

R. v. Dixon, [1998] 1 S.C.R. 244

Spencer Dixon

Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Dixon

File No.: 25834.

1997: December 5; 1998: February 19.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for nova scotia

Constitutional law -- Charter of Rights -- Fundamental justice -- Duty to disclose -- Accused convicted of aggravated assault -- Crown not disclosing statements made by four individuals -- Summary of statements included in police reports provided to defence counsel at trial -- Appropriate test for determining whether Crown's inadvertent failure to disclose relevant material violated accused's right to disclosure -- If right to disclosure violated, appropriate test for determining whether constitutional right to make full answer and defence impaired -- Effect to be given to defence counsel's lack of due diligence -- Canadian Charter of Rights and Freedoms, ss. 7, 24(1).

Three persons were injured in a brawl where the attackers surrounded their victims in turn and kicked and pummelled them. Two victims (Gillis and Charman) were badly injured and a third (Watts) was permanently and very seriously injured. The accused, who was tried with four others, was convicted of aggravated assault of Watts. Significantly, he was found guilty both as a principal and as a party (aiding or abetting) under s. 21 of the *Criminal Code*. During the course of the trial, counsel for all the accused were provided with copies of police occurrence reports which included summaries of statements given by four individuals. Two statements indicated that the persons making them had not witnessed the assaults. The third (Tynes') stated that the person was with the Crown's main identification witness in the vicinity of the assaults. It also described that witness' clothing that night. The fourth (Daye's) indicated that the person witnessed two of the assaults, identified the location of some of the accused during the assaults and identified some of the assailants. It implicated the accused in an assault for which he was neither charged nor convicted and contradicted the evidence of the main identification witness in certain respects.

None of the four statements was produced by the Crown and this gave rise to a ground of appeal based on the Crown's failure to disclose information as required by s. 7 of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal dismissed the appeals. It admitted fresh evidence, however, which indicated that counsel had not only transcripts and statements that made reference to some of the persons whose statements were not disclosed but also a chart and cross-reference sheet. The accused's counsel also reviewed the police occurrence reports and decided that nothing in the four statements referred to in those reports would assist the accused in making full answer and defence. The other counsel came to the same conclusion on the basis of the summaries. At issue were: (1) what was the appropriate test to be used in determining whether the Crown's inadvertent failure to disclose relevant material violated the

accused's right to disclosure; (2) if the right to disclosure were violated, what was the appropriate test to determine whether the *Charter* right to make full answer and defence was impaired; and (3) in determining whether that right had been impaired, what was the effect to be given to defence counsel's lack of due diligence.

Held: The appeal should be dismissed.

(1) *The Crown's Duty to Disclose*

Where an accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence, he or she has also established the impairment of his or her *Charter* right to disclosure. The right to disclosure of all relevant material has a broad scope and includes material which may have only marginal value to the ultimate issues at trial. The Crown accordingly may fail to disclose information which meets the *Stinchcombe* threshold but which could not possibly affect the reliability of the result reached or the overall fairness of the trial process. A court may well find that an accused's *Charter* right to disclosure has been breached, and yet deny the remedy of a new trial if it is found that the trial process was fundamentally fair and that there was no reasonable possibility that the result at trial might have been different had the undisclosed material been produced. The right to full disclosure is just one component of the right to make full answer and defence. The *Charter* right to make full answer and defence is not necessarily impaired solely because the right to disclosure was violated.

The Crown need not produce what is clearly irrelevant. Here, the first two statements had no relevant information at all and there was no reasonable possibility that

they could have been of any use to the accused at trial. Both the third (Tynes') and fourth (Daye's) statements met the low threshold for disclosure and should have been disclosed.

(2) *Impairment of the Right to Make Full Answer and Defence and the Remedy to Be Granted under Section 24(1) of the Charter*

In order to determine whether the right to make full answer and defence was impaired, a two-step analysis must be undertaken. First, to assess the reliability of the result, the undisclosed information must be examined to determine the impact it might have had on the decision to convict. If an appellate court is persuaded that there is a reasonable possibility that, on its face, the undisclosed information affects the reliability of the conviction, a new trial should be ordered. Even if the undisclosed information does not itself affect the reliability of the result at trial, the effect of the non-disclosure on the overall fairness of the trial process must be considered at the second stage of analysis. This will be done by assessing, on the basis of a reasonable possibility, the lines of inquiry with witnesses or the opportunities to garner additional evidence that could have been available to the defence if the relevant information had been disclosed.

In considering the overall fairness of the trial process, defence counsel's diligence in pursuing disclosure from the Crown must be taken into account. A lack of due diligence is a significant factor in determining whether the Crown's non-disclosure affected the fairness of the trial process. When counsel becomes or ought to become aware, from other relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure.

Whether a new trial should be ordered on the basis that the Crown's non-disclosure rendered the trial process unfair involves a process of weighing and balancing. If defence counsel knew or ought to have known on the basis of other disclosures that the Crown through inadvertence had failed to disclose information and yet remained passive as a result of a tactical decision or lack of due diligence, it would be difficult to accept a submission that the failure to disclose affected the fairness of the trial process.

All these factors must be appropriately balanced. In situations where the materiality of the undisclosed evidence is, on its face, very high, a new trial should be ordered on this basis alone. In these circumstances, it will not be necessary to consider the impact of lost opportunities to garner additional evidence flowing from the failure to disclose. However, where the materiality of the undisclosed information is relatively low, an appellate court will have to determine whether any realistic opportunities were lost to the defence. To that end, the due diligence or lack of due diligence of defence counsel in pursuing disclosure will be a very significant factor in deciding whether to order a new trial.

Here, the accused had the burden of demonstrating that either (i) it is reasonably possible the non-disclosed statements affected the reliability of his conviction as a principal in the aggravated assault and his conviction for aiding or abetting the assault; or (ii) that it is reasonably possible the non-disclosure of the statements affected the overall fairness of the trial process. First, the accused did not demonstrate that the non-disclosure of the statements affected each of the alternative conclusions referred to in s. 21(1) of the *Code* -- that he either kicked or beat the victim, helped to administer the beating or encouraged the beating. Second, the non-disclosure did not affect the overall fairness of the trial. The third statement (Tynes') and the fourth (Daye's), on their faces, would have had no impact on the reliability of the conviction. The Crown's

failure to disclose did not deprive the defence of opportunities to pursue additional lines of inquiry with witnesses or garner additional evidence flowing from the undisclosed material. A significant factor in reaching this conclusion was defence counsel's lack of due diligence in pursuing disclosure.

