C.A.C. No. 126136

NOVA SCOTIA COURT OF APPEAL

Chipman, Bateman and Flinn, JJ.A.
Cite as: R. v. Dixon, 1997 NSCA 50

BETWEEN:		
SPENCER DIXON		Lawrence W. Scaravelli for the Appellant
	Appellant	
- and -		
HER MAJESTY THE QUEEN		Kenneth W.F. Fiske, Q.C. for the Respondent
	Respondent	
		Appeal Heard: September 11, 1996
		Judgment Delivered: January 15, 1997

THE COURT: The appeal from conviction is dismissed; leave to appeal sentence is granted, but the sentence appeal is dismissed as per reasons for judgment of Chipman, J.A.; Flinn, J.A. concurring. Bateman, J.A. dissenting, would allow the appeal from conviction and order a new trial.

CHIPMAN, J.A.:

Spencer Dixon appeals to this Court from his conviction in Supreme Court without a jury for aggravated assault on Darren Watts and the sentence imposed therefor of a term of seven years incarceration.

The appellant was tried together with five others (Cyril Smith, Damon Cole, Herman McQuaid, Stacey Skinner and Guy Robart) on the charge of aggravated assault on Watts. The trial commenced on February 5, 1996 and ended on February 27, 1996. All were convicted following the trial: **R. v. McQuaid, et al.** (1996), 148 N.S.R. (2d) 321. Cole was sentenced to a term of six years incarceration for the assault and the other four to a term of eight years. **R. v. McQuaid, et al.** (1996), 149 N.S.R. (2d) 104.

Damon Cole and Cyril Smith were also convicted of aggravated assault on Rob Gillis. Each received two years imprisonment consecutive to the sentence for the assault upon Watts. Herman McQuaid and Stacey Skinner were convicted of aggravated assault on John Charman. Each was sentenced to prison for two years consecutive to the Watts sentence.

The other five men brought separate appeals from conviction and sentence to this Court. The appeal of Mr. Cole was heard on June 12, 1996, and by judgment of the Court (Freeman, Roscoe and Pugsley, JJ.A.) dated August 23, 1996, an application for fresh evidence relating to the failure of the Crown to grant full and timely disclosure to Mr. Cole was granted and a new trial ordered. The Court also rejected other grounds of appeal on which Mr. Cole relied for an order for a new trial or in the alternative, an acquittal. This judgment is reported as **R. v. Cole (D.)** (1996), 152 N.S.R. (2d) 321.

Appeals by Guy Robart, Cyril Smith and Herman McQuaid were heard by this panel of the Court following the argument of this appeal. The appeal of Stacey Skinner was heard on December 11, 1996. This opinion will deal, not only with the Dixon appeals, but those issues which are common to all appeals. I will give separate reasons only with respect to points unique to any specific appeal.

In these appeals, the grounds of appeal can be summarized:

(1) The trial judge erred in failing to consider relevant evidence.

(2) The trial judge erred in the application of the law relating to identification evidence.

(3) The trial judge erred in using out of court statements of the appellant's co-accused.

(4) The trial judge erred in reaching a verdict that was unreasonable.

(5) The Crown failed to make full and timely disclosure of four witness' statements: Terris Daye, Terrance Tynes, Travia Carvery and Edmond T.J. Levier.

(6) The sentences were manifestly excessive.

FACTS

Phi Kappa Pi fraternity held a party at its chapter house at 1770 Robie Street, Halifax on the evening of Saturday, September 10, 1994. It was heavily attended, with some estimates ranging up to 400 people. Shortly after 11:00 p.m. a group of black males arrived at the party. Michael Arsenault who was on the door at the time admitted them. The party was uneventful until Shannon Burke, a female, was admitted shortly after midnight in search of her boyfriend, Terrence Dixon. When Burke found him, he was dancing with Nina Mohammed. Burke physically assaulted Mohammed, whereupon Dixon grabbed Burke, slapped and hit her and dragged her out of the fraternity house by the hair. Burke responded by punching him back. A number of people, including Dixon's friends, followed as Dixon forcibly led Burke in a southerly direction along the west sidewalk of Robie Street to the corner of Robie and Cedar Streets. One of Burke's friends screamed "don't let him hit her, she's pregnant".

Several of the fraternity members followed the couple down the street. They expressed verbal concerns about Burke. Although told by Dixon's friends to mind their own business, the fraternity members verbally persisted in attempting to ensure Burke's safety.

The trial judge described the ensuing events as follows (148 N.S.R. (2d) at p. 330):

> One of those who attempted to intervene and help Shannon Burke was Rob Gillis . . . I accept that . . . he simply wanted to ensure the girl was all right and was not hurt . . . at some point he had a hold of Shannon Burke and may also have come into

> physical contact with Terrence Dixon. Suddenly without any warning and provocation Damon Cole stepped forward, threw a punch at Rob Gillis which knocked him down immediately. Gillis struck the back of his head as a result of falling from this punch, and was bleeding badly . . .
>
> John Charman was also one of those who attempted to verbally intercede and separate Shannon Burke from Terry Dixon. At 5' 7" and 140 pounds he was obviously the smaller of his friends, Gillis and Watts. He saw Gillis struck and on the ground about 10 feet away. Moments later, perhaps two or three seconds, a circle started to form around him and without warning he was hit from behind and had his teeth knocked out . . .
>
> Darren Watts went to the aid of his friend, John Charman. As soon as he did the circle of men that formed around Charman, switched their focus and attention to Darren Watts. One from that circle of men, which included all of the accused and Danny Clayton, eventually caught him with a punch, knocking him to the ground with such force that the sound of his head striking the concrete was heard by witnesses at the Camp Hill hospital across the street . . .
>
> Darren Watts lay on the ground, unable to defend himself as he was repeatedly kicked by the men forming the circle around him. He had absolutely no malice or ill will towards any of his assailants. He did nothing to provoke them.

Darren Watts received life threatening injuries. His friends had great difficulty recognizing him at the scene because of the extent of his beating. A CT scan performed at the hospital disclosed damage and bleeding in his brain. As the doctors were unable to control the intercranial pressure, his skull was opened and there was a "partial removal of the necrotic frontal lobe". He spent several months at the Nova Scotia Rehabilitation Centre undertaking speech, social, psychological and vocational rehabilitation. As late as January, 1996, he was continuing to suffer seizures requiring admission to hospital. His friends and family observed that his cognitive and motor skills had not returned to their pre-injury level.

The main issue at the trial was the identity of those persons who committed the assaults on Watts, Gills and Charman. The principal witness called on behalf of the Crown in relation to that issue was Danny Clayton, an admitted accomplice in the assault

on Watts who received immunity from the Crown in return for his testimony.

The trial lasted 11 days. The Crown called 29 witnesses. An agreed statement of facts was introduced detailing the extent of the injuries sustained by the three victims. None of the six accused testified nor was evidence tendered on their behalf.

The trial judge found that the group that formed the circle around Watts and administered the savage beating on him comprised at least seven black males, those being the six accused and Clayton. The trial judge was convinced beyond a reasonable doubt as to the guilt of the six accused on all counts. He was satisfied that the men in the circle were all there for the same reasons: to kick or beat Watts, help in administering the beatings, encourage the beatings, stand shoulder to shoulder so as to form a circle thereby ensnaring Watts and stop others from coming to his rescue.

RELEVANT LEGISLATION

The **Criminal Code**, R.S.C. 1985, c-46:

> 268 (1) Everyone commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.
>
> (2) Everyone who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.
>
> 21 (1) Everyone 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.
>
> 27 Everyone is justified in using as much force as it reasonably necessary
>
> (a) to prevent the commission of an offence
>
> (i) for which, if it were

committed, the person who committed it might be arrested without warrant, and

(ii) that would be likely to cause immediate and serious injury to the person or property of anyone; or

(b) to prevent anything being done that, on reasonable grounds, he believes would, if it were done, be an offence mentioned in paragraph (a).

686 On the hearing of an appeal against the conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on a count of mental disorder, the court of appeal

(a) may allow the appeal where it is of the opinion

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

(b) may dismiss the appeal where

. . .

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion no substantial wrong or miscarriage of justice has occurred

. . .

650 (3) An accused is entitled, after the close of the case for the prosecution, to make full answer and defence personally or by counsel.

683 (1) For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interest of

justice,

. . .

(d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness.

Canadian Charter of Rights and Freedoms:

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.

NON-DISCLOSURE BY CROWN

I will deal first with the application for fresh evidence relating to the Crown's failure to make full and timely disclosure of statements of four witnesses: Terris Daye, Terrance Tynes, Travia Carvery and Edmond Levier.

Counsel relies on **R. v. Stinchcombe** (1991), 68 C.C.C. (3d) 1 (S.C.C.), the leading case on the Crown's duty of disclosure, as well as a number of subsequent cases and the directive of the Minister of Justice and Attorney General of Nova Scotia regarding disclosure by the Crown in criminal cases.

The duty of disclosure is now well understood. The philosophy underlying it is discussed by Sopinka, J. in **Stinchcombe, supra**, in the following two passages found on pp. 7 and 11:

> It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour, are, in my view, overwhelming. The suggestion that the duty should be reciprocal may deserve consideration by this court in the future but is not a valid reason for absolving the Crown of its duty. The contrary contention fails to take account of the fundamental difference in the respective roles of the prosecution and the defence. In **Boucher v. The Queen** (1955), 110 C.C.C. 263, [1955] S.C.R. 16, 20 C.R. 1, Rand J. states (at p. 270):
>
> > It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain

> a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.
>
> I would add that the 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. The absence of a duty to disclose can, therefore, be justified as being consistent with this role.
>
> . . .
>
> In **R. v. C. (M.H.)** (1989), 46 C.C.C. (3d) 142 at p. 155, 6 W.C.B. (2d) 300 (B.C.C.A.), McEachern C.J.B.C. after a review of the authorities stated what I respectfully accept as a correct statement of the law. He said that: "there is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it". This passage was cited with approval by McLachlin J. in her reasons on behalf of the court (**R. v. C. (M.H.)** (1991), 63 C.C.C. (3d) 385, 4 C.R. (4th) 1, 123 N.R. 63). She went on to add (at p. 394): "This court has previously stated that the Crown is under a duty at common law to disclose to the defence all material evidence whether favourable to the accused or not".

The right of an accused to full and timely disclosure is incident to the right at common law to make full answer and defence. This right has been codified in s. 802(1) of the **Code** and enshrined in s. 7 of the **Charter** as one of the principles of fundamental justice.

At the outset of the appeal, the appellant's counsel submitted his affidavit sworn September 6, 1996, and affidavits used in the **Cole** appeal of Peter Katsihtis,

counsel for Cyril Smith, Anthony Brunt, articled clerk representing a young offender charged in connection with the Watts beating, Gary H. Levine, an associate of the lawyer defending Guy Robart, and Stanley W. MacDonald, counsel for Damon Cole.

The Crown filed an agreed statement of facts signed by counsel for the Crown and appellant's counsel. It was agreed that there was no improper motive in the Crown's failure to disclose the four statements. While improper motive might be relevant to an issue relating to abuse of process, its absence does not mitigate the seriousness of any non-disclosure by the Crown.

During the argument, this Court admitted all of the fresh evidence tendered and indicated that any counsel could file additional fresh evidence by way of affidavit, and was at liberty to call Terris Daye to testify before the Court. It 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. His statement was taken on September 19, 1994.

The Court received the affidavits because they are relevant to the issue of non-disclosure. The stringent **Palmer** criteria, applicable to an application to place before an appellate court additional material relevant to factual or legal determinations made at trial, are not relevant here. I refer to the passage from the decision of Doherty, J.A., on behalf of the Ontario Court of Appeal in **R. v. W.(W.)** (1995), 100 C.C.C. (3d) 225 at 232 which was quoted by Pugsley, J.A. in **Cole, supra**. The subject is further discussed by Osborne, J. A. on behalf of the Ontario Court of Appeal in **R. v. Peterson** (1996), 106 C.C.C. (3d) 64 at 79 where he said:

> The fresh evidence that counsel agreed we should review is relevant to the issue of non-disclosure. The appellant seeks to establish through the fresh evidence and the trial record that the Crown breached its disclosure obligations and that the failure to make the required disclosure impaired the appellant's right to make full answer and defence.
>
> In my view, the somewhat exacting standards for the

> admission of fresh evidence, as set out in **Palmer and Palmer v. The Queen** (1979), 50 C.C.C. (2d) 193, 106 D.L.R. (3d) 212, [1980] 1 S.C.R. 759, and **R. v. Stolar** (1988), 40 C.C.C. (3d) 1, [1988] 1 S.C.R. 480, 62 C.R. (3d) 313, do not determine whether the tendered fresh evidence should be admitted. It seems to me that, consistent with s. 683, it is in "the interests of justice" that the tendered fresh evidence be admitted.
>
> The fresh evidence establishes and explains the Crown's failure to make full disclosure. It is also relevant to the extent to which the non-disclosure affected the appellant's right to make full answer and defence. In this case, without the fresh evidence, it would not be possible to consider the non-disclosure issue in an appropriate context: see **R. v. W.(W.)**, released August 15, 1995 (Ont. C.A.) [now reported 100 C.C.C. (3d) 225, 43 C.R. (4th) 26, 25 O.R. (3d) 161], and **R. v. Joanisse**, released October 3, 1995 (Ont. C.A.) [now reported 102 C.C.C. (3d) 35, 44 C.R. (4th) 364, 85 O.A.C. 186]. I do not accept, in circumstances such as exist here, that to be admitted the court must be of the opinion that, if believed and taken with the other evidence, the fresh evidence might have altered the result at trial. Thus, the admission of the fresh evidence does not in these circumstances inevitably lead to an order that there be a new trial: see **R. v. Stolar**.

Such admission does not, by itself, require that a new trial be ordered. The question is whether, on the basis of the trial record and the fresh evidence tendered, the non-disclosure was such that the right to make full answer and defence was impaired.

The appellant's counsel attended at the Crown Attorney's Office in October of 1994 and obtained the Crown sheet, a summary of events and some statements. Subsequently, more statements were sent to him by the Crown as they became available.

Counsel received a copy of the Crown's proposed witness list for the preliminary inquiry and the trial. There was no mention of the four names on either list.

Counsel for all accused attended the pre-trial conference on January 4, 1996. They were advised by Craig Botterill, Crown Attorney, that they were welcome to attend at his office to determine if there was material in the file which they did not have. Appellant's counsel discussed this matter with Katsihtis, who advised that he would attend and provide counsel with copies of anything he found which they did not already have. Appellant's counsel was subsequently advised that he did not discover any significant additional

material on this visit.

The appellant gave two statements to the police in September 1994 in which he said that he first went to the Frat House in the company of Terrance Tynes, his cousin.

The trial began on February 5, 1996 and concluded on February 27, 1996.

Appellant's counsel states that during the trial copies of police occurrence reports were asked for, and he received them.

Appellant's counsel first saw the statements when he received them with a copy of a letter dated April 16, 1996 from the Crown attorney to counsel for Cole.

The other affidavits tendered showed the following:

(a) Peter Katsihtis, representing Cyril Smith, attended at the office of the Crown counsel and examined material made available there for him. He found no statements from the four individuals. He received a copy of the police occurrence reports after the trial commenced and reviewed them on Sunday, February 11, 1996. Given the information contained therein, he did not request copies of the statements from the Crown. The first time he saw copies of the four statements was when they were produced on April 17, 1996.

(b) Michael Brunt, who represented the young offender who had not yet been tried, specifically sought the four statements on March 15, 1996. He was unable to secure them from Crown counsel.

(c) Gary Levine made a search of stacks of material in January of 1996 at the office of the Crown attorney, including a large binder of statements in alphabetical order. Levine copied all of the material, with an immaterial exception. After receiving the four statements on April 16, 1996, he checked the material obtained by him prior to the trial and was satisfied that none of the four statements was there.

(d) Stanley W. MacDonald had not learned of the four statements prior to the commencement of the trial. On Thursday, February 8, 1996 after making specific

verbal requests of the Crown prosecutor, he received a copy of police occurrence reports from Constable Tom Martin. He reviewed them on Sunday, February 11, 1996 and found that they made reference to the fact that statements had been taken from Terris Daye, Terrance Tynes, Travia Carvery and Edmond Levier in September of 1994. This was the first he learned that these people had given statements to the police. The occurrence reports contained a summary of the statements. Given the nature of the summary, MacDonald did not request copies of the statements. By Sunday, February 11, 1996 the Crown had already called 23 witnesses against the six accused.

Returning to the affidavit of the appellant's counsel, he referred to the discovery at trial that the four statements had been taken. He said:

> That I recall on Monday, February 12, 1996 Stanley MacDonald and the other defence counsel had a brief huddle wherein Mr. MacDonald advised us of what he saw and of course we all agreed that there did not appear to be anything that we saw that would aid us in making a full answer and defence.

He did not seek copies of the statements from the Crown.

Other information in possession of counsel relating to Terris Daye's statement appears from the agreed statement of facts.

Although the Crown Sheet does not disclose that the police had taken statements from the four individuals, it contains references to them.

The undertaking entered into by the appellants McQuaid, Robart, Smith and Skinner on October 24, 1994 and the recognizance entered into by the appellant Dixon on March 31, 1995 each contained a "no-contact" clause of several names, including those of the four individuals in question. Counsel for all appellants had received disclosure from the Crown of the written police statements of everybody on the list except the four individuals.

Counsel for all appellants had disclosure of police statements of Stephen (Dee) Nelson (Downey), Nathaniel Robart and Michael Barton, all of which contained

references to three of the individuals, including Daye.

Counsel for all appellants received a chart dated October 13, 1994 and a cross-reference sheet dated October 14, 1994. While the date of receipt by defence counsel is not mentioned, it is a fair inference that these were received before the preliminary inquiry and in all events, prior to the trial. The chart illustrates, among other things, the three assault victims, the six accused and five other people in one area. Immediately below them are five circles. The centre circle has printed therein "Michael Barton Witness". To his left, are two circles containing names of Tynes and Daye and to his right, the names of Carvery and Levier.

