

LANDMARK CASE

CROWN DUTY TO DISCLOSE:

R v STINCHCOMBE



CURRICULUM LINKS:

Canadian and International Law,
Grade 12, University Preparation
(CLN4U)

Understanding Canadian Law,
Grade 11, University/College
Preparation (CLU3M)

ESTIMATED TIME:

1 - 2 periods

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R v STINCHCOMBE [1991] 3 SCR 326

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R v STINCHCOMBE [1991] 3 SCR 326

OVERVIEW

This case established the principle that when a person is charged with an offence, the Crown has an obligation to disclose to the accused all relevant information in the Crown's possession. Prior to this case, the Crown could withhold evidence that it believed was harmful to their case. In *Stinchcombe*, the Supreme Court of Canada (SCC) held that full disclosure of all relevant information enables the defendant to make "full answer and defence," which is a right protected by the *Canadian Charter of Rights and Freedoms*. As a result of *Stinchcombe*, an accused is now entitled to see all the relevant evidence against them, regardless of whether the Crown is going to use it.

FACTS

William Stinchcombe was a lawyer in Alberta and Jack Abrams was his client. Mr. Abrams accused Mr. Stinchcombe of misusing property that belonged to him, which he had given to Mr. Stinchcombe to hold on his behalf *in trust*. To hold something in trust means that the person holding the property (in this case, Mr. Stinchcombe) becomes the legal owner of the property and holds it in trust for the beneficiary (in this case, Mr. Abrams). When something is held in trust, the trustee is not permitted to do anything with the property that would be harmful to beneficiary's interest in it. Here, the Crown accused Mr. Stinchcombe of breach of trust, as well as theft and fraud. In response, Mr. Stinchcombe claimed that he was not holding the property in trust for Mr. Abrams, and that he was lawfully entitled to use it.

At the preliminary inquiry, Mr. Stinchcombe's former secretary, Patricia Lineham, was called as a witness. She gave oral testimony that supported Mr. Stinchcombe's defence. After the preliminary inquiry, but prior to the trial, Ms. Lineham was interviewed by a police officer and the interview was tape recorded. The Crown informed the defence about the existence of the tape, but refused to disclose it to them. Later, during the trial, Ms. Lineham was again interviewed by a police officer and a written statement was taken. Again, the Crown informed the defence about the existence of the written statement but refused to disclose its contents. The Crown did not call Ms. Lineham as a witness during the trial.

PROGRESSION THROUGH THE COURTS

In 1989, the trial was held before a judge of the Alberta Court of Queen's Bench. After learning that the Crown was not going to call Ms. Lineham as a witness, the defence brought a motion requesting that the Crown either call Ms. Lineham as a witness or disclose the tape and written statement in the Crown's possession. The Crown refused. Without reviewing the tape or the written statement, the trial judge ruled that the Crown was not obligated to call Ms. Lineham as a witness or make the requested disclosure. The trial proceeded and Mr. Stinchcombe was found guilty of breach of trust and fraud.

Mr. Stinchcombe appealed to the Alberta Court of Appeal, which upheld the trial decision. Mr. Stinchcombe then appealed to the SCC, the highest appeal court in Canada.

SUPREME COURT OF CANADA

In a unanimous decision, the SCC overturned the Alberta Court of Appeal's decision and held that the Crown did have an obligation to disclose the tape and the written statement to the defence. They ordered a new trial.

The SCC ruled that a Crown obligation to disclose will save the court's time because cases will be settled with more guilty pleas or withdrawal of charges. Witnesses are also entitled to refresh their memories by reviewing any previous testimony they gave. Although this eliminates the element of surprise and certain advantages for the Crown during cross-examination, ultimately, justice is more likely to be served.

A Crown's obligation to disclose is also important because the Crown and the defence play different roles in the judicial system. The Crown's role is not to secure a conviction, but to present to the court all the credible evidence against the accused. The defence, on the other hand, can "assume a purely adversarial role". They have no corresponding duty to disclose and no duty to assist the Crown in their prosecution.

The Crown's failure to disclose all of the relevant information meant that Mr. Stinchcombe was unable to make full answer and defence with regard to the charges against him. In other words, because he did not have all the information that the Crown had, he was not given a fair trial.