Defence counsel is not entitled to assume at any point that all relevant information has been disclosed to the defence. Just as the Crown's disclosure obligations are ongoing, and persist throughout the trial process, so too does defence counsel's obligation to be duly diligent in pursuing disclosure. To do nothing in the face of knowledge that relevant information has not been disclosed will, at a minimum, often justify a finding of lack of due diligence, and may, in certain circumstances, support an inference that counsel made a strategic decision not to pursue disclosure.

Cases Cited

Referred to: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Egger*, [1993] 2 S.C.R. 451; *R. v. Chaplin*, [1995] 1 S.C.R. 727; *R. v. Carosella*, [1997] 1 S.C.R. 80; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. C. (M.H.)*, [1991] 1 S.C.R. 763; *R. v. Bramwell* (1996), 106 C.C.C. (3d) 365, aff'd [1996] 3 S.C.R. 1126; *R. v. S.E.S.* (1992), 100 Sask. R. 110; *R. v. McAnespie*, [1993] 4 S.C.R. 501.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 24(1).

Criminal Code, R.S.C., 1985, c. C-46, s. 21(1).

APPEAL from a judgment of the Nova Scotia Court of Appeal (1997), 156 N.S.R. (2d) 81, 461 A.P.R. 81, [1997] N.S.J. No. 20 (QL) (*sub nom. R. v. McQuaid (Dixon Appeal)*), dismissing the accused's appeal from his conviction for aggravated assault (1996), 148 N.S.R. (2d) 321 (*sub nom. R. v. McQuaid*), 429 A.P.R. 321, [1996] N.S.J. No. 81 (QL). Appeal dismissed.

L. W. Scaravelli, for the appellant.

Kenneth W. F. Fiske, Q.C., and *Richard B. Miller*, for the respondent.

//Cory J.//

The judgment of the Court was delivered by

1 CORY J. -- Three issues arise in this appeal:

- (1) What is the appropriate test to be used to determine whether the Crown's inadvertent failure to disclose relevant material constituted a violation of the appellant's right to disclosure under s. 7 of the *Canadian Charter of Rights and Freedoms*?
- (2) Where an appellant's right to disclosure is violated, what is the appropriate test to be used to determine whether his or her *Charter* right to make full answer and defence was also thereby impaired?

(3) In determining whether an appellant's right to make full answer and defence was impaired, what effect is to be given to defence counsel's lack of due diligence?

2 Several aspects of these issues are common to the appeals of Spencer Dixon, Herman McQuaid, Guy Leaman Robart, Cyril Joseph Smith and Stacey Skinner, all of whom were tried together on charges of aggravated assault arising out of the same factual circumstances. All five appeals were heard together by this Court. These reasons will address the common aspects, and separate reasons will deal with any issues that are unique to the other appeals.

I. Factual Background

3 On September 10, 1994, a fraternity hosted a party in Halifax. The evening was uneventful until a young woman named Shannon Burke became involved in a physical confrontation with Terrence Dixon, a young man whom she claimed was the father of her child. Terrence Dixon dragged Burke out of the fraternity house with others following. Two young men who had attended the party -- Rob Gillis and John Charman -- attempted to intervene and help Burke. This confrontation escalated and expanded to include a number of young men who attacked Gillis and Charman. Gillis fell to the ground, hit the back of his head and began bleeding badly. A circle formed around Charman, he was hit from behind and had his teeth knocked out.

4 Darren Watts went to the aid of his friend Charman. As soon as he did, the circle of men that had formed around Charman switched its attention to Watts. One from that group knocked him to the ground with a single punch. The men in the group kicked him and continued to do so repeatedly until they fled across the street. The vicious

beating left Watts permanently disabled. He underwent two operations including the partial removal of the frontal lobe of his brain. He had to undertake extensive rehabilitation treatment, and has lost the use of his left side. His cognitive and motor skills have not returned to the levels he enjoyed before the assault.

5 Six men, including the five appellants, were convicted of committing an aggravated assault on Darren Watts. At the same trial, the appellant Cyril Smith was also convicted of the aggravated assault of Rob Gillis. The appellants Herman McQuaid and Stacey Skinner were convicted of the aggravated assault of John Charman.

6 During the course of the trial, counsel for all the accused were provided with copies of police occurrence reports. The reports included summaries of statements given by Terris Daye, Terrance Tynes, Travia Carvery and Edmond Levia, none of which had been produced by the Crown. After conviction and sentencing, trial counsel for all of the accused except Skinner met to discuss appeal issues. The statements were produced by the Crown after this meeting at the request of counsel for one of the accused. One of the grounds raised in the appeal pertained to the Crown's failure to disclose these statements.

7 The Nova Scotia Court of Appeal admitted fresh evidence by way of counsel's affidavits as to their conduct in pursuing disclosure prior to and during the trial. The affidavits reveal that by the time the preliminary inquiry was held during the week of June 5, 1995, counsel for all accused determined that the same material had been disclosed to all of them. This disclosure did not include the four missing statements or any reference to the fact that these statements had been taken. However, counsel had received a transcript of the sworn statement given by Danny Clayton -- the Crown's main identification witness -- in which Clayton identified Terris Daye and Terrance

Tynes as eyewitnesses to the assaults. Counsel also received the statements of Stephen (Dee) Nelson, Nathaniel Robart and Michael Barton, all of whom referred to three of the four individuals whose statements were not disclosed, including Terris Daye. The Court of Appeal observed that all counsel also received a chart dated October 13, 1994 and a cross-reference sheet dated October 14, 1994. While it is not clear exactly when these documents were received, the Court of Appeal found that defence counsel probably had them prior to the preliminary inquiry, and certainly prior to trial. The chart indicates that Tynes, Daye, Carvery and Levia were in the immediate vicinity when the assaults took place. The cross-reference sheet also suggests that a statement was taken from Terris Daye.

8 Counsel for all accused met for a pre-trial conference with Crown counsel, Mr. Craig Botterill, on January 4, 1996. At that time, Mr. Botterill invited all counsel to attend at his office and copy any of the material in the Crown's file. Counsel representing Cyril Smith attended on behalf of counsel for Spencer Dixon and counsel for Herman McQuaid. Counsel for Guy Robart and counsel for Stacey Skinner attended separately. All three counsel who attended Mr. Botterill's office stated in their affidavits that the four undisclosed statements were not in the Crown's file when they reviewed it prior to trial.