An examination of the second horizontal line and the fourth last vertical line of the cross reference sheet suggests that a statement was taken from Daye, but it may be regarded as equivocal, particularly when read with the chart, which refers to Barton as a witness and the reference on the cross-reference sheet to Barton under the heading "Key Witness Statements". The description of Daye in the column "suspect's statement admits to offence" is "undertaking violation". The reader might conclude that the statement only relates to something in connection with Terris Daye breaching his own undertaking.

In response to the Court's invitation to file further evidence or to call Daye to testify before this Court, appellant's counsel filed a supplementary affidavit. He said that at no time until after trial did he speak to Daye respecting the case. Counsel for Robart and McQuaid advised him that they were adamant that there was no "huddle" as he had deposed in his affidavit. On consideration, he cannot swear that such a discussion took place with respect to the information contained in the occurrence reports or that there was any kind of agreement. He can only say that there did not appear to be anything of relevance therein to the appellant's defence.

Thus, prior to the trial, counsel was aware that the four individuals were known to the police to have been in close proximity to the fights giving rise to the charges.

If he did not know, he had cause to suspect from perusing the chart, that Daye had given a statement. He learned during the course of the trial that the four statements were given. The summary in the occurrence report was not a complete account of the statement of Daye. I will set it out later.

Two sub issues arise under the subject of non-disclosure:

(1) due diligence; and,

(2) materiality of the non-disclosed statements.

(1) <u>Due Diligence</u>:

The Crown submits that counsel for the appellant was not diligent in determining whether statements had been given by the four individuals and, after discovering the existence of those statements, in failing to demand production.

In **R. v. McAnespie** (1993), 86 C.C.C. (3d) 191 (S.C.C.), Sopinka, J. in delivering judgment for the court said:

> With respect to (1), we are of the opinion that although disclosure of the information ought to have been made earlier, counsel for the respondent failed to bring this to the attention of the trial judge at the earliest opportunity as required. In **R. v. Stinchcombe** (1991), 68 C.C.C. (3d) 1 at p. 13, [1991] 3 S.C.R. 326, 9 C.R. (4th) 277, in referring to this obligation, we stated: "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." We agree with Labrosse J.A., dissenting, that the trial judge was still seized of the trial and had the discretion to reopen the trial proceedings or to order a mistrial.

In **R. v. Bramwell** (1996), 106 C.C.C. (3d) 365 (B.C.C.A., appeal to the Supreme Court of Canada dismissed (1996), S.C.J. No. 120), the court, in reversing an order for a stay as a result of non-disclosure said at p. 374:

> . . . It is important to emphasize, however, that 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...

In dismissing **Bramwell's** appeal, Sopinka, J. speaking on behalf of the Supreme Court said:

> The appeal is here as of right. We agree with the Court of Appeal that this was not one of the clearest cases in which a stay of proceedings was warranted. In our opinion, the Court of Appeal was justified in reviewing and reversing the trial judge's exercise of his discretion by reason of the trial judge's failure to take into account the absence on the part of the appellant of timely objection to non-disclosure and by reason of the trial judge's error in finding that a stay was the only appropriate remedy. The appeal is dismissed.

I have given careful consideration to whether or not counsel exercised due diligence and in particular whether he made a tactical decision not to pursue the statements.

Counsel has satisfied me that the fact that the Crown gave him the names of the four individuals (thereby giving them the option to interview them) does not lessen in any way the obligation of the Crown to make disclosure of the statements it had obtained. There was a large number of persons in the area, estimates running up to four hundred. Counsel's decision whether to interview any person may be based on a number of factors, including the nature of the instructions obtained, and generally it is not for this Court to second guess counsel's strategy and consider it as relevant to the fulfilment of the Crown's obligation.

Counsel's strategy is relevant, however, in determining whether there was a failure to adequately pursue disclosure.

If counsel did not already know from the cross reference sheet that a statement was taken from Daye, he was put on inquiry as a result of the check mark opposite his name under the column "suspect statement admits to offence". It was also

obvious from the chart that Daye and the others were known to the police. It was also known to counsel that Daye and Tynes were close to the events occurring outside the Frat House in the vicinity of Robie and Cedar Streets. As Crown counsel says, the trial record is replete with references to all four of the individuals in question, particulary Tynes and Daye. I accept the Crown's submission that it is reasonable to conclude that appellant's counsel knew from the police statements of others and generally, that Tynes and Daye figured prominently in the events in question. These circumstances must be taken into account in drawing inferences as to the knowledge the chart, the cross reference sheet and the occurrence reports placed in his mind.

Whether or not a huddle took place on Monday, February 12, 1996 - and this Court cannot make a definitive finding on the contradictory affidavit material - counsel definitely knew by then that statements were taken. I am of the opinion that, in all the circumstances, counsel now had a choice - call for the statements or live without them. The description of Daye's statement in the occurrence report was, on its face, not complete, but invited further inquiry:

> After being given young offender caution and explained 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 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, Terrence 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 Nathanial 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.

(emphasis added)

Counsel with any interest in the statements would want to know more about the discrepancy in the attackers on Charman. I will refer to this discrepancy later. This apparent contradiction of the testimony of Clayton should have been explored at that time. Interested counsel would want to know who the "other players" were; what the questioning was that led Daye to place himself in the outer circle; what the difference was between an outer circle and an inner circle; what, if anything, the mother might have added to the statement. I am not prepared to infer incompetence on the part of the appellant's experienced counsel. Rather I infer a complete lack of interest in the statement at that time or an election to use it later, if needed.

As an officer of the court, appellant's counsel had a duty to demand the statements and bring the matter to the attention of the trial judge if it was his intention to place reliance on the statements or their non-disclosure in the advancement of his client's cause.

The explanation for the failure to demand the statements suggests itself from the events following the trial.

In his affidavit, Michael Brunt stated that he was "specifically seeking" disclosure of the four statements on March 15, 1996 - just after the appellant was convicted and sentenced. On or about April 2, Stanley MacDonald advised his partner Garson of the existence of the statements. On April 3, Garson asked the Crown for them. The Crown sent them to Garson on April 16 and MacDonald provided them to appellant's counsel. If

the possibility that these statements might be helpful escaped counsel when he first became aware of them, it quickly became an avenue worth pursuing on appeal. What, apart from the fact that the appellant was convicted and sentenced, took place between February 12, 1996 and April 2, 1996 to change the attitude of counsel to the statement?

During the course of the argument this Court asked counsel pointedly what it was that prompted the sudden interest in the statements following conviction and sentencing. No direct answer was provided. Further, when counsel responded to the court's concerns by submitting further evidence, this question was not answered.

I am satisfied that appellant's counsel did not seek the statements or bring the non-disclosure to the attention of the trial judge at the earliest opportunity as required. The only rational inference to be drawn from all the circumstances is that a decision not to call for the statements was taken at trial, albeit quickly reversed following conviction.

A mere error or slip should not preclude the granting of a new trial. A deliberate election requires consideration be given to denying that relief.

At the time counsel had the opportunity to demand the statement, 23 witnesses had already testified for the Crown. However the Crown's case had not been closed and Clayton, the principal Crown witness, had not testified. At this point, no witness had identified any of the attackers of Watts. The thrust of counsel's argument in this Court is that the statement would have been of assistance in the cross-examination of Clayton and the making of a decision whether or not to call Daye or the accused. At this time, there was ample opportunity to seek any necessary adjournment to permit needed preparation. This was not a jury trial and even a lengthy adjournment, were it necessary, should not have been a problem. There is nothing in the statement not already summarized in the occurrence report that relates to any of the 23 witnesses already called. If there were, an application could have been made to the trial judge to recall any witness and to give any and all necessary adjournments for preparation.

In spite of counsel's assertion that no conscious election was made not to pursue the statements, all of the circumstances surrounding the disclosure made by the Crown and counsel's course of action point to no other conclusion than, if not consciously, then unconsciously, the choice was made not to seek them. Viewed objectively, counsel's actions present the unmistakeable appearance of a tactical decision not to pursue this disclosure.

In **McAnespie, supra**, Sopinka, J. has made it clear that absence of due diligence is an important factor in determining whether a new trial should be ordered. It is not the only factor, but it is an important factor. Materiality of the non-disclosed matter should also be considered.

(2) Materiality of Non-Disclosure:

What is the standard of review to be applied by an appeal court when, following conviction, material is discovered that was not disclosed by the Crown at or before trial? This Court said in **Cole, supra**, that the admission of such material before the Appeal Court to establish such non-disclosure did not, by itself, call for the quashing of a conviction and the granting of a new trial. I agree.

I propose to review a number of cases decided by appeal courts, most of which address the issue of non-disclosure of material that came to light after conviction.

In **Stinchcombe, supra**, the Crown had two statements from a witness who testified favourably to the accused at the preliminary inquiry. The Crown refused to produce these. Counsel for the accused applied to the trial judge for an order that the Crown call the witness, that the court call the witness or that the Crown disclose the contents of the statements to the defence. All of these applications were dismissed. The accused did not call the witness. The accused was convicted. An appeal to the Alberta Court of Appeal was dismissed. On appeal to the Supreme Court of Canada the

statements were tendered as fresh evidence. The Supreme Court held that an examination of the statements should be carried out at the trial so that counsel for the defence, in the context of the issues in the case and the other evidence, could explain what use might be made of them. Counsel would then have an opportunity to call the witness after having seen the statements. At p. 17 Sopinka, J. said:

> What are the legal consequences flowing from the failure to disclose? In my opinion, when a court of appeal is called upon to review a failure to disclose, it must consider whether such failure impaired the right to make full answer and defence. This, in turn, depends on the nature of the information withheld and whether it might have affected the outcome. As McLachlin J. put it in **R. v. C. (M.H.), supra** (at p. 395):
>
> > Had counsel for the appellant been aware of this statement, he might well have decided to use it in support of the defence that the evidence of the complainant was a fabrication. In my view, that evidence could conceivably have affected the jury's conclusions on the only real issue, the respective credibility of the complainant and the appellant.
> >
> > (emphasis added)
>
> At p. 18 Sopinka, J. said:
>
> . . . In the circumstances we must assume that non-production of the statements was an important factor in the decision not to call the witness. The absence of this evidence might very well have affected the outcome.
>
> (emphasis added)

In **C.(M.H.) v. The Queen** (1991), 63 C.C.C. (3d) 385 (S.C.C.), the appellant was convicted of indecent assault on his ex-wife and sexual assault of the daughter of his subsequent common-law wife. An appeal to the Supreme Court of Canada raised a number of issues. At the outset, McLachlin, J. speaking for the court noted that a new trial must be ordered as a result of the cumulative effect of a number of errors which, taken together, led to the conclusion that the appellant did not receive a fair trial. McLachlin, J.

found errors in the jury instructions and errors respecting the admission of similar fact evidence. McLachlin, J. then addressed the issue of the Crown's failure to disclose a statement taken from a former teacher of the daughter after the preliminary inquiry and before trial. The defence did not discover this statement until after trial and conviction.

McLachlin, J. said at p. 394 that in view of the fact that no submissions were made respecting the effect of the **Charter** on the duty to disclose, the matter would be addressed independently of **Charter** considerations. After reviewing authorities relating to the Crown's duty at common law to disclose all relevant material whether favourable to the accused or not, McLachlin, J. stated at p. 394:

> In my view, the failure of the Crown in this case to disclose either the statement or the existence of the potential witness created such prejudice against the appellant that it cannot be said with certainty that he received a fair trial . . .

The teacher had become concerned about the complainant's behaviour. The teacher knew the child well and thus questioned her about possible abuse. In the course of the questioning, the complainant referred to the appellant. The following appeared toward the end of the teacher's statement:

> I spoke with N. and asked her if there anything going on to let either myself, her mother, the Counsellor or any other adult know. There was an extreme amount of tension in the home. This was very apparent. Also there was a bump on N's head at one time. She also denied everything that I asked her and we had a very good relationship. I spoke with her quite often.

McLachlin, J. said at p. 395:

> . . . had counsel for the appellant been aware of this statement he might well have decided to use it in support of the defence that the evidence of the complainant was a fabrication. In my view that evidence could conceivably have affected the jury's conclusion on the only real issue, the respective credibility of the complainant and the appellant.

McLachlin, J. referred to the **Palmer** test for the admissibility of evidence on appeal and stated at p. 396 that she was satisfied that the admission of the evidence at trial might reasonably have been viewed as capable of affecting the result. In such a case, the

court had an option to either regard the evidence as conclusive and resolve the case or send it back for a new trial. The latter was the course it followed. McLachlin, J., by the application of this test, considered that the evidence met a high standard for its admission.

McLachlin, J. concluded her judgment at p. 397:

> The cumulative affect of the errors at trial is such that it cannot be said with any assurance that the appellant received a fair trial in any of his charges. I would allow the appeal and direct a new trial.

Is this case authority for the proposition that wherever any non-disclosed evidence appears on appeal, the conviction must be set aside unless it can be said with certainty that the result would be the same? It is clear that underlying McLachlin, J.'s comments is the concern that upon production of additional non-disclosed evidence, an appeal court must be satisfied that the accused received a fair trial. In that case, the failure to disclose created such prejudice against the appellant that it could not be said with certainty that he received a fair trial. She was also satisfied, applying the **Palmer** test, that the admission of the evidence at the trial might reasonably be viewed as capable of affecting the result. The value of the teacher's statement to defence counsel at trial is obvious. It provided material upon which the complainant could be cross-examined directly. Its unavailability to the defence would be highly prejudicial. I do not take this one word "certainty" as defining a test which necessarily applies when all non-disclosed evidence is being assessed on appeal. This word is used following the words "created such prejudice against the appellant". The entire context in which McLachlin, J. was speaking must be kept in mind. I would suggest that in each case the nature of the evidence will play the critical part in leading a court of appeal to the conclusion whether or not the trial was fair.

In **Regina v. Leo Angus T.** (1993), 14 O.R. (3d) 378, the accused was charged with sexual offences involving his daughter and stepdaughter. At the conclusion of the defence's case, counsel learned of the existence of a statement given to the police

by the daughter's sister saying that the daughter told her that she had been assaulted by another person. The defence applied to the court for a stay of proceedings and alternatively a mistrial. The application was dismissed.

An appeal to the Ontario Court of Appeal was allowed, and a new trial ordered. The non-production of the statement was an error prejudicing the accused's ability to make full answer and defence. Lacourciere, J.A. giving judgment for the court referred to **R. v. C. (M.H.), supra**. He observed that ever since the Crown's duty to disclose had been elevated to a constitutional imperative, courts had been interpreting the duty in a very strict fashion. By being deprived of the statement of the sister, the critical opportunity to attack the credibility of the complainant was considerably and arguably, irredeemably reduced. At p. 384 the court said:

> . . . The late disclosure may also have affected the ability of the defence counsel to attack the complainant's credibility, which is critical in this case.
>
> (emphasis added)

In **Regina v. Hamilton** (1994), 94 C.C.C. (3d) 12, the Saskatchewan Court of Appeal addressed the issue of the effect of delayed disclosure at trial when a guilty verdict is reviewed on appeal.

In that case, the accused were convicted of conspiracy to import marijuana. On cross-examination of the Crown's principal witness during the trial, it appeared that he had been offered immunity by the Canadian police in return for providing a statement. Crown counsel then disclosed several letters between Canadian and American authorities relating to the immunity. In one of these letters reference was made to a "Rights" card and a "package" concerning the witness which the American authorities had sent to Canadian police. The items were not produced and were not mentioned during the trial. As the trial progressed, other matters were discovered, including some police notes of interviews with witnesses. The witnesses' statements had been disclosed, but the notes were only made

available to the defence during the trial. As a result of the delayed disclosure, the trial judge refused to permit the Crown to call certain evidence. On appeal from conviction it was urged on the appellant's behalf that the delayed disclosure had impaired his right to make full answer and defence. At p. 25, Jackson, J.A. speaking on behalf of the court said:

> . . . But what is the standard to be applied after conviction when it is discovered that relevant evidence has not been disclosed? Does the failure to disclose amount automatically to a new trial or some other sanction imposed on the Crown or benefit given to the accused?
>
> . . .
>
> In **Stinchcombe**, Sopinka J. ordered a new trial because the statements of a witness who gave favourable testimony at the preliminary inquiry (and who had not been called at trial) were not disclosed.

Jackson, J.A. referred to the following passage of Vancise, J.A. in **R. v. S. (S.E.)** (1992), 100 Sask. R. 110 (Sask. C.A.) at p. 121:

> In my opinion, there is nothing to indicate that the production of the notes may have affected the result of the trial or in any way diminished the credibility of C.Z. His evidence was fully and extensively examined and tested by the defence, including his inconsistent statements. Furthermore, in the circumstances of this case, where the appellants had knowledge of the material which was prepared and failed to request its production, I am not prepared to find that the failure to disclose the notes could have impaired the fairness of the trial, necessitating a new trial.
>
> (emphasis added)

Jackson, J.A. reviewed American authorities dealing with the position of an appeal court reviewing a conviction where information was not disclosed to the defence. These authorities developed a test of materiality based on the probability of the effect of the non-disclosed information on the outcome. At p. 29 Jackson, J.A. said:

> The factor linking the Canadian and American cases is the need for an appellate court to weigh the failure to disclose against the result. Whether the standard as articulated by Sopinka J. (i.e., "might have affected the outcome") is a different standard of review than that articulated in **Bagley** (i.e., "reasonable probability . . . the result . . . would have been

> different") remains to be seen. But it is clear that both the Canadian and American Supreme Courts agree that different principles are to be applied to answer whether disclosure should be made before conviction than to determine, after conviction, the effect of the failure to disclose. Speaking broadly, and not considering the exceptions, in the first case the prosecutor and the reviewing judge would strive to disclose most everything. In the second, the Court of Appeal has before it the whole of the evidence and can better determine the impact on the defence of the non-disclosure. Sopinka J. was clearly mindful of this when he set one standard for the reviewing judge, at p. 12, **Stinchcombe**: "the trial judge on a review should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence"; and a somewhat different standard for the appellate judge, at p. 17, **Stinchcombe**: "when a court of appeal is called upon to review a failure to disclose, it must consider whether such failure impaired the right to make full answer and defence". He went on to say, at p. 17, "[t]his, in turn, depends on the nature of the information withheld and whether it might have affected the outcome". In one case the prosecutor and the reviewing judge are looking forward, not knowing the theory of the defence and perhaps not knowing the full import of the case. In the second, one can assess the failure to disclose in the context of the whole case.
>
> (emphasis added)

Jackson, J.A. then embarked upon an inquiry whether, having in mind the principles stated, a new trial should be ordered. At p. 33 she observed that on appeal it is appropriate for the court to consider that the accused did not testify. After reviewing the trial evidence and the delayed disclosure, Jackson, J.A. concluded at p. 34:

> . . . It cannot reasonably be said that Mr. Hamilton's right to make full answer and defence was impaired. It cannot be said that if these documents and information had been disclosed, it "might have affected the outcome".

