

(12031 - 12068)

**IN THE SPECIAL COURT FOR SIERRA LEONE**

**THE TRIAL CHAMBER**

**Before:** The Trial Chamber  
Justice Pierre Boutet, Presiding.  
Justice Benjamin Itoe  
Justice Bankole Thompson

**Registrar:** Mr Robin Vincent

**Date filed:** 1 June 2005

**Case No.** SCSL 2004 - 15 - T

**In the matter of:**

**THE PROSECUTOR**

**Against**

**ISSA SESAY  
MORRIS KALLON  
AUGUSTINE BAO**

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**REPLY TO PROSECUTION RESPONSE TO APPLICATION FOR EXCLUSION  
OF TESTIMONY OF WITNESS TF1-141**

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**Office of the Prosecutor**

Luc Cote, Chief of Prosecutions  
Lesley Taylor  
Pete Harrison  
Sharan Palmer

**Counsel for Augustine Bao**

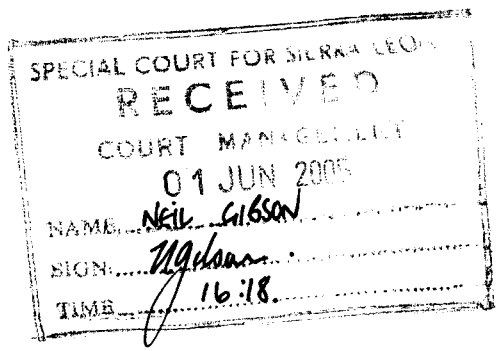
Andreas O'Shea, Girish Thanki and John Cammegh

**Counsel for Issa Sesay**

Wayne Jordash, Sareta Ashraph

**Counsel for Morris Kallon**

Shekou Touray, Charles Taku and Melron Nicol-Wilson



### **Prosecution submission on admission of evidence**

1. In its response the prosecution relies firstly on the principle of orality as set out in the Trial Chamber's Decision in *Norman et al* of 16 July 2004<sup>1</sup> and the power to admit any relevant evidence under Rule 89(C). These principles are not in question here. Neither the significance of the oral testimony of the witness, nor the relevance of the evidence or power to admit relevant evidence is being placed in issue. What is in issue is whether the evidence in question ought not to be admitted notwithstanding its relevance, in this case as the appropriate remedy for procedural defects and a breach of Rule 66 of the Rules of Procedure and Evidence.
2. Rule 89 (C) is a power to admit evidence which is relevant and not a mandatory requirement in all circumstances, if there are other cogent reasons for the exclusion of such evidence. This is confirmed by the use of the word 'may' in the provision, as well as Rule 95 requiring the exclusion of evidence where its admission would bring the administration of justice into serious disrepute. Apart from the mandatory exclusion of evidence in terms of Rule 95, it is submitted in accordance with general principles of law and the terms of Rules 89 (C) and 54, and in order to protect the rights of the accused under Article 17 of the Statute, that there may be other circumstances where evidence may be excluded as a matter of discretion usually as a remedy for a breach of a rule or to prevent an abuse of process.
3. In this respect it is submitted that the prosecution's assertion that the defence is purporting to create new law is incorrect. It is understandable that there would be no authority directly on the point of destruction of notes in the international criminal tribunals since in the other tribunals there is as far as we are aware no instance, policy or practice of the destruction of interview notes by prosecution authorities which has come to light and been challenged by defence. The defence relies primarily on the right to a remedy for a breach of the rules and as a secondary argument the doctrine of abuse of process to the

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<sup>1</sup> *Prosecutor v Norman, Fofana and Kondewa*, Decision on exclusion of evidence of 16 July 2004

extent that this situation of the deliberate destruction of material prima facie subject to disclosure brings the administration of justice into disrepute. It is to illustrate the former – remedy (in this case exclusion) for breach of the rules – that the defence cited the cases of *Delaney*, *Absolam*, *Scott and Sang*. With respect to abuse of process it is respectfully submitted that the administration of justice is brought into disrepute by a practice which effectively removes any possibility for the defence, the Chamber or the prosecution itself to identify a breach of rule 68 in relation to the content of notes; and further where the prosecution continue to implement such a policy in full knowledge of a Ruling stating that such notes constitute Rule 66 material.

4. With regard to the prosecution's own reference to jurisprudence of the other tribunals, it is noted that the reference to *Blaskic* involved the question of expert testimony as opposed to testimony of fact, arguably different; the reference to *Ndayambaje* involved questionnaires, which is a specific issue not affecting the issues here; and the references to *Nahimana* and *Niyitegeka* involved situations where there was no question of the destruction of the notes in question which were therefore still available and could if necessary be examined by the Chamber for an assessment of whether they contained material which should be disclosed.

#### **The prosecution explanation for the destruction of notes and its assertion of compliance**

5. The prosecution has the peculiar knowledge of its own internal policies and practices as well as the position in relation to the destruction of notes in this instance. It is submitted that the proof of the existence of handwritten notes in the interview process of witness TF1-141 as well as their non-disclosure, through the evidence of the witness and the corroboration through prosecution admissions provides *prima facie* proof of a breach of Rule 66 in line with the

Chamber's decision in *Norman et al* of the 1 October 2004.<sup>2</sup> The onus must then rest on the prosecution to explain the non-disclosure. It is submitted that in these circumstances the explanation offered by the prosecution is unsatisfactory because of its general nature and failure to satisfactorily explain the need to destroy the notes in question.

6. As to the general nature of the prosecution explanation the prosecution essentially relies on its general policy on the destruction of interview notes as a basis to explain the position with regard to witness TF1-141. It asserts that '*Therefore, all the evidence with respect to TF1-141 was disclosed*' [our emphasis], not based on any specific record of the position in relation to witness 141 or affidavit from the relevant prosecution counsel who was being referred to by the witness. It makes its proposition merely on the basis of their stated general position that 'where hand-written interview notes were taken by investigators, pursuant to a policy, all information of any evidentiary value was transferred to a type-written statement, including exculpatory as well as inculpatory evidence, in order to fulfil the disclosure obligation of the prosecution.'<sup>3</sup> In the context of the prosecution explanations in court, after inquiry, and with the prosecution counsel who conducted the said interviews present in court, it would seem that the prosecution had no specific recollection or record of specifically which hand-written notes had been destroyed or what their specific contents were. This is confirmed by the prosecution response which merely relies on its said general policy for the assertion that all evidence had been disclosed. It is submitted that this specific assertion cannot be made on the basis of a general policy alone. It is not because there is a policy that the prosecution can claim its proper application in a specific instance.
7. The prosecution does not claim that all interview notes are hand-written. Nor does it claim to be able to identify which specific handwritten notes were taken, and on which dates. Nor does it claim to keep a record of this. Nor does