9 The trial began on Monday, February 5, 1996. At some point after the trial commenced, Mr. Scaravelli, counsel for Spencer Dixon, asked a police constable for copies of the occurrence reports. Approximately 160 pages of original reports were produced a short time later. Mr. Scaravelli brought these reports to the attention of other counsel, and by Thursday, February 8, 1996, all counsel had copies of the police occurrence reports, which made reference to the four undisclosed statements.

10 By Monday, February 12, 1996, when he had completed his review of the police occurrence reports, Mr. Scaravelli was aware that four statements had been taken by the police and had not been disclosed by the Crown. However, based on summaries of the statements included in the occurrence reports, he decided there was nothing in the statements that would assist the accused in making full answer and defence. He stated in his affidavit that he was confident that all relevant information had been disclosed by the Crown, and he therefore did not pursue the matter further. By that same date three other defence counsel, Mr. Katsihtis, Mr. O'Neill and Mr. Coady, representing Cyril Smith, Herman McQuaid and Guy Robart respectively, were also aware that four witness statements had not been disclosed by the Crown. They too decided, on the basis of the summaries, not to request disclosure of the statements. Ms. Cain-Grant, counsel for the appellant Skinner, had acted in only one other criminal trial. She believed the summaries in the occurrence reports to be the complete statements given to police and as a result did not seek further disclosure.

II. Decisions Below

A. *Nova Scotia Supreme Court* (1996), 148 N.S.R. (2d) 321

11 At the trial for the assault on Darren Watts, Saunders J. made very careful and comprehensive findings of fact. He found that the five appellants were part of the group of men who surrounded Watts and were responsible for his beating. Saunders J. found that the appellants, as part of the group around Watts, were there either to beat Watts, to encourage the beating or to stand shoulder to shoulder to entrap him. Applying s. 21(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, he found all were guilty of committing an aggravated assault on Darren Watts.

12 The Crown relied heavily on the testimony of Danny Clayton, who admitted to participating in the aggravated assault on Darren Watts and who testified in return for immunity. Clayton was the only Crown witness to identify Watts's assailants. His character was questioned. Further, he was an accomplice. Saunders J. very carefully scrutinized his evidence. He fully recognized the frailties of eyewitness testimony, but found that they were minimized by Clayton's presence at and participation in the assault. Clayton also knew the appellants personally, and had grown up with them and lived with them in the same community. These factors were found to have strengthened his evidence of identification. Further, Saunders J. found that Clayton's evidence was supported, in material respects, by the other evidence adduced. As a result, he was not left with the sense that it would be unsafe to convict the appellants of the aggravated assault of Darren Watts. On the basis of Clayton's testimony and all the evidence presented he was satisfied beyond a reasonable doubt of their guilt.

13 Saunders J. also accepted Clayton's testimony that Cyril Smith struck Rob Gillis, and found Smith guilty of the aggravated assault on Gillis. Saunders J. further noted that both Stacey Skinner and Herman McQuaid admitted to striking John Charman in their police statements. These admissions supported Clayton's testimony that Stacey Skinner and a man whom Clayton tentatively identified as Stephen (Dee) Nelson struck John Charman. The trial judge concluded that Skinner and McQuaid had committed an aggravated assault on Charman.

B. Nova Scotia Court of Appeal (1997), 156 N.S.R. (2d) 81

14 The principal issue before the Court of Appeal was whether the failure to disclose the four witness statements impaired the appellant's right to make full answer and defence. Chipman J.A., writing for the majority, noted that the parties agreed there

was no improper motive in the Crown's failure to disclose the statements, and that the only potentially material statement was that of Terris Daye.

15 Chipman J.A. found that trial counsel for the appellant did not seek the missing statements or bring the failure to disclose the statements to the attention of the trial judge at the earliest opportunity as they were required to do. It was his opinion that once the Crown produced the police occurrence reports during the course of the trial, defence counsel must have known that four statements had been taken by the police and had not been produced by the Crown. In his view, counsel had a choice at that point -- "call for the statements or live without them" (p. 93). He found that certain contradictions between the summary of Daye's statement and Clayton's testimony would have prompted counsel who had any interest in the statements to investigate these discrepancies further. Chipman J.A. concluded that a tactical decision had been made at trial not to pursue disclosure of these statements, and that a contrary position was only taken following conviction. He observed that a lack of due diligence on the part of defence counsel is an important factor in determining whether to order a new trial.

16 However, the majority went on to dismiss the appeal on the basis that the undisclosed material was of no weight. Chipman J.A. held that on appeal from a conviction, where the Crown has failed to provide full disclosure, an appellant must show "that there is a reasonable probability that had the non-disclosed material been disclosed, the result might have been different" (p. 104). He then considered the materiality of Terris Daye's statement in light of this test and concluded that it did not undermine "the overwhelming body of evidence indicat[ing] that there was a circle of black males surrounding and beating Watts" (p. 111). Though Chipman J.A. recognized that there were inconsistencies among the witnesses, he found a surprising unanimity about this circle, which was described from various different vantage points. He further

found that Daye either did not see or was unwilling to admit to seeing who attacked Watts, and concluded that there was no reasonable probability that had this statement been available at or prior to the trial, the result might have been different.

17 Chipman J.A. therefore rejected the appellant's argument that because Daye's statement contradicted Clayton's testimony as to the location of some of the accused during the attack on Watts, it could have been used to weaken Clayton's credibility. He similarly rejected the argument that Daye's description of inner and outer circles surrounding Darren Watts supported evidence given by other Crown witnesses suggesting that the number of Watts's attackers was limited to three or four men. Chipman J.A. further noted that the summary of Daye's statement in the police occurrence report included this description of two circles around Watts, and thus counsel did not lose a realistic opportunity to garner and present evidence flowing from this statement. Chipman J.A. held that there was nothing in the statement that opened any avenue of pre-trial investigation not already available to diligent counsel.

