that some evidence existed that the information requested was potentially relevant to a defence or excuse of officially induced error, or an argument that the decision to prosecute the accused persons in the circumstances was an improper exercise of prosecutorial discretion.

B. Police Notes

The Martin Committee Report explains that a police officer, acting diligently and fairly, is expected to pursue all investigative leads, including those that prove to be favourable to a suspect: Martin Committee Report, p.150. "Full" disclosure therefore requires that exculpatory information acquired at this stage be presented to the defence, subject to established privilege rules and policy considerations: *ibid.*

Mr. Justice Martin observed that

> The notes of an investigator are often the most immediate source of the evidence relevant to the commission of a

> crime. The notes may be closest to what the witness actually saw or experienced. As the earliest record created, they may be the most accurate. Thus, they may be the most important material in the investigative file for both the prosecution and the defence: Martin Committee Report, p.152.

Accordingly, the Martin Committee recommended that "an investigator's notes fall well within the compass of what must be disclosed," within the terms of *Stinchcombe*: Martin Committee Report, pp.151-52. Indeed, Mr. Justice Sopinka made clear in *Stinchcombe* that the kind of relevant information the Crown is obliged to disclose is not limited to evidence or information that is useful to the Crown: *Stinchcombe, supra,* at 16. The defence should be entitled to know at what point and why, even if early on in an investigation, a police officer stopped pursuing a particular lead. If, for example, a suspect presented an alibi and the investigating officer believed it, counsel for an accused person should be able to know who supported the alibi, and to make reasonable inquiries into the credibility of those persons and the person who proffered the alibi.

C. Witness Statements

It is well-accepted that witness statements taken in the course of a police investigation must be disclosed to defence counsel, even if only of "marginal value" to the defence: *R. v. Dixon* (1993), 122 C.C.C. (3d) 1 (S.C.C.) at 15. If the statements are contained or reflected in the notes of police officers, then copies of such notes should be produced: *Stinchcombe*, supra, p.14. Notes taken by Crown counsel in the course of interviewing witnesses are not necessarily in this same category.

III. PRIVILEGE "CLAIMS": THEIR MANY VARIANTS

A. "Work-Product" Privilege

The Crown can ordinarily claim "work product" privilege in relation to notes that it takes during or after witness interviews, as long as the purpose of the interviews themselves is not investigatory: *R. v. Regan* [Disclosure Application], [1997] N.S.J. No. 428 (S.C.) at para. 37. Notes taken in relation to fact-finding or investigatory interviews should be disclosed and indeed, where the information revealed in the course of the interview contains material inconsistencies or facts in addition to information already held by defence counsel, no work product privilege attaches to the new information: see *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.) at 45; *R. v. DeRose*, [2000] A.J. No. 566 (Alta. Prov. Ct.) at para. 80.

Even in certain cases where Crown notes of witness interviews are not taken for investigative purposes, some form of record of the interview might be required for defence to make full answer and defence. If, for example, Crown notes are taken simply to help guide a witness through examination-in-chief, "will-say" statements containing any different or novel information disclosed to counsel during the pre-trial interview will suffice: *R. v. Johal*, [1995] B.C.J. No 1271 (B.C.S.C.). The Martin Committee recommended that Crown counsel arrange to have a police officer present during interviews with Crown witnesses, so that the officer can disclose any new information that comes to light, and testify in the same regard if necessary: Martin Committee Report, p.253.

Generally the work product privilege is designed to protect against disclosure of counsel's *opinions* about the case at hand, and does not apply to relevant *factual* information that a witness provides. The Martin Committee Report has observed, therefore, that "a comment [by Crown counsel] that a proposed witness is truthful would be an expression of opinion, and would be exempt from disclosure": Martin Committee Report, p.252. Where other kinds of Crown opinions or beliefs are concerned, the applicability of the work product privilege becomes less clear-cut.