A test to be applied on appeal in determining whether non-disclosure at trial warrants a new trial was developed by Osborne, J.A., writing on behalf of the Ontario Court of Appeal, in **Peterson, supra**, (leave to appeal to the Supreme Court of Canada refused). At p. 82 through to p. 86, Osborne, J.A. formulates and applies a test which may be stated as follows:

> The appellant has the burden to show a reasonable probability (a probability sufficient to undermine confidence in the outcome) that had the non-disclosed material been disclosed the result might have been different.
>
> (emphasis added)

Osborne, J.A. referred to the following passage from the decision of L'Heureux-Dubé, J. in **R. O'Connor** (1995), 103 C.C.C. (3d) 1 (S.C.C.) at pp. 25-26:

> *Consequently, a challenge based on non-disclosure will generally require a showing of actual prejudice to the accused's ability to make full answer and defence*. In this connection, I am in full agreement with the Court of Appeal that there is no autonomous "right" to disclosure in the Charter . . . Where the accused seeks to establish that the non-disclosure by the Crown violates s. 7 of the Charter, he or she must establish that the impugned non-disclosure has, *on the balance of probabilities, prejudiced or had an adverse effect on his or her ability to make full answer and defence.* It goes without saying that such a determination requires reasonable inquiry into the materiality of the non-disclosed information. Where the information is found to be immaterial to the accused's ability to make full answer and defence, there cannot possibly be a violation of the Charter in this respect.

Osborne, J.A. said at p. 83:

> In my view, the materiality of the non-disclosure should be considered and measured in much the same way as the materiality of errors said to have been made by counsel at trial in cases where the appellant contends that he was denied the effective assistance of counsel at his trial. The court's core concern in both cases is whether there has been a miscarriage of justice. In the leading American case of **Strickland v. Washington**, 46 U.S. 668, 104 S. Ct. 2052 (1984), O'Connor J. specifically adopted the non-disclosure prejudice test as a basis upon which to measure the prejudicial affect of trial counsel's alleged errors. This court has applied the **Strickland v. Washington** prejudice test in the ineffective assistance of counsel cases and it seems to me that it is logical to apply the same test in this, a non-disclosure case: see **R. v. Garofoli** (1988), 41 C.C.C. (3d) 97, 64 C.R. (3d) 193, 43 C.R.R. 252; **R. v. Silvini** (1991), 68 C.C.C. (3d) 251, 9 C.R. (4th) 233, 5 O.R. (3d) 545. Thus, to show prejudice as a consequence of the non-disclosure, the appellant must satisfy the court that there is a reasonable probability that, had there been proper disclosure, the result might have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome: see **Strickland v. Washington** at p. 2068 S. Ct., and **R. v. Garofoli** at p. 152.) In applying this prejudice test, it

> is necessary to consider the nature of Kayla B.'s new allegations and the defence trial strategy.

The trial had been before a judge and jury. The non-disclosed statement came to the judge's attention after the verdict but before sentencing. He rejected it as not material. Osborne, J.A., on behalf of the Court of Appeal, made an extensive review of the material not disclosed. It was a statement from the complainant making additional allegations against the appellant. Osborne, J.A. was far from persuaded that defence counsel would have raised the additional matter in cross-examination, having regard to the potential damage it would do to the defence's position. He was satisfied that the non-disclosure caused no prejudice to the appellant.

In **R. v. Creamer** (1995), 39 C.R. (4th) 383 (B.C.C.A.), the accused was charged with sexual assault. The issue was consent. One of the issues was whether the complainant had changed her clothes in front of the accused after the sexual activity. The trial judge found the complainant's version credible and convicted the accused. On appeal, the accused sought to tender, as fresh evidence, an equivocating statement given by the complainant to the police relating to the change of clothes and other issues. The disclosure problem respecting the statement was raised for the first time on appeal. The British Columbia Court of Appeal ordered a new trial. Donald, J.A. said at pp. 387-9:

> I think that defence counsel should have had an opportunity to confront the complainant with the equivocation and uncertainty of this part of her statement.
>
> . . . . .
>
> . . . The case depended on the credibility of the two persons involved; there were no other witnesses to the incident. The trial judge relied on how they gave their evidence, as well as what they said, in making his findings on credibility. Assessments of demeanour and apparent probity are often subtle and intuitive. Because of that, it is almost impossible to measure the possible impact a relevant line of questioning might have had on the assessment.
>
> I think the **Palmer** test must be modified when the fresh evidence sought to be entered on an appeal relates to non-

> disclosure of relevant information. The test to be applied should be whether the right to a fair trial may have been affected.

In **R. v. O'Grady** (1995), 64 B.C.A.C. 111, the British Columbia Court of Appeal granted a new trial to the appellant who had been convicted of murder of his wife. She was beaten to death in the kitchen of their home. The appellant testified that he was in an adjoining room watching television with the aid of earphones and heard nothing. His theory was that the crime had been committed by an intruder and that blood spots on his clothes were the result of attempts at mouth to mouth resuscitation and from holding his wife in his arms and across his body while doing so. The jury accepted the theory of the Crown and convicted the appellant. Following the trial, defence counsel became aware that the Crown's blood spatter expert had conducted an experiment which had not been disclosed prior to or at the trial. The expert had stated that he could not exclude the possibility that resuscitative actions created the blood stains observed on the appellant's clothing.

In ordering a new trial, MacFarlane, J.A. reviewed the trial evidence and the fresh evidence regarding the experiment. He said at para. 24:

> Approaching the matter in that way I conclude that the non-disclosure of the possibility now raised may have impacted on the fairness of the trial and that the outcome might reasonably have been different had this disclosure been made.

(emphasis added)

In **R. v. Groves** (1995), 174 A.R. 179, the Alberta Court of Appeal allowed the appeal of the accused from conviction and ordered a new trial where a copy of a statement made to the police by a defence witness was not provided to him until the witness was being cross-examined at trial. Heatherington, J.A. said at para. 3:

> In this case, counsel for the Crown concedes that the appellant's **Charter** rights are breached. On the record, we are satisfied on a balance of probabilities that there is a reasonable possibility that the appellant's right to make full answer and defence was impaired.

(emphasis added)

In **R. v. Jarema**, unreported, (1996) A.J. No. 782, the Alberta Court of Appeal addressed the issue whether the Crown's failure to disclose certain information to the accused rendered guilty pleas invalid and required a new trial. The court concluded that the non-disclosure did not impinge upon the accused's right to make full answer and defence and that the appeal should, therefore, be dismissed.

After referring to several passages from the decision of the Supreme Court of Canada in **R. v. O'Connor** (1995), 103 C.C.C. (3d) 1 (S.C.C.); **R. v. Egger** (1993), 15 C.R. (2d) 193 (S.C.C.); **R. v. Antinello** (1995), 97 C.C.C. (3d) 126 (Alta. C.A.) and **R. v. Chaplin** (1995), 96 C.C.C. (3d) 225 (S.C.C.), the court referred to **Hamilton, supra**, and the passage that I have already quoted from Jackson, J.A.'s judgment therein. The court said at para. 24:

> The Crown in this case did fail to disclose some information which it ought to have disclosed. The Crown concedes this fact. The question is whether the accused has met the most favourable possible test for him. That is a reasonable possibility that this **non-disclosure** impaired his right to full answer and defence. From the perspective of an appellate court, this in turn requires an assessment of materiality, by asking whether there is a reasonable possibility that the outcome of the trial would have been different if the information had been disclosed. In the context of a guilty plea by the accused, this materiality question must be modified slightly: the Court must evaluate whether there is a reasonable possibility either that the accused's choice to plead guilty would have been different, or that the undisclosed information undermines the validity of the guilty pleas: see R. v. T. (R.) (1992), 17 C.R. (4th) 247 at p. 262 (Ont. C.A.).

(emphasis added)

After examining the materiality of the non-disclosed information, the court concluded that individually and cumulatively the non-disclosed pieces of information did not give rise to a reasonable possibility that they affected the appellant's decision to plead guilty.

There may be a difference in the approach taken by the Alberta Court of

Appeal and the British Columbia Court of Appeal in dealing with problems of non-disclosure encountered at the trial. See **R. v. Antenello** (1995), 39 C.R. (4th) 99 at p. 108 **et sic**; **R. v. Biscette** (1995), 99 C.C.C. (3d) 326, notice of appeal to the Supreme Court of Canada filed as of right June 21, 1995, Court File No. 24787.

Antenello, supra, deals with the delayed disclosure by the Crown of its intention to call a fellow jail inmate of the accused. The trial judge had allowed the Crown to call this witness, but because there was a reasonable possibility that the accused might not have a fair trial, the Crown was directed to pay the cost of a private investigator. The witness was called after the accused had only nine days to prepare. On appeal from conviction the Alberta Court of Appeal observed that the evidence of the witness, if believed, would invariably lead to a conviction. This evidence was such that the accused could reasonably be expected to find material to attack the credibility of the witness - a convict who had served 17 years for various offences. The discovery of such material would involve careful inquiry. The delayed disclosure without more would impair the right to a fair trial. The issue was, then, whether the action taken by the trial judge was sufficient.

In holding that nine days delay was insufficient for the purpose of the defence, Kerans J.A., on behalf of the Court, said at p. 134:

> As a result, it was argued, the judge erred here because the accused never established, on the balance of probabilities, that he suffered actual prejudice in making a full answer and defence. To do that, he had to show that there was something "out there" about Stapleton that the defence would have found if it had had more time, but failed to find in the allotted time.
>
> With respect, an accused need not meet that impossible burden. What he must show on the balance of probabilities is that he lost a realistic *opportunity* to garner evidence, or make decisions about the defence. This court held in *R. v. Chaplin* (1993), 20 C.R.R. (2d) 152, 55 W.A.C. 153, 14 alta. L.R. (3d) 283 (affirmed 96 C.C.C. (3d) 225, 27 Alta. L.R. (3d) 1, [1994] S.C.J. No. 89), that the accused need show only a "reasonable possibility" of impairment of the right to full answer and defence. In its affirming reasons, published after argument in

this case, the Supreme Court again approved this test.

As the Court pointed out, the evidence of the witness was such that one could readily expect to find material to impeach his credibility. Given that, it is easy to see why, in the circumstances, the Court found a nine day delay insufficient. There was, I suggest, a reasonably probability there that the outcome might have been different if a reasonable time for preparation was given.

In **R. v. MacKenzie** (1996), 106 C.C.C. (3d) 1, the Saskatchewan Court of Appeal allowed an appeal from conviction and ordered a new trial. Reasons were given by Tallis, J.A. (Sherstobitoff, J.A. concurring) and by Vancise, J.A. Vancise, J.A. discussed at pp. 8-13, a claim that lack of disclosure by the Crown prejudiced the appellant's right to make full answer and defence. After reviewing the materials, Vancise, J.A. came to the conclusion that this ground of appeal should fail as there was no reasonable possibility that the disclosure could assist the appellant to make full answer and defence. At p. 12 he said:

> . . . In my opinion, the appellant has failed to establish, on the balance of probabilities, that the impugned non-disclosure prejudiced or had an adverse effect on his ability to make full answer and defence. This ground of appeal must fail.

In **R. v. Santocono** (1996), 91 O.A.C. 26, the Ontario Court of Appeal dismissed an appeal from a conviction for sexual assault. Grounds of appeal were that the accused had been denied a stay of proceedings on the grounds that a sexual assault kit was destroyed before the trial, and that the Crown failed to produce the clothing worn by the complainant at the trial. The trial judge concluded that the destruction of the sexual assault kit by the police and the Crown's failure to disclose that the clothes worn by the complainant on the night of the assault were still available were innocent errors. The application for a stay was dismissed.

In addressing this ground, Finlayson, J.A. for the court stated at p. 32:

> The standard for appellate review in this jurisdiction for this issue is set out in **R. v. Peterson**, a decision of the Ontario

> Court of Appeal, released February 29, 1996 [now reported 27 O.R. (3d) 739, 106 C.C.C. (3d) 64]. There Osborne J.A. stated at p. 30 [p. 758 O.R.]:
>
> > Thus, to show prejudice as a consequence of the non-disclosure, the appellant must satisfy the court that there is a reasonable probability that, had there been proper disclosure, the result might have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome: see Strickland v. Washington at p. 2068 S. Ct. and R. V. Garofoli at p. 152.
>
> See also **R. v. Murray**, [1994] O.J. No. 2392 (C.A.) at para. 5.
>
> This standard has not been met in this case. The rape kit was destroyed shortly after it was used but there is no record of any forensic tests being done that could have eliminated the appellant as a possible perpetrator. Defence counsel was not diligent in exercising the right to disclosure and, more importantly, the uses to which the defence could have put the samples is highly speculative. The argument that samples of the complainant's blood might have revealed her true alcohol blood levels does not address a live issue: she could not have had much more alcohol in her system that the uncontradicted expert testimony that it was at the 320 to 350 milligram level. With respect to the complainant's clothes, the defence knew of their existence, they were entered as exhibits at trial, and the complainant was re-called for questioning as to their condition before and after the alleged sexual assault.

I conclude that on appeal from a conviction, where the Crown has failed to provide full disclosure, the appellant must show on a balance of probabilities that such prejudiced the right to make full answer and defence. To determine this, the Court makes an inquiry into the materiality of the information not disclosed. On such inquiry, the appellant must satisfy the Court that there is a reasonable probability that had the non-disclosed material been disclosed, the result might have been different. The Court must make an assessment of the difference between what was and what might have been but for the non-disclosure.

Discussion took place on the argument of this appeal about the significance of the word "might" as opposed to "would" or any word of similar meaning. It can be said

that the use of the word "might" implies any possibility. Equally, it could be said that a word such as "would" implies that the burden is to show that the result must certainly have been different. That would be too high a burden, particularly in view of what Sopinka, J. said in **Stinchcombe, supra**. While it can be said that the word "might" opens the door to any and all possibilities, I believe that word must be read in the context of the obligation to show that there was a reasonable probability that the result might have been different. Put another way, the probability of a different outcome must be a reasonable possibility. Another way of expressing the test might be that there must be an air of reality to the submission that the result might have been different. My colleague Bateman, J.A. presents as the test: the accused must satisfy the court on a balance of probabilities that he lost a realistic opportunity to garner evidence or make decisions about the defence which in turn might have affected the outcome. That test was developed by Kerans, J.A. in **Antenello, supra**, as appropriate to the assessment of the adjournment given by the trial judge as a fit remedy in the circumstances there.

The majority of the judges who have addressed this subject have required that the appellant assume the burden of persuasion that the non-disclosure of material prejudiced a fair trial. On consideration, I do not regard this as unreasonable. The material itself is the means by which this burden can be discharged. In many cases it will be instantly apparent that the material satisfies the burden.

I do not accept that it is necessary to impose a burden on the Crown to prove no prejudice resulting from the non-disclosure. The rationale underlying this approach is that the Crown is constantly playing games and seeking ways in which to frustrate the fair trial of an accused. Where this has been shown, it might well be appropriate to consider the burden of persuasion to have thereby shifted to the Crown. Such a technique has no relevance in a case such as this where counsel have agreed that there was no improper motive on the part of the Crown in the failure to make the four statements available.

In all the cases the underlying concern of the courts, in making the inquiry into the materiality of the non-disclosed evidence, is whether the accused received a fair trial. Where, in a case such as **R. v. C. (M.H.), supra**, the evidence not disclosed is highly significant, the degree of certainty that the trial was nevertheless fair must be very high. Conversely, the degree of certainty would be less high where the materiality of the evidence was less. Significant evidence is matter upon which key Crown witnesses can be cross-examined or contradicted on material points.

Whether the standard articulated in these cases differs from each of the others remains, to use the words of Jackson, J.A., to be seen. But I am not convinced that the precise words used in articulating the standard are as important as the fact that the court is satisfied, after making an inquiry of the record and weighing that record against the non-disclosed evidence, that the accused received a fair trial.

I will now embark upon an inquiry into the materiality of the statement of Terris Daye. This necessitates weighing it against the trial evidence to which it relates, the other material disclosed by the Crown, the manner in which the defence was conducted and the findings made by the trial judge. Unlike a jury verdict, we have the trial judge's reasons which disclose the impression made on him by the Crown's key witness, Danny Clayton. Clayton was the only witness providing direct eyewitness identification of the appellant and the other five accused in the attack upon Darren Watts and was the principal witness respecting the attackers of Charman and Gillis. The trial judge gives an extensive review of the evidence supporting the testimony of Clayton.

It will be necessary to refer to specific portions of the statement of Terris Daye but it is essential to place the entire statement before the reader. It is annexed hereto as Appendix "A".

Counsel emphasize that the statement could have been a useful tool in (a) meeting the Crown's case, and in (b) building a defence. For example, counsel for Cyril

Smith said that had Daye's statement been available he believed he would have subpoenaed him to testify for the trial and would have considered calling his client. He did not choose to call Daye before this Court. If he had called Daye as a witness at trial, we can presume no more than that his testimony would have mirrored his statement. Is there anything in that statement which advances counsel's argument?

In assessing the value of Daye's statement, it is to be kept in mind that its value as a tool in cross-examination extends only to such information therein as might form the basis of questions to the various witnesses at trial. Those witnesses could not be cross-examined on the statement itself. Only the maker of a statement can be cross-examined thereon: **Canada Evidence Act**, sections 5, 9, 10 and 11. Moreover, this statement does not attribute to any witness at trial, statements upon which such witnesses might be cross-examined.

I propose to examine the potential of the statement, had it been disclosed, under two broad headings: (i) to assist in advancing a defence, and (ii) to damage the Crown's case. These two areas overlap, and some repetition is necessary in dealing with them.