18 Bateman J.A., in dissent, disagreed with the majority's conclusion that to merit a new trial, an appellant must show a reasonable probability that the result might have been different had the non-disclosed material been produced. She held that any inquiry into the materiality of undisclosed information must include a generous assessment of the reasonable possibility that the non-disclosure impaired the preparation of the defence and fairness of the trial process, and that this inquiry encompassed more than a consideration of the reliability of the result. It was her opinion that there was enough information in Daye's statement to make it a potentially important resource in assisting with the preparation and presentation of the defence. She could not say that had Daye's statement been available to the defence, there was no reasonable possibility that the result might have been different, nor could she find that the fairness of the trial was

not affected. She thus held that the right of the appellant to make full answer and defence was impaired by the Crown's non-disclosure.

19 Bateman J.A. also disagreed with her colleagues' conclusion that trial counsel for the appellant had failed to exercise due diligence. She shared the majority's concerns that failure by counsel for the various appellants to provide answers to questions posed at the appeal hearings, the lack of information in the affidavits of defence counsel as to their knowledge of the statement, and the unexplained interest in the statements subsequent to trial gave rise to suspicions that some or all of them may have made a strategic decision not to pursue disclosure. However, she did not conclude that trial counsel for the appellant had made a tactical choice to ignore the Crown's non-disclosure. She would have granted the appellant's request for a new trial.

III. Analysis

A. *The Crown's Duty to Disclose*

20 In *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, it was held that the Crown has an obligation to disclose all relevant material in its possession, so long as the material is not privileged. Material is relevant if it could reasonably be used by the defence in meeting the case for the Crown. Relevance was described in *R. v. Egger*, [1993] 2 S.C.R. 451, at p. 467, in this way:

One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed -- *Stinchcombe*, *supra*, at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.

21 Clearly the threshold requirement for disclosure is set quite low. As a result, a broad range of material, whether exculpatory or inculpatory, is subject to disclosure. See *Stinchcombe*, *supra*, at p. 343. In particular, “all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses” (p. 345). The Crown’s duty to disclose is therefore triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence. See *R. v. Chaplin*, [1995] 1 S.C.R. 727, at p. 742.

22 The obligation resting upon the Crown to disclose material gives rise to a corresponding constitutional right of the accused to the disclosure of all material which meets the *Stinchcombe* threshold. As Sopinka J. recently wrote for the majority of this Court in *R. v. Carosella*, [1997] 1 S.C.R. 80, at p. 106:

The right to disclosure of material which meets the *Stinchcombe* threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the *Charter*. Breach of that obligation is a breach of the accused’s constitutional rights without the requirement of an additional showing of prejudice.

Thus, where an accused demonstrates a reasonable possibility that the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence, he has also established the impairment of his *Charter* right to disclosure.

23 However, a finding that an accused’s right to disclosure has been violated does not end the analysis. As Sopinka J. wisely observed in *Carosella*, *supra*, at p. 100, an appellate court must be careful not to “confus[e] the obligation to establish a breach

of the right [to full answer and defence] with the burden resting on the appellant in seeking a stay”. Similarly, the initial test which must be met in order to establish a breach of the right to disclosure is analytically distinct from the burden to be discharged to merit the remedy of a new trial. The right to disclosure of all relevant material has a broad scope and includes material which may have only marginal value to the ultimate issues at trial. It follows that the Crown may fail to disclose information which meets the *Stinchcombe* threshold, but which could not possibly affect the reliability of the result reached or the overall fairness of the trial process. In those circumstances there would be no basis for granting the remedy of a new trial under s. 24(1) of the *Charter*, since no harm has been suffered by the accused.

24 It will be necessary later to explore in greater depth the nature of the burden to be discharged to merit a new trial. Now it will suffice to observe that for the purposes of this first stage of the analysis, an appellate court may well find that an accused’s *Charter* right to disclosure has been breached, and yet deny the remedy of a new trial if it is found that the trial process was fundamentally fair and that there was no reasonable possibility the result at trial might have been different had the undisclosed material been produced. The right to full disclosure is just one component of the right to make full answer and defence. It does not automatically follow that solely because the right to disclosure was violated, the *Charter* right to make full answer and defence was impaired.

Was the Appellant’s Right to Disclosure Breached at Trial?

25 The appellant has based his appeal on the failure to disclose all four witness statements, despite the finding of the Nova Scotia Court of Appeal that “[i]t was apparent from the argument that Daye’s statement is the only one of the four non-disclosed statements relied on as material to the issue of full answer and defence” (p. 88). Both

the majority and dissenting reasons were restricted to a consideration of Daye's statement. However, the majority evaluated the undisclosed statements solely in relation to their impact on the result reached at trial, and did not consider each statement in relation to the threshold issue as to whether there had been a breach of the appellant's *Charter* right to disclosure, although both issues may well have been collapsed into one. As a result, it will be appropriate to consider whether the failure to disclose each of the four statements violated the appellant's right to disclosure of relevant material.

26 The four statements may be briefly summarized as follows:

- (1) The statement of Travia Carvery dated September 16, 1994, indicates that he was inside the fraternity house when the assaults took place and that he did not witness any of the beatings;
- (2) The statement of Edmond ("T.J.") Levia dated September 22, 1994, indicates that he was inside the fraternity house when the assaults took place and that he did not witness any of the beatings;
- (3) The statement of Terrance Tynes dated September 21, 1994, reveals that he was in the vicinity of the assaults. He also states that he was with Danny Clayton, the Crown's main identification witness, while Shannon Burke and Terrence Dixon were arguing, and that he left the scene with Clayton. Tynes also describes the clothing he was wearing that night;
- (4) The statement of Terris Daye dated September 19, 1994, indicates that he witnessed two of the assaults. Daye identifies the location of some of the accused during these assaults, and identifies some of the assailants. Daye

specifically implicates the appellant in the assault of John Charman, though it is possible that Daye was referring to the assault of Rob Gillis. The appellant was convicted of the assault on Darren Watts only.

27 The Crown has an obligation to disclose all information, whether inculpatory or exculpatory, that could “reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence” (*Egger, supra*, at p. 467). Even so, “[w]hile the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant” (*Stinchcombe, supra*, at p. 339). The statements of Carvery and Levia contain no relevant information at all, and there is no reasonable possibility that their statements could have been of any use to the appellant at trial.

