

Ask, And It Will Be Given: Disclosure

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"The devil is in the details" – German Proverb

In any kind of litigation what you don't know can hurt you, but in criminal litigation failing to grasp as many of the pertinent details as possible helps ensure that misery awaits.

Statutory Law

The laws, rules and regulations enacted by legislatures and other governing bodies. Canada's taxation laws are codified in the *Income Tax Act* ("ITA") and Regulations. Criminal law is similarly codified in the *Criminal Code* ("CC").

Common Law

This is the body of law first developed in England from judicial decisions shaped by custom and precedent and later adopted by Canada and the United States; also called "case law" these decisions interpret and apply the statutory provisions enacted by the legislature to particular sets of facts.

The Prosecution's Duty

"...[T]he purpose of a criminal prosecution is not to obtain a conviction... The role of prosecutor excludes any notion of winning or losing... the fruits of the investigation... 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." *Boucher v. The Queen*, [1955] S.C.R. 16, Rand J. states, at pp. 23-24.

Crown counsel are in a different position from ordinary litigants as they represent the public interest of the community at large: *Re: Skogman and The Queen*, [1984] 2 S.C.R. 93 (S.C.C.)

What Is Disclosure?

Disclosure in this context means the release, transfer, provision of, access to, or divulging in any manner of information by the Crown corporately to the Defence.

Federal Crown counsel are under a duty at common law to disclose to Defence counsel all material evidence, whether favourable to the accused or not. Any breach of this duty constitutes a very serious breach of legal ethics: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

The Crown's obligation to disclose is not absolute. It is subject to a discretion both to withhold information and to the timing of disclosures made: *Stinchcombe*, per Sopinka, J. at 339.

At the same time Crown counsel have a duty to act fairly – the proper administration of the justice system depends on it: *Cunliffe and Bledsoe v. Law Society of British Columbia* (1984), 13 C.C.C. (3d) 560 (B.C.C.A.)

What Must Be Disclosed?

With respect to what should be disclosed, the general principle is that all relevant information must be disclosed. When Crown counsel exercises their discretion not to make disclosure that decision is reviewable by the trial judge.

The material disclosed must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction in disclosure should be made between inculpatory and exculpatory evidence: *Stinchcombe*, at 343.

The Request

The obligation to disclose will be triggered by a request by or on behalf of the accused. Technically, such a request can be made at any time after a charge has been laid; but early and often is a good rule of thumb.

If the request for disclosure has been timely, the Crown should comply with it to allow the accused has sufficient time to consider the information before election or plea: *Ibid.*, at 343.

What If Disclosure Is Refused?

Defence counsel must bring any failure of the Crown to comply with its duty to disclose at the earliest opportunity; by doing so promptly the trial judge can frequently remedy any prejudice to the accused: *Caccamo v. The Queen*, [1976] 1 S.C.R. 786.

Any failure or delay by Defence counsel to object, or to object promptly, would be an important factor in determining whether, on appeal, a new trial should be ordered: for the defence will be an important factor in determining on appeal whether a new trial should be ordered: *Stinchcombe*, at 341.

The Guiding Principle

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: *Ibid.*, at 340.

The Form Of Disclosure

CRA uses a suite of software called SUPERText to provide electronic disclosure of documents. Given the extremely paper intensive nature of tax litigation, it may be the only practical means of handling the process, but the basic version of software usually offered by CRA to Defence counsel isn't best suited for the task.

As respecting CRA's software, your lawyer should request two (2) things from the Crown:

1. a copy of SUPERText: Research, which when properly installed and used will facilitate accessing, processing and collating the materials relevant to your defence; and
2. training on the using the Research program.

The training can be arranged directly with SuperGravity Inc. (Tel.: 416-447-6566).

We know of at least one case where a federal Crown agent offered to pay for the training. Authority For Electronic Disclosure "... [i]f there are cases in which the Crown's disclosure obligation can be met only by providing the accused with copies of the software and the training to use it, that will be for the trial judge to consider...": *R. v. Cassidy* (2004), 69 O.R. (3d) 585 (Ont. C.A.) at §14.

In a tax prosecution where the electronic disclosure amounts to tens of thousands of pages of documents, it is impractical to limit access to that information at CRA's office, during normal business hours.

Defence counsel should ask for copies of the Research software, and the training to use it, so that their clients will be able to make full answer and defence to the charges against them.

Spreadsheets

Tax cases by their very nature involve numbers, lots and lots of numbers – the best, fastest and most accurate means of working with that kind of data is on a computer.

While the electronic disclosure above may be a mixed blessing, when it comes to spreadsheets you need to get the electronic versions of all of the spreadsheets that were prepared, used and relied on by CRA in its investigation.

Since CRA doesn't use proprietary software to prepared its spreadsheets, the Crown has no reason not to comply and under *Stinchcombe* they are thus, obligated to do so.

Wilful Non-Disclosure

Although very rare, there has been a case where a trial judge stayed charges against an accused on the grounds of wilful non-disclosure by a senior Crown prosecutor. While the decision reversed on appeal, the case does stand for the proposition that in appropriate circumstances the courts will intervene: *R. v. Leduc* (2003), 66 O.R. (3d) 1 (Ont. C.A.)

Lost Opportunity

It is crucial that Defence counsel introduce into evidence everything exculpatory that is available, because if it isn't introduced during the trial, it may not be admissible thereafter.

This principle also binds the Crown: *R. v. Khan*, [2000] 2 S.C.R. 915.

Appellate courts are reluctant to allow one party to raise a new issue on an appeal. The policy grounds for this reluctance include: the possibility of prejudice to the other party; an incomplete trial record; the absence of factual findings on the issue; and the public's interest in the finality of criminal litigation: *R. v. Brown*, [1993] 2 S.C.R. 918 (S.C.C.) at 923.

If fresh evidence which is both exculpatory and probative is discovered and it would likely result in an acquittal, it might be admissible: *Palmer v. The Queen*, [1980] 1 S.C.R. 759; but every effort should be made to get it right at the trial.

The Bottom Line

There will be things wrong with CRA's case, they may be big or small, but if your lawyer knows that they are he, or she, may be able to turn them to your advantage.

Success when mining for gold is measured in ounces per ton, and so too with mining disclosure materials, the gold is there you just have to find it. Staff Writer
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