(i) <u>Advancing a defence</u>:

In submitting that this statement formed a fruitful source of material to mount a defence, counsel said that it was not possible to indicate all of the ways in which the statement might have helped. Only if they had it and had a chance to work with it, could it be known what might have developed. It is said that the material might have led one or more of the accused to testify. I will address this general submission of lost opportunity later.

Counsel made reference to specific points in the statement by way of example.

Counsel referred to:

> Me, Terrence Tynes, Danny Clayton, Michael Barton, Stevie Dee is the crowd I was with and we were standing north of the corner of Cedar and Robie. Another crowd of people were over on the other side, more black than white. Stacey, Damon Cole. And more black people were still in the house...

It is said that if Daye placed Cole and Stacey Skinner elsewhere, this weakened the credibility of Clayton. It also affords Skinner an argument that Daye's testimony could place him elsewhere at the time of the attack on Watts. The question leading to this answer was "who are you with at this point". The "point" is referred to in the preceding question, "Where did you see Terry and Shannon arguing?" Daye responded, "South side of Cedar and Robie." This, of course, was at a time prior to the attack upon Darren Watts. This time interlude could not be determined with certainty, but the attacks on Gillis and Charman followed the argument between Shannon and Terry Dixon on the south side of Cedar Street and were in turn followed by the attack upon Watts.

Michael Arsenault, a member of the Fraternity, testified that he saw Damon Cole punch Rob Gillis. This was evidence independent of Clayton that implicated an accused in one of the assaults prior to that on Watts. By this time Cole had migrated northward to a point which Arsenault identified on the plan with an "A" as being closer to the north side of Cedar Street. Arsenault also made an estimate of the location from photograph one on Exhibit 4. This evidence is not contradicted by Daye's statement. Clayton testified that Cole participated in the beating of Watts. Charman was struck next. After Charman was struck, the attackers moved to Watts. By this time Cole, Skinner and the others had moved to the location where that beating took place, just north of the north corner of Robie and Cedar on the sidewalk. There is nothing in Daye's statement which contradicts this evidence.

I am therefore unable to accept that Daye's location of Cole and Skinner at the time Burke and Terry Dixon were arguing contradicts Crown evidence or provides material for a defence that any of the appellants and, in particular, Skinner were elsewhere

at the time Watts was beaten.

Counsel for Skinner says that the placement by Daye of Skinner in a different location at an earlier time would "have been highly relevant to the cross-examination of Danny Clayton because this meant that Mr. Clayton and Mr. Daye were in the same circle that assaulted Darren Watts while, it appears, Mr. Skinner was some distance away on the other corner". With respect it does not follow that Skinner was elsewhere when Watts was beaten. Daye's placement of Skinner earlier when Terry Dixon and Shannon Burke were arguing is not inconsistent with Skinner being present at the beating of Watts. Skinner's own statement to the police clearly implicates him in the beating of Charman. This was the second fight which occurred subsequent to the placement of Skinner on the south side of Cedar Street. The Watts beating took place because Watts came to the aid of Charman. It started where the Charman assault left off. Skinner is now clearly in the centre of the action. It is as simple as that.

Counsel refers to Daye's statement that:

> . . . While one fight was going on there was a fight over here and one over there. Everywhere you turned there was a fight.

It is said that this is consistent with the evidence of Lloyd Finter that he saw only a small number of persons actually attacking Watts. Clayton's testimony was that there were three fights, the first on the south corner of Cedar Street and the third on the north. The second fight is not precisely fixed. Counsel referred to the fact that Terris Daye's mother provided the police, in his presence, with the names of four people "in his group". These were Danny, Terrence, Michael B. and Stevie Dee.

Lloyd Finter was a Commissionaire at Camp Hill Hospital. Early in the morning of September 11, he was in front of the hospital on the steps leading down to Robie Street and noticed a commotion on the front steps of the Frat House at 1770. A big mob proceeded south on Robie towards the intersection of Cedar and Robie. He saw a fellow returning to the Frat House carrying another male and set him down on the doorstep.

The mob proceeded down to the intersection of Robie and Cedar, followed by more and more people from the Frat House. Eventually the whole intersection was filled with young people. There was a lot of pushing, shoving, hollering and yelling. He was approached by a young man who asked him to call the police. He went to the information desk and did so. He went back outside and noticed that instead of one big group in the middle of Cedar, it had broken down to three, possibly four groups. Because of darkness he really could not count the number of groups. He could not tell who the combatants were because all he could see was the fringes. His attention was drawn to the corner of Cedar and Robie. He saw four men, all of whom were black, swinging at something or somebody. He then moved down to the driveway of the hospital so he could better see what was going on. He noticed that one male had another by the hair or the sweater and he was bent forward holding with one hand and punching with the other. Three other males were also punching in the head area. Finter then went back up to the steps and continued to observe. The pounding went on for a few minutes until the person that was beaten straightened himself up and got away and started to walk north up Robie Street. At this time three of the four that were assaulting him came after him, punching him in the back of the head. Finally one person swung him around and hit him on the head. Finter was waiting for his relief to come and he moved back off the steps to see if his relief had come through the hospital. He heard a punch. The victim dropped and his head was on the sidewalk. When he heard that, he was halfway between the doors of the hospital and the steps leading down to the Robie Street sidewalk. The three people continued to kick his head area, kick at the ribs, and on two occasions jumped up in the air with both feet and came down onto the chest and the head area. One person waved his friends back, stepped back about three feet and ran forward and kicked him with a soccer type kick. The kick caught the victim on the side of the head. This sickened Finter and he turned his head briefly. Again, he looked for his relief to come. When the relief came, Finter went over and at that time about 12 or more

persons that were involved in the altercation came back across Robie Street, crossing the median and heading in a northeasterly direction toward Queen Elizabeth High School. They were all black, all wearing baseball hats, some had on track suits.

While Finter was assisting the victim, the group of young people that had been involved in the fight and who he had passed on the median were coming back down the sidewalk on which the victim lay. They walked off on the side of Robie Street, made a few comments and turned westerly on Cedar Street. He saw them walking down and after they got about 50 or 75 yards, a couple of them turned and saw him and then ran westerly.

The Commissionaire could not make out the faces of the individuals and he was not able to make an identification from photographs shown to him. The attackers were black. They wore baseball hats and were probably 18 to 20 years of age. Finter said that the group of 12 was not all by the victim. There were four attackers initially and when he went around the corner on Robie, three continued to follow him and to do the damage. When asked what the others comprising the group of 12 were doing at the time, three were assaulting the victim, he responded:

> A. Well, all the people that were in that intersection, now with this battle going on . . . or with this beating, I should say going on, on Mr. Watts, there wasn't that much distance between them and the other people in that intersection. That intersection was full of people. So there were certainly people in a close proximity to it. I mean from my vantage point I couldn't say how many feet there were between these people. It could have been one feet, two feet. It could have been 15 feet because you know the distance I was from them I couldn't see how close they all were.

An examination of the record indicates that Finter differed from the majority of other independent witnesses who spoke of the number of attackers. It is noted that he left his vantage point or turned away on at least six separate occasions.

Arsenault was very definite that there was, at all material times, a cohesive

group of eight to ten black males that followed Burke and Terry Dixon out of the Frat House, down Robie Street. He had let in such a group when they arrived at the door of the Fraternity house.

Shirley Wall, who shared the same vantage point with Finter, heard the crack of a head on the sidewalk. She said there was a group of blacks which circled the victim. She could see for a time through the circle and noticed two or three people kicking. The beating went on for five minutes, but when asked how it stopped, she said she was unable to say, because the gathering had thickened around the victim so that she could not see anymore. After the beating, she saw 12 or 15 blacks leave the area. She referred to them as "the group". Some were short, some tall. Most wore baseball caps. Afterward, the same group headed towards Cedar Street, singing. This is consistent with the evidence of Arsenault and others about the cohesive group of blacks, and supports the finding of the trial judge that at least seven black males attacked Watts.

Thomas Wilson was at the party. He saw a black man and a white woman emerge from the house fighting. They were followed by a group of black men and more people, both black and white. He saw a bunch of people surround and kick Watts. They were in a tight group around him. He thought they were all black. One of them took a soccer type kick to the victim's head. They then took off in a group toward Queen Elizabeth High School. When people were ministering to Watts, the group came back down Robie Street and west on Cedar. They were chanting something to the effect, "we gotta go but now you know". These people were the ones who poured out of the house after Burke and Terry Dixon. While he noticed only three kicking the victim, the others in the group were all around and could have blocked his view of other attackers.

Cooper Tardival arrived at the Frat House around 9:30 p.m. He knew three of the six accused and had a general knowledge of all. He saw them walk in close to midnight. Later, about nine to 11 of Terry Dixon's black friends followed him as he dragged

Burke out of the house. After he learned that something was amiss, Tardival left to get his car on Cedar Street. He saw a group of seven to nine black men on Cedar Street joking and laughing. He recognized Cole, Spencer Dixon, Cyril Smith, Guy Robart, Stacey Skinner and Stevie Nelson.

Preman Edwards was working the Frat House door checking I.D.'s. Around 9:00 p.m. he turned away six black men who did not have I.D.'s. He was replaced by Michael Arsenault. About 11:30 he saw a group consisting of these six and more black males being admitted by Arsenault. He went outside about 12:30 upon learning of an incident. He saw some of the group running up towards Queen Elizabeth High School. Then he saw them coming back down Robie Street chanting a song about "now you know you don't mess with us". He recognized Damon Cole, Herman McQuaid and Cyril Smith. He estimated their numbers to be from seven to ten. They went down Cedar Street.

Blaine E. McQueen first saw a group of about 15 black males arrive at the Frat House. He recognized Cyril Smith, Damon Cole, McQuaid and Guy Robart in the group. He saw Burke being dragged out of the house by Terry Dixon, followed by a group of black males. He asked Cyril Smith about it and was told to mind his own business. He took this advice and did not follow. After he heard about the beating, he saw the group in a circle, like a pack, at the corner of Cedar Street. They left and ran off towards Queen Elizabeth High School. In the area that they had been circling was Watts. The group then headed back towards Cedar Street chanting to the effect "we gotta go but now you know". He said it took about five minutes for the group to spill out of the porch and make their way down to Cedar Street.

Robert Gillis was outside the Frat House with Dennis MacDonald. He heard screaming and yelling and noticed a black male dragging a white female down the street. He and MacDonald followed and he approached the couple and told the man to leave the female alone. A punch was thrown at Dennis MacDonald and after that there was a punch

thrown at Gillis. He did not know where it came from and that is all that he remembers. Five to ten friends of the black male were following the couple out of the Frat House. Gillis could only describe two of them and could identify none.

William Murphy lived at 6010 Cedar Street on the southwest corner of Cedar and Robie. He heard yelling and looked out his window and saw a group of people coming south on the west side of Robie Street towards Cedar Street. A female was yelling and he saw a group of about ten black males and a few white males on the sidewalk. The female and the black male were directly outside of his window on the south sidewalk of Cedar Street. He saw a fight up on Robie Street. There was a group of about ten males in a circle around a white male, kicking him. Eventually, this group ran across Robie Street and then later came back headed west down Cedar Street. He thought they were the same people. When they ran by his window on Cedar Street, they were yelling a song to the effect "if you don't know now you know". The males who were running were black.

Lisa Wells was standing on the sidewalk talking to Gillis. She saw a black man dragging a blonde woman by the hair smacking her and punching her. He dragged her up the street a little ways, she turned to talk to a friend and then the next thing she knew Rob Gillis had been hit. She had seen a group of approximately ten black men exit from the Fraternity house following the man and woman.

Kathryn Clark lived at 6010 Cedar Street. She returned to her apartment shortly after midnight and was aware of a party going on at the Fraternity house up Robie Street. She heard females screaming and looked out the window and then saw a man being carried across Cedar Street in a northerly direction. She first noticed him just north of the south curb of Cedar Street being carried by his friends. She assumed there had been a fight and that it was over. She turned away from the window and then there were two people fighting under their window, a man and a woman, and they were yelling and screaming. She called him Terry and then they continued down the street away from Robie

Street. There was commotion outside. She looked out her window and saw a group of people in a circle, about ten guys beating up somebody. She turned and phoned the police. When she next looked out the window there was a group of men running down the street chanting something. When she saw them in the circle they were facing each other, jumping and kicking. She could not see what was in the centre of the circle. One individual seemed to stand out from the others. He jumped quite high in the air and came down and delivered what looked like a killer kick, as if he was kicking a football. She described the group as being between 18 and 25 years of age, black, some wearing baseball caps and some not, and the guy who delivered the kick was wearing what seemed to be a light coloured track suit of some sort. After she telephoned the police and next looked out the window, they were running west on Cedar Street chanting. The beating by the men in the circle took place on the west side of Robie Street directly in front of the house at civic number 1756 on the corner of Robie and Cedar. On cross-examination, she conceded that other than the one person kicking, she only made that assumption with respect to the others in the circle. She had given an earlier statement in which she had said they were all jumping and kicking.

Melinda Waterman lived in the apartment with Kathyrn Clark. She heard the male and female arguing on the south side of Cedar Street. She saw a white male punched and carried off. She then looked out another window and saw between eight and ten black males circle a white male and punch him. He fell and immediately after they started kicking and jumping. They were in a circle right around the white man. The men in the circle were black. There were about 20 other people in the area standing around within 10 to 15 feet of the circular group. There was a street light on the corner of Robie and Cedar. Of the eight to ten in the circle, she estimated that four were doing the actual kicking.

Shauna MacLeod lived in an apartment at 6010 Cedar Street. She heard

yelling outside and on looking out the window saw a blonde man get knocked out and his friends carried him away. She turned away from the window and then was attracted to a man and woman yelling outside. They went west on Cedar Street. She thought everything was over and then heard yelling and screaming and looked out again and saw a group of eight or ten people in a little circle on the south corner of Robie and Cedar Streets. There was not much space in the middle, but she assumed from their actions that it was a person. They were kicking and she saw one man jump in the air. Nobody left or joined the group during this. The men were young and all black which was all she could say. She left the window while her sister called the police. When she next looked out, the group had pretty much dispersed. She saw a Commissionaire come across from Camp Hill Hospital and then a group who she was sure was the same group started running down Cedar Street all yelling. There were other people, maybe five, in the vicinity of the closed circle of black men. This witness could not identify faces because it was too dark, even though there was a street light on the corner. As the group eventually proceeded west on Cedar Street she heard one say, "cops man come on run".

I have summarized the evidence of these witnesses at some length because counsel point out that the evidence of Finter restricts the attackers to three or four people. It is suggested that this undermines Clayton's evidence and opens the possibility that someone other than those mentioned by him could have been the attackers. It is said that it is a reasonable inference that Daye and perhaps others standing with him were the participants in the attacks.

The statement of Daye does not develop a theme that there was a small group of only three or four who attacked Watts. The names given by Daye's mother in his presence to the police numbered five as being in Daye's group. He does not exclude others. Daye refers to an inner circle of black and white people and an outer circle of black and white. This statement does not support a theory that there was but a smaller number

of different attackers.

The occurrence report made reference to the fact that Daye's statement dealt with an "outer circle" and an "inner circle" around Watts and that Daye did not name those in the inner circle. In view of the position they now take, it is surprising that counsel was not interested in this as they prepared to cross-examine Clayton.

The testimony which I have summarized shows that the overwhelming body of evidence indicates that there was a circle of black males surrounding and beating Watts. The trial judge so found. Naturally, there were inconsistencies among the witnesses. The surprising thing is that there was as much unanimity about this circle from various different vantage points. Daye's statement does not undermine this evidence. He either did not see or was unwilling to admit seeing who attacked Watts. He stated:

> . . . there were a lot of people, white and black on the north corner of Cedar and Robie. There were so much people. I couldn't see who was doing all the damage while Watts was getting beat up.

I therefore disagree with counsel's argument that it is a reasonable inference that Daye and perhaps some others that were standing with him participated in the attack on Watts, to the exclusion of the seven individuals identified by the trial judge. I have already pointed out that this statement offers nothing by way of direct material upon which any of the witnesses could have been cross-examined. The other two avenues of argument left to counsel are that the statement could have led them to interview other potential witnesses and that they could have called Daye himself.

As to the first alternative, the opportunity to interview potential witnesses was always open to counsel. The occurrence report developed the theme of two circles around Watts which, as I have said, was of no interest to counsel at the time of trial. I have already indicated that it is not for us to judge counsel's pre-trial preparation, but it is clear that the material already available to counsel pointed not only to Daye but to a number of other persons in the vicinity who could have been interviewed. There is nothing in this

statement that opens up any avenue of pre-trial investigation not already clearly available to diligent counsel.

As to calling Daye, one difficulty is that all the circumstances point to him as a possible suspect. Not only does his statement on the face of it add nothing that would improve the position of the appellants or diminish the credibility of the Crown witnesses, but it places Daye in a position where he would obviously be an unwilling and unhelpful witness. I see no reasonable possibility that he would have been called had his statement been in the hands of counsel. Again, I mention the two circles referred to in the occurrence report. I see no loss of a realistic opportunity to garner and present evidence flowing from this statement.

Counsel also point to the fact that Daye said that he did not see Clayton or Smith do anything and that he cannot remember Nathaniel or Guy Robart hitting anyone. When asked if Skinner hit anyone, he replied, "I didn't see it, but he told me he told you guys he did."

It might be different had he said these people did not hit anyone. Daye implicates no one, whether or not in his group.

Just before Daye's mother provided the names to the officers, the statement says that in the context of Watts, ". . . and he said he didn't see anything and then he said he was in the circle".

This statement does not contradict the evidence which supported, to varying degrees, that of Clayton. This evidence was referred to by the trial judge. There is nothing in the statement upon which any of the Crown witnesses could be cross-examined directly. Clayton never denied that Daye was in the group. I do not see in the statement any basis to encourage the appellant or any of the other accused to take the stand if they were not otherwise disposed to do so.

Another portion of Terris Daye's statement would be of concern to the

appellant. On page 6 of the statement he says he saw "two white guys get hit". He referred to one Dennis MacDonald as the person who got hit in the number two spot. At the end of page 6 reference is made to John Charman as number one guy. Daye says that he saw number two get beat up. When asked who hit this number two guy, he said at the end of page 6 and the beginning of page 7:

> Spencer punched and kicked this guy. He likes to kick.