THE RIGHT TO MAKE FULL ANSWER AND DEFENCE

The right of a person to make “full answer and defence” is protected under s. 7 of the *Canadian Charter of Rights and Freedoms* as a principle of fundamental justice. It is a pillar of criminal justice ensuring that the innocent are not convicted.

The principles of fundamental justice are legal principles that most citizens would agree are fundamental to the notion of justice and the way that the legal system ought to operate. They essentially require that people be treated fairly by the government. If a legal principle is found to be a principle of fundamental justice it is a right protected by the *Charter* and can only be limited if it is justifiable under s.1 of the *Charter*.

According to s. 1, all of the rights under the *Charter* are subject to reasonable limits¹. If an infringement of a right is found to be within a reasonable limit, then the infringement is said to be justified under s. 1 and there is no violation of the *Charter*. However, if the infringement is found to be an unreasonable limit on the right, then there is a violation of the *Charter*. Whether an infringement is reasonable or not is determined by the courts. For example, a bylaw limiting loud noise in a public place may be considered a reasonable limit on freedom of expression, which is protected by s. 2(b) of the *Charter*, while a law limiting any form of expression in a public place may not be considered reasonable. In that case, if the bylaw is found to be unreasonable it will be struck down.

When a person is convicted of a crime and sent to prison it is a deprivation of that person’s liberty. Under s. 7 of the *Charter*, a deprivation of liberty is only constitutional if done so in accordance with the principles of fundamental justice. These include the right of an accused to make a full answer and defence to

Canadian Charter of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

¹For further information and activities on s. 1 of the *Charter*, see OJEN’s resource *In Brief: Section 1 of the Charter and the Oakes Test*, available at <http://ojen.ca/resource/980>.

charges against him. Here, the SCC ruled that in order to be able to make full answer and defence, an accused must be given all relevant information in relation to the investigation of the accused in the Crown's possession, subject to the Crown's discretion.

TIMING OF DISCLOSURE AND WHAT MUST BE DISCLOSED

The Crown should disclose all relevant information before the accused is required to plead guilty or not guilty, or elects the mode of trial (i.e. whether before a judge and jury, or a judge alone). The Crown's obligation to disclose new information is ongoing throughout the duration of the trial. Therefore, if the Crown gathers new evidence in the middle of the trial, it has an obligation to disclose this to the defence at that time.

In terms of what must be disclosed, the duty includes all relevant information in the possession of the Crown. Relevant information is any information that could affect the case against the accused. It includes evidence that the Crown intends to introduce as evidence, and even that which it does not. Whether the evidence is relevant is subject to the Crown's discretion (i.e. choice). When in doubt, the Crown must err on the side of inclusion. However, it does not need to disclose what is clearly irrelevant. For example, if the police find fingerprints at the scene of a crime that do not match those of the accused, the Crown must disclose the evidence to the defence.

The Crown may withhold relevant information where its disclosure would violate the rules of privilege, such as where it could reveal the identity of a confidential informant.

In rare cases, the Crown may also delay the disclosure of relevant information where the disclosure could compromise an ongoing investigation. For example, if the Crown were to make disclosure prior to the completion of a police investigation, this could alert the accused and give them an opportunity to attempt to conceal any illegal activities.

WHAT HAPPENS IF THE CROWN DOES NOT DISCLOSE?

The Crown's exercise of discretion is reviewable by the trial judge. This process ensures that the Crown is held accountable for its decisions on disclosure. The trial judge considers whether the information that was withheld impairs the right of the accused to make full answer and defence.

If the trial is ongoing and there is relevant information that is not disclosed, the judge may order disclosure and the trial will continue after the information is disclosed. In rare cases, a whole new trial may be ordered where the information will be disclosed from the beginning. The defence can also ask for a “stay of proceedings” which is a remedy reserved for serious breaches of *Charter* rights. A stay of proceedings would stop the trial and prevent the Crown from continuing with the prosecution of that particular case.

RESULT

The SCC held that the Crown’s failure to disclose was a violation of Mr. Stinchcombe’s right to make full answer and defence. A new trial was ordered where the defence would receive the tape and written statement.

At the second trial, the Crown revealed that it had lost the original tape and written statement. As a result, the trial judge stayed the proceeding, preventing the trial from continuing. The Crown appealed the stay all the way up to the SCC. The SCC ruled that disclosure of the original evidence was not necessary and that the trial could proceed using copies of the evidence.