B. Solicitor-Client Privilege

Whether or not solicitor-client privilege attaches to communications between federal or provincial prosecutors and investigating officers or witnesses involved in a particular prosecution depends on the nature of the relationship between the individuals involved, the subject matter of the advice, and the circumstances in which the advice is sought and rendered: *R. v. Campbell and Shirose*, [1999] 1 S.C.R. 565, 133 C.C.C. (3d) 257 at 289; *R. v. DeRose*, [2000] A. J. No. 566 (Alta. Prov. Ct.) at para. 42.

The general rule that legal opinions and advice given in a professional capacity by Crown counsel are immune from disclosure as a matter of "solicitor-client" privilege has been qualified recently, in order to accommodate certain legal and evidentiary problems posed by undercover operations, in particular the so-called "reverse sting" operations. Where, for example, the very legality of a pre-*Controlled Drugs and Substances Act*, "reverse sting" operation is in question, Crown counsel can avoid having the proceedings against the accused person stayed, possibly as a matter of abuse of process, by showing that the

relevant undercover officers acted in good faith. One way of demonstrating the good faith of the police officers in question is to show that these officers acted in accordance with legal advice they obtained from Crown counsel. Legal advice that investigating officers obtain from Crown counsel can attract solicitor-client privilege: *Campbell and Shirose*, *supra*. However, when Crown counsel makes the "good faith" of its undercover and other investigating officers part and parcel of its argument against having proceedings stayed, then the solicitor-client privilege attached to the relevant communications is thereby waived: *Campbell and Shirose*, *supra*.

"Waiver" of solicitor-client and other such privileges in the criminal context must be voluntary. Significantly, waiver can occur testimonially or positionally: *Campbell and Shirose*, *supra*. It does not occur, for example, simply because a witness is forced to reveal the substance of privileged communications in response to cross-examination: see *R. v. Creswell*, 2000 BCCA 583 at para. 42. Similarly, in a civil context, waiver does not arise just because a witness is forced to reveal confidential communications in the course of being cross-examined on his or her affidavit: *Gower v. Tolko Manitoba Inc.*, [2001] M.J. No. 39 (Man. C.A.) at para. 42.

As mentioned in the introductory discussion of *Stinchcombe*, solicitor-client privilege must give way if the withholding of relevant communications between lawyer and client will impair an accused person's right to make full answer and defence. This rule applies to the very kind of Crown advice to police that was at issue in *Campbell and Shirose*, and has been construed as dictating that solicitor-client privilege, like informer-privilege,

must yield where withholding relevant, privileged communications places an accused person's innocence at stake: *Creswell*, *supra*, at paras.47 and 52; *R. v. Scott*, [1990] 3 S.C.R. 979. The notion of "innocence at stake" has been interpreted broadly to refer to 'legal' innocence arising from a breach of s.8 of the *Charter*, or police illegality constituting an abuse of process, as well as classic 'factual' innocence: see *Creswell*, *supra*, at para. 51.

Having considered *Campbell and Shirose*, and *Creswell*, Mr. Justice Burrows of the Alberta Court of Queen's Bench recently decided that he should review a legal opinion prepared by a Crown prosecutor as to whether perjury charges should be laid in relation to two Crown witnesses in the trial of the accused person: see *R. v. Tonner*, [2001] A.J. No. 60. For Mr. Justice Burrows, the otherwise privileged communications possibly had a bearing on Mr. Tonner's innocence. His Lordship explained that,

> The accused's innocence is considered to be at stake in both the context of the trial itself and in the context of any application the accused might make for a Charter stay, such as one alleging abuse of process by the Crown, at least where that application is made before the determination of the issue of guilt or innocence.
>
> As to whether the content of the opinion is potentially relevant in this case, [defence counsel] submitted that it would certainly be relevant to the issue of the credibility of the two important witnesses if they had been convicted of perjury. If the opinion concluded that perjury charges should be brought (though they have not been), or if it recommended waiting until they have given their evidence at Mr. Tonner's new trial before charges are brought against them, or if charging them was determined to be precluded by previous arrangements made with them, it would be significant to Mr. Tonner's defence.... Alternatively such information might raise questions as to the manner in which the prosecution has been handled to be

> tested in the context of a Charter application: Tonner, *ibid.* at paras. 17 and 18.

