

**Review of Prosecutions Policy on Disclosure**  
**Manitoba Department of Justice – Issued May, 2001**  
**March 2004**

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During the time I was conducting the Disclosure Review of the 1991 James Driskell Murder Trial and Appeal, I was also asked to review and comment upon the Prosecutions Policy on Disclosure issued more recently in May 2001. The authorization for this task was outlined in Terms of Reference issued by the Honourable Gord Mackintosh, Minister of Justice, on February 9, 2004, and reads as follows:

*“Terms of Reference*

*To: John J. Enns*

*Decisions of the Supreme Court of Canada have confirmed a broad obligation on the part of the Crown to disclose information to an accused relating to the charge he or she is facing. Manitoba Justice has implemented new policies respecting the disclosure of information since the time of the Driskell case. I believe it is important to assure the public that the disclosure policies now in place are appropriate, or, if they are not, that any necessary changes are made.*

*Attached for your reference is the current Prosecutions Policy on Disclosure, Dated May 2001. I request that you review the policy to determine whether adherence to it would result in the Crown satisfying its legal obligations to make disclosure.*

*In the discharge of your responsibilities you may have full access to all staff employed by or documents held within Manitoba Justice relating to this policy. I would appreciate your advice on these matters as soon as reasonably practicable.*

*Dated at Winnipeg, Manitoba this 9<sup>th</sup> day of February 2004.*

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*Gord Mackintosh*  
*Minister of Justice*  
*Attorney General*

*Attachment”*

Attached and forming part of this Review is a copy of the nine-page Prosecutions Policy on Disclosure under consideration.

In the years preceding the issuance of this document, (which will hereafter be simply referred to as the “Disclosure Policy”), I had been provided with six earlier directives and memoranda on the subject matter of disclosure which were all listed in the Driskell Review. Several of these pre-dated the *Stinchcombe* decision and others followed the 1991 case. On perusing these earlier directives it was evident to me that there was substantial awareness of the requirements of disclosure in criminal prosecutions at that time.

However, a consideration of the 2001 Disclosure Policy reveals a much more comprehensive and detailed treatment of this area of Crown responsibility. The paper is thorough and chronologically developed under 12 main headings as follows:

1. *Policy Statement*
2. *What Must Be Disclosed*
3. *Additional Disclosure Subject To Crown Discretion*
4. *Exceptions To Full Disclosure*
5. *When Disclosure Should Occur*
6. *Discretion To Delay Disclosure*
7. *Format Of Disclosure*
8. *Disclosure Of Evidence To An Unrepresented Accused*

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9. *Guilty Plea Without Disclosure*
  10. *Indexing Of Disclosed Materials*
  11. *Flexibility In Application Of Directives*
  12. *Rationale*

I had recently reviewed the case law relevant to disclosure issues when preparing the Driskell Review, including the following, as well as others: –

*R. v. Stinchcombe* (1991) 3. S.C.R. 326

*R. v. Regan* (1997) 113 C.C.C. (3<sup>rd</sup>) 237

*R. v. Egger* (1993) 82 C.C.C. (3<sup>rd</sup>) 193 (S.C.C.)

*R. v. Chaplin* (1995) 1. S.C.R. 727

*R. v. Dixon* (1998) 1. S.C.R. 244

*R. v. O'Connor* (1995) 4. S.C.R. 411

*R. v. Carosella* (1997) 1. S.C.R. 80

*R. v. Leipert* (1997) 1. S.C.R. 281

*R. v. Willingham* – Devine, P.J. (unreported), February 20, 2004

*R. v. Greganti* (2000) O.J. No. 34 (Ont. Sup. Ct.)

*Law Reform Commission of Canada Report, Disclosure by the Prosecutions*, June, 1984

Without discussing the *dicta* in each of these cases, each enunciated certain principles and criteria relevant to the issues of disclosure.

The present Disclosure Policy clearly incorporates all of the principles referred to in the case law. There may be future developments by virtue of new situations which will require refinements in the Disclosure Policy, but to the best of my knowledge and understanding of the relevant case law, the Disclosure Policy is complete and if adhered to, would result in the Crown satisfying its legal obligations to make disclosure.

In the Driskell Review, I alluded to a concern regarding police/Crown disclosure. It is this concern that also arises when considering the present Disclosure Policy. Complete and appropriate as its terms are, much is nevertheless dependent upon full and complete police disclosure to the Crown – which was at the heart of the Driskell Review. The recent pronouncement by Judge Susan Devine in the *Willingham* case clearly point to this problem. As I indicated in the Driskell Review, I have no easy solution or recommendation as to how this can be rectified, as the Crown is truly dependent on the police to provide complete and timely information for each criminal prosecution. The initiative and direction for this to happen must clearly emanate from the Chief Constable's office and other senior police officials. When such direction is either not provided, or if provided but not adhered to by rank and file police officers, the dilemma for the Crown remains because, as is well known, the failure to provide disclosure, whether at the fault of the police in not providing information or the Crown, it is the Crown that will be held accountable in the courts.

It is of course also equally important that rank and file Crown Attorneys adhere to the principles in the present Disclosure Policy. To the extent that both police and Crown fulfill these obligations, the important issue of disclosure will be met.

Respectfully submitted this 31st day of March, 2004.

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John J. Enns

Attachment