28 To minimize the risk of inadvertent non-disclosure, the Crown might well choose to disclose even those witness statements that do not initially appear to be relevant. The defence obviously knows its case better than the Crown, and something which seems irrelevant could have significance to the defence. However it is clear that neither Carvery nor Levia had any further participation in the incident or in the investigation or prosecution of the appellant. Their statements were irrelevant and the Crown did not breach its obligation to disclose relevant material by failing to produce them.

29 However, the same thing cannot be said of the statement of Terrance Tynes, even though it seems to contain very little relevant information. It is significant that Tynes places himself in the vicinity of the assaults, though he does not identify any of the assailants. He also states he was with Danny Clayton for some part of the evening. Though Tynes does not contradict or add anything to Clayton’s evidence, the fact that

Tynes was with Clayton at some point during the assaults may have been of some use to the defence. Tynes's description of his clothing on the night in question may also have been of some use to the defence in cross-examining those Crown witnesses who could not identify Watts's assailants by name and who had to describe the appearance of the men they saw. Although the statement is of marginal value, it does meet the threshold articulated in *Stinchcombe* and should have been disclosed.

30 The statement of Terris Daye should also have been disclosed. Daye implicates the appellant in the assault of Rob Gillis, for which he was neither indicted nor convicted. Daye also makes certain incriminating remarks about the appellant in the course of his statement, such as "Spencer punched and kicked this guy. He likes to kick." Daye's statement also contradicts the evidence given by Clayton in certain respects, and as a result it could possibly have been of some use in challenging Clayton's credibility. These aspects of Daye's statement will have to be considered in greater detail in considering whether the appellant's *Charter* right to make full answer and defence was impaired by the Crown's non-disclosure of this statement. Once again, this statement meets the threshold set out in *Stinchcombe* and should have been disclosed. It follows that the appellant's right to disclosure was infringed by the Crown's inadvertent failure to produce these two statements.

B. *Impairment of the Right to Make Full Answer and Defence and the Remedy to Be Granted under Section 24(1)*

31 The right to disclosure is but one component of the right to make full answer and defence. Although the right to disclosure may be violated, the right to make full answer and defence may not be impaired as a result of that violation. Indeed, different principles and standards apply in determining whether disclosure should be made before

conviction and in determining the effect of a failure to disclose after conviction. For instance, where the undisclosed material is available for review at trial, the presiding judge will evaluate it in relation to the *Stinchcombe* threshold to determine whether the Crown breached its obligation to disclose by withholding the material. If it has, an order for production or perhaps an adjournment will be the appropriate remedy. Obviously, these remedies are no longer available after conviction. At this stage, an appellate court must determine not only whether the undisclosed information meets the *Stinchcombe* threshold, but also whether the Crown's failure to disclose impaired the accused's right to make full answer and defence. Where an appellate court finds that the right to make full answer and defence was breached by the Crown's failure to disclose, the appropriate remedy will depend on the extent to which the right was impaired. Where, as here, the accused was tried before a judge alone, the judge has provided thorough reasons for the decision, and the undisclosed evidence is available for review, an appellate court is particularly well placed to assess the impact of the failure to disclose on the accused's ability to make full answer and defence at trial.

32 At this point, something should also be said about the standard to be met by an accused who asserts that the right to make full answer and defence was impaired. It is trite but worth repeating that in all cases where a person claims that a *Charter* right has been violated, he or she must prove on a balance of probabilities that the violation occurred. Thus, before granting any sort of remedy under s. 24(1), it must be found that it was more likely than not that the *Charter* right in question was infringed or denied. See *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 277.

33 The evidence required to meet this burden and the factors to be considered will differ according to the particular right at issue and the particular remedy sought. For example, where a court is persuaded that undisclosed information meets the *Stinchcombe*

threshold, an accused has met his burden to establish a violation of his *Charter* right to disclosure. As noted above, the appropriate remedy for such a violation is, at trial, an order for production or an adjournment. Where non-disclosure is raised on an appeal from a conviction, an accused must, as a threshold matter, establish a violation of the right to disclosure. Further, the accused bears the additional burden of demonstrating on a balance of probabilities that the right to make full answer and defence was impaired as a result of the failure to disclose.

34 This burden is discharged where an accused demonstrates that there is a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process. See *R. v. C. (M.H.)*, [1991] 1 S.C.R. 763, at p. 776; *Stinchcombe, supra*, at p. 348. Imposing a test based on a reasonable possibility strikes a fair balance between an accused's interest in a fair trial and the public's interest in the efficient administration of justice. It recognizes the difficulty of reconstructing accurately the trial process, and avoids the undesirable effect of undermining the Crown's disclosure obligations. This would be the result if the Crown were placed in a better position by withholding rather than disclosing information of relatively low probative value. However, the reasonable possibility to be shown under this test must not be entirely speculative. It must be based on reasonably possible uses of the non-disclosed evidence or reasonably possible avenues of investigation that were closed to the accused as a result of the non-disclosure. If this possibility is shown to exist, then the right to make full answer and defence was impaired.

35 Once an accused establishes impairment of the right to make full answer and defence as a result of the Crown's failure to disclose, he or she is entitled to a remedy under s. 24(1). Again, it is at this stage that the degree of impairment or prejudice to the accused's rights must be assessed and considered in relation to the remedy sought. For

example, an accused who seeks the extraordinary remedy of a stay of proceedings must not only establish, on a balance of probabilities, that the right to make full answer and defence was impaired, but must also demonstrate irreparable prejudice to that right. See *Carosella, supra*, at p. 112. By contrast, where the remedy sought is a new trial, an accused need only persuade the appellate court of the reasonable possibility that the failure to disclose affected either the outcome at trial or the overall fairness of the trial process, and nothing more.

36 Thus, in order to determine whether the right to make full answer and defence was impaired, it is necessary to undertake a two-step analysis based on these considerations. First, in order to assess the reliability of the result, the undisclosed information must be examined to determine the impact it might have had on the decision to convict. Obviously this will be an easier task if the accused was tried before a judge alone, and reasons were given for the conviction. If at the first stage an appellate court is persuaded that there is a reasonable possibility that, on its face, the undisclosed information affects the reliability of the conviction, a new trial should be ordered. Even if the undisclosed information does not itself affect the reliability of the result at trial, the effect of the non-disclosure on the overall fairness of the trial process must be considered at the second stage of analysis. This will be done by assessing, on the basis of a reasonable possibility, the lines of inquiry with witnesses or the opportunities to garner additional evidence that could have been available to the defence if the relevant information had been disclosed. In short, the reasonable possibility that the undisclosed information impaired the right to make full answer and defence relates not only to the content of the information itself, but also to the realistic opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence.