In another recent Alberta case, Mr. Justice Watson was asked to order that Crown counsel provide the accused person with full and complete disclosure of a police officer's notes pertaining to the termination of an undercover agent almost two years after the investigation into the offence at bar: *R. v. Song*, [2001] A. J. No. 1056 (Alta. Q. B.). These notes were described by Crown counsel as being "in the nature of police practices and internal operational policies", and that the decision (presumably relating to the undercover agent's dismissal) was made "at the upper managerial levels of both the Department of Justice and the Edmonton Police Service": *Song*, *supra*, at para. 22. Justice Watson ruled ultimately that he did not have jurisdiction to make the order, because the application was made to him based on developments at a preliminary inquiry. In his analysis of the substantive issue, however, he implied that information surrounding the agent's subsequent termination might reveal that the agent's "conduct in this particular investigation was in some manner corrupt or incompetent or 'entrapping'": *Song*, *supra*, at para. 42. Moreover, he reasoned at paras. 50 and 51 that

> the Crown possession of information about Agent 909 which could be obtained by questioning Agent 909 seems to me to be somewhat analogous to the Crown possession of information touching on the credibility of complainant in the judgment of Sopinka J. and Lamer C.J.C. in O'Connor. The question posed for the Applicant here is: if the Crown has it, should not the Defence have it?
>
> It would appear that the Crown has some information which it concedes is at least marginally relevant to the credibility of Agent 909, even if on a collateral basis. The Defence wants to have it also. A rule of evidence about the

> information being also collateral would not, by itself, be a bar to Crown disclosure of apparently relevant evidence.

Information of the type sought in *Song*, related to the management of a police civilian agent, and the misdeeds of same, has been voluntarily disclosed in an ongoing proceeding in the Supreme Court of British Columbia, albeit subject to a publication ban.

In British Columbia the Department of Justice has recently sought to curtail the reach of the "innocence at stake" principle articulated by the British Columbia Court of Appeal in *Creswell*, *supra*, in light of the Supreme Court of Canada's decision in *R. v. McClure*, [2001] 1 S.C.R. 445: see *Castro*, *supra*. In *McClure*, Mr. Justice Major affirmed, at para. 48, "the central place of solicitor-client privilege within the administration of justice" and urged, accordingly, that the innocence at stake test be "stringent", such that the privilege is infringed "only where core issues going to the guilt of the accused are involved and there is a genuine risk of wrongful conviction". Mr. Justice Major also maintained that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis": *McClure*, *supra*, at para. 35.

Mr. Justice Major expressly asked whether solicitor-client privilege or an accused person's right to make full answer and defence should prevail when the two interests "clash", but in answering the question did not address the *Campbell and Shirose*, and *Creswell*, line of cases: *McClure*, *supra*, at para.38. The specific disclosure problem in

McClure involved a request made in the course of criminal proceedings for records pertaining to a civil suit. In *Castro*, *supra*, the British Columbia Court of Appeal considered the impact of *McClure* on the ratio of *Creswell* and found that the two cases did not conflict in principle: *Castro*, *supra*, at para. 38. For the court, Mr. Justice Donald reasoned at para. 38 that *McClure* was not addressed to the issue of when communications that would otherwise be privileged as solicitor-client should be disclosed in the context of a stay of proceedings application, which was the issue in *Castro*. *McClure* simply ruled that "the proper test for determining whether to set aside solicitor-client privilege is "innocence at stake", not *O'Connor*. Accordingly, in British Columbia, "*Creswell* remains good law and should be followed": *Castro*, *supra*, at para. 38.

Of course the underlying facts and specific issues in question in any proceeding remain paramount. In a recent undercover case from Alberta, *McClure* was applied as authority in part for denying defence counsel requests for disclosure of a variety of communications and memos from the Crown prosecutor to file and to other persons, including investigating officers: *R. v. Mah*, [2001] A. J. No. 516 (Alta. Q. B.), at paras. 52 and 53. Having reviewed the memoranda and communications in question, and having listened to argument on point, Justice Sulyma did not find on the evidence that the communications supported defence counsels' claim that Crown counsel was purposefully obfuscating disclosure and attempting to prejudice the accused persons' ability to prepare for their defence. It is perhaps noteworthy that Justice Sulyma did not consider *Campbell and Shirose*, *supra*, or *Creswell*, *supra*.