Daye then returns to number one who he refers to as Charman and then about two-thirds of the way through p. 7 after being asked what happens next, he says: "two or three minutes later number 2 gets beat up and then we leave". If number two is Dennis MacDonald, not Watts, Daye would have left the scene even before Watts was beaten. This simply adds to the confusion the statement presents. If, on the other hand, it was Watts that was beaten, Daye's response to the next question would be of grave concern to appellant's counsel. Upon being asked who hits number two, he answers "Spencer. All I see was Spencer kicking him. The guy that hit this guy was light skin."

Appellant's counsel, in his supplementary affidavit, states:

> That a further investigation with one of the officers who took the statement of Terris Daye confirms that Mr. Daye, when he states on page 7 of his written statement that he saw "Spencer kicking no. 2 . . ." that no. 2 was Dennis MacDonald.

I accept that this is a possible interpretation of the statement, but appellant's counsel nevertheless has a real problem with the statement "two or three minutes later no. 2 gets beat up and then we leave".

Counsel suggest Daye's evidence may have carried weight because it contains details relating to his flight from the scene that are similar to those given by Clayton. This merely supports the inference that Daye was in the group that included the accused, nothing more. It is alluded to in the occurrence report.

In all, nothing in the statement would give comfort to counsel preparing the defence of these accused.

(ii) **Damage to the Crown's case**:

Does Daye's statement materially add to the damage that counsel for the appellant and the other accused inflicted on the Crown's case? I will consider the material actually used by counsel to discredit the Crown's principal witness Clayton. I will review the trial judge's comments to assess his view of Clayton's credibility and of the attacks made upon it.

Defence counsel conducted lengthy and damaging cross-examinations of Clayton.

It is apparent from Clayton's evidence that, while implicating six others he too had participated in the assault on Watts, and had turned on his friends to save himself. He was given immunity from prosecution in return for his testimony. He never voluntarily turned himself in, but first maintained a denial of any involvement in the matter.

Clayton, when testifying, did not at first mention Damon Cole in listing the attackers of Watts. He only named Cole in response to a leading question from the Crown.

Clayton had deliberately given the name of Levier as one of the attackers and did not mention Guy Robart in his first statement to the police. He admitted this was a lie. Later he withdrew the name of Levier and added the name of Robart.

In the video deposition given November 10, 1994 Clayton said that Cyril Smith hit Watts first. At trial, he said it was Guy Robart who delivered the first blow.

Clayton had named Dee Nelson in the video statement and not Herman McQuaid.

Clayton was unable to indicate the precise location of each of the attackers in the circle around Watts.

Clayton admitted his memory was better in November of 1994 than at the trial in February of 1996.

Clayton gave two statements to the police on September 20, 1994. He

admitted that he made untruthful statements. He said that the police told him it would go easier on him if he gave a truthful statement. He never discussed this incident with members of his family. Nor did he discuss with them the question of immunity.

There were numerous inconsistencies developed between previous statements, both to the police and at the preliminary and his present testimony.

Clayton agreed that the police had first suggested Robart's name to him. He did not mention him in the first statement of September 20, but did in the second.

The police offered immunity to Clayton about three weeks after the two statements of September 20.

Clayton admitted that he felt that his immunity depended on him naming certain people.

When asked if there were persons other than the six accused surrounding Watts, he testified that he was not sure. Daye's statement is not contradictory of this.

At one time Clayton said he was looking all around when he was kicking, to see if the police were there. Clayton said at the preliminary that he was not looking at the other kickers of Watts and when pressed that Guy Robart was one of them he said, "I don't know. I can't remember." He then said he was not 100% sure that Guy Robart was kicking Watts while he was on the ground because he was looking at the person he was kicking. Nevertheless he stated at the trial that he was sure that Robart was indeed doing such kicking. He was sure because he relied on his statement.

He said at trial that he was sure Robart was in the group but at the preliminary he was not sure of that.

On cross-examination by counsel for Cole, Clayton admitted that in his first statement on September 20 he told the police he did not know who beat up the white people at the corner of Cedar and Robie, and did not strike or kick any of those people. He admitted that that was not the truth. He had no trouble lying to the police. In the

second statement on September 20 he said that he did not kick or punch Watts.

When asked if Terris Daye or Terrance Tynes did anything to Watts, he said he did not see them do anything.

Clayton acknowledged, in response to questioning by Cole's counsel, that he did not name Cole as an attacker of Watts in his second statement of September 20 until after a washroom break and after questions put to him by the police. He told Cole's counsel that he was looking all around as he kicked Watts. He was confronted with evidence at the preliminary that he was looking where he was kicking and when further pressed on this, replied that he did not know. Then he volunteered that his attention was all around.

Clayton agreed that while he had not named Stevie Downey as a person who had attacked or kicked Darren Watts, he did name him in the statement to the police.

In response to cross-examination by Smith's counsel, he stated that he did not know where Smith was when he was kicking Watts.

In his second statement of September 20, 1994, Clayton stated that "when the little blonde guy came over Stevie Dee was pushing him and the blonde guy pushed Stevie Dee off him. It was like self-defence. That's when Cyril Smith, Damon Cole, Stacey Skinner and Stevie Dee rushed him. I couldn't see what happened then because of the crowd." He then agreed that in the video statement he had not named Spencer Dixon and Cyril Smith as hitting the blonde guy.

Again and again Clayton admitted to the cross-examiners that he had lied to the police in the first instance.

To the suggestion of counsel that Clayton would have been confronted with Daye's statement that the circle included Daye, Tynes, Barton and Dee, I refer to cross-examination of Clayton where Robart's counsel puts to him that his friends, Daye and Tynes were there that night and nowhere in his evidence did he implicate them. Cole's

counsel put to him that he was a friend of Daye and Tynes, that he went to the party with them that night and yet he had not named them as harming Watts. To this, Clayton replied that he did not see them do anything. He was reminded of his first statement to the police where he said that he left with Tynes "because he didn't do nothing either". Clayton agreed that he left the area with Tynes, Daye and Cyril Smith. Skinner's counsel also questioned Clayton on where Daye and Tynes were standing in the group to which he responded that he could not remember.

Counsel for McQuaid questioned Clayton about a statement provided by Tynes about his involvement in statements, about statements by Daye, about his friendship with these two individuals and a statement from some other person suggesting that Tynes had kicked a white person on the ground and that Daye and Clayton had blocked a person during this attack. In admitting that he felt others were implicating him so that they could get off, he felt he was just one of the "little guys" of whom Tynes was another. He was further questioned on whether Tynes kicked a white person on the ground to which he responded he did not see him, but admitted he could have been there kicking.

Counsel knew that other black males were in the vicinity of the beatings and tested Clayton about their possible involvement. He did not deny that they were there. He claimed to know nothing of their participation. Nor does Daye involve anybody in the Watts attack. There is nothing new in all of this.

It is submitted that Daye's statement could be used to cross-examine Clayton so that he would become aware that Daye was available to contradict him. It is suggested that Daye's statement throws Clayton's evidence into disrepute. With respect, compared to all the material with which defence counsel attacked Clayton, there is nothing of significance in the statement. Overall, the statement is negative and evasive. The police were told in Daye's presence that Daye suffers from Attention Deficit Disorder and that his idea of a couple of minutes could be one-half hour or whatever.

Specifically counsel relied on the following passage to suggest a contradiction:

> Terry Dixon says just mind your business. I guess this guy (Charman) grabs Terry and Damon Cole punches this guy in the face. I'm saying there is a reason he just didn't hit him for nothing. I see this.
>
> Q. Did anyone else hit this number one guy (Charman)?
>
> A. Spencer. That's all I can remember.
>
> Q. What did you see?
>
> A. Lots of people around him, he's in Terry's face, grabs Terry, Damon says take your hands off my cousin and punches him (number one person) (added when read over).

Clayton testified that he saw Damon Cole and Cyril Smith punch a "white guy". Arsenault testified that all of sudden out of the crowd Gillis was punched by Damon Cole. That Daye does not mention Cyril Smith does not contradict Clayton's testimony. The point is made that Gillis grabbed Terry Dixon and that Cole was protecting his cousin from an attack. When Daye first makes this point, he speaks of it in terms of a guess, but later on he says that the person who was punched "grabs Terry". When Gillis was cross-examined, it was put to him that he had grabbed Terry Dixon, to which he stated that he could not remember grabbing him. When pressed further, Gillis repeated that he may have done so but he did not remember. It will be recalled that the trial judge found that Gillis had a hold of Shannon Burke and may have also come into physical contact with Terrence Dixon. This was brought out on cross-examination by Cole's counsel. This Court in **Cole, supra**, relied on this as material to Cole's position. Daye does not contradict Gillis who freely admits that he did not remember if he grabbed Dixon. Although Cole's counsel obviously had this point in mind at trial, he did not even put the point to Clayton. However he had the point. He did not need Daye's statement to put it in his mind.

I do not take the passage quoted above as being contradictory of Clayton or

undermining his credibility. Far greater inconsistencies were developed in Clayton's own previous statements, as I have demonstrated.

The passage quoted is inaccurate in that Daye identifies Charman and yet counsel argue that he means to describe the attack on Gillis. It just adds to the sense of confusion that the statement projects.

If counsel would take comfort from this part of the statement, I would remind him that the occurrence report already summarized it. He did not consider it important when he read the occurrence report. It is no more important now.

By his own admission in his second statement to the police, McQuaid struck Charman. Stacey Skinner also gave a statement to the police admitting that he struck Charman.

Consistent with the overwhelming body of evidence about the attackers of Watts, the trial judge found:

> 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 7 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 . . .

(emphasis added)

The trial judge, after cautioning himself as to the manner in which the evidence of an accomplice must be scrutinized, made the following comments about Clayton and his credibility:

> In scrutinizing Clayton's evidence both in itself, and when compared to other accounts he has given, as well as to the evidence in this case as a whole, I have recalled each of the criticisms and challenges levelled by defence counsel. I

have paid particular attention to the fact that at this trial Damon Cole was not a name mentioned by Clayton when first asked to identify those persons who first started kicking Darren Watts. I have kept in mind the fact that Damon Cole's name was not given until Clayton was first led by the Crown to admit that he knew Damon Cole, after which Clayton was then asked whether there were any men in court who had struck Darren Watts that night. I have not forgotten any of these circumstances in analyzing Clayton's evidence or the case in its entirety.

I have done the same thing with respect to those situations where Clayton did not provide certain names in the narrative portion of his videotaped deposition, but did, after taking a washroom break, and then responding to the police in the Q & A portion of the interview.

I am also mindful of Clayton's testimony that the police investigators frequently mentioned the name Guy Robart to him during their questioning. However, I accept Clayton's evidence on cross-examination where he told Mr. Coady that he did not feel the police were pressuring or encouraging him to name Guy Robart . . .

While it is despicable that in his second statement to the police on September 20, 1994 Clayton included the name of "T.J." Edmund Levieé as being there when Darren Watts was attacked, it is not accurate to say that Clayton merely substituted Guy Robart's name for that of Levieé. In fact it was only two questions later that he specifically named Robart. When asked "why" by HPD Detective Martin, his explanation for the omission was fear of Robart.

I have kept all of these important circumstances in mind as I considered and reconsidered his testimony as well as all of the other evidence presented. I have also looked for other evidence which might tend to confirm Danny Clayton's accusations and version of events when he testified before me February 13 - 14, 1996. There was considerable supporting evidence, some of which I will illustrate in a moment.

. . .

Despite the fact that Danny Clayton admitted relying upon his earlier transcripts, to some extent, in refreshing his memory and notwithstanding the fact that Clayton could not visualize the circle of men to the extent of being able to tell me, 17 months later, such things as who exactly was standing where, or what each was wearing, Clayton was nonetheless resolute in the naming of his former friends. His resolve did not waiver, despite relentless attacks on his credit and character by defence counsel.

. . .

After reviewing details of Clayton's evidence, the trial judge continued:

> Mr. Clayton was on the witness stand for two days. He was vigorously and thoroughly cross-examined by 6 defence counsel. I was impressed by the way he conducted himself while testifying. I watched him and 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 6 accused as being responsible for the aggravated assault of Darren Watts. Despite the detailed submissions of defence counsel I was not left with the sense that it would be unsafe to convict upon the testimony of Mr. Clayton which points to himself and the other 6 accused as being responsible for Mr. Watts' life-threatening and permanent injuries. Quite apart from Mr. Clayton's own evidence, I am satisfied that such convincing proof was supported, in material respects, by other evidence adduced.
>
> While testifying Mr. Clayton left me with the clear impression that he was responding carefully and honestly to questions posed by counsel . . . He acknowledged the obvious . . . His answers to difficult questions were reasonable. He met them head on. For example why he did not engage a lawyer to negotiate the immunity agreement. Or why he inferred that his friends Day and Tynes were not the ones "ratting" on him when shown extracts from other statements by the investigators . . .
>
> Naturally Mr. Clayton was uncomfortable during the long hours he sat on the witness stand - it could not have been an easy thing to face his 6 former friends and accuse them of such serious crimes. Whenever Clayton seemed uncertain or had difficulty recollecting or occasionally presented with a flat affect, I am well satisfied that such appearances ought be attributed to either fatigue after vigorous cross-examination; shame for his participation; fear of retribution; or a healthy measure of both.

In the context of the trial evidence and these findings, what difference does the statement of Terris Daye make?

The statement is significant for the number of things that Terris Daye did not see or was unwilling to discuss. It is confusing and imprecise overall. When stacked up against all of the evidence which the trial judge accepted as adverse to the position of the appellant, it casts no doubt upon the result. Counsel relied on information supplied in Daye's presence by his mother. His mother and grandfather also supplied in his presence

the information that he had Attention Deficit Syndrome and no sense of time.

I refer again to the submission that, generally, counsel lost an opportunity to work with the statement at the trial. I have already reviewed the statement, the material disclosed by the Crown to the defence and the evidence. As I have shown, the statement could not be used directly as a weapon on cross-examination. The statement is best remembered for what Daye did not see. The reasons are obvious. The flight from the scene was alluded to in the occurrence report. So are the two circles. The discrepancy respecting the Gillis/Charman assault is covered in detail in the occurrence report. These points were of no interest to counsel when they read that report. I do not accept their argument that the statement had potential.

I recognize that another panel of this Court in **Cole** took a different view of the impact of Daye's statement. For the reasons given by Flinn, J.A. in **Robart** and **Skinner**, I consider the cases before this panel to be distinguishable from **Cole**.

I return to the various tests that have been expressed by courts of appeal. Based on the material before us, I am certain that the appellant received a fair trial. I am satisfied that the non-disclosed evidence is of no weight. I am satisfied that there is no reasonable probability that had this material been available at or prior to the trial, the result might have been different. Any suggested use to which this material could have been put is highly speculative. The statement presented no reasonable opportunity to garner evidence. It cannot be compared to the non-disclosed evidence calling for new trials in the cases which I have reviewed.

Antinello, supra, is of no help here. There, the remedy fashioned by the trial judge was held by the Court of Appeal to be inadequate. Here, counsel did not bother to ask the trial judge for a remedy. There, the late disclosed evidence was crucial to the Crown's case. Here, the late disclosed evidence was a statement that says nothing.

I have also taken into account that the appellant did not testify or call

evidence on his behalf. I see nothing in Terris Daye's statement that would encourage an accused who was otherwise not planning to take the stand to change that decision. In particular, there is no similarity to the situation in **Stinchcombe, supra**, where the non-disclosure of the statement clearly impacted on the decision of counsel whether or not to call a particular witness and whether or not to call the appellant.

I would dismiss this ground of appeal.

OTHER GROUNDS OF APPEAL

The first four grounds of appeal are the same grounds which were urged on behalf of the appellant to this Court in **R. v. Cole, supra**. This Court disposed of all of those grounds adversely to the position the appellant now takes. I adopt the reasoning of that panel of the Court and need not repeat it here. I would dismiss the first four grounds of appeal from conviction.

SENTENCE APPEAL

The trial judge, in imposing a sentence of seven years incarceration for the aggravated assault on Watts, took into account the fact that the appellant had already served time prior to the sentencing. But for this, he would presumably have received the same eight year sentence of incarceration imposed upon the other accused with the exception of Cole. No issue is taken with respect to the trial judge's one year reduction for time served so the question before us is the fitness of the term of incarceration of eight years imposed for the aggravated assault upon Watts. In determining the appellant's sentence appeal, I must address the fitness of that sentence.

For a long time, this Court has stated its unwillingness to interfere with a sentence where the trial judge has not misapprehended the principles of sentencing and where the sentence is not manifestly excessive or lenient having regard to the circumstances of the offence and the offender.

Recently, the Supreme Court of Canada in **R. v. Shropshire** (1995), 102 C.C.C. (3d) 193 indicated that the party seeking variation of a sentence must satisfy the court of appeal that the sentence under review is "clearly unreasonable".

The test is not what sentence I would have imposed if I were the trial judge. The test is whether the sentence he imposed was clearly unreasonable or manifestly excessive.

The appellant was 19 years of age and had previous convictions for theft, breach of an undertaking and assault.

The sentence imposed here was lengthy. The position of the appellant is that it is out of line with other sentences for aggravated assault. It is undoubtedly out of line with the sentences imposed in many aggravated assault cases. That is because one has rarely encountered such a vicious assault as that committed here or with such disastrous consequences. A case not too dissimilar from the present is **R. v. Silvea** (1988), 86 N.S.R. (2d) 346. There, the accused beat a pizza delivery man with such brutality that the victim was rendered a spastic quadriplegic. It is only good luck that Watts made a better recovery than did that victim. In **Silvea, supra**, a sentence of nine years incarceration imposed by the trial judge was upheld by this Court. It is true that the circumstances of the offence in **Silvea, supra**, were more repugnant than in this case. Because this Court upheld the nine year sentence there, I do not consider that as supporting the submission that the sentence imposed here was not fit.

It is not a valid submission that just because the sentence is high, it is erroneous simply because the offenders are, in general, persons with no significant previous record. The trial judge has commented fully upon the vicious nature of this

assault. Parliament gave him the option of imposing a sentence as high as 14 years for this offence. The appellant has failed to satisfy me that the sentence imposed was not a fit one in all the circumstances.

I would dismiss the appeals.

Chipman, J.A.

Concurred in:

Flinn, J.A.

Bateman, J.A. (dissenting):

The facts underlying this appeal are set out in the judgment of Chipman, J.A.

