

## **Criminal Discovery in Canada: *R. v. Stinchcombe***

The Canadian Charter of Rights and Freedoms was adopted in 1982. It brought to Canada the express constitutional regulation of the police and prosecution function that exists in the United States under the Bill of Rights. One of the rights accorded the accused under the Charter, in §7, is the right to "make full answer and defence." This provision exactly parallels the compulsory process clause in purpose, and they share common ancestry in English-speaking common law traditions. The Canadian Supreme Court's landmark ruling in *R. v. Stinchcombe*, 3 S.C.R. 326, 68 C.C.C. (3d) 1 (1991), relying in part on "due process" but mainly on the right "make full answer and defence," described as "one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted," held that the prosecution had to turn over to the defense all material relevant to the charges, whether the prosecution intended to use it or not. The unanimous opinion, authored by the late, revered Chief Justice John Sopinka changed the landscape in Canada for criminal discovery where it has been working since that time.

The case involved an apparently favorable witness who the prosecution did not intend to call, and the refusal of the prosecution to turn over a tape recording of one interview and a written statement from another. Defense counsel was informed of the existence but not of the content of the statements. His requests for an order that the witness be called or that the Crown disclose the contents of the statements were refused. The provincial Court of Appeal upheld the conviction, but the Supreme Court of Canada reversed, ordering a new trial.

Held: The appeal should be allowed and a new trial ordered. The Crown has a legal duty to disclose all relevant information to the defense. The fruits of the investigation which are in its possession 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. The obligation to disclose is subject to the Crown's duty to respect the rules of privilege and to protect the identity of informers. Discretion must also be exercised with respect to the relevance of information. The Crown's discretion is reviewable by the trial judge, who should be guided by the general principle that information should not be withheld if there is a reasonable possibility that this will impair the right of the accused to make full answer and defense. The absolute withholding of information which is relevant to the defense can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure. This privilege is reviewable, however, on the ground that it is not a reasonable limit on the right to make full answer and defense in a particular case.

The Canadian Supreme Court's analysis puts full disclosure to the defense on foundational constitutional principles common to both our constitutions. It supersedes debates about what is "favorable" to an accused and the various vantage points from which to determine whether undisclosed information is "material" to the case.