All of the above occurs in the context of a series of mid-1990s British Columbia Court of Appeal decisions that held that the disclosure of legal advice given by Department of Justice lawyers to RCMP and Revenue Canada investigators must be disclosed in order to ensure that an accused person's right to make full answer and defence is not unduly impaired, even though such communications would otherwise be protected by solicitor-client privilege: *R. v. Gray* (1993), 79 C.C.C. (3d) 332 (B.C.C.A.), leave to appeal to S.C.C. refused, 83 C.C.C. (3d) vi; *Canada (Attorney-General) v. Sander* (1994), 90 C.C.C. (3d) 41 (B.C.C.A.).

C. Informer Privilege

Police informer privilege is well established but is not absolute: *R.v. Scott*, [1990] 3 S.C.R. 979 at 995, 61 C.C.C. (3d) 300. Like solicitor-client privilege, informer privilege must yield where its application will interfere with an accused person's right to make full answer and defence: *Scott*, *supra*, at 995-96. Informer privilege must give way where the non-disclosure of an informer's identity will put an accused person's innocence at stake: *R. v. Liepert*, [1997] 1 S.C.R. 281. Different situations in which Canadian courts have found an accused person's innocence to be at stake have been discussed above, in the context of solicitor-client privilege. Before an accused person can acquire knowledge of an informer's identity, on the basis of "innocence at stake", he or she must first show some basis for claiming that, without such disclosure, his or her innocence is at stake: *Liepert, ibid.* at para. 33.

Where an informer is a material witness or the only material witness against the accused person, the identity of that informer must be revealed: *R. v. Davies* (1982), 1 C.C.C. (3d) 299 (Ont. C.A.); *Scott*, *supra* at 995-96. The identity of an informer must also be revealed where he or she is an agent provocateur, or where the accused person intends to rely upon the defence of entrapment: *Scott*, *supra*, at 995-96. Just as the defence of entrapment is a policy matter, which examines whether the police conduct amounted to an abuse of process, a supportable allegation that the Crown has abused the process of prosecution by treating the accused person unfairly, should suffice to obtain disclosure of an informant's identity: *Creswell*, *supra*, at paras. 49–51.

The informer privilege might also yield in situations where the accused person alleges that police have not conducted their investigation in a constitutionally proper manner: *Scott*, *supra* at 996.

D. Expert Opinions

As a general rule relevant expert reports prepared for Crown counsel, for the purposes of criminal proceedings, must be disclosed to defence counsel, but reports prepared by defence experts normally attract privilege. If either Crown or defence counsel receives advice from an expert that merely enhances that counsel's ability to examine or cross-examine another witness effectively, then such advice is properly related to trial strategy considerations, and need not be disclosed: Martin Report Committee, p.253.

Defence counsel can waive the privilege associated with its own expert report merely by tendering the expert at trial: *R. v. Stone* (1999), 134 C.C.C. (3d) 353 (S.C.C.) at 403. At this point the expert is "offering an opinion for the assistance of the court" and Crown counsel is entitled to have access to the foundation for the opinion in order to test it adequately: *Stone*, *supra*, at 403. Moreover, if defence counsel discloses some favourable portion of his expert's opinion in the course of the trial, then the balance of the foundational expert report must be disclosed to Crown, as it could contract or place in context the portion that has been disclosed: *Stone*, *supra*, at 402.

If Clause 72 of Bill C-15, entitled "Criminal Law Amendment Act", becomes law, both Crown counsel and defence counsel will have to give advance notice of any expert testimony they propose to offer at trial. The notice must be accompanied by a copy of the report prepared by the witness or, where such a report has not been prepared, a summary of the opinion to be given by the witness. If a proposed defence expert does not ultimately testify at trial, his or her report or summary will be inadmissible as evidence, unless the accused consents.