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<sup>2</sup> *Prosecutor v Norman, Fofana and Kondewa*, Ruling on Disclosure of Witness Statements of 1 October 2004

<sup>3</sup> See prosecution response, at par 5.

it claim to have a specific recollection of the notes in question in the case of witness 141. These facts accord with the conversation between defence counsel and Mr Peter Harrison and Ms Sharon Palmer, described by Mr Harrison to the Chamber but not accepted by the Chamber as a privileged 'conversation between counsel'. The existence of notes but lack of specific recollection on the specifics is further corroborated by Mr Harrison's assertion, in front of the counsel who conducted the interviews in question, that there were probably notes and they would have been destroyed. Accordingly, it is submitted that given the prosecution handicap in specifically remembering the situation with regard to witness 141, it is simply not possible for the prosecution to assert that the handwritten notes referred to by the witness were in fact all transferred into typed versions disclosed to the defence or indeed that material which the prosecution previously judged as irrelevant has not become subject to disclosure as exculpatory evidence in the light of witness TF1-141's subsequent testimony. It is further submitted that given this handicap the prosecution's purported distinction from the case of *Carosella* is unfounded. A more valid point would have been that in the case of *Carosella* the prejudice to the trial was arguably greater, but so was the applicable remedy: a stay of proceedings.<sup>4</sup>

8. Errors can be made, individuals may not respect the pre-requisites for such a policy and most importantly, the exculpatory nature of material may only become apparent during the course of the testimony of the witness or at a later stage during the testimony of another witness. As this case illustrates it is often difficult if not impossible for counsel to remember the contents of all of its internal memoranda. This is why in other tribunals the prosecution will at various stages of the proceedings conduct searches of its internal memoranda to comply with its continuing obligation and to react to defence applications and developments in the rules, jurisprudence or the order of the Trial Chamber or Appeals Chamber on what must be disclosed. This can change. The prosecution impliedly admits that it will select the inculpatory and exculpatory evidence from the handwritten notes by asserting that 'it is most likely

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<sup>4</sup> *R v Carosella* [1997] 1 SCR 80 (SCC)

recorded on the same note paper as a great deal of confidential and privileged information which is not subject to disclosure'. Destroying the notes therefore removes the prosecution's ability to comply with its continuing obligation in relation to the contents of those notes in circumstances where material proves to be exculpatory or otherwise subject to disclosure at a later stage. This problem of the continuing possibility of material perceived as non-disclosable becoming subject to disclosure also highlights the fallacy in the argument that it is the evidence as opposed to the pieces of paper which must be disclosed or preserved. It is the prior statements of witnesses and any other exculpatory material in notes<sup>5</sup> which must be preserved and disclosed at whichever point in the trial it becomes apparent that they are legally subject to disclosure.

9. The intractable difficulty which the prosecution faces in actually being able to confirm the position in relation to the notes of witness 141, arises out of the inappropriateness of the said policy which it now says exists. The prosecution has not annexed the said policy to the response, which would have enabled the defence and the Chamber to assess its actual content, rationale and the extent to which it safeguards against individual error or *male fides*. By having such a policy, the defence and the Chamber are deprived of the ability to monitor the prosecution's compliance with its obligations, particularly where, as here, an issue is raised. The prosecution provide no explanation to the defence of the rationale of the policy other than the illegibility of hand-written notes and privileged nature of some investigator's or counsel's notes. It is submitted that the said policy cannot be deemed necessary, reasonable or fair. It is hard to see why it is necessary or helpful to destroy notes because of their lack of legibility. Rather than destroy such material, if the prosecution has an issue of confidentiality or any other them difficulty with them, it could simply safely lock away the material, as it presumably does with all other sensitive material.
  
10. It is submitted that this practice not only has no real justification, but because of the lack of necessity for this and the impossibility of future scrutiny it

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<sup>5</sup> For instance, while questionnaires may have been held not to be disclosable in the ICTR, the way in which questions were put to a witness or the things said by a person present at an interview may become exculpatory if proper professional standards were not followed.


creates, further creates an obvious impression of unfairness and may engender a fear of foul play in the mind of the objective observer, whether such fear be actually justified or not. It therefore raises questions about the appearance of independence of the prosecution as an integral part of the Tribunal. It is not without significance that the prosecution have not been able to cite examples where such a practice has been judicially accepted in any international arena or any of the 190 national legal jurisdictions, including those without a consistent reputation for fair trial procedures.

### **The prosecution reference to the maxim *nemo tenetur ad impossibile***

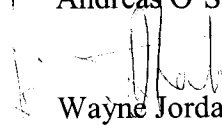
11. The prosecution notes that the Chamber in Norman relied on the principle which the prosecution describes as '*nemo tenetur ad impossibile* [sic] (no one is bound by an impossibility). It is suggested that the proper translation of the maxim of *nemo tenetur ad impossibile* is no one is obliged to do the impossible and should be interpreted to mean law obliges no one to perform an impossibility. However, the defence does not request that the prosecution be ordered to perform an impossibility because it does not request that it be ordered to produce the notice. Rather, the defence requests a remedy for the prosecution breach of Rule 66 deriving from the fact that it has put itself in a position where it would be impossible to produce the notes or check or confirm what they related to and whether their contents were in fact transmitted to the defence. It is unfair for the prosecution to rely on its own conduct to assert that the production of the notes is impossible, and it is submitted that it should be estopped from relying on that assertion to oppose the defence request for a remedy. Here, it is submitted that two other Latin maxims of established legal principles are more germane – 1. *Nemo contra factum suum venire protest* (No one can contradict his own deed); and 2. *Nemo ex suo delicto meliorem suam conditionem facere protest* (No man may improve his position by his own wrongdoing). This is particularly so in the case of the statements of witness TF1-141 taken after the Trial Chamber decision of 1 October 2004 and destroyed with the advantage and the knowledge of such decision.

## Conclusion

12. It is therefore respectfully submitted that the prosecution's reliance on a policy cannot be properly invoked as a justification for this *prima facie* breach of Rule 66 and potential, now unverifiable (even by the prosecution itself), breach of Rule 68. This situation has been initiated by the non-disclosure of notes by virtue of their prior destruction, in circumstances where the prosecution are not in a position through actual recollection or records kept to provide specific information about those specific notes. The revelation of the existence of such policy merely raises grave concerns for the defence with respect to the prosecution's ability to comply with its continuing obligation to examine its material and disclose exculpatory evidence.