In considering the overall fairness of the trial process, defence counsel's diligence in pursuing disclosure from the Crown must be taken into account. A lack of due diligence is a significant factor in determining whether the Crown's non-disclosure affected the fairness of the trial process. In *Stinchcombe*, *supra*, at p. 341, defence counsel's duty to be duly diligent was described in this way:

Counsel for the accused must 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. Observance of this rule will enable the trial judge to remedy any prejudice to the accused if possible and thus avoid a new trial. See *Caccamo v. The Queen*, [1976] 1 S.C.R. 786. Failure to do so by counsel for the defence will be an important factor in determining on appeal whether a new trial should be ordered.

The fair and efficient functioning of the criminal justice system requires that defence counsel exercise due diligence in actively seeking and pursuing Crown disclosure. The very nature of the disclosure process makes it prone to human error and vulnerable to attack. As officers of the court, defence counsel have an obligation to pursue disclosure diligently. When counsel becomes or ought to become aware, from other relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure. This was aptly stated by the British Columbia Court of Appeal in *R. v. Bramwell* (1996), 106 C.C.C. (3d) 365 (aff'd [1996] 3 S.C.R. 1126), at p. 374:

. . . the disclosure process is one which engages both the Crown and the defence. It is not one in which defence counsel has no role to play except as passive receiver of information. The goal of the disclosure process is to ensure that the accused is not denied a fair trial. To that end, Crown counsel must disclose everything in its possession which is not clearly irrelevant to the defence, but the defence must also play its part by diligently pursuing disclosure from Crown counsel in a timely manner. Further, where, as here, defence counsel makes a tactical decision not to pursue disclosure of certain documents, the court will generally be unsympathetic to a plea that full disclosure of those documents was not made.

See also *R. v. S.E.S.* (1992), 100 Sask. R. 110 (C.A.), at p. 121.

38 Whether a new trial should be ordered on the basis that the Crown's non-disclosure rendered the trial process unfair involves a process of weighing and balancing. If defence counsel knew or ought to have known on the basis of other disclosures that the Crown through inadvertence had failed to disclose information yet remained passive as a result of a tactical decision or lack of due diligence it would be difficult to accept a submission that the failure to disclose affected the fairness of the trial. See *R. v. McAnespie*, [1993] 4 S.C.R. 501, at pp. 502-3.

39 In sum, all these factors must be appropriately balanced. In situations where the materiality of the undisclosed evidence is, on its face, very high, a new trial should be ordered on this basis alone. In these circumstances, it will not be necessary to consider the impact of lost opportunities to garner additional evidence flowing from the failure to disclose. However, where the materiality of the undisclosed information is relatively low, an appellate court will have to determine whether any realistic opportunities were lost to the defence. To that end, the due diligence or lack of due diligence of defence counsel in pursuing disclosure will be a very significant factor in deciding whether to order a new trial. This balancing process must now be applied to this appeal.

Application to this Appeal

- (a) *The Appellant's Conviction under Section 21(1) of the Criminal Code*

It is significant to the disposition of this appeal that the trial judge found that the appellant was guilty both as a principal and as a party under s. 21(1) of the *Criminal Code*. That section provides:

21. (1) Every one is a party to an offence who

(a) actually commits it;

(b) does or omits to do anything for the purpose of aiding any person to commit it; or

(c) abets any person in committing it.

The trial judge's reasons for convicting the appellant for the aggravated assault of Darren Watts under s. 21(1) of the *Code* were expressed forcefully and with great clarity. He stated (at p. 324):

The identity of the man or men who jumped up and down on Darren Watts, and the identity of the man who pushed away his friends so as to get a better angle, or more space, to take a vicious three step kick at his head, described at various times as a "soccer", "grey cup", or "killer kick", cannot be affirmed. I find that the group that formed a circle around Darren Watts and were responsible for his savage beating comprised at least seven black males, those being these six accused and the Crown witness, Danny Clayton. There were possibly others in that circle which surrounded Mr. Watts, whose identities are best known to his assailants. However, their names and level of participation that night are irrelevant for the purposes of this trial, as I am satisfied beyond a reasonable doubt of the guilt of each of these six accused in the aggravated assault of Darren Watts.

It is well settled that mere presence at the scene of a crime is not sufficient to support a finding of culpability. (*Dunlop and Sylvester v. The Queen* [[1979] 2 S.C.R. 881]). Something more is required. Here, the Crown relies upon s. 21(1) of the *Criminal Code*, the effect of which is to make equally culpable the person who actually commits the offense, and any person who aids or abets in committing the offense. While I am convinced beyond a reasonable doubt as to the guilt of these six accused on all counts based on the testimony of their accomplice, Danny Clayton, were it necessary, I would also be prepared to say that each of the accused and Danny Clayton were parties to the aggravated assault of Darren Watts as charged on the Indictment, within the meaning of s. 21(1). I am satisfied the men in the circle were all there for the same reasons: to kick or beat Darren Watts; or help in administering the beating; or encourage it; or stand -- as

observed by others -- shoulder to shoulder so as to form a circle thereby ensnaring Darren Watts and preventing him from getting away or stopping others from coming to his rescue. [Emphasis added.]

41 The appellant bears the burden of demonstrating that either (i) it is reasonably possible the non-disclosed statements affect the reliability of his conviction as a principal in the aggravated assault on Darren Watts, and the conviction for aiding or abetting the assault on Watts; or (ii) that it is reasonably possible the non-disclosure of the statements affected the overall fairness of the trial process. It must be remembered that as a result of the appellant's conviction under s. 21(1) of the *Code*, he must show that the undisclosed statements affected each of the alternative conclusions referred to in the subsection, specifically, that the appellant either kicked or beat Darren Watts; helped to administer the beating; or encouraged the beating. In my opinion, the appellant has not discharged this burden.

(b) *Materiality of Tynes's Statement*

42 There is little to say in relation to the materiality of Tynes's statement. It neither adds to nor contradicts the identification evidence given by Danny Clayton. Tynes makes no reference to the appellant at all. Neither does his description of his own clothing and appearance that night have any impact on the appellant's conviction. It is apparent that, on its face, Tynes's statement could not have had any impact on the reliability of the appellant's conviction at trial. The possibility that Tynes's statement could have been used to garner additional evidence will be considered later in relation to the fairness of the trial process.