E. Public Interest Immunity – Section 37 of the *Canada Evidence Act*

The "public interest" immunity from disclosure afforded by s.37 of the *Canada Evidence Act* is concerned with "content" claims related to certain classes of documents. In a criminal case, an accused person's right to make full answer and defence is at the heart of the question whether the public interest in disclosure of relevant information must prevail over another specified public interest bearing on the proper functioning of government:

Canada (Attorney-General) v. Sander (1994), 90 C.C.C. (3d) 41 (B.C.C.A.) at 46. The proper functioning of government can include a public interest in maintaining the confidentiality of discussions between government lawyers and those government officials who they advise: *Sander*, *supra*, at 48. It can also include a public interest in maintaining the confidentiality of communications between police and their legal advisors: *R. v. Gray* (1993), 79 C.C.C. (3d) 332 (B.C.C.A.).

In order for a public interest immunity claim to succeed, the government party claiming the immunity must be able to identify the specific public interest at stake: *Carey v. Ontario et al.* (1986), 30 C.C.C. (3d) 498 (S.C.C.); *R. v. Meuckon* (1990), 57 C.C.C. (3d) 193 (B.C.C.A.).

Communications between servants of different government departments who are in a solicitor-client relationship, can be subject to public interest immunity within the terms of s.37 of the *Canada Evidence Act*, whether or not they attract solicitor-client privilege: *Canada (Attorney-General) v. Sander* (1994), 90 C.C.C. (3d) 41 (B.C.C.A.) at 50.

Public interest immunity can be waived: *Leeds v. Alberta (Minister of the Environment)* (1990), 69 D.L.R. (4th) 681 (Alta. Q.B.); *Babcock v. Canada (Attorney General)* (2000), 76 B.C.L.R. (3d) 35 (B.C.C.A.) at 44. Public interest immunity can be waived even when an interested non-party to the litigation, such as an intervenor, has done nothing that amounts to waiver and asserts the immunity: *P. J. v. Canada (Attorney General),* [2000] B.C.J. No. 2729 (B.C.S.C.) at para. 44.

F. National Security – Section 38 of the *Canada Evidence Act*

The Chief Justice of the Federal Court has discretion to review documents for which immunity from disclosure is claimed in the interest of national security, and in exercising his or her discretion the Chief Justice will balance competing public interests: *R. v. Goguen*, [1983] 2 F.C. 463, 10 C.C.C. (3d) 492 (C.A.). If an accused person can persuade the court that disclosure of the evidence in question is critical , in the sense that he or she will probably not be able to make full answer without the evidence, then that accused person may be entitled to a stay of proceedings at a criminal prosecution that relies on the evidence: *R. v. Kevork*, [1984] 2 F. C. 753, 17 C.C.C. (3d) 426 (T.D.); *R. v. Kevork* (1986), 27 C.C.C. (3d) 523 (Ont. H.C.). Upon hearing a renewed application for the disclosure of intelligence information and communications at issue in the Federal Court in *Kevork*, Mr. Justice Smith of the Ontario High Court of Justice emphasized at p.542 that, as a result of weighing the public interest in national security against that of a fair trial process,

> innocent persons must not be sacrificed at the altar of national security for one could then legitimately wonder about the kind of society an organization such as CSIS was trying to save.

G. Cabinet Confidentiality – Section 39 of the *Canada Evidence Act*

Section 39 of the *Canada Evidence Act* creates a "class" privilege claim and directs the court to refuse disclosure of information certified to be Privy Council confidences: *Babcock v. Canada (Attorney General)* (2000), 76 B.C.L.R. (3d) 35, [2000] B.C.J. No.

1127 (B.C.C.A.) at para. 10. Such confidences are protected without regard to the public interest in disclosing or withholding the information: *Babcock*, *supra*, at para. 10. A Certificate is conclusive evidence that the information subject to the Certificate is a confidence: *Babcock*, *supra*, at para.10.