OTHER GROUNDS OF APPEAL:

I agree that the grounds of appeal, excepting the disclosure issue, are identical to those raised in **R. v. Cole**, (reported as **R. v. Cole (D)** ((1996) 152 N.S.R. (2d) 321 (N.S.S.C.)) and concur with the disposition of the panel on those issues.

NON-DISCLOSURE BY THE CROWN

The significant issue on this appeal is the effect of the failure by the Crown to disclose to the defence four witness statements.

The Test:

In **R. v. Peterson** (1996), 106 C.C.C. (3d) 64 (Ont.C.A.), (leave to appeal to S.C.C. refused), Osborne, J.A. wrote at p. 20:

> . . . to show prejudice as a consequence of the non-disclosure, the appellant must satisfy the court that there is a reasonable probability that, had there been proper disclosure, the result might have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome . . .

This is the test favoured by my colleagues. With respect, and for the reasons set out below, I would frame the test differently.

Osborne, J.A., in **Peterson, supra**, adopted the "reasonable probability test" (also called the "non-disclosure prejudice test" or "proof of prejudice test") from the leading American case of **Strickland v. Washington**, 46 U.S. 668 (1984), 104 S.C.R. 2052. He wrote at p. 82:

> . . . O'Connor J. specifically adopted the non-disclosure prejudice test as a basis upon which to measure the prejudicial affect of trial counsel's alleged errors. This court has applied the **Strickland v. Washington** prejudice test in the ineffective assistance of counsel cases and it seems to me that it is logical to apply the same test in this, a non-disclosure case.

Osborne, J.A. accepts that there is an analogy between non-disclosure cases and those where there is a claim of ineffective counsel. I agree that the court's concern, in both cases, is whether there has been a miscarriage of justice. I do not agree, that because Canadian courts have adopted the non-disclosure prejudice test in circumstances where ineffective trial counsel is alleged on appeal, it necessarily follows that the same test is appropriate for non-disclosure cases.

It is fitting to set a high standard for an accused who wishes to appeal on the basis of ineffective assistance of trial counsel. The government plays no role in the selection, instruction or performance of counsel. There is, as well, a presumption that counsel is competent. As O'Connor, J. wrote in **Strickland, supra**, at p. 2067:

> Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. **The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence.** (my emphasis)

The "proof of prejudice test" is not, however, applied in all cases where ineffective counsel is alleged. Where the government plays a role in the denial of counsel, prejudice is presumed. As Justice O'Connor notes in **Strickland, supra**, the presumption is applied "because the prosecution is directly responsible, [the denial of counsel] is easy for the government to prevent". Prejudice is presumed because the court is concerned not only with the reliability of the result but also with the fairness of the trial process. In my view, the test, as articulated in **Peterson, supra**, or at least, as applied by my colleagues, centres primarily upon the reliability of the result, and does not sufficiently accommodate concerns about the fairness of the trial process.

A withholding of information by the Crown, whether intentional, or as here, inadvertent, is not analogous to the ineffective counsel cases where proof of prejudice is required "because no responsibility lies with the government". In situations of non-disclosure, responsibility for the withholding of relevant information from the defence lies squarely with the government through its agents. It is the government that has undertaken action impacting upon the trial process (here, the non-disclosure). While I would not go so far as to invoke a presumption of prejudice in favour of the appellant in such cases, where government action (or inaction) is the source of the complaint, a court must carefully scrutinize the fairness of the process.

The proof of prejudice requirement "finds its roots in the test for materiality of exculpatory information not disclosed to the defence by the prosecution . . ." (O'Connor, J. in **Strickland**, **supra**, at p. 2068). The obligation upon the prosecution in the United States, at least at the time of **Strickland v. Washington**, extended only to disclosing material that would be exculpatory. "The prosecutor is not required to deliver his entire file to defence counsel but only to disclose evidence favourable to the accused that, if suppressed, would deprive the defendant of a fair trial." (see **United States v. Bagley** 105 S.Ct. 3375 per Blackmun, J. at p. 3380.) In **Bagley** the court held that undisclosed evidence is "material" only if there is a reasonable probability that, had it been disclosed to the defence, the result of the proceeding would have been different.

"Materiality" in this context, however, is broadly defined by Blackmun, J. and includes an analysis of the effect of the non-disclosure on the trial process itself. He wrote at p 3384:

> The Government notes that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defence that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued. . .

> . . . **the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case**. **The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response**. (emphasis added)

Thus, although Blackmun, J. endorsed the "reasonable probability" standard, in assessing materiality (on an appeal from conviction) he would take into account the "possibility" that the non-disclosure had an adverse effect on the preparation of the defence. He recognizes, as well, the difficulty of retrospectively reconstructing the course that the defence would have taken, had there been full disclosure. I agree that any inquiry into the materiality of undisclosed information must include a generous assessment of the possibility that the non-disclosure impaired the preparation of the defence and the trial process. In my view, although this examination is linked to the reliability of the result, it encompasses a much broader analysis. While I would prefer the suggested restatement of the test which I have set out below, if the “reasonable probability” test is applied in the liberal manner contemplated by Blackmun, J., in my view it adequately accommodates my concerns. Indeed, in reviewing the analysis of Osborne, J.A. in **Peterson, supra**, it is arguable that he did take into account the effect of the non-disclosure upon the trial process, as opposed to limiting his focus to a narrow view of the reliability of the result.

The standard applied by the Supreme Court of Canada in disclosure cases (prior to **R. v. O'Connor** (1996), 103 C.C.C. (3d) 1 (S.C.C.), discussed below), where non-disclosure is discovered after conviction, does not accord with a strict interpretation of the **Peterson** "reasonable probability" test.

In **R. v. Stinchcombe**, (1991) 68 C.C.C. (3d) 1 (S.C.C.), at p. 17, Sopinka, J. wrote for the majority:

> What are the legal consequences flowing from the failure to disclose? In my opinion, when a court of appeal is called upon to review a failure to disclose, it must consider whether such failure impaired the right to make full answer and defence. **This in turn depends on the nature of the information withheld and whether it might have affected the outcome**. As McLachlin J. put it in **R. v. C. (M.H.)**, supra:
>
> Had counsel for the appellant been aware of this statement, he might well have decided to use it in support of the defence that the evidence of the complainant was a fabrication. In my view, that evidence **could conceivably have affected the jury's conclusions** on the only real issue, the respective credibility of the complainant and the appellant. [At p. 76.] (emphasis added)

In **Stinchcombe, supra**, the burden was met by the appellant where it was demonstrated that the information withheld "might have affected the outcome". In **R. v. C.(M.H.)**, (1991), 63 C.C.C. (3d) 385 (S.C.C.), McLachlin, J., writing for the court, found it sufficient if the evidence withheld "could conceivably" have affected the jury's conclusions.

In **R. v. C.(M.H.), supra**, the appellant was convicted of sexual abuse of the daughter of his common law wife. Following the trial the defence learned that a statement had not been disclosed by the Crown. In that statement a former school teacher of the daughter said that he had been concerned about the complainant in that she had suddenly become very withdrawn. He questioned the complainant about possible child abuse. In the statement the teacher said that the complainant had "denied everything I asked her". On appeal to the Supreme Court of Canada, McLachlin, J., reversing the decision of the Court of Appeal, ordered a new trial. She wrote at p: 395:

> The majority of the Court of Appeal (as revealed from its reasons on the application to adduce fresh evidence) doubted the value of the statement, characterizing it as merely confirming what the complainant said at trial - that she had told no one of the assault. The Chief Justice, on the other hand, felt the evidence could have been crucial to the defence, requiring a new trial.
>
> I share the view of the Chief Justice.

While in both **Stinchcombe** and **C. (M.H.)** the court was clearly concerned about the reliability of the result, in determining whether there has been a miscarriage of justice, the focus extended to the fairness of the trial process. As McLachlin J., in **R. v. C. (M.H.), supra**, wrote at p. 394:

> It is not necessary on the facts of this case to establish the exact ambit of the Crown's duty of disclosure. **It is sufficient to note that failure to disclose may constitute grounds for appeal where it results in an unfair trial**. As Spence J. observed in his reasons in **Caccamo** (dissenting on another ground, Laskin C.J.C. concurring), **courts must not hesitate to interfere where conduct of the Crown suggests there was unfairness at the trial** (at p. 796 [S.C.R., pp. 86-87 C.R.]):
>
> > "In my view, it is the duty of the court to be vigilant to assure itself that the appellant has had a fair trial and **if the regrettable conduct of the prosecution, using that term to cover both the police and the Crown counsel, ever results in unfairness then the court should act with decisiveness to reverse such unfairness**."
> > (emphasis added)

And at p: 395:

> In my view, the failure of the Crown in this case to disclose either the statement or the existence of the potential witness **created such prejudice against the appellant that it cannot be said with certainty that he received a fair trial**.

Factors such as the impact that the non-disclosure may have had upon the defence's decision to interview or call witnesses; or upon the decision to call the accused; or upon the questioning of Crown witnesses must be considered in assessing the fairness of the process. When a conviction rests, in substantial part, upon the evidence of a single witness a lost opportunity to attack the credibility of that witness is pivotal.

In **R. v. T.(L.A.)** (1993), 84 C.C.C. (3d) 90 (Ont.C.A.), Lacourcière, J.A. wrote at p. 95:

> Ever since the Crown's duty to disclose has been elevated to a constitutional imperative, courts have been interpreting the duty in a very strict fashion.
>
> . . .
>
> In the present case, whether or not one agrees with the tactical decision of defence counsel not to avail himself of the offer to conduct further cross-examination of the complainant and experts, **it cannot be said with certainty that the appellant was not prejudiced**. **The critical opportunity to attack the credibility of the complainant Carolyn T. was considerably, and arguably, irredeemably reduced**.
>
> It is apparent from the court's statement in **Stinchcombe**, supra, at p. 343 S.C.R., p. 14 C.C.C., previously quoted, that the disclosure of evidence by the Crown can affect the defence's election with respect to the mode of trial or to the plea. Defence counsel argued that the late disclosure by the Crown may have affected the accused's choice of forum and his decision to testify. While this argument would not necessarily succeed in every case, I would give effect to it in this case having regard, among other things, to the clear statement of defence counsel on the record. **The late disclosure may also have affected the ability of defence counsel to attack the complainants' credibility, which was critical in this case.** (emphasis added)

A reliable result is not the measure of a fair trial process. A result may be reliable, notwithstanding that the process in arriving at that result was unfair. In **R. v. Joanisse** (1995), 102 C.C.C. (3d) 35 (Ont.C.A.), Doherty, J.A., wrote at p. 62:

> Many of the American cases have emphasized the effect of counsel's incompetence on the reliability of the verdict in assessing incompetence claims. **I do not, however, read the American jurisprudence as limiting the fairness inquiry to the impact of counsel's incompetence on the reliability of the verdict. In my view, those cases also look to the impact of that incompetence on the fairness of the process leading to the verdict**: **Strickland v. Washington**, supra, per Brennan J., at p. 2073; **Lockhart v. Fretwell**, supra, at pp. 842-844; **U.S. v. Cronic**, supra, per Stevens J. at 2046-7. Whatever the American law may be, this court's obligation to quash convictions which are the product of a miscarriage of justice requires that it consider the impact of counsel's incompetence on both the reliability of the result, and the fairness of the process by which that result was achieved. **A reliable verdict may still be the product of a miscarriage of justice if the process through which that verdict was reached was unfair**: **R. v. Morrissey** (1995), 97 C.C.C. (3d)

193 at 220-221 (Ont. C.A.); **R. v. Hertrich** (1982), 67 C.C.C. (2d) 510 at 543 (Ont. C.A.) leave to appeal to S.C.C. refused, [1982] 2 S.C.R. x., 45 N.R. 629*n*.

The nature of the incompetence demonstrated will, in large measure, dictate the kind of inquiry required to determine the effect of that incompetence on the fairness of the trial. In some cases, counsel's incompetence rests in conduct which permeates and infects counsel's entire performance. Where counsel's incompetence is pervasive, the focus must be on the effect of that incompetence on the fairness of the adjudicative process. **R. v. Cook and Cain** (1980), 53 C.C.C. (2d) 217 (Ont. C.A.) provides a good example of this kind of incompetence. In that case, counsel was impaired during a good part of the trial including during his closing address. **His condition so skewed the appearance of fairness at trial that no inquiry into the reliability of the verdict was needed in order to conclude that a miscarriage of justice had occurred**. Martin J.A. put it this way at p. 224:

> No citation of authority is required for the proposition that justice must not only be done, but must be manifestly seen to be done. We are of the view that in the circumstances this principle was infringed and on the strong and uncontradicted material before us we have grave doubts whether in these circumstances the appellant can be said to have received a fair trial ....

Cases of ineffective representation, such as **R. v. Cook and Cain**, **supra**, are closely akin to cases where the accused is required to proceed without counsel in circumstances where he cannot receive a fair trial without the assistance of counsel. **In those cases, the appearance of the fairness of the trial is lost because the accused was unrepresented, regardless of whether the assistance of counsel could have affected the verdict**: **R. v. Rowbotham**, supra, at p. 69.

The conflict of interests cases such as **R. v. Widdifield and Widdifield**, supra, provide a second example of ineffective representation which destroys the fairness of the adjudicative process at trial. **Where counsel represents competing interests at trial, and as a result, counsel's ability to represent either or both of those interests is adversely affected, a miscarriage of justice has occurred without any inquiry into the effect of the conflict on the reliability of the verdict**. (emphasis added)

In **R. v. W. (W.)** (1995), 100 C.C.C. (2d) 225 (Ont.C.A.) the court, ordered a new trial on the basis that there had been a miscarriage of justice. At trial two accused were

represented by the same lawyer. No conflict issue was raised at the time of trial. The issue on appeal was whether their joint representation resulted in a miscarriage of justice. At p. 236 per Doherty, J.:

> The approach formulated in **Silvini** requires that the appellant demonstrate:
> - an actual conflict of interest between the respective interests represented by counsel
>
> AND
>
> - as a result of that conflict, some impairment of counsel's ability to represent effectively the interests of the appellant.
>
> If both criteria are established, then the appellant has been denied the right to make full answer and defence and a miscarriage of justice has occurred. **The appellant need not demonstrate that, but for the ineffective representation of counsel, the verdict could have been different. The absence of any need to show prejudice in terms of an adverse impact on the verdict flows from characterizing the product of ineffective representation flowing from a conflict of interests as a miscarriage of justice.** By its own terms, the curative proviso in s. 683(1)(b)(iii) can have no application. (emphasis added).

In a situation of non-disclosure, the court must consider its effect both upon the reliability of the result and, in the broader context, the fairness of the process. There must be a retrospective analysis of what impact the undisclosed information might have had, not only upon the result, but also upon investigation and preparation by defence counsel, which effect may be more speculatively or remotely related to the result. This is a particularly difficult task when the undisclosed material is, as here, a statement, admittedly of questionable value on its face, but one which might have led defence counsel in other directions.

When the Crown has breached its obligation to disclose relevant information, an appeal court should look most favourably upon granting relief. To do otherwise will inevitably have a inhibiting impact on the Crown's practice of disclosure.

In **R. v. Biscette** (1995), 99 C.C.C. (3d) 326 (Alta.C.A.), (aff'd (1996), 110 C.C.C. (3d) 285 (S.C.C.)) defence counsel, in response to late disclosure, made no motion for a mistrial but requested and was granted an adjournment by the trial judge. Counsel, then, unsuccessfully sought a stay of proceedings on appeal. While, on the particular facts of that case, I take no issue with the majority result, Harradance, J.A., in dissent, clearly articulates the limiting impact upon Crown disclosure, should the test on appeal be set too high. At p. 355:

> The discretion of the Crown to withhold evidence does not extend to information that is relevant but by its assessment will probably not impair an accused's right to make full answer and defence. Likewise, the Crown's discretion as to the timing of disclosure cannot be premised on the assumption that late disclosure of relevant information will probably not impair the accused's right to make full answer and defence. As I noted previously, in reviewing an exercise of the Crown's discretion, a trial judge is to be guided by the principle that disclosure is required where there is a reasonable possibility that a failure to disclose will impair the right of the accused to make full answer and defence. **If an accused were required to show that non-disclosure had probably impaired his right to make full answer and defence then the Crown's discretion would be, in effect, expanded. It seems unlikely the Court in Stinchcombe intended that disclosure be granted upon an accused showing a reasonable possibility of impairment of his right to make full answer and defence, yet require evidence of probable impairment of that right before finding a Charter breach in the case of late disclosure.** . . .
>
> . . . I also had occasion to consider this issue in **R. v. Skidd** (1994), 149 A.R. 136 (C.A.). The Crown in this case failed to disclose statements made by two unindicted co-conspirators of the accused to the authorities until after the jury verdicts were rendered but before sentencing. The Crown admitted that the statements should have been disclosed prior to the trial but argued that the accused had not been prejudiced by the late disclosure in any event. Prior to concluding that a new trial was warranted as a result of the late disclosure, the Court stated at p. 138:
>
> > **It is not possible for us to say at this stage of the proceedings whether or not timely disclosure would necessarily have made a difference to the defence.**
> >
> > . . .

> In my view, if the approach proposed **R. v. O'Connor, supra,** [referring here to the decision of the British Columbia Court of Appeal] were adopted, it might sometimes create a conundrum for an accused claiming a Charter breach. In cases of late or non-disclosure of clearly relevant material, an accused may be unable to show on a balance of probabilities that the right to make full answer and defence was infringed or denied because any opportunity to make use of the undisclosed information has since passed or otherwise been lost. **Clearly, late disclosure of relevant information denies an accused an opportunity to gain useful evidence. Notwithstanding an accused can concretely point to a lost opportunity in such cases, he will often be able only to speculate as to what use he might have made of that opportunity and thus how its loss impaired his right to make full answer and defence. In other words, an accused may be unable to "establish" that late disclosure probably impaired his Charter right because the late disclosure itself robbed him of the very chance to prove the value of the material.** (emphasis added)

(see also the remarks of White, J. in **United States v. Bagley, supra** at p. 3392: "At worst, the [reasonable probability] standard invites a prosecutor, whose interests are conflicting, to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive." Justice White, with whose opinion (concurring with the majority in the result) Chief Justice Burger and Justice Renquist joined, would reverse in cases of non-disclosure "unless it is clear beyond a reasonable doubt that the withheld evidence would not have affected the outcome of the trial", placing the burden to so demonstrate upon the prosecutor.)