(c) *Materiality of Daye's Statement*

43 It is significant that Daye states very clearly that he only witnessed two of the assaults that took place on the night in question, and definitely implies that he did not witness the assault of Darren Watts. Indeed, he has little to offer in relation to the assault on Watts, beyond the description of two circles of people around the victim and the location of the assault. This paucity of detail stands in stark contrast to Daye's description of the other two assaults, in which he implicates the appellant.

44 Thus, in terms of direct impact on the appellant's conviction, the statement is of no consequence. Daye not only has little to say about the assault on Watts, he in fact makes highly incriminating statements about the appellant. It follows that there is no reasonable possibility that Daye's statement, on its face, could directly affect the reliability of the result reached at trial.

45 It now must be considered whether the statement could have had some indirect impact. The identification of the appellant as one of the men who assaulted Darren Watts rested to a large extent on Clayton's credibility. As a result, any contradictions that exist between Daye's statement and the evidence given by Clayton are relevant to the appellant's defence and could potentially affect the reliability of the conviction. The significant contradictions may be summarized in this way:

- i. Daye stated that the appellant and Damon Cole assaulted "#1 guy" (it appears Daye was referring to the assault on Rob Gillis). Clayton testified that Cyril Smith and Damon Cole assaulted Rob Gillis.

- ii. When asked whether he saw Cyril Smith punch, hit or kick anyone, Daye responded, “No”. Clayton testified that Cyril Smith assaulted Rob Gillis.
- iii. Daye stated that he did not see Stacey Skinner hit anyone, though he knew that Skinner had admitted to an assault in his own statement to police. Clayton testified that Skinner assaulted Charman and Watts. It should also be noted that Skinner admitted to the assault on Charman in his statement to the police.
- iv. Daye stated that he could not remember Guy Robart hitting anyone. Clayton testified that Robart assaulted Watts.
- v. Daye stated that one group of men ran toward the hospital across from the fraternity house, and then another group joined them. Clayton testified that there was a single group -- the one that assaulted Darren Watts -- that ran to the hospital. This was supported by the testimony of another Crown witness, Blaine McQueen. The “single cohesive group” theory was a significant part of the Crown’s theory at trial.

It seems to me that these relatively insignificant contradictions could not possibly affect the reliability of the appellant’s conviction under s. 21(1) for the assault on Darren Watts. As to (i), it is not reasonably possible that Daye’s identification of the appellant as one of Gillis’s assailants would undermine the credibility of Clayton’s identification of the appellant as one of Watts’s assailants. This very minor contradiction on a peripheral issue could not raise a doubt in the trial judge’s mind regarding the appellant’s conviction for the assault on Watts. The contradictions referred to in (ii), (iii)

and (iv) are based on Daye's recollection and observation of the events in question. Once again, it is not reasonably possible that these gaps in Daye's memory and observations would undermine Clayton's credibility in the mind of the trial judge regarding the appellant's participation in the assault on Watts. It must be remembered that the trial judge carefully scrutinized all of Clayton's evidence and was convinced of his credibility. On this aspect he stated (at pp. 327-28):

I was impressed by the way he conducted himself while testifying. I watched him listened to him intently. Nothing of what he said or how he said it caused me to be left with any reasonable doubt of his positive identification of these six accused as being responsible for the aggravated assault of Darren Watts. . . .

While testifying Mr. Clayton left me with the clear impression that he was responding carefully and honestly to questions posed by counsel. Simply to illustrate, I noted that occasionally he asked questions of the cross-examiner to be sure that he understood the question before responding. He never appeared evasive, or argumentative, or attempting to cast himself or his answers in the best possible light. He acknowledged the obvious. Sometimes the form of the question posed resulted in an unsolicited response which, in my eyes, bolstered Clayton's credibility. When referred to previous statements where questions were asked using compound phrases like "kicking and punching" Clayton attempted to carefully draw a distinction. His answers to difficult questions were reasonable. He met them head on. . . .

In light of these comments it is unrealistic to think that the minor contradictions apparent in Daye's statement would have had the effect of undermining Clayton's credibility. Quite simply, they do not render the appellant's conviction unreliable.

47

As to (v), the Crown's theory of a single cohesive group is only significant in its application to the group of men who assaulted John Charman and then turned on Watts. Daye's statement that two groups of men left the scene does nothing to contradict this theory. This contradiction does not suggest in any way that the appellant's conviction is unreliable.

48 Lastly, Daye's description of an inner and outer circle around Watts indirectly supports the evidence of Lloyd Finter, the commissionaire at the hospital across the street from the fraternity house. Mr. Finter testified that he saw a group of about 12 people surrounding Watts, and that four men were administering the beating. The majority of the Court of Appeal noted that Mr. Finter differed from the majority of the other witnesses who testified as to the number of attackers, but that Mr. Finter left his vantage point or turned away from the attacks on at least six separate occasions.

49 No less than 12 other Crown witnesses described a group comprised of some 7 to 10 men around Watts. Moreover, the actual number of men who struck Watts that night is immaterial to the appellant's conviction, based on s. 21(1) of the *Code*. Thus, even if it were to be assumed that Daye's description of an inner circle of some undefined number of men around Darren Watts could affect the trial judge's conclusion based on Clayton's identification testimony that the appellant was one of the men who actually struck Darren Watts, this still would have no impact on the trial judge's conclusion that the appellant aided or abetted the assault on Watts. It is thus clear that there is no reasonable possibility that these statements affect the reliability of the result reached at trial, particularly since the appellant was convicted as both a principal and a party to the assault on Darren Watts.

(d) *Fairness of the Trial Process*

50 Though both Daye's and Tynes's statements, on their face, have little, if any, impact on the reliability of the result reached at trial, the appellant would nevertheless be entitled to a new trial if he were to show that the failure to disclose these statements affected the overall fairness of the trial process. This would be the result if the Crown's

failure to disclose deprived the defence of opportunities to pursue additional lines of inquiry with witnesses or garner additional evidence flowing from the undisclosed material. In the circumstances of this case, the fairness of the trial process was not affected by the Crown's failure to disclose. A significant factor in reaching this conclusion is defence counsel's lack of due diligence in pursuing disclosure.