It is not clear whether a court is powerless to examine the contents of communications that are certified for the purpose of section 39 of the *Canada Evidence Act*. For the majority of the court in *Babcock*, Mackenzie J.A. did not answer the question. His Lordship held, nonetheless, that the view which precludes judicial access to the contents of certified communications is contrary to the desired constitutional relationship whereby the judiciary exists to check executive action: *Babcock*, *supra*, at para.14; see also *Carey v. Ontario*, [1986] 2 S.C.R. 637. In dissent, Madam Justice Southin held that section 39 of the *Canada Evidence Act* appears to be limited to those Cabinet confidences "which [go] before Cabinet and discussions within Cabinet and inter-ministerial communications": *Babcock*, *supra*, at para. 50. It appears, therefore, that the courts may be empowered to review the contents of Certified communications, particularly where the contents of the documents are not adequately particularized on the face of the certification, or where external or internal evidence indicates that the Clerk of the Privy Council has exceeded the power conferred on her: *Babcock*, *supra*, at para. 54. Leave has been granted in *Babcock*, [2000] S.C.C.A. No. 413, no doubt with more to come.

Madam Justice Southin's reasoning with respect to the proper particularization of the contents of certified confidences has since been followed in *Ainsworth Lumber Co. v.*

Canada (Attorney General), [2001] B.C.J. No. 220 (B.C.S.C.). In this case, Tysoe J. ordered the Defendant to provide the Plaintiff with a properly particularized Certificate.

Prior disclosure of documents that cover information which is also the subject of s.39 certification in effect constitutes a sufficient waiver of any claim to immunity from disclosure of all the certified information: *Babcock*, *ibid.* at para. 22. If the government places its "good faith" in issue in a civil suit, for example, by referring to it in a Statement of Defence, then it loses the immunity otherwise provided to those cabinet confidences that are probative of the good faith issue: *Ainsworth Lumber Co.*, *ibid.* at para. 30.

Whether or not the invocation of s.39 of the *Canada Evidence Act* in criminal proceedings is constitutionally sound has not yet been decided: *Babcock*, *ibid.* at para. 61.

IV. OTHER CURRENT ISSUES

A. Records of Other Law Enforcement Agencies

There is no legal obligation on the Crown to disclose material from a foreign state unless authorities from those states choose to turn the material over to Canadian police or Crown: *R. v. Guilbride*, [2001] B.C.J. No. 1998 (B.C. Prov. Ct.) at para. 7. A provincial court judge has no jurisdiction to order anyone in the United States to disclose information to Canadian Crown counsel or the R.C.M.P. about interviews a police informer has had or might have had with American law enforcement officers: *Guilbride*, *supra*, at para. 8.

However, if the "foreign" material is relevant and in possession of the domestic investigative agency it must be disclosed, whether or not provided to the agency subject to a "third party" rule requiring that it not be disclosed without the permission of the "foreign" agency. It would appear that if the foreign agency will not consent to disclosure, the Crown, the RCMP, or the foreign agency itself must give consideration to invoking section 37 or 38 of the *Canada Evidence Act*, as may be, so that the "public interest" in the maintenance of informal police information sharing can be judicially assessed in the context of the public interest in the due administration of justice, including the right of an accused person to a fair trial, in the context of the particular contents of the communications in question and in light of their materiality to the proceedings in which they are sought.

B. Jailhouse Informants

In recognition that in-custody informants typically have a real incentive to fabricate incriminatory evidence against an accused person, some provincial Attorneys-General have developed special policies which impose an affirmative obligation on them and the police to investigate such a proposed Crown witness and to disclose the product of that investigation to the defence before such a witness can be called.

Ontario Crown policy, pre-Morin, provided limited protections against fabricated jailhouse confessions. The *Report of The Commission on Proceedings Involving Guy Paul Morin* criticized these as inadequate: see The Honourable F. Kaufman, *Report of The Commission on Proceedings Involving Guy Paul Morin* (Toronto, Ont: Queen's

Printer for Ontario, 1998), pp.11-12 (hereinafter the "Morin Report"). Recommendation 37 of the Morin Report reads in relevant part:

> The current Crown policy does not adequately articulate the dangers associated with the reception of in-custody informer evidence....The Crown policy should reflect that such evidence has resulted in miscarriages of justice in the past or been shown to be untruthful. Most such informers wish to benefit for their contemplated participation as witnesses for the prosecution....The danger of an unscrupulous witness manufacturing evidence for personal benefit is a significant one.