At the third trial, the Crown did not call any evidence and Mr. Stinchcombe was acquitted of all the charges.

ACTIVITY 1: DISCUSSION QUESTIONS

1. Who were the parties involved in this case?
2. What three courts heard this case and in what order? What was the outcome at each level?
3. Which sections of the *Charter* were mentioned in the SCC decision? Why were they mentioned?
4. Suppose the Crown receives information halfway through the trial that is favourable to the accused. Is the Crown obligated to disclose this to the defence?
5. What do you think is meant by the term '*relevant* information'?
6. Who is entitled to use their discretion in deciding what is relevant?
7. What is a principle of fundamental justice?
8. Suppose a court is considering a Crown's claim of privilege and whether to compel disclosure of the identity of a confidential informant. Whose interests must be balanced in the decision?
9. Suppose prior to trial the Crown accidentally misplaces evidence that it would have been obligated to disclose to the defence. What do you think should happen? Would it make any difference if the Crown had deliberately destroyed the evidence?.
10. Prior to this case, the Crown had no duty to disclose all relevant evidence to the defence. Though most evidence was generally disclosed, the customs varied across the country. By changing the law, the SCC removed the element of surprise between the Crown and defence from the criminal process. Do you think the SCC was correct in doing so? Why or why not?

ACTIVITY 2: VOCABULARY

Match the vocabulary words in the left hand column with the correct definition in the right hand column. Place the letter next to the definition in the space provided.

A. In Trust	___ The accused and any lawyers representing the accused.
B. Criminal Code of Canada	___ An application to a court to rule on a particular issue, usually within the context of an ongoing proceeding. The court may receive written and/or oral arguments and the other party may or may not be present.
C. Preliminary Inquiry	___ Part of the Constitution of Canada. It protects the rights and fundamental freedoms of Canadian citizens, subject to reasonable limits, against the actions of government officials, such as the police or the Crown. It does not constrain the actions of private citizens.
D. Crown	___ The ability to decide whether or not to do something. As a result of this case, we know that the Crown can decide not to disclose information on the basis of irrelevance or privilege. However, this ability/right is reviewable by the court.
E. Defence	___ The act of the Crown presenting its evidence to the defence prior to trial.
F. Disclosure	___ The rules that either prevent certain people from being forced to testify or allow for the refusal to disclose certain information. The right against self-incrimination in s. 11(c) of the <i>Charter</i> provides that the accused does not have to testify at his or her own trial. Other than the right against self-incrimination, all forms of this are subject to certain limits and exceptions.
G. Motion	___ The legal principles that most citizens would agree are fundamental to the notion of justice and the way that our legal system ought to operate. These principles essentially require that people be treated fairly by the government.

H. Appeal	___ A federal statute that contains all of the criminal offences and associated punishments in Canadian law. It is the main source of criminal law, along with the Constitution and the common law (the body of law contained in legal cases). Other forms of regulatory offences are contained in various federal and provincial statutes (for example, the Highway Traffic Act).
I. Canadian Charter of Rights and Freedoms	___ The lawyer who is representing the government and prosecuting the accused.
J. Principles of Fundamental Justice	___ A lawyer may receive money or other property from a client or third party for use in the future on behalf of the client. This property must be held in a trust account, separate from the lawyer's other accounts. The lawyer cannot treat property held in this way as if it were their own.
K. Acquitted	___ A hearing held prior to a trial in order to determine if the Crown has enough evidence to go to trial. An accused charged with an indictable offence (as opposed to a less serious summary offence) under the <i>Criminal Code</i> has a right to it. It is like a trial, in that the Crown presents its evidence that the accused has committed a crime, including witness testimony. The judge then decides whether to commit the accused to trial or dismiss the charges.
L. Rules of Privilege	___ A request made to a higher court for a review of a decision. A party may wish to do this if they think that the decision was flawed in some way. Courts that perform these typically only review the trial judge's application of the law to the facts, although they may sometimes question the trial judge's interpretation of the evidence. There are generally two levels of this in Canada, with the Supreme Court of Canada being the highest.
M. Discretion	___ Where either the charges are dropped or the accused is found not guilty at trial. Once this happens, the accused is free to go.