I would not go so far as did Harradance, J.A. in **R. v. Biscette**, **supra** in that he suggests that every withholding of relevant information by the prosecution is presumed to impair the accused's right to make full answer and defence. I agree, however, with his concerns, should the threshold for an appellant be set too high. Some balance must be found.

I recognize, as did Jackson, J.A. in **R. v. Hamilton** (1994), 94 C.C.C. (3d) 12 (Sask.C.A.), (see also **R. v. Hamilton** (1994), 94 C.C.C. (3d) 37 (Sask. C.A.)), that the test applied on appeal, being a retrospective analysis of the non-disclosure, will differ from that

applied when disclosure is sought at or before trial. Clearly, the non-disclosure of technically relevant information, absent a realistic possibility that the disclosure might have affected the result or the fairness of the process, should not entitle an appellant to a new trial.

In **R. v. Antinello** (1995), 97 C.C.C. (2d) 126 (Alta.C.A) at an accused's trial for first degree murder, the Crown relied upon incriminating statements which the accused had allegedly made to acquaintances. Well prior to trial, a fellow inmate of the accused came forward with information that the accused had made a number of admissions to him. The existence of this further witness was not revealed to the defence until several days after the start of the trial, to allow time for the Crown to make arrangements for the safety of the informer. The trial judge denied defence counsel's motion for a mistrial and, instead, granted an adjournment and ordered that the witness's background be investigated for the defence at Crown expense. Mr. Antinello was convicted. On appeal it was acknowledged by the appellant's counsel that there was no bad faith on the part of the Crown in failing to make timely disclosure. Kerans, J.A., for the court, found that failure to make timely disclosure may breach the right of an accused to a fair trial if it denies to the accused a reasonable opportunity to prepare his defence. Here, he concluded that the evidence of the witness, if believed, would inevitably lead to a conviction. The late disclosure had denied the defence an opportunity to carefully inquire into the background of the witness and find material that could impeach his credibility, which, in the case of this witness, the defence might reasonably expect to find. The court was not satisfied that the remedy imposed by the trial judge was adequate. He wrote, for the court, at p. 132:

> . . . it is obvious that this trial was largely about the reliability of the three former friends of the accused. That the jury struggled with this is obvious from their questions. It is impossible to say what the outcome of a trial would be if the defence succeeded in demolishing the credibility of Stapleton.

As to the onus of proof, Kerans, J.A. wrote at p. 134:

> . . . it was argued, the judge erred here because the accused never established, on the balance of probabilities, that he suffered actual prejudice in making a full answer and defence. To do that, he had to show that there was something "out there" about Stapleton that the defence would have found if it had had more time, but failed to find in the allotted time.
>
> **With respect, an accused need not meet that impossible burden. What he must show on the balance of probabilities is that he lost a realistic opportunity to garner evidence, or make decisions about the defence**. This Court held in **R. v. Chaplin** (1993), 14 Alta. L.R. (3d) 283 (C.A.), (affirmed [1994] S.C.J. No. 89) that the accused need show only a "reasonable possibility" of impairment of the right to a full answer and defence. In its affirming reasons, published after argument in this case, the Supreme Court again approved this test.

Antinello was decided after **R. v. O'Connor** in the British Columbia Court of Appeal ((1994) 90 C.C.C. (3d) 257) but before that case received consideration by the Supreme Court of Canada ((1995) 103 C.C.C. (3d) 1 (S.C.C.)).

It is submitted by the Crown that the test to be applied has evolved since **Stinchcombe**, **supra**, and **C.(M.H.), supra,** with specific reference to the decision of the Supreme Court in **R. v. O'Connor, supra**. There, the issue before the court was whether a material non-disclosure amounts to an abuse of process sufficient to warrant a stay. L'Heureux-Dubé, J. examined abuse of process and non-disclosure in the context of a breach of s. 7 and 11(d) of the **Charter**. She concluded, for the majority, at p. 40:

> Non-disclosure by the Crown normally falls within the second category described above. [an infringement of an accused's right to a fair trial] Consequently, a challenge based on non-disclosure will generally require a showing of actual prejudice to the accused's ability to make full answer and defence. In this connection, I am in full agreement with the Court of Appeal that there is no autonomous "right" to disclosure in the **Charter** (at pp. 148-49 C.C.C.):
>
> > . . . the right of an accused to full disclosure by the Crown is an adjunct of the right to make full answer and defence. It is not itself a constitutionally protected right. What this means is that while the Crown has an obligation to disclose, and the accused has a right to all

> that which the Crown is obligated to disclose, a simple breach of the accused's right to such disclosure does not, in and of itself, constitute a violation of the Charter such as to entitle a remedy under s. 24(1). This flows from the fact that the **non-disclosure of information which ought to have been disclosed because it was relevant, in the sense there was a reasonable possibility it could assist the accused in making full answer and defence, will not amount to a violation of the accused's s. 7 right not to be deprived of liberty except in accordance with the principles of fundamental justice unless the accused established that the non-disclosure has probably prejudiced or had an adverse effect on his or her ability to make full answer and defence.**
>
> It is the distinction between the "reasonable possibility" of impairment of the right to make full answer and defence and the "probable" impairment of that right which marks the difference between a mere breach of the right to relevant disclosure on the one hand and a constitutionally material non-disclosure on the other. (emphasis added)

I agree with Chipman, J.A. that, as a result of the remarks of L'Heureux-Dubé, J. in **O'Connor**, the endorsement of the less onerous tests in **Stinchcombe** and **C.(M.H.)** is in some doubt. A reading of the judgments of Sopinka, J. and L'Heureux-Dubé, J., (in dissent), in **R. v. Farinacci**, (1994), 88 C.C.C. (3d) 1 (S.C.C.), however, leads me to conclude that there may remain a difference of opinion among the judges of the Supreme Court of Canada, about the test to be applied by an appeal court in circumstances of non-disclosure. In **Farinacci** the accused challenged the validity of wiretap authorizations and, therefore, sought access to the material contained in the sealed packets. The trial judge extensively edited the Affidavits prior to their provision to defence counsel. The two accused were convicted. They unsuccessfully appealed on the basis that they had been improperly denied access to the excised information and thus prevented from effectively challenging the wiretaps. Sopinka, J. with Lamer, C.J., Cory and Major, JJ. concurring, ordered a new trial, holding that it was sufficient that the accused demonstrate, *prima facie*, that their ability to make full answer and defence was prejudiced. He held that the accused

need not demonstrate the specific use to which they would put information which, in the circumstances of that case, they had not even seen. L'Heureux-Dubé, J., however, in dissent, found that the accused were not entitled to a new trial, having failed to show actual prejudice, resulting from the editing of the Affidavits. I acknowledge that **Farinacci** is factually dissimilar to this case in that it involves information not yet seen by the defence, however, the judgments do seem to reveal a comparable policy division within the Court.

Until the Supreme Court of Canada has clarified the law in this area any doubt should be resolved in favour of an accused. (see **R. v. Jarema**, [1996] A.J. No. 782 (Alta.C.A.)) I add, parenthetically, that gaining any clear thread from the case law is further complicated by the fact that the appeal courts tend to use the terms "relevant" and "material" interchangeably. All relevant material must be disclosed by the Crown. The issue on appeal may be whether the Crown had a duty to disclose the particular information i.e. whether it was "relevant" or whether, notwithstanding the breach of the duty to disclose, it was "material", in the context of whether the non-disclosure impaired the right to make full answer and defence.

It bears noting that in **Peterson, supra**, the non-disclosure came to light after trial but before sentencing. It was brought to the attention of the trial judge who found that it was not material. The Court of Appeal was thus reviewing that decision of the trial judge. In neither **Stinchcombe** nor **C.(M.H.)** had the trial judge had an opportunity to review and assess the impact of the undisclosed material. The Supreme Court of Canada declined to do so in the trial judge's stead. In my view, one can take much greater comfort in rejecting the materiality of the withheld information, if the trial judge, who has heard all of the other evidence, has concluded that the information is not material. When, as here, the trial judge has not had an opportunity to assess the significance of the undisclosed information, only in the clearest of circumstances, in my view, should an appeal court discount its importance.

In **R. v. Stinchcombe**, for example, Sopinka, J. wrote at p. 18:

> In this case, we are told that the witness gave evidence at the preliminary hearing favourable to the defence. The subsequent statements were not produced and therefore we have no indication from the trial judge as to whether they were favourable or unfavourable. **Examination of the statements, which were tendered as fresh evidence in this Court, should be carried out at trial so that counsel for the defence, in the context of the issues in the case and the other evidence, can explain what use might be made of them by the defence**. In the circumstances, we must assume that non-production of the statements was an important factor in the decision not to call the witness. **The absence of this evidence might very well have affected the outcome**. (emphasis added)

In **R. v. Creamer** (1995), 39 C.R. (4th) 383 (B.C.C.A.), referred to in the decision of Chipman, J.A., Donald, J.A., in the context of considering an application for fresh evidence resulting from non-disclosure, wrote at p. 389:

> For fresh evidence to be admitted under **Palmer, supra,** it must "be expected to have affected the result"; while evidence withheld by the Crown which "might have affected the outcome" is sufficient to require a new trial. In my view, the difference is significant. **It reflects the difficulty in ascertaining with any precision how the trial would have gone if the defence had the relevant information**.
>
> The instant case illustrates the need for the difference in approach. The case depended on the credibility of the two persons involved; there were no other witnesses to the incident. The trial judge relied on how they gave their evidence, as well as what they said, in making his findings on credibility. **Assessments of demeanour and apparent probity are often subtle and intuitive. Because of that, it is almost impossible to measure the possible impact a relevant line of questioning might have had on the assessment.** (emphasis added)

Similarly, in **R. v. O'Grady**, reported on Quicklaw as [1995] B.C.J. No. 2041 (B.C.C.A.), and summarized in the judgment of Chipman, J.A., Macfarlane, J.A. wrote at para 23:

> In the end the question to be answered is: if the possibility now left open by Silvester's disclosure had been considered by the jury might it have affected the outcome of the trial? The

> conclusion of Dr. Ferris would have had to be reconsidered in the light of that possibility. The weaknesses in his evidence would need to be more carefully examined. If it was possible that the blood stains did not label the appellant as the assailant a more careful consideration of the intruder theory would have been necessary. One has to ask whether that misstatement of evidence concerning the lock on the apartment door may have affected the weight which the jury may have given to the intruder theory.
>
> The thrust of the Crown's case, absent the possibility now raised by Silvester, was that if there was no blood to be aspirated from the air passages of the victim the blood spots on the appellant's clothing must have been made during the beating and not during the attempted resuscitation. A consideration of the possibility now disclosed by Silvester may have blunted that thrust at least to the extent of making it necessary to examine the intruder theory more carefully. The Crown could no longer say "It is clear he is the assailant. You need go no further." Approaching the matter in that way **I conclude that the non-disclosure of the possibility now raised may have impacted on the fairness of the trial, and that the outcome might reasonably have been different had this disclosure been made.** (emphasis added)

It is not every non-disclosure that should result in a new trial. Clearly, in cases where the withheld material is simply another form of information already disclosed or where it is evidence, although not disclosed, the substance of which was known to the accused, a new trial is not warranted. In addition, when an appeal court is able to predict, with certainty, what use an accused might have made of the withheld information and can conclude that the non-disclosure did not affect the fairness of the trial process, including the preparation of the defence, and could not possibly have affected the result, the appellant is not entitled to a new trial. (see for example **R. v. Santocono** [1996] O.J. No. 1561(Ont.C.A.))

In my view, to demand that an appellant demonstrate a "reasonable **probability**" that the result might have been different sets the standard too high. While I agree that an appeal court must distinguish between speculation and real possibilities - any doubt should be resolved in favour of the accused. In reality, the wording of the test is less important

that it's application. However, drawing heavily upon the words of Kerans, J.A. in **Antinello, supra**, the following would, in my view, more accurately capture the test to be applied: *The accused (appellant) must satisfy the court that, as a result of the non-disclosure, he lost a realistic opportunity to garner evidence or make decisions about the defence, which, in turn, rendered the trial process unfair or might have affected the outcome of the trial.*

Application to the Facts of This Case:

In this analysis I will consider only the undisclosed statement of Terris Daye.

Defence counsel have advised this court that they were unaware, prior to trial, that Terris Daye had provided a statement to the police. None had interviewed Terris Daye in preparation for trial. Counsel became aware of the statement(s) when, during the trial, a police Occurrence Report was provided to one of them. That Occurrence Report included a brief summary of Terris Daye's statement. Counsel concluded, upon reviewing the Report, that the statement contained nothing of substance and, thus, did not request it's disclosure during the trial.

The full statement of Terris Daye is reproduced as Appendix A to the decision of Chipman, J.A. Terris Daye met with the police in the presence of his mother, Melinda Daye and his grandfather, Buddy Daye. Their interjections are included in the police statement. An edited version follows:

Q. **Where did you see Terry and Shannon arguing?**
A. *(Plotted it on the map). South side of Cedar and Robie*.
Q. **Who are you with at this point?**
A. **Me, Terrance Tynes, Danny Clayton, Michael Barton, Stevie Dee is the crowd I was with and we were standing north corner of Cedar and Robie. Another crowd of people were over on the other side, more white and black. Stacey, Damon Cole. . . .**
Q. So Terry and Shannon are arguing, what happened from there?

. . .

Q. Then what happened?

. . .

A. People arguing. The big black guy was telling the white guys to mind their business. A couple white guys got in the wrong people face and

got hurt. Nothing would have happened if the white guys would have listened to the black bouncer. All four of the white guys tried to be supermans.

. . .

Q. Did you see any of the white guys get hit?
A. Ya, I seen four guys but two of them is what I seen get hit. They were right here. (Plots on map 1st and 2nd guys locations where they got hit).

17:34 Cst. Carmichael shows all 4 photographs of victims. (Points to Dennis MacDonald as the person who got hit in the #2 spot). Stated he was pretty sure he was wearing a red shirt and he remembered them. #1 guy is this guy, I think he got hit here. (Pointing to John Charman). #2 guy kept on following Terry and Shannon across Cedar down Robie saying it was his party. Remember I only see 2 get beat up. Actually it was Stevie Dee saying to this guy (#2 guy) just leave before you get beat up or something happens to you. I'd say 100-200 people were outside. This guy (#2) got warned to go so he got punched in the face whatever. Before he got beat up I heard someone say just leave before you get beat up like your buddy or your friend.

Q. **Who hit this guy (#2 guy)?**
A. There was a crowd of people around him. **Spencer punched and kicked this guy. [7] He likes to kick**. **He also hit this guy #1** (John Charman). Terry and Shannon go from south Cedar, Shannon goes back to the house, Shannon Burke, and Terry goes down Cedar with the crowd. Terry Dixon says just mind your business. **I guess this guy (Charman) grabs Terry and Damon Cole punches this guy in the face. I'm saying there is a reason. He just didn't hit him for nothing.** I see this.
Q. **Did anyone else hit this guy #1 (Charman).**
A. **Spencer. That's all I can remember.**
Q. What did you see?
A. Lot of people around him, he's in Terry's face, grabs Terry, **Damon says take your hands of my cousin and punches him**. (#1 person) (added when read over).
Q. Where did the punch land?
A. In the jaw. **One punch, he's down, Spencer kicked him and I can't remembered who all kicked him.**
Q. Do you remember anyone who was around him when he was being kicked (Charman)?
A. **My crowd was still with me, Terrance, Danny, Michael Barton, Stevie Dee.**
Q. What happens next?
A. 2 or 3 minutes later #2 gets beat up and then we leave.
Q. Who hits #2?
A. Spencer. All I see was Spencer kicking him. The guy that hit this guy was light skinned.
Q. Did Dee hit this guy?
A. Nope. He was telling him to leave.

Cst. Reeves read section 21 Parties to Offence to Terris. We talked about Watts the victim being in the same area he was standing. And that he said he didn't see anything and then he said he was in the circle.
18:13 - Melinda asks Carmichael and Reeves to leave.
18:20 - Constable Carmichael and Reeves return. **Melinda said that Terris was in the group** and she wants to know if the people who Terris said was in his group were identified in the police or in the group. **She gave a list to Cst. Carmichael of Terris, Danny, Terrance, Mike B., and Stevie Dee. Melinda wrote down Nathaniel or Guy (after Cst. Carmichael - (?) Robart).** Buddy went on to say that Terris' ? is not because he was involved but - his peer association creates problems. (Buddy adds he doesn't want to be viewed as a "rat").
18:28 - Terris says he would like to draw a map. Cst. Reeves gives him a map. Terris explained it verbally and then I wrote it out. There were a lot of people, white and black on the north corner of Cedar and Robie. There was so much people. I couldn't see who was doing all the damage, while Watts was getting beat up. People of the Frat House was saying we called the cops. **So myself and other people Terrance Tynes, Travia was still in the house, Michael Barton and I think Danny Clayton walked away toward QEH. By the time we got over to QEH someone said what about Terry, there was about 6 or 7 of us at QEH and then we returned and met up with the others who were going to QEH and we then went down Cedar to see about Terry. . .**

Q. **Did you see Cyril Smith strike, hit or kick anyone**.
A. **No**
Q. **Did you see Danny Clayton hit anyone?**
A. **No, he was with me, he might have stepped [or slipped] away**.
Q. Did you see Terrance Tynes hit anyone?
A. No
Buddy: he might have stepped [or slipped] away is he might have lost track of him in the excitement.
Q. **Was there a circle around Darren Watts?**
A. **Ya**.
Q. Were the people around Darren Watts black or white?
A. Black and white.
Q. Describe the circle?
A. **There was an inner circle of black and white people and the outer circle of black and white. Majority white.**
Q. Show picture of Watts to Terris - Did you see this guy that night?
A. No, the only reason I knew this guy because of the news.
Q. What colour was the guy getting beat?
A. White

. . .

Q. Cst. Carmichael says Terris I think you know more **[10]** about the circle. Cst. Carmichael asks him if he has been intimidated. Terris says no. . . .

Q. **Did you see Danny Clayton do anything?**
A. **No**
Buddy went on asking him questions regarding Danny Clayton and where he was.