The Morin Report made a host of recommendations designed to enhance the scrutiny to which in-custody informant evidence is subjected. For example, it recommended that where a Crown prosecutor in Ontario believes that the prosecution *may rely, in part*, on in-custody informer evidence, she should be obliged to bring the matter to the attention of the supervising Director of Crown Operations for approval: Recommendation 40. The Ontario Crown Policy Manual relating to In-Custody Informers already requires that Crown counsel ensure that the background of an informer has been appropriately investigated.

As regards the issue of disclosure of relevant jailhouse informer evidence, the Morin Report specifically proposed (in Recommendation 47) that a variety of information be disclosed. This includes the informer's criminal record (with synopses attached); information pertaining to other cases in which the informer has testified for the Crown; information about offers, promises, inducements, and benefits held out police, corrections authorities, and Crown counsel, to the informant, his associates, or family, in the past; the notes of police officers, corrections officials, or Crown lawyers who participated in

negotiations with the informer; and knowledge of the circumstances under which the informer and his or her information came to the attention of authorities.

All of the abovementioned recommendations have been adopted in the current Ontario Crown Policy Manual regarding In-Custody Informers. In British Columbia, the "Crown Counsel Policy Manual" of the British Columbia Ministry of the Attorney General also makes special provision for in-custody informer witnesses. It mandates, for example, that Crown counsel make a preliminary assessment of the reliability of anticipated evidence of an in-custody informer. Crown counsel is expected to consult police information about an in-custody informer's criminal record, and whether the informer has requested benefits or special treatment. Crown counsel is also expected to consult an informer registry based in Vancouver. However, the British Columbia policy pertaining to in-custody informers does not appear at this point in time to require the affirmative duty to investigate proactively, nor does it explicitly require that the product of the assessment be disclosed to the defence.

C. Crown Witnesses Receiving "State Benefits"

Perhaps one of the most interesting emerging developments relates to whether the standards related to jailhouse informants ought to be adopted in relation to all Crown witnesses who receive "state benefits" of various forms. The Morin Report recommended that Crown counsel should be prepared to apply the special disclosure rules that it established in relation to in-custody informers to other categories of witnesses who raise evidentiary concerns that are similar to, but not identical with, those of in-

custody informants: Recommendation 52. Justice Kaufman reasoned that "a person facing charges, or a person in custody who claims to have observed relevant events or heard an accused confess while both were out of custody, may be no less motivated than an in-custody informer to falsely implicate an accused in return for benefits": Recommendation 52. In a recent conspiracy to traffic narcotics case in Nova Scotia, the principal Crown witness, Mr. Henneberry, was also a named co-conspirator: *Innocente*, *supra*. In exchange for giving Crown evidence in the case, Henneberry had been relocated according to an RCMP Witness Protection Program, and had been paid various amounts by the RCMP, aggregating to $60,000 at the time of trial, with another $10,000 still owing. Moreover, Henneberry was a self-confessed "cheat and liar", and had a criminal record that was so lengthy that he could not remember all of it: *Innocente*, *supra*, at 11, 17.

In the course of being cross-examined, Henneberry elicited that he had previously cooperated with the RCMP in an unrelated murder investigation, and was given $300 cash and a plane ticket for so doing: *Innocente*, *supra*, at 11. On appeal from conviction to the Nova Scotia Court of Appeal, Chipman, J.A., held that, to the extent that Crown counsel had already properly raised the issue of the *Vetrovec* caution at trial, the Crown had a duty in the circumstances "to adduce evidence respecting all the arrangements made by the RCMP with Henneberry, including financial arrangements, as well as his status within the witness relocation program": *Innocente*, *supra*, at 14. Indeed, Chipman, J.A., ruled that evidence of the witness's criminal record and of the financial

arrangements Henneberry had made with the RCMP was relevant to "the Crown's duty of laying a proper foundation for the *Vetrovec* warning": *Innocente*, *supra*, at 14.