Andreas O'Shea for Augustine Bao



Wayne Jordash for Issa Sesay

31 May 2005



10 of 32 DOCUMENTS

Nick Carosella Appellant v. Her Majesty The Queen Respondent

Indexed as: R. v. Carosella

File No.: 24974

Supreme Court of Canada

1997 Can. Sup. Ct. LEXIS 11

June 19, 1996

February 6, 1997

**CATCHWORDS:**

[\*1] *Constitutional law — Charter of Rights — Fundamental justice — Full answer and defence — Disclosure — Destruction of evidence by third party — Complainant interviewed by sexual assault crisis centre social worker — Accused later charged with gross indecency — Notes made by social worker during interview with complainant destroyed by centre prior to court ordering production of complainant's file — Whether failure to produce notes breached accused's right to full answer and defence — Canadian Charter of Rights and Freedoms, s. 7.*

*Constitutional law — Charter of Rights — Remedy — Destruction of evidence by third party — Complainant interviewed by sexual assault crisis centre social worker — Accused later charged with gross indecency — Notes made by social worker during interview with complainant destroyed by centre prior to court ordering production of complainant's file — Accused's right to full answer and defence breached — Whether stay of proceedings appropriate remedy — Canadian Charter of Rights and Freedoms, s. 24(1).*

**HEADNOTE:**

In 1992, the complainant went to a sexual assault crisis centre for advice as to how to lay charges against the accused for sexual abuse [\*2] that she alleged occurred in 1964 when she was a student in a school in which the accused was a teacher. The centre is provided with government funding pursuant to the terms of a comprehensive agreement which requires the centre, *inter alia*, to develop a close liaison with justice agencies and to maintain as confidential and secure all material that is under the centre's control, which is not to be disclosed except where required by law. The complainant was interviewed by a social worker for about an hour and forty-five minutes. During the interview, the social worker took

notes and informed the complainant that whatever she said could be subpoenaed to court. The complainant said that was quite all right. Following the interview, the complainant contacted the police and shortly thereafter the accused was charged with gross indecency. After the preliminary inquiry, at which the complainant testified and was cross-examined, the accused was ordered to stand trial. In October 1994, prior to the commencement of the trial, the defence brought an application for production of the centre's file concerning the complainant. The Crown, the complainant and the centre consented to the order. [\*3] When the file was produced, it did not contain the notes of the complainant's interview. A *voir dire* was held which indicated that the notes had been destroyed in April 1994 pursuant to the centre's policy of shredding files with police involvement before being served in relation to criminal proceedings. The social worker who had conducted the interview and later shredded the notes had no recollection of the contents of the destroyed notes. By consent, the case to meet was tendered by the Crown. It included the police officer's notes of his interview with the complainant made one day after she attended the centre, the complainant's police statement, her testimony at the preliminary inquiry, and other evidence. Based on this material, the trial judge ruled on the defence's application for a stay of proceedings. He found that the destroyed notes were relevant and material and that they would more likely than not tend to assist the accused. He concluded that their destruction had seriously prejudiced the accused by depriving him of the opportunity to cross-examine the complainant as to her previous statements relating to the allegations she made and that, as a result, the accused's [\*4] *Charter* right to make full answer and defence had been breached. Since it would be unfair, in such circumstances, to permit the prosecution to proceed, the trial judge ordered a stay of proceedings. The Court of Appeal set aside the order and directed the matter to proceed to trial. The court stated that the evidence must

disclose something more than a "mere risk" to a *Charter* right and that in this case no realistic appraisal of the probable effect of the lost notes could support the conclusion that the accused's right to make full answer and defence was compromised.

*Held* (La Forest, L'Heureux-Dube, Gonthier and McLachlin JJ. dissenting): The appeal should be allowed.

*Per* Lamer C.J. and Sopinka, Cory, Iacobucci and Major JJ.: An accused who alleges a breach of his right to make full answer and defence as a result of non-disclosure or non-production is not required to show that the conduct of his defence was prejudiced. The question of the degree of prejudice suffered by an accused is not a consideration to be addressed in the context of determining whether a substantive *Charter* right has been breached. The extent to which the *Charter* violation caused [\*5] prejudice to the accused falls to be considered only at the remedy stage of a *Charter* analysis.

The foundation for the Crown's obligation to produce material which may affect the conduct of the defence is that failure to do so would breach the accused's constitutional right to make full answer and defence. The right to disclosure of material which meets the *Stinchcombe* threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the *Charter*. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice. The breach of this principle of fundamental justice is in itself prejudicial. It is immaterial that the right to disclosure is not explicitly listed as one of the components of the principles of fundamental justice. The components of the right cannot be separated from the right itself. The requirement to show additional prejudice or actual prejudice relates to the remedy to be fashioned pursuant to s. 24(1) of the *Charter*. It follows that if the material which was destroyed meets the threshold test [\*6] for disclosure or production, the accused's *Charter* right was breached without the requirement of showing additional prejudice.

In this case, the complainant consented to the application for production and it is clear, given the circumstances, that the file would have been disclosed to the Crown. As material in the possession of the Crown, only the *Stinchcombe* standard would have applied; however, even if the higher *O'Connor* standard relating to production from third parties was applicable, both standards were met in this case. There was abundant evidence before the trial judge to enable him to conclude that there was a reasonable possibility that the information contained in the notes that

were destroyed was logically probative to an issue at the trial as to the credibility of the complainant. Once the material satisfied the *O'Connor* relevance test, the balancing required in the second stage of the test would have inevitably resulted in an order to produce since confidentiality had been waived and since the complainant and the Crown consented to production. The destruction of this material and its consequent non-disclosure resulted in a breach of the accused's [\*7] constitutional right to full answer and defence.

The trial judge did not err in finding that a stay of proceedings was the appropriate remedy in the circumstances of this case. He instructed himself in accordance with the appropriate standard that the power to grant a stay is one that should only be exercised in the clearest of cases. Noting that credibility was a major issue in the case, the trial judge found that the destruction of the notes was significant and had seriously prejudiced the accused, depriving him of his basic right of the opportunity to cross-examine the complainant on previous statements made by her as to the incidents, and, as a result, had substantially impaired the accused's ability to make full answer and defence. The notes represented the first detailed account of the alleged incidents and constituted the only written record which was not created as a result of an investigation. Since the complainant would not likely admit that what was said was inconsistent with her testimony, any possibility of contradiction of the complainant by reference to her previous account was destroyed.

