CROWN DISCLOSURE

Introduction

1. The Crown is under an obligation to disclose to the accused all material information in its possession
    - Obligation exists regardless whether the Crown intends to use the information at trial
    - Obligations also exists even if the information is helpful to the accused – exculpatory evidence
    - Continuous obligation – during the process of the trial if new evidence comes to light, the Crown must disclose it to the accused
2. The accused is entitled to make "full answer and defence" to any charges – therefore must have access to all material information
3. The Crown's job is not to get a conviction but is to see that justice is done
4. No "trial by ambush"

Legal Basis – Crown Disclosure

1. **Common Law**
    - Long standing common law duty on prosecutors to disclose

2. **Criminal Code Section 603 – Right of the Accused**
    - After a preliminary inquiry at which the accused is ordered to stand trial, the accused is entitled to inspect :
    1. The indictment
    2. Accused's own statements
    3. Any evidence of exhibits rendered at the preliminary inquiry

3. **Criminal Code Section 650 (3) – To Make Defence**
    - The accused is entitled to make full answer and defense
    - Provision applies to a jury trial in superiors court (indictable offences)
    - The entitlement to make "full answer and defence" has been interpreted as imposing on the Crown an obligation to make full disclosure in this circumstance

4. **Charter Section 7 and R v Stinchcombe (1991)**
    - Prior to the Charter the legal basis for Crown disclosure was not completely clear or certain
    1. There was a common law basis which was not clearly defined (unsettles)
    2. There was some basis in the Criminal Code of Canada but only for indictable offences
    3. No clear and comprehensive requirement for Crown disclosure

    - Charter section 7 made the obligation for Crown disclosure more comprehensive and made it a constitutional requirement – the "principles of fundamental justice"

- In Stinchombe the Supreme Court of Canada ruled that the right to "make full answer and defense" is a substantive principle of fundamental justice
- In order to make a "full answer and defense" the accused must know the case against them, this necessitates full Crown disclosure

Exception to Obligations of Crown Disclosure

1. **Relevance Exception**
    1. Irrelevant information needn't be disclosed
    2. Relevance is determined by reference to the accused – would the accused find the information useful in making his/her defense ?
    3. So if there is information in Crown's possession which would in no way be useful to the accused, then it is irrelevant and needn't be disclosed
    4. All information that the Crown will be using in trial is relevant – since the accused will need this information in order to prepare for trial

2. **Privilege Exception**
    1. Information that is relevant, and would therefore otherwise have to be disclosed, may be "privileged" so it can be withheld
    2. Privilege is based on some public policy reason for protecting information (keeping it confidential)
    →examples: lawyer-client privilege, police informer privilege
    3. Privilege may be waived by the person who has the privilege

Means of Disclosure

1. **Particulars**
    1. Particulars of the circumstances of the alleged offense
    2. Particulars will include
        - Narrative of the alleged offense
        - Stetements made by the accused and the witnsesses
        - Details of the accused criminal records
    3. Particulars are disclosed informally – phone calls, emails etc
    4. Particular may also be disclosed formally via court application – if the Defense believes that the Crown is not making dull disclosure they can make a court application

2. **Pre – Trial Conference**

    1. Mandatory for jury trials, but discretionary for other trials

    2. Meant to promote "fair and expeditious trial" by sorting out certain matters before the trial (witness lists, time estimates, summaries of testimony)

3. **Preliminary Inquiry**
    - A hearing after an information is laid but before an indictment is preferred, to establish if the Crown has enough evidence to take the case to Court

Timing of Crown Disclosure

1. Disclosure should be made before the accused makes an election or enters a plea
2. Continuing obligation – as more evidence comes to Crowns attention they must disclose it

Remedies for Crown Non-Disclosure : Charter Section 24(1)

1. Failure to disclose may constitute as section 7 violation
2. Court can provide a remedy for a Charter violation under section 24(1)
3. The remedy will depend on two things:
    1. The timing of the non-disclosure
    2. The effect of the non-disclosure on the right of the accused

Remedies Based on the Timing of Non-Disclosure

1. **Before Trial** : Remedy is to order a disclosure
2. **During Trial** : Court will order a disclosure and Court may also order an adjournment (to allow Defence counsel time to review the new material)
3. **After Trial (On Appeal)** : Court may order a new order or in exceptional cases may enter a judicial state of proceedings if the two-step test is met by the Defense

The Two-Step Test

1. Accused must demonstrate there is reasonable possibility that the verdict might have been different if the Crown has disclosed
2. Accuse must demonstrate there is reasonable possibility that the failure to disclose affected the overall fairness of the trial process

Defense Disclosure

1. There is no corresponding duty on the accused to disclose information
2. Justifications
    1. Right to remain silent – the Crown cannot compel the accused to give them self-incriminating evidence
    2. Significantly greater recourses of the Crown as opposed to the accused
3. Critics argue that there should be a requirement for defense disclosure
    1. The importance of the search of the truth as an overriding goal
    2. Disclosure should be a two-way street as it is in civil court
    3. It would make the system more efficient – more guilty pleas or charge dropped

PRELIMINRY INQUIRY

1. General - Preliminary Inquiry : Section 535-551

1. Preliminary inquires only occur for indictable offences tried in superior court
2. Occur after the information is laid but prior to indictment being preferred
3. Purpose of preliminary inquiry:
    1. Protect the accused from being put on trial unnecessarily
    2. Tool for discovery by defence (furthers Crown's disclosure)

2.Procedure of Preliminary Inquiry

1. Crown presents case, calls witnesses who testify under oath
2. Defense is given the opportunity to cross-examine
3. All evidence is recorded – a written record is produced
4. Accused may agree at any point to stand trial by consent (thus ending the preliminary inquiry)
5. Evidence is not weighed at the preliminary inquiry
6. Defense does not call witnesses at the preliminary inquiry

3. Possible Outcomes of Preliminary Inquiry : Section 548-549

1. Accused is ordered to stand trial
2. Accused agrees to stand trial by consent (with Crown)
   →accused may consent at any point in the preliminary inquiry which would bring the preliminary inquiry to an end
3. Accused is discharged (prosecution proceeds no further)

Test for Proceedings to Trial

- **Section 548(1)(a):** An order to stand trial will only be issued where the justice believes "there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction"
- "Sufficient evidence" – defined as "any evidence upon which a reasonable jury properly instructed could return a verdict of guilt"
- "The judge is required to commit an accused person for trial in any case where there is admissible evidence which could, if it were believed, result in a conviction
- There must be some evidence on each essential element of the offence

4.Use of Evidence from Preliminary Inquiry

1. **Establishing the prima facie case** - the principal use of evidence led at preliminary inquiry is to assist the judge in determining whether the Crown has a strong enough case that it should be taken to trial
2. **Preservation of Evidence – Perpetuated Evidence**
   - Situations in which the evidence given at the preliminary inquiry are "read in" to the record of evidence at trial
   - The situations in which perpetuated evidence is introduced
      1. Witness is dead, insane, or too ill to testify, absent from Canada, and
      2. The accused was present at the preliminary inquiry when the witness gave testimony
   - The Judge has discretion whether to permit perpetuated evidence at trial
      - In exercising this discretion the Judge will weight
         1. Probative value of the evidence (value of evidence to prove something), and
         2. Potential prejudice to the accused
3. **Cross-Examination of Witness**
   - Transcripts of evidence given by a witness in preliminary inquiry can be used to cross-examine that same witness at trial (impeachment)