ACTIVITY 3: ROLES OF THE CROWN AND DEFENCE

The following statement was made by the SCC in this case:

“[T]he 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.”

1. What was meant by the statement that the “fruits of the investigation” are the “property of the public”?
2. The SCC stated that the Crown and the defence have different roles in the adversarial system. Brainstorm different roles and responsibilities of the Crown and the defence, and fill out the following chart.

ROLES AND RESPONSIBILITIES OF CROWN

ROLES AND RESPONSIBILITIES OF DEFENCE

3. According to the SCC, justice is best served if the Crown discloses all evidence to the defence, even if this evidence is exculpatory (i.e. favourable to the accused). Do you agree that the defence should have no reciprocal obligation to assist the Crown? What would it mean if they did? In small groups, discuss whether the defence should have an obligation to disclose.

TEACHER'S KEY

ACTIVITY 1: DISCUSSION QUESTIONS

1. Who were the parties involved in this case?

This case involved the Crown and Mr. Stinchcombe. At the trial, Mr. Stinchcombe was the defendant and at both appeals he was the appellant.

2. What three courts heard this case and in what order? What was the outcome at each level?

The three levels of court and who won were as follows:

- (1) Alberta Court of Queen's Bench, where Mr. Stinchcombe was convicted
- (2) Alberta Court of Appeal, which upheld the conviction
- (3) Supreme Court of Canada, where a new trial was ordered

3. Which sections of the *Charter* were mentioned in the SCC decision? Why were they mentioned?

The SCC decision mentioned two sections of the *Charter*: ss. 7 and 1. Section 7 protects the right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." One of the principles of fundamental justice implicit in this section, the right of the accused to make full answer and defence, formed the basis of this decision. The Crown's failure to disclose the tape and the written statement to the defence was considered a violation of Mr. Stinchcombe's right to make full answer and defence.

The second section mentioned, though not explicitly, was s. 1 of the *Charter*. The SCC stated that a court may demand the Crown make disclosure, despite having established a claim of privilege, if the claim amounts to an unreasonable limit on the right of the accused to make full answer and defence. Where there is an infringement of a right under the *Charter*, a court will look to s. 1 to see if the infringement can be justified as a reasonable limit on the right. If it is reasonable, then there is no violation of the *Charter*.

4. Suppose the Crown receives information halfway through the trial that is favourable to the accused. Is the Crown obligated to disclose this to the defence?

Yes. The SCC stated that the Crown's obligation to make disclosure is ongoing and applies to information that it receives over the course of the trial.

5. What do you think is meant by the term 'relevant information'?

The Crown can refuse to disclose information on the basis that it is irrelevant or it is subject to privilege. Otherwise, all relevant information must be disclosed. Determining whether or not something is relevant is discretionary. It includes all information regardless of whether it is helpful to the Crown's case or not, even if the Crown does not intend to introduce it as evidence. If it might impact the accused's ability to make full answer and defence, it must be disclosed.

6. Who is entitled to use their discretion in deciding what is relevant?

The Crown and the trial judge, if the Crown's decision is being reviewed. In reviewing the Crown's decision, the trial judge must consider whether there is a reasonable possibility that the information withheld impairs the right of the accused to make full answer and defence. If the Crown's claim of privilege amounts to an unreasonable limit on this right, then the court may compel disclosure, despite the claim of privilege.

7. What is a principle of fundamental justice?

A principle of fundamental justice is a legal principle that most citizens would agree are fundamental to the notion of justice and the way that the legal system ought to operate. If a legal principle is found to be a principle of fundamental justice, it is a right protected by the *Charter* and can only be limited if it is justifiable under s.1. The right of a person to make full answer and defence is protected under s. 7 of the *Charter* as a principle of fundamental justice. It is a pillar of criminal justice ensuring that the innocent are not convicted.

8. Suppose a court is considering a Crown's claim of privilege and whether to compel disclosure of the identity of a confidential informant. Whose interests must be balanced in the decision?

The interests of the accused must be balanced against those of the confidential informant. If the information is not disclosed, the accused may not be able to prove his or her innocence. On the other hand, the disclosure of information may put the informant at risk of harm, especially if the informant is an undercover police officer. The interests of the police in general are also involved, as they rely on confidential informants to help detect and prevent crime. Unless the police can guarantee that in almost all cases the identity of an informant will be kept confidential, fewer people will be willing to come forward.