The presence of either one of the following two factors justifies the exercise [\*8] of discretion in favour of a stay: no alternative remedy would cure the prejudice to the accused's ability to make full answer and defence, and irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued. The presence of the first factor cannot be denied. With respect to the second, the complete absence of any remedy to redress or mitigate the consequences of a deliberate destruction of material in order to deprive the court and the accused of relevant evidence would damage the image of the administration of justice. Confidence in the system would be undermined if the court condoned conduct designed to defeat the processes of the court by an agency that receives public money and whose actions are scrutinized by the provincial government.

*Per* La Forest, L'Heureux-Dube, Gonthier and McLachlin JJ. (dissenting): This case is not about disclosure. Disclosure is a concept which is binding solely upon the Crown. This duty to disclose does not extend to third parties. Nor does it impose an obligation upon the Crown to comb the world for information which might be

of possible relevance to the defence. The centre is a third party, [\*9] a party which has no obligation to preserve evidence for prosecutions or otherwise. Its policy decisions are for itself to determine and not for the Crown, the accused or the courts to interfere with, so long as it acts within the confines of the law. As well, this case is not, strictly speaking, about the production of records since the material requested is no longer available to be produced. The key issue is in what circumstances the unavailability of material previously held by a third party translates into a violation of an accused's rights. Although there would appear to be no government action which would trigger the *Charter's* application in this case — the accused's allegation concerns the actions of the centre — the *Charter* is engaged by the fact of the prosecution itself. Where the Crown pursues a prosecution which would result in an unfair trial, this constitutes state action for the purposes of the *Charter*.

While the production of every relevant piece of evidence might be an ideal goal from the accused's point of view, it is inaccurate to elevate this objective to a right, the non-performance of which leads instantaneously to an unfair trial. Where evidence [\*10] is unavailable, the accused must demonstrate that a fair trial, and not a perfect one, cannot be had as a result of the loss. He must establish a real likelihood of prejudice to his defence; it is not enough to speculate that there is the potential for harm. Materials can be easily lost and setting too low a threshold for finding a breach of the right to full answer and defence would bring the justice system to a halt. While it is true that, with regard to certain rights, a court can infer the necessary degree of prejudice, this is not uniformly so. Where an accused alleges a violation of ss. 7 and 11(d) of the *Charter*, he will often have to demonstrate harm to his interests before a breach can be established. This is so because ss. 7 and 11(d) encompass extremely broad and multifaceted concerns, and not every action by the state will automatically trigger a violation. To demonstrate that a breach has actually occurred often demands a finding and measuring of the prejudice suffered. Given the nature of the action which is being challenged in the present case the actual pursuing of the prosecution it seems quite appropriate to require a demonstration of a real likelihood [\*11] of prejudice. There are ample legal and policy reasons for placing this onus upon the accused. The burden is not an unmanageable one and is consistent with established jurisprudence. For missing evidence to cause a violation of the *Charter*, therefore, the accused must demonstrate upon a balance of probabilities that the absence of the evidence denies him a fair trial. For this to happen, there must be a real likelihood of prejudice to the right to full answer and defence, in that the evidence if available would have been more likely than not to assist

the accused. It is not proper to state that a *Charter* right has been violated and that a fair trial cannot be had based on pure speculation.

In this case, the trial judge erred in not properly considering whether or not the accused had actually suffered a violation of his *Charter* rights by measuring the prejudice caused by the absence of the impugned material. Any loss was no more than a mere speculative risk to the accused's rights. Furthermore, if a proper inquiry into the need for the documents had been held, these notes would not even have met the standard for production to the trial judge set out in *O'Connor* [\*12] since there is no basis to conclude that they were "likely relevant", aside from the bare assertion of the defence that the material could somehow have been used to cross-examine the complainant. If this lower standard is not met, the more difficult onus of showing prejudice to the accused's fair trial interest will also not be satisfied. The defence's request for production amounted to no more than a fishing expedition in the hopes of uncovering a prior inconsistent statement. Despite the finding of the trial judge, nothing on the record suggests that there was any discussion between the complainant and the social worker about the actual details of the events themselves. More importantly, the defence never asked a question about the details of the conversations to the complainant — the one person who could have answered whether they were relevant or not. While there was some evidence indicating that the complainant spoke of the offence, this is a long way from saying that there were details given which could have impacted upon her credibility on a material issue if she were to be cross-examined. Finally, it should not be inferred from the sheer length of the conversations between [\*13] the complainant and the social worker that there were notes made which could have been of assistance.

Since the notes were not "likely relevant", to accept the trial judge's finding that there was undoubtedly prejudice occasioned by their loss would involve a major "leap of logic". Moreover, these notes were merely a summary, and not a detailed recounting of the interview, and it is highly likely that anything which did appear inconsistent would have been of such low value given the circumstances that the prejudice from allowing the complainant to be cross-examined upon them would have outweighed any potential probative value. Even if the defence could have cross-examined the complainant on the destroyed notes, or laid a foundation for such cross-examination, their absence does not demonstrate prejudice in the context of this case. The defence had no shortage of material upon which to test the complainant's credibility and there is no indication that the notes made at the centre would have been materially different from the two detailed statements given to

the police. In addition, the complainant was subject to cross-examination at the preliminary inquiry, in which the defence probed [\*14] deeply into the details of the alleged offence. In light of the multitude of evidence which was available to the accused, it is purely speculative to suggest that anything the complainant said to the social worker may have been materially inconsistent, and even if it was, that it was not duplicated by what was available to the defence. The accused did not demonstrate a real likelihood of prejudice to his ability to make full answer and defence and, therefore, there was no breach of his rights in this regard.

Before coming to a concrete assessment of the appropriate remedy in a case where missing evidence is shown to affect the accused's right to full answer and defence, the trial judge must consider all the evidence and the assessment must be done in its proper context. A stay of proceedings should continue to be a remedy of last resort, and should come into play only in the "clearest of cases" where the prejudice suffered is irreparable, and no other remedy will suffice. The key factor in assessing whether other remedies are possible will be an examination of how the evidence could have potentially impacted upon the Crown's case.

The centre's conduct was not an abuse of process [\*15] by virtue of being an affront to the judicial system. First, this "residual category" of abuse of process focuses on the motives and conduct of the prosecution, not on the motives of third parties. The question is whether the prosecution undermines the moral integrity of the system. The conduct of a third party cannot, unless it affects the fairness of the trial, disentitle the Crown to proceed with a case which it believes in good faith to be suitable for prosecution. Here, whatever the motives of the centre, the Crown was not abusing the court's process. The suggestion that the centre can be considered an arm of the Attorney General, or even a government agency, because it receives funding from the government and must follow certain guidelines in the process, cannot be seriously entertained. Second, even if third parties' conduct were relevant, the centre's conduct was not such an affront to the judicial system that it could be characterized as an abuse of process. The centre was not acting out of generalized *animus* against persons accused of sexual assault or at the instigation of the Crown. Rather, the centre was implementing a general policy designed to protect its clients' [\*16] privacy. It was also under no obligation to create or maintain records. To suggest that a court should be able to enforce an obligation maintenance to property which might one day be needed by the courts is a hefty burden. The procedure set out in *O'Connor* does not impose a special obligation on therapists and counsellors to create or retain records.