Q. **Did Nathaniel or Guy Robart hit anyone?**
A. **I can't remember them hitting anyone**.

. . .

Q. **Did Skinner hit anyone?**
A. **I didn't see it but he told me that he told you guys he did.**

. . .

Terris said he did not want to sign it. Buddy said they wanted to go and they may want to add stuff. (emphasis added)

The Occurrence Report provided, in part:

> Terris Daye after some questioning places himself in the outer circle surrounding Darren Watts. It is quite clear that he does not want to I.D. the key players as he is scared of them. . . .
>
> . . . **The statement had to be concluded as Buddy Daye had other commitments but stated he would be willing to return another day.** Buddy Daye did not want to leave his daughter and her son by themselves. 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 she might give some useful information**. (emphasis added)

In my view, the inquiry into the materiality of the undisclosed statement is not confined to a review of the information contained in the statement, but must include some consideration of the information which may have been revealed had defence counsel had an opportunity to work with the statement prior to trial.

In **C.(M.H.), supra**, McLachlin, J., in measuring the potential impact of the non-disclosure, did not confine herself to the four corners of the undisclosed statement but speculated upon what the evidence might have been, had the statement been produced at trial. At p. 395 she wrote:

> **While the statement does not disclose whether the teachers asked the child about possible sexual abuse, it clearly raises the suggestion that she may have been questioned about this or other abuse, which she denied**. A jury may find a distinction between evidence that the complainant had told no one of the alleged offences, and evidence that in response to direct questioning she denied any such events. Arguably, the state of mind required for silence may well be different from that required for a direct denial. A jury may consider that it is one thing to be silent, another to lie

> in response to a direct question. The former may be easy; the latter more difficult.

Counsel for the defence admit that they cannot specify all of the ways in which the Terris Daye statement could have been used. Mr. Katsihtis, counsel for Cyril Smith, deposes in his affidavit of September 6, 1996, filed with this court:

> 15. THAT having reviewed the aforementioned statements, it is my belief that, in particular, the statement of Terris Daye, contains information that could have been used in meeting the case for the Crown or advancing a defence. The evidence of Terris Daye could have affected my decision as to whether or not to call evidence on behalf of Mr. Smith;
>
> 16. THAT on Page 2 of the statement of Terris Daye, he stated:
>
> > "While one fight going (sic) on there was a fight over here and one over there. Everywhere you turned there was a fight".
>
> 17. THAT this excerpt from the statement of Terris Daye is consistent with the evidence given at trial by Mr. Lloyd Finter;
>
> 18. THAT Terris Daye stated at Page 5 of his statement:
>
> > "Me, Terrance Tynes, Danny Clayton, Michael Barton, Stevie Dee is (sic) the crowd I was with and were standing north corner of Cedar and Robie. Another crowd of people were over on the other side, more white and black. Stacey, Damon Cole."
>
> 19. THAT the area where Mr. Daye identifies himself as having stood with Mr. Clayton and others is the area where Mr. Watts was assaulted as confirmed in Mr. Daye's statement at pages 7 and 8 where the following is set out:
>
> > "Cst. Reeves read Section 21 - parties to offence to Terris. We talked about Watts the victim being in the same area he was standing. And that he said he didn't see anything and then he said he was in the circle. 18:13 Melinda asks Carmichael and Reeves to leave. 18:20 Cst. Carmichael and Reeves return. Melinda said that Terris was in the group and she wants to know if the people who Terris said was in the group were identified in (sic) the police as in the group. She gave a list to Cst.

> Carmichael of Terris, Danny, Terrance, Mike B., and Stevie Dee."

This piece of evidence from the statement of Terrance Daye is important in determining who assaulted Darren Watts since Danny Clayton admitted at trial that he in fact participated in the attack on Darren Watts and according to Mr. Daye, Danny Clayton was standing with him at the time Darren Watts was being assaulted. It is a reasonable inference that Mr. Daye and perhaps some of the others that were standing with him, also participated in the attack on Darren Watts;

20. THAT Terris Daye also provided information in his statement that was relevant to the charge of aggravated assault involving Rob Gillis for two reasons. Firstly, from reviewing Mr. Daye's statement in general, where he describes Damon Cole striking John Charman, it appears that he is in fact describing the assault on Rob Gillis. This is critical in that the only individuals he saw strike Rob Gillis was Damon Cole and Spencer Dixon. Secondly, even if Mr. Daye was mistaken as to whether Cyril Smith struck Rob Gillis, the evidence is relevant to the defence of a third person pursuant to Section 27 of the **Criminal Code of Canada**.

21. THAT Mr. Daye also states the following at page 9 of his statement:

> Q. Did you see Cyril Smith strike, hit or kick anyone?
> A. No.

22. THAT the above excerpt from Mr. Daye's statement is important given Mr. Daye's position and observations of the assaults that took place;

23. THAT had I been in possession of the statement of Mr. Daye prior to trial, I believe I would have subpoenaed him to testify. His evidence would have been relevant to both of the charges alleged against Mr. Smith;

24. THAT there was information in the statement of Mr. Daye that was in fact corroborated by other witnesses such that Mr. Daye's evidence may have carried some weight with the trial judge given the fact that the trial judge referred to certain details in enhancing the credibility of Danny Clayton. For these excerpts, I refer to the affidavit of Stanley W. MacDonald, sworn to on the 9th day of May, 1996 and in particular to Paragraphs 36 through 41;

25. THAT it is my belief that the evidence of Terris Daye, as disclosed in his statement dated September 19, 1994, was relevant to a proper determination of the issues raised at the trial of the Appellant in February of 1996.

Mr. Coady, counsel for Guy Robart, deposes in his affidavit of September 5, 1996 filed on the appeal:

> 12. THAT my assessment of the above-referenced information is that it is critical to any efforts to attack the credibility of Danny Clayton, as Mr. Clayton had identified the Appellant (and the other accused individuals) as participating in the assault on Mr. Watts. THAT Mr. Daye's statement (see page 11) includes a response that he did not remember seeing the Appellant hit anyone on the night in question. THAT the inconsistencies between Danny Clayton's evidence and Terris Daye's statement are striking in light of Daye's information that the two were together in the circle around Darren Watts, and presumably would have similar (if not identical) vantage points.
>
> 13. THAT if the four statements (particularly the statement of Terris Daye) had been disclosed, I would have used them in my cross-examination of Danny Clayton, and other Crown witnesses. I would have confronted Mr. Clayton with Mr. Daye's information that the circle of people around Darren Watts at the time of his beating was comprised of Terris Daye, Terrance Tynes, Michael Barton, Stevie Dee, and Mr. Clayton. THAT I would also have confronted Mr. Clayton with Mr. Daye's information that despite his vantage point, Mr. Daye did not recall seeing the Appellant hit anyone. THAT I believe it is fair to say that <u>generally</u> Mr. Daye's statement would have been a prominent "tool" in my cross-examination of Danny Clayton. THAT I have no way of knowing whether my use of Mr. Daye's statement would have been effective or ineffective in raising a reasonable doubt on behalf of the Appellant.
>
> 14. THAT if the statement of Terris Daye had been disclosed I believe that I would have re-considered the decision not to call evidence on behalf of the Appellant. THAT any decision to call Mr. Daye (or anyone else) as a witness on behalf of the Appellant would have obviously been influenced by what, if any, information would have been obtained in interviewing Mr. Daye, as well as the other individuals whom he named as being in the circle of people surrounding Darren Watts. THAT it is not possible for me to retrospectively say with certainty that disclosure of the statements would have led to evidence being called on behalf of the Appellant, but I can say with certainty that it would have been considered and explored or investigated.
>
> 15. THAT the statements of Terrance Tynes, Edmond (T.J.) Levia, and Travia Carvery do not make any reference to the Appellant. THAT in light of Mr. Daye's information that Terrance Tynes was in the circle of people surrounding Darren

> Watts, his failure to mention the Appellant may also have been useful information.
>
> 16. THAT in swearing this Affidavit I acknowledge the accuracy of the phrase "hindsight is twenty-twenty." However, I do believe that the information contained in the undisclosed statement of Terris Days is unquestionably relevant to the sole issue at trial, that being the ability of the Crown to establish beyond a reasonable doubt the Appellant's identification as one of the individuals precipitating or assisting in the assault on Darren Watts. THAT I further believe that the Crown's failure to disclose the statement of Terris Daye influenced my preparation and conduct of the Appellant's defence, to an extent that renders it impossible to determine its real impact, as that could only be determined by the trial judge.

There is no suggestion that defence counsel were unaware, well in advance of trial, that Terris Daye was a possible eye witness 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 twenty times in the evidence of the proceedings. It is no answer, however, to say that defence counsel should have or could have interviewed Terris Daye. Apart from the obvious fact that defence counsel have no authority to compel a witness to cooperate with them, his statement not having been disclosed, it was reasonable for defence counsel to assume that Terris Daye had nothing to contribute - that he would not be helpful to the Crown nor to the accused. Had the statement been disclosed, the defence might have chosen to call Daye as a witness; might have interviewed Daye; might have asked the Crown to follow up on Buddy Daye's offer to provide additional information (as noted in the Occurrence Report); might have confronted Clayton with the fact that he didn't name Daye as being in the circle that night, yet Daye positioned himself with Clayton; might have suggested to Clayton, on cross examination, that he was falsely admitting his own role

(Terris Daye having denied that Danny Clayton was involved) to bolster his credibility, since he was not in jeopardy due to the immunity agreement.

In **R. v. Antinello, supra**, although there was no evidence that the defence could have demolished the informer's credibility, the Court of Appeal ordered a new trial because the defence should have been permitted an opportunity to explore that possibility.

Applying the "reasonable probability test" in the manner of my learned colleagues, the appellant(s) must demonstrate precisely how the Daye statement could have been used, without having had the opportunity, while preparing for trial, to further investigate and develop that avenue. It may be that upon a re-trial, the Terris Daye statement is of no assistance to the appellant(s), however, that is not the determining factor here. There is enough information in that statement to have made it a potentially important resource in assisting with the preparation and presentation of the defence.

Summarizing, I view the following as some of the important information contained in the Daye statement:

i. Terris Daye says he was with Danny Clayton throughout the time of the assaults, yet didn't see Cyril Smith or Danny Clayton punch kick or hit anyone.

ii. Terris Daye says he ran to Q.E.H. with one group of blacks (including Danny Clayton), then another group joined them. Danny Clayton's evidence was that there was a single group (the group that assaulted Darren Watts) that ran to Q.E.H. Blaine McQueen testified that the group that had beaten Darren Watts (including Cyril Smith and Danny Clayton) "peeled off" and ran towards Q.E.H. This "single cohesive group" was a significant part of the Crown theory, supporting the conviction of the accused.

iii. Terris Daye speaks of an inner circle and an outer circle surrounding Darren Watts. It is not clear which circle he was a part of, however, he maintains that he was with Danny Clayton, which may place him in the inner circle.

iv. Terris Daye places Damon Cole and Stacey Skinner across the street from the other appellants at some point during the assault on Gillis, Charman or Watts. While it is reasonable to infer this was during the time that Gillis and Charman were assaulted, the timing is unclear. Danny Clayton testified that both were in the circle of those who beat Darren Watts. If Danny Clayton was found to be wrong on this point, it could affect his general credibility.

v. Terris Daye says that one of the "white guys" (most likely Rob Gillis) was felled by a single punch which was thrown by Damon Cole, and that Spencer Dixon kicked Gillis when he was down. Although he saw the assault on Gillis he specifically says that he did not see Cyril Smith hit anyone. Danny Clayton testified that Cyril Smith and Damon Cole punched Rob Gillis simultaneously. That testimony was accepted by the judge who found Cyril Smith and Damon Cole guilty of an assault upon Rob Gillis. Michael Arsenault testified that Rob Gillis was felled by one punch thrown by Damon Cole. This is consistent with Terris Daye's statement. The Daye statement is thus relevant to the alleged assault by Smith on Gillis in that Terris Daye's evidence (if he was called) may have successfully contradicted the evidence of Danny Clayton. In that event this information may also be relevant to the reliability of Danny Clayton's evidence, generally.

vi. Terris Daye acknowledged that he was in "the circle". After speaking with her son in the absence of the police, Melinda Daye said that Terris was "in the group". Ms. Daye named Terris, Danny, Terrance, Mike B., and Stevie Dee and Nathaniel or Guy Robart as part of that group. In view of the fact that Danny Clayton had, in an earlier statement to the police, volunteered the name of a person who was not involved (T.J. Levieé), the defence might have successfully raised a doubt in the judge's mind as to the accuracy of Danny Clayton's trial evidence on the composition of the group who assaulted Darren Watts. While the trial judge

acknowledged in his decision that there may have been other unidentified persons in that group, the critical issue is whether, had defence counsel been possessed of Terris Daye's statement, they could have used it to raise a doubt in the judge's mind about Danny Clayton's identification of any or all of the appellants as the offenders.

vii. Although Terris Daye identifies Guy or Nathanial Robart as part of his group, he says he "can't remember" them hitting anyone.

There was ample evidence placing the appellants in the vicinity of the beatings. The identity of those persons actually in the circle around Darren Watts, however, was critical, because all who were identified were convicted. Danny Clayton provided the only individual identification. His testimony was not without contradiction in that he had previously declined to name two of the accused (Robart and Cole) and had implicated, by name, a person whom he later said was not involved (T. J. Edmund Levieé). In addition, the trial judge accepted that he may not have named all of the individuals in the circle.

I agree with my colleagues that, at first glance, the statement of Terris Daye appears to be of marginal value. It does, however, contain information bearing on the beating of all three victims. Terris Daye, notwithstanding his protestations that he saw nothing of the actual beating of Darren Watts, positioned himself with the Crown's only eyewitness. Terris Daye left the interview prematurely. There was an indication in the occurrence report that Terris Daye or his mother may have had more information. Buddy Daye, Terris Daye's grandfather, who was present at the interview, indicated a willingness to return for a further interview. What the defence lost was a realistic opportunity to assess and explore the possible use of Terris Daye's statement and, potentially, his evidence at trial.

Michael Barton, who was present during the assaults, was an intended Crown witness. Although under subpoena, he did not appear at trial. The Crown elected to proceed without his evidence. It is fair to surmise that the police did not follow up on the Terris Daye interview because they had a statement from Michael Barton, who was in the

same group as Terris Daye. This may explain why the Crown did not further interview Terris Daye or his mother. It is not possible, however, for this court to assess with comfort the full impact of the failure to disclose, in terms of the lost opportunities for the defence. Had Mr. Barton testified, and had his evidence corroborated that of Danny Clayton, in my view, the failure to disclose the Terris Daye statement would not warrant a new trial. As the trial unfolded, however, the only eyewitness identification of the appellants with respect to the assault of Darren Watts, was Danny Clayton's evidence. I cannot say that the Daye statement could not have been of some assistance to the defence. The defence lost an opportunity to investigate and garner evidence. My concerns are similar to those expressed by the court in the above quote from **R. v. O'Grady**. I reach this conclusion aware that, on a retrial, Terris Daye may be unhelpful to the appellant(s) or, indeed, harmful.

There a significant likelihood that the withholding of the Daye statement misleadingly induced the defence to believe that Terris Daye had nothing to contribute which might assist their clients. If Terris Daye had said, for example, no more than "I didn't see anything", then I would agree with my learned colleagues that we could confidently conclude that it would have been of no assistance to the appellant(s).

Notwithstanding the trial judge's careful and reasoned assessment of Danny Clayton's credibility, I cannot say that, had the Terris Daye statement been available to the defence, there is not a reasonable possibility that the result might have been different. Nor can I say, with certainty, in view of the non-disclosure, that the fairness of the trial was not affected. The right of the accused to make full answer and defence was impaired. I am satisfied, on a balance of probabilities that the appellant(s) lost a realistic opportunity to make decisions and garner evidence about their defence and that, had they had that opportunity, the result might have been different.

(2) DUE DILIGENCE:

I respectfully disagree with my learned colleagues that defence counsel failed to exercise due diligence to a sufficient degree to override the prejudice resulting from the failure to disclose. I accept the explanation of counsel that it was a reasonable interpretation of the reference to a Terris Daye statement, in the material provided by the Crown in advance of trial, that it concerned his violation of an undertaking and was not relevant to these offences. This conclusion was bolstered by the fact that the Crown did not include Terris Daye on the witness list, nor provide his statement to defence counsel.

While counsel can be presumed to have known about the statement(s) when the Occurrence Report was produced at trial, given the lack of detail in the report; the fact that Terris Daye was not a Crown witness; the fact that his statement had not been disclosed; and the timing of the disclosure of the Occurrence Report; it was reasonable for counsel to have proceeded without the statement and reasonable, as well, that they did not bring the non-disclosure to the attention of the trial judge. I accept that they did not think the statement contained any information that would be useful in making full answer and defence. The defence is entitled not just to disclosure, but to timely disclosure, in other words, disclosure occurring at a point in the process such that counsel have a real opportunity to reflect upon and assess the potential importance of the information. I do share my colleagues' concern that counsels' failure to provide answers to certain questions posed by the panel at the hearings; the lack of information contained in their Affidavits as to the extent of their knowledge about the Terris Daye statement; and their unexplained interest in the content of the undisclosed statements subsequent to trial give rise to suspicions that some or all of them may have made a tactical decision not to pursue disclosure. Notwithstanding my misgivings, I cannot conclude, with comfort, that there was a tactical election by defence counsel to ignore the fact that information had not been disclosed.

Disposition:

I would not disturb the convictions of Stacey Skinner nor Herman McQuaid for the aggravated assault upon John Charman. Both admit hitting him in their police statements. The trial judge rejected any claim of self-defence. There is nothing in the undisclosed material bearing upon these assaults. While Danny Clayton too identified Mr. Skinner and Mr. McQuaid as the assailants of Mr. Charman, the evidence before the court is sufficient to warrant a conviction without his evidence. Any concerns arising from the possibility that the defence could successfully undermine the general credibility of Mr. Clayton would not alter these convictions. I agree with my colleagues that the sentences for those assaults should be reduced to three months.

I would order a new trial for all appellants on the aggravated assault of Darren Watts. In addition, I would order a new trial in relation to the aggravated assault by Cyril Smith upon Rob Gillis.

Bateman, J.A.