The Crown's claim of privilege will generally be upheld by the court unless the accused can satisfy the innocence at stake exception by showing evidence that the disclosure is necessary in order to demonstrate his or her innocence.

9. Suppose prior to trial the Crown accidentally misplaces evidence that it would have been obligated to disclose to the defence. What do you think should happen? Would it make any difference if the Crown had deliberately destroyed the evidence?

If the Crown can provide a satisfactory explanation as to how it lost the evidence, then there will be no violation of s. 7 of the *Charter*. This is so, even with respect to relevant information. However, there will be a violation of s. 7 if not having the information would prejudice the ability of the accused to make full answer and defence, thereby causing an unfair trial. This will depend on how critical the information was. Where the Crown cannot provide a satisfactory explanation as to how it lost the evidence, or where the evidence was deliberately destroyed, there will be a violation of s. 7. This would also likely constitute a serious breach of professional responsibility on the part of the Crown. In these cases, where the evidence is simply no longer available, it is likely that a stay of proceedings would be ordered, meaning the trial would be suspended indefinitely.

10. Prior to this case, the Crown had no duty to disclose all relevant evidence to the defence. Though most evidence was generally disclosed, the customs varied across the country. By changing the law, the SCC removed the element of surprise between the Crown and defence from the criminal process. Do you think the SCC was correct in doing so? Why or why not?

Discussion points: In civil proceedings both parties have a duty of full disclosure and full discovery of documents and witnesses. The criminal process is distinct from this in that there is no corresponding duty for the defence to disclose

information to the Crown. The duty to disclose rests solely on the Crown. The element of surprise that existed prior to Stinchcombe diminished a defendant's ability to mount a proper defence to the case made against them. If the accused does not know what evidence the Crown has, they cannot make an argument against it. Thus, the element of surprise heavily favoured the Crown and wasted precious court time and resources. Students should consider whether the element of surprise was a fair advantage for the Crown.

ACTIVITY 2: VOCABULARY

E, G, I, M, F, L, J, B, D, A, C, H, K

ACTIVITY 3: ROLES OF THE CROWN AND DEFENCE

1. What was meant by the statement that the "fruits of the investigation" are the "property of the public"?

This statement means that the Crown has a duty to the public not to conceal evidence. Any information in the Crown's possession that is relevant to the accused must be disclosed. Despite the fact that this may hurt the Crown's case, justice is better served by making the disclosure. The 'fruits of the investigation' is the evidence. The 'property of the public' is the Crown's public duty.

2. The SCC stated that the Crown and the defence have different roles in the adversarial system. Brainstorm different roles and responsibilities of the Crown and the defence, and fill out the following chart.

ROLES AND RESPONSIBILITIES OF CROWN

The Crown's role is to present the most persuasive case against the accused on behalf of the state. They present evidence gathered by the police and attempt to show that the evidence points to the guilt of the accused. They now have a duty to disclose all relevant information to the defence.

ROLES AND RESPONSIBILITIES OF DEFENCE

The defence's role is to defend the accused and raise doubt about the Crown's case. They may simply respond to the Crown's case, raising issues with it wherever possible, or they may present an alternate set of facts where someone other than the accused could be guilty. The defence is entitled to assume a purely adversarial role. They have no obligation to assist the prosecution and there is no duty to disclose to the Crown.

3. According to the SCC, justice is best served if the Crown discloses all evidence to the defence, even if this evidence is exculpatory (i.e. favourable to the accused). Do you agree that the defence should have no reciprocal obligation to assist the Crown? What would it mean if they did? In small groups, discuss whether the defence should have an obligation to disclose.

If the defence had an obligation to assist the Crown, this would have significant implications on the judicial process. The presumption of innocence forces the Crown to make a case against the accused. If the Crown fails, then the accused is set free. However, if the accused were forced to assist the Crown, then the Crown would no longer have the same burden of proof on it. The Crown could rely on the accused for most of its case, forcing the accused to aid in their own conviction. If the accused were guilty, presumably they would have an obligation to inform the Crown. Even if they were innocent, they may know of certain things that would increase the likelihood they would be convicted.