51 In order to place the Crown's failure to disclose in the proper context, it is necessary to review the disclosure process followed in this case. First, prior to the preliminary inquiry, the Crown provided counsel with a transcript of the videotaped deposition of Danny Clayton. The following passage is included in this statement:

Q. Could Terrance Tynes, Terrence Day [sic], Nathaniel Robart and Michael Barton see the beating taking place on Darren Watts?

A. Most likely, yeah. Most likely, yeah.

Q. Do you recall where they were standing when Mr. Watts was being beaten?

A. I really can't recall where they were standing though, but I know they were on the corner.

Q. They were right there?

A. Um.

Q. Were they there all -- were they present also when the other frat guys were beaten?

A. Yeah.

Q. Were they? Okay. . . . [Emphasis added.]

Moreover, as Bateman J.A. noted in the Court of Appeal (at p. 137):

There is no suggestion that defence counsel were unaware, well in advance of trial, that Terris Daye was a possible eyewitness to all or some of the events that evening. He was clearly shown as such by the police

material provided to the defence; Guy Robart, in his statement to the police, identified Terris Daye as one of the people who was kicking Darren Watts; counsel for at least one of the accused cross-examined the key Crown witness, Danny Clayton, about Terris Daye's role in the assault; Mr. Daye's name arises more than 20 times in the evidence of the proceedings.

52 Indeed, on direct examination, Clayton testified that he attended the party with Tynes and Daye and left with them after the assaults took place. Counsel for the accused Guy Robart, on cross-examination, specifically asked Clayton about Daye's and Tynes's involvement in the assaults. In addition, in his own statement to the police, the appellant stated five times that he was with Tynes at the fraternity party, and that Tynes came out of the house with him when he followed Terrence Dixon and Shannon Burke onto the street. Clearly, defence counsel was well aware that both Daye and Tynes took some part in the events outside the fraternity house that evening, and knew that they might have witnessed the assaults.

53 In light of this background, it is surprising that when he became aware of the Crown's non-disclosure of Daye's and Tynes's statements, defence counsel did not request them. Instead, defence counsel maintains he had no interest in receiving the police statements of named eyewitnesses, including the man who accompanied the appellant into the fray outside the fraternity house. This position assumes even greater significance in light of the summary of the statements included in the police occurrence reports. The material parts of the summary of Daye's statement read as follows:

After being given young offender caution and explained [sic] in detail, it was decided by Terris Daye that he would give a statement. He places himself and the other players at the Frat party, 1770 Robie Street he cannot describe the clothing being worn by others that night. He states he seen [sic] four white guys walking south on Robie Street following Terry Dixon and Shannon Burke who were arguing. He reviewed the four pictures of the victims and identified John Charman as the first guy who got hit and went down. He stated Damon Cole punched him first and Spencer Dixon kicked him when he was down, because that's what Spencer likes to do. He points

out Dennis MacDonald as the second man being punched and he states Spencer Dixon did the punch and the kicking. Then he was unable to ID Robert Gillis' photo, but he knew Darren Watts' face from seeing it in the news. But he couldn't ID Watts as the man getting the beating that night. As it turns out Darren Watts was a friend of his brother Troy Daye.

Terris Daye after some questioning places himself on the outer circle surrounding Darren Watts. It is quite clear that he does not want to ID the key players as he is scared of them. Terris Daye places Cyril Smith, Danny Clayton, Terrance Tynes running west on Cedar Street after Guy Robart screams police. When questioned about the assault on the police officer he described that Guy and Nathaniel Robart ran in the same direction and were chased by the policeman. He described the police car as a burgundy shadow. . . . The writers were unable to get Daye to name any of the persons in the inner circle around Darren Watts. The mother seems to know more and if interviewed away from her son might give some useful information.

The occurrence reports were given to all defence counsel during the trial some days before Clayton testified.

54 In light of the damaging information about the appellant disclosed in the summary, it is not difficult to imagine that defence counsel might have made a tactical decision not to pursue disclosure. Nevertheless, defence counsel maintains in his affidavit filed with the Court of Appeal that he did not see anything in the summary that would help the accused in making full answer and defence and that "the reason [he] did not pursue the matter further is that [he] was confident at the time of trial, after having gone through the preliminary, that all relevant information was disclosed to the defence".

55 It must be remembered that defence counsel is not entitled to assume at any point that all relevant information has been disclosed to the defence. Just as the Crown's disclosure obligations are ongoing, and persist throughout the trial process, so too does defence counsel's obligation to be duly diligent in pursuing disclosure. To do nothing in the face of knowledge that relevant information has not been disclosed will, at a minimum, often justify a finding of lack of due diligence, and may, in certain

circumstances, support an inference that counsel made a strategic decision not to pursue disclosure. In this case, the summary in the occurrence report indicates that Daye's statement would very likely meet the test for relevance set out in *Stinchcombe*. When defence counsel reviewed the occurrence report, he knew or should have known that the Crown had failed in its disclosure obligations. When this became apparent, defence counsel should have brought this matter to the attention of the trial judge at the earliest opportunity. In the circumstances of this case, the Court of Appeal was right to conclude that at this point, defence counsel was faced with a choice: "call for the statements or live without them" (p. 93).

56 When he was aware or should have been aware of the Crown's failure to disclose Tynes's statement, defence counsel was obliged to take appropriate steps. He failed to do so and thereby failed to exercise due diligence in pursuing disclosure. The appellant is in no position to argue that he lost an opportunity to garner evidence flowing from Tynes's statement, since the failure to disclose it is to a significant extent attributable to defence counsel's inaction. Similarly, the appellant cannot now complain that Daye's statement was not disclosed. Indeed, his position is even less compelling in relation to this statement. The summary in the occurrence report, which was disclosed, refers to Daye's description of an inner and outer circle around Watts. When the summary was disclosed, before Clayton testified, counsel could have requested disclosure, sought an adjournment, and would then have had sufficient opportunity to investigate this aspect of Daye's statement. The summary also indicates a contradiction between Daye and Clayton as to who assaulted John Charman. Once again, counsel had the opportunity to pursue this apparent contradiction. The appellant cannot now claim the trial process was rendered unfair by virtue of the Crown's failure to disclose.

IV. Disposition

57 I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: Scaravelli & Associates, Halifax.

*Solicitor for the respondent: The Nova Scotia Public Prosecution Service,
Halifax.*