#### CASES-CITED:

By Sopinka J.

**Referred to:** *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Young* (1984), 46 O.R. (2d) 520; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Stinchcombe (No. 2)* (1994), 149 A.R. 167, aff'd [1995] 1 S.C.R. 754; *R. v. O'Connor*, [1995] 4 S.C.R. 411, aff'g (1994), 89 C.C.C. (3d) 109; *R. v. Tran*, [1994] 2 S.C.R. 951; *R. v. Bartle*, [1994] 3 S.C.R. 173; *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505; *R. v. Durette*, [1994] 1 S.C.R. 469; *Carey v. Ontario*, [1986] 2 S.C.R. 637; *R. v. Antinello* (1995), 97 C.C.C. (3d) 126; *R. v. Egger*, [1993] 2 S.C.R. 451; *R. v. Simpson*, [1995] 1 S.C.R. 449; *Elsom v. Elsom*, [1989] 1 S.C.R. 1367; *R. v. Duguay*, [1989] 1 S.C.R. 93; *R. v. Greffe*, [1990] 1 S.C.R. 755; *R. v. Grant*, [1993] 3 [\*17] S.C.R. 223; *R. v. Borden*, [1994] 3 S.C.R. 145; *R. v. Silveira*, [1995] 2 S.C.R. 297; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130; *Reza v. Canada*, [1994] 2 S.C.R. 394; *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110.

By L'Heureux-Dube J. (dissenting)

*R. v. Chaplin*, [1995] 1 S.C.R. 727; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Egger*, [1993] 2 S.C.R. 451; *R. v. Durette*, [1994] 1 S.C.R. 469; *R. v. Stinchcombe (No. 2)* (1994), 149 A.R. 167, aff'd [1995] 1 S.C.R. 754; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *R. v. A. (D.)* (1995), 76 C.C.C. (3d) 1; *R. v. Santoccono* (1996), 28 O.R. (3d) 630; *R. v. B. (D.J.)* (1993), 16 C.R.R. (2d) 381; *R. v. Finta*, Ont. S.C., April 24, 1990, unreported; *R. v. MacDonnell* (1996), 148 N.S.R. (2d) 289; *R. v. Dieffenbaugh* (1993), 80 C.C.C. (3d) 97; *R. v. L. (P.S.)* (1995), 103 C.C.C. (3d) 341; *R. v. Gatley* (1992), 74 C.C.C. (3d) 468; *R. v. [\*18] Halcrow* (1993), 80 C.C.C. (3d) 320; *R. v. D. (D.L.)* (1992), 77 C.C.C. (3d) 426; *R. v. Ledinski* (1995), 102 C.C.C. (3d) 445; *R. v. G. (W.G.)* (1990), 58 C.C.C. (3d) 263; *R. v. Lupien* (1995), 68 Q.A.C. 253; *R. v. Finta*, [1994] 1 S.C.R. 701; *California v. Trombetta*, 467 U.S. 479 (1984); *United States v. Fletcher*, 801 F.2d 1222 (1986); *State v. Wittenbarger*, 880 P.2d 517 (1994); *Arizona v. Youngblood*, 488 U.S. 51 (1988); *People v. Beeler*, 891 P.2d 153 (1995); *State v. Morales*, 657 A.2d 585 (1995); *State v. Garcia*, 643 A.2d 180 (1994); *United States v. Castro*, 887 F.2d 988 (1989); *Smith v. Secretary of New Mexico Department of Corrections*, 50 F.3d 801 (1995); *People v. Webb*, 862 P.2d 779 (1993); *State v. Waite*, 484 A.2d 887 (1984); *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091; *R. v. Power*, [1994] 1 S.C.R.

601; *R. v. Potvin*, [1993] 2 S.C.R. 880; *R. v. Morin*, [1992] 1 S.C.R. 771; *R. v. Sharma*, [1992] 1 S.C.R. 814; *R. v. Vermette*, [1988] 1 S.C.R. 985, rev'g (1984), 16 C.C.C. (3d) 532, [1984] C.A. 466; *R. v. La* (1996), 105 C.C.C. (3d) 417; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Lyons*, [1987] 2 [\*19] S.C.R. 309; *R. v. Tobin* (1995), 142 N.S.R. (2d) 83; *R. v. Ross*, [1995] O.J. No. 3716 (QL); *United States v. Femia*, 9 F.3d 990 (1993); *R. v. Martin* (1991), 63 C.C.C. (3d) 71, aff'd [1992] 1 S.C.R. 838; *R. v. Andrew* (1992), 60 O.A.C. 324; *People v. Kelly*, 467 N.E.2d 498 (1984); *People v. Sams*, 685 P.2d 157 (1984); *Rourke v. The Queen*, [1978] 1 S.C.R. 1021; *R. v. Osolin*, [1993] 4 S.C.R. 595.

#### LEGISLATION-REFERRED-TO:

##### Statutes and Regulations Cited

*Canada Evidence Act*, R.S.C., 1985, c. C-5, s. 9(2).

*Canadian Charter of Rights and Freedoms*, ss. 7, 10(b), 11(d), 24(1).

*Criminal Code*, S.C. 1953-54, c. 51, s. 149.

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##### INTRODUCTION:

APPEAL from a judgment of the *Ontario Court of Appeal* (1995), 26 *O.R.* (3d) 209, 85 *O.A.C.* 297, 102 *C.C.C.* (3d) 28, 44 C.R. (4th) 266, allowing the Crown's appeal from

a judgment of Ouellette J. (1994), 35 C.R. (4th) 301, ordering a stay of proceedings. Appeal allowed, La Forest, L'Heureux-Dube, Gonthier and McLachlin JJ. dissenting.

**COUNSEL:** *Bruce Duncan*, for the appellant.  
*Susan Chapman* and *Hugh Ashford*, for the respondent.

**PANEL:** Present: Lamer C.J. and La Forest, L'Heureux-Dube, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

**JUDGMENTBY-1:** SOPINKA J.:

##### JUDGMENT-1:

1. This appeal requires the Court to determine the appropriate response of a trial court to the deliberate destruction of evidence which may be relevant to the defence of an accused person. The trial judge found that notes of interviews with the complainant conducted before she laid a charge of gross indecency were relevant [\*21] and material and that this destruction deprived the appellant of the right to make full answer and defence in breach of his constitutional rights. The trial judge ordered a stay of proceedings. The Court of Appeal reversed the trial judge and the appeal to this Court is, therefore, as of right.