It is clear that the analysis of issues associated with the disclosure of data maintained by various state agencies related to Crown witnesses is just beginning to develop. Although Justice Sulyma of the Alberta Court of Queen's Bench recently denied defence counsel requests for the CPIC and PIRS records of police informers, as being too broad and in the nature of a fishing expedition (see *Mah*, *supra*, at para. 38), experienced defence counsel frequently request and are voluntarily given such PIRS information. *Mah* may be contrasted with *Innocente*, where prior to trial the Crown had voluntarily provided the accused person with a CPIC fingerprint criminal record of the key Crown informer witness, and on the day of the trial was ordered to provide an updated CPIC record of the same informer to the accused person: *Innocente*, *supra*, at 15-16. State data related to the prior criminal conduct of Crown witnesses, and evidence related to the receipt of state benefits, either in the form of lucre or liberty, are as obviously relevant to credibility as a "prior" potentially inconsistent statement. If the latter is routinely disclosed, obviously disclosure of the former should not be in issue.

D. Electronic Disclosure

The technological revolution also continues to intersect with the law of disclosure. Whether or not electronic disclosure is permissible within the terms of *Stinchcombe* will depend on the circumstances of each case. Where Crown counsel provides defence counsel with paper copies of the materials that it intends to use at trial, and electronic

copies of other electronic information that the Crown possesses (for example, in CD-ROM format), Crown counsel will not necessarily be obliged to provide defence counsel with paper copies of these other materials: see *R. v. Cazzetta* (Que. Sup. Ct., Crim. Div.), October 26, 1998; and *R. v. Amzallag et al.* (Que. Sup. Ct., Crim. Div.), February 19, 1999.

If an accused person or defence counsel is unable for some reason, such as computer illiteracy or simply technological limitations, to access computerized information, then the Crown may be required to provide paper copies of the information, or the technology and training to enable the accused person to have access to the relevant information: *R. v. Keeshig*, [1999] O. J. No. 1271 (Ont. Ct. (Gen. Div.)). In *R. v. Cheung et al.*, [2000] A. J. No. 704 (Alta. Prov. Ct.), the court ordered the Crown to provide defence with hard copies of documentary data and audiotapes of intercepted communications stored on CD-ROMs, because the in-custody computer facilities provided to the accused persons lacked printing capability, and could not give each accused person time to review the disclosure materials properly.

In *R. v. Hallstone Products Ltd.*, [1999] O. J. No. 4308 (Ont. S. C.), a large tax fraud case, Crown provided disclosure of a vast amount of material compiled on CD-ROM disks, and offered the defence technical support in the form of software and computer training to access and print the electronic information. The Crown also provided paper copies of a smaller subset of materials that it intended to use at the preliminary inquiry and access to actual seized documents by way of inspection. Due to a number of

problems that the defence had in accessing the information, the court ordered that the Crown provide the defendant a paper copy of all the materials that it intended to use at trial, without cost.

If a defendant wishes to utilize electronic disclosure because the hardcopy disclosure provided by Crown counsel is unworkable, then Crown counsel could be obliged to provide the search engine software that will enable the defendant to access the electronic materials: see *Mah*, *supra*.

Where the computerization and coding of information, such as the contents of officers' notes and witness statements, is the product of analysis, not investigation, such information can attract work product privilege: *R. v. Stewart*, [1997] O.J. No. 924 (Ont. Ct. J. (Gen. Div.)) at paras .32 and 33. Crown counsel will not be obliged to provide an edited version of its electronic work product where defence counsel or the accused person already has the edited version of that information in paper copy: *Stewart*, *supra*, at para. 43.

V. CONCLUSION

If the decade past was characterized by the articulation of core disclosure requirements, including the standards of relevance and timeliness, then the decade that has just begun will no doubt trace the content and scope of the exceptions to such duties. The public appears to continue to demand that "their records, their property", be made accessible so as to "ensure that justice is done".

Emergent Disclosure Issues

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2. *R. v. Girimonte* (1998), 121 C.C.C. (3d) 33 (Ont. C.A.)
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6. *R. v. Innocente (D.J.)* (2000), 185 N.S.R. (2d) 1 (N.S.C.A.)
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