##### Facts

2. The appellant was charged by indictment dated March 8, 1993 that between January 18, 1964 and January 17, 1966 he committed acts of gross indecency with the complainant contrary to s. 149 of the *Criminal Code*, S.C. 1953-54, c. 51. The charge related to sexual contact with the complainant when she was a Grade 7 and 8 student in a school in which the appellant was employed as a teacher.

3. The Sexual Assault Crisis Centre ("Centre") in Windsor provides counselling and other support to sexual assault complainants. Government funding is provided to the Centre pursuant to the terms of a comprehensive agreement which requires the Centre, *inter alia*, to develop a close liaison with local health, justice and social service agencies, train and supervise its volunteers, be available for consultations with Ministry staff, maintain financial records and statistics for submission to [\*22] the Ministry upon request, maintain program records and submit annually a comprehensive report respecting the services provided, and maintain as confidential and secure all material that is under the control of the Centre which is not to be disclosed except where required by law.

4. On March 16, 1992, the complainant went to the Centre

for advice as to how to lay charges against the appellant for sexual abuse that she alleged occurred in 1964 when the complainant was a student in a school class taught by the appellant. The complainant was interviewed for an hour and a half to two hours by social worker Peggy Romanello who took notes of the interview, during which the complainant told the "whole story". She was advised that whatever she said could be subpoenaed to court, and the complainant said that was quite all right. Following the interview, the complainant immediately went home and contacted the police. Shortly thereafter the appellant was charged with the present offence.

5. A preliminary inquiry was held in November of 1992 and the appellant was ordered to stand trial. After jury selection but before the appellant was put in the charge of the jury, the appellant's counsel [\*23] brought an application for an order for production requiring the Centre to deliver a copy of its file concerning the complainant to the trial judge for him to review and determine what material, if any, would be released to the defence. All parties including the Centre, the complainant and the Crown consented to the order being granted and it was so ordered on October 26, 1994.

6. The Centre's file produced to the trial judge did not contain the notes of the interview with the complainant, or anything else of importance. On discovering that the expected material was absent from the Centre's file, counsel for the appellant sought continuation of the application for production to determine whether the production order had been complied with and whether there was other material that had not been produced. A *voir dire* was held into that issue. At the commencement of the *voir dire* the court and Crown were informed that an application to stay proceedings might result, depending on what was disclosed on the *voir dire*. Counsel for the Crown indicated his consent to the evidence about to be heard on the *voir dire* applying on the stay motion, if there was one.

7. Counsel for [\*24] the appellant called Lydia Fiorini, the executive director of the Centre in Windsor from 1990 to the present time. Eventually, the defence was permitted, without objection from the Crown, to cross-examine Fiorini first under s. 9(2) of the *Canada Evidence Act*, R.S.C., 1985, c. C-5, and, eventually, at large as an adverse witness.

8. The evidence of Fiorini established that the notes from the file of the complainant in this case, along with those in about 300 to 400 other files, had been shredded by Fiorini or at her direction in April of 1994. The shredded files were ones that were identified as having "police involvement", that is, where an application for production might

be made.

9. The background to this destruction of records was explored at some considerable length by counsel for the appellant in his cross-examination of Fiorini. It revealed that the Centre had been unsuccessful in opposing applications for production of records in the past and ultimately determined that it would combat the practice by following a policy of taking notes that would be misleading if ordered produced and of shredding files with police involvement before being served in relation to criminal [\*25] proceedings. The policy was summarized in an April 15, 1994 memo from Fiorini to her staff, parts of which were:

#### NOTE TAKING:

Write your notes as though it was going to a Defence lawyer. Concentrate on reactions, goals and feelings and not on what happened. We know that no-one says the same story twice.

Do not use quotations. Do not make reference directly to the client.

Use language like it appears, seems, around, approximately to reduce the risk of what appears like a direct statement.

Use short forms that mean nothing to someone else.

Use spaces and pauses as though something followed or was to follow your statement.

#### SHREDDING

The Centre has reached a decision (Board approved) that documents in a file can be shredded. The Centre will make it known to the Courts that although it does not like this alternative, that in order to reduce further victimization to the clients it serves, the Centre has felt that this decision was forced upon them by present Court practices.

We can not shred a document if it has been subpoenaed or there is an application requesting a Court Order.

We need to identify in advance the cases that have police involvement and shred [\*26] in advance to being served for the criminal proceedings.

...

Before shredding do the following:

1. Conference with Lydia letting her know that we might want to consider shredding the identified file. She will make a decision based on whether there is knowledge of a pending court application.
2. Keep only what is required by the Board motion.
3. Indicate to Judy the case number of the client's file that is being shredded so that Judy can eliminate identifying information from the client data system on the computer.
4. Destroy any traces of the case number that can identify the client to the computer file.
5. To ensure other documents that are no longer necessary to keep in the client file as a result of the Board Policy indicating what would be the minimum requirement of a client file are maintained confidential, shred these aforementioned documents. [sic]
10. Since instituting this shredding policy, the Centre no longer opposes production applications and consents to release of its files. There is nothing in them.
11. The notes in the file of the complainant were destroyed pursuant to this policy. Before destroying the notes, Fiorini did not read the notes, and [\*27] made no inquiries of the complainant or the Centre worker involved as to whether the complainant requested confidentiality or opposed disclosure. Nor did she inquire as to what stage court proceedings were at in the case. As mentioned above, the complainant, at her first interview, in March 1992, had been told that what she said could possibly be subpoenaed to court, and she said that that was quite all right with her. When she learned that the notes had been destroyed, she was upset with Fiorini.
12. The actual shredding of the notes in relation to the complainant was done by social worker Peggy Romanello. She could not remember exactly when it was done, but it was sometime around the time of the adoption of the new policy. Romanello testified candidly that the shredding was done to prevent anything from being ordered produced. She made no inquiries to determine if the matter was still before the courts. She said that she did not want to take any chances and wanted to get rid of the file before it was subpoenaed or ordered produced by the court. At the time of the shredding, the therapeutic process in relation to the complainant had ended. Her counselling had ended around June of [\*28] 1993, some 10 or 11 months before the file was shredded. Romanello

had no recollection of the contents of the approximately 10 pages of notes that were destroyed.

13. After completion of the appellant's evidence on the *voir dire*, Crown counsel tendered, on consent, a collection of materials in order to give the trial judge the factual foundation of the case. These materials included Constable Saxon's notes of an interview with the complainant on March 17, 1992, a typed transcript of those notes, the complete statement of the complainant given to Constable Saxon on March 19, 1992, the written statements of Vicki Sprague, the complainant's husband and the complainant's brother and a transcript of the complainant's evidence at the preliminary inquiry. Counsel agreed that the trial judge should resolve the application for a stay on the basis of this factual foundation. The Crown called no other evidence and this material plus the evidence called by the appellant was the factual basis upon which the appellant's application for a stay was based. The trial judge declined to read the complainant's transcript at the preliminary inquiry in its entirety but counsel for the appellant [\*29] was allowed to direct his attention to certain parts of it.

#### Judgments Below

*Ontario Court (General Division) (1994), 35 C.R. (4th) 301*

14. After reviewing the evidence, Ouellette J. noted that the burden of proof was on the appellant to establish, on a balance of probabilities, that the destruction of the notes created a prejudice to the appellant of such a magnitude that the appellant was effectively deprived of the opportunity to make full answer and defence.

15. Ouellette J. agreed with Crown counsel that the court ought not to speculate as to what was contained in the destroyed notes, but concluded that no speculation was involved in determining that the notes of the interviews related to the alleged sexual offences that were the subject of the trial and that the notes were therefore relevant and material, and that they would more likely than not tend to assist the appellant. He noted that defence counsel readily conceded that the Crown had played no part in the destruction of the notes, and the only authorities defence counsel was aware of dealt with actions on the part of the Crown. Ouellette J. found that the principles set out in those authorities were equally applicable [\*30] to the present factual situation, wherein the records had been destroyed by a third party.

16. Ouellette J. stated that the appellant was correct in his contention that it matters not who destroyed the evidence.

The question to be determined is whether the destruction of the notes has deprived the appellant of his right to make full answer and defence. He referred to the decision of this Court in *R. v. Osolin*, [1993] 4 S.C.R. 595, noting that cross-examination is a basic principle of our legal system and a right with constitutional status, but that it is not an unlimited right and, therefore, in order to avoid abuse, there must be a solid basis in relevance and purpose to permit cross-examination on notes such as those in issue here. Ouellette J. further noted that, in cases such as the one at bar, where the trial involves a very sensitive matter, the court should be reluctant to dispose of the accusations other than on their merits. However, he stated that every accused is entitled to a fair trial and where, as here, the evidence establishes that a blatant and systematic process was put into place by which the director of the Centre suppressed, distorted and destroyed files in [\*31] order to prevent the information in those files from being produced in court, a miscarriage of justice could be the result, in that an innocent person could be convicted of a crime which he did not commit.

17. Ouellette J. noted that, if the information contained in the destroyed notes had not been relevant, it would not have become public. He further noted that before determining whether information contained in such a file should be released, in addition to considering relevancy, the court must also consider the right of the complainant to privacy with respect to the information contained in the file. Ouellette J. concluded that the appellant had been deprived of the opportunity to introduce inconsistencies in the complainant's evidence that might be sufficient to cause a jury to question the reliability of the complainant. The fact that the contents of the file cannot be known is not an answer to the denial of this right; such an attitude would encourage and condone the action undertaken by the Centre in this case.

18. Ouellette J. concluded that the appellant had been seriously prejudiced as a result of the deprivation of the opportunity to cross-examine the complainant as to [\*32] her previous statements relating to the allegations she made. As a result, Ouellette J. found that the appellant's ss. 7 and 11(d) rights had been infringed by the destruction of the contents of the complainant's file, and that it would be unfair, in such circumstances, to permit the prosecution to proceed. He therefore ordered a stay of proceedings.

*Ontario Court of Appeal (1995)*, 26 O.R. 209 (Endorsement)

19. The Court of Appeal (Catzman, Osborne and Abella J.J.A.) reviewed the facts in some detail, then turned to the reasons of the trial judge. The court noted that Ouellette J. referred to *R. v. Young (1984)*, 46 O.R. (2d) 520 (C.A.),

a case concerning the doctrine of abuse of process. He did not, however, rest his conclusion on the basis of abuse of process; rather, he held that the proceedings should be stayed as a result of the violations of the appellant's rights under the *Canadian Charter of Rights and Freedoms*. The Court of Appeal stated that there is no basis in this case upon which a finding of abuse of process could be made.

20. All members of the panel were of the view that the effect of, as opposed to the Centre's reasons for, the destruction of the records [\*33] is the important point of emphasis in this case. In that regard, the court noted that the missing notes were not a verified account of what the complainant had said, nor did the notes constitute a written statement of the complainant. In fact, the notes were not read, reviewed or signed by the complainant. The question whether the defence would ever have seen the notes had they not been shredded is unclear, because their shredding prevented the trial judge from reviewing them to determine whether they should be produced for the defence to review.

21. The court stated that the probable effect of the lost notes should have been considered in light of what further material was available to the defence. The Crown's disclosure package included the investigating police officer's notes, the complainant's statement to the police, written statements of three Crown witnesses and the complainant's preliminary inquiry evidence. The complainant, having no knowledge that the notes at the Centre had been shredded, had consented in writing to the release to the trial judge of all of the Centre's records. The court found that the complainant's consent to the application for production eliminated the [\*34] need to consider whether the threshold test for production and review by the trial judge had been met. The issue was not whether the Centre's file should have been ordered to have been produced, but whether the Centre's inability to produce all its original file contents resulted in the likelihood of prejudice to the appellant that would compromise his *Charter* right to make full answer and defence.

22. The court was of the view that the possibility of the notes being of assistance to the defence was obscure. Further, the court stated that the evidence must disclose something more than a "mere risk" to a *Charter* right. The court found that no realistic appraisal of the probable effect of the lost notes could support the conclusion that the appellant's right to make full answer and defence was compromised. The trial judge had committed "a leap of logic" in reaching the conclusion he did. The court found that the evidence did not establish a breach of the appellant's right to make full answer and defence. The court concluded that the trial judge erred in imposing a stay of



proceedings. The trial judge's order was set aside and the matter directed to proceed to trial.

Issues

[\*35]

23. The issues in this case are:

1. Did the failure to produce the notes of the interview of the complainant by reason of their destruction constitute a violation of the appellant's *Charter* rights?

2. If the appellant's *Charter* rights were breached, was a stay based on s. 24(1) the appropriate remedy?

24. In view of my conclusions in respect of issues (1) and (2), it is not necessary for me to consider whether in the circumstances an abuse of process has been made out.

Was there a Breach of the Right to Full Answer and Defence?

25. The Court of Appeal agreed with the appellant that production of the files of the Centre for review by the trial judge was a non-issue and that it was not necessary to consider whether the threshold test for production and review by the trial judge had been met. The Court of Appeal disagreed with the finding of the trial judge that the appellant's constitutional rights were breached because, "The issue is not whether the Centre's file should have been ordered to have been produced, but rather whether the Centre's inability to produce all of its original file contents resulted in the likelihood of prejudice to the accused that would compromise [\*36] the defendant's *Charter* right to make full answer and defence" (p. 215).

26. With respect, this is a misapplication of the burden which rested on the appellant and confuses the obligation to establish a breach of the right with the burden resting on the appellant in seeking a stay. The entitlement of an accused person to production either from the Crown or third parties is a constitutional right. See *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, and *R. v. O'Connor*, [1995] 4 S.C.R. 411. Breach of this right entitles the accused person to a remedy under s. 24(1) of the *Charter*. Remedies range from one or several adjournments to a stay of proceedings. To require the accused to show that the conduct of his or her defence was prejudiced would foredoom any application for even the most modest remedy where the material has not been produced. It would require the accused to show how the defence would be affected by the absence of material which the accused has not seen.

27. This Court has consistently taken the position that the

question of the degree of prejudice suffered by an accused is not a consideration to be addressed in the context of determining whether a substantive [\*37] *Charter* right has been breached. The extent to which the *Charter* violation caused prejudice to the accused falls to be considered only at the remedy stage of a *Charter* analysis. The decision of this Court in *R. v. Tran*, [1994] 2 S.C.R. 951, dealt with the accused's right to an interpreter, as guaranteed by ss. 7 and 14 of the *Charter*. Lamer C.J. stated (for the Court), at pp. 994-95, that:

... it is crucial that, at the stage where it is being determined whether an accused's s. 14 rights were in fact violated, courts not engage in speculation as to whether or not the lack of or lapse in interpretation in a specific instance made any difference to the outcome of the case...

Section 14 expressly guarantees the right to the assistance of an interpreter when certain conditions precedent are met. Nowhere does it require or suggest that an *ex post facto* assessment of prejudice to an accused's right to full answer and defence be carried out before a violation of the right can be found...

Section 14 guarantees the right to interpreter assistance without qualification. Therefore, it would be wrong to introduce into the assessment of whether the right has been [\*38] breached any consideration of whether or not the accused actually suffered prejudice when being denied his or her s. 14 rights. The *Charter* in effect proclaims that being denied proper interpretation while the case is being advanced is in itself prejudicial... Actual resulting prejudice is a matter to be assessed and accommodated under s. 24(1) of the *Charter* when fashioning an appropriate and just remedy for the violation in question. In other words, the "prejudice" is in being denied the right to which one is entitled, nothing more. [Emphasis added.]

28. Similarly, in *R. v. Bartle*, [1994] 3 S.C.R. 173, the Court commented on the issue of prejudice in relation to a violation of s. 10(b), and held that the question of prejudice was relevant only in determining whether the evidence obtained in violation of that right ought to be excluded. Although the scope of legal advice available to the accused in that case was limited (he was charged with having care and control of a motor vehicle while his blood alcohol level was in excess of .08), the Court held that it would be improper to speculate in relation to what the accused would have done had he been properly informed [\*39] of his right to counsel. Thus, even though there may not have been actual prejudice to the accused as a result of the s. 10(b) breach, since the information would likely have been obtained in any event, this fact is not relevant

to the question of whether a *Charter* violation has been established.

29. A similar approach to that adopted in this case was asserted in connection with access to documents used to obtain a wiretap authorization and contained in a sealed packet. Early jurisprudence would have required the applicant accused to establish fraud or misrepresentation in order to gain access. In *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505, this Court held that a denial of access was a denial to make full answer and defence. Accordingly, if the section which authorized a judge to unseal the packet required the accused to establish fraud or material non-disclosure, it would be unconstitutional. The Court concluded that to require the accused applicant to establish these pre-conditions would have placed him in an untenable position and that the restricted access cases should not be followed.

30. In *R. v. Farinacci*, [1994] 1 S.C.R. 469 (indexed as *R. [\*40] v. Durette*), the appellants complained of the excessive editing of affidavits which had secured wiretap authorization. It was submitted by the respondent Crown and accepted by the majority of the Court of Appeal that the non-disclosure did not impair the right of the appellants to make full answer and defence because they had not shown that the material would be useful. In the majority judgment, at pp. 498-99, we stated:

In order to conclude that a failure to disclose information to the defence amounts to a denial of the right to make full answer and defence, the court must consider the nature of the information withheld and whether it might have affected the outcome of the case: *Stinchcombe, supra*, at p. 348... With respect, I think that Finlayson J.A. erred in placing the onus upon the appellants to show how the excised material might have been useful to their case. As Doherty J.A. stated, at p. 477, in concluding that s. 686(1)(b)(iii) was inapplicable:

It is particularly inappropriate to place any onus on the appellants to demonstrate prejudice flowing from the error revealed in this case. The appellants have not seen the unedited affidavits. How can they [\*41] be expected to show prejudice flowing from the improper editing of those affidavits when they have no idea what information was improperly kept from them? Placing an onus on the appellants to demonstrate prejudice from the denial of appropriate access to the affidavits is akin to the now rejected contention that an accused had to show fraud before she could obtain an order directing the opening of the sealed packet. In both cases the accused is placed in the untenable position of being denied access to the very material which is crucial to demonstrating either prejudice

or fraud. [Emphasis added]

31. A similar conclusion was expressed by La Forest J. in respect of Cabinet documents for which Crown privilege was claimed. In *Carey v. Ontario*, [1986] 2 S.C.R. 637, at p. 678, La Forest J. observed:

What troubles me about this approach is that it puts on a plaintiff the burden of proving how the documents, which are admittedly relevant, can be of assistance. How can he do that? He has never seen them; they are confidential and so unavailable. To some extent, then, what the documents contain must be a matter of speculation.

32. The respondent relies on the following statement [\*42] of the British Columbia Court of Appeal in *R. v. O'Connor* (1994), 89 C.C.C. (3d) 109, at pp. 148-49, which was adopted by L'Heureux-Dube J. in this Court:

... 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 that 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 establishes that the non-disclosure *has probably* prejudiced or had an adverse effect on his or her ability to make full answer [\*43] 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 in original.]

33. Although a majority of the Court agreed with the conclusion of L'Heureux-Dube J. that that was not one of those clearest of cases which merits the imposition of the ultimate remedy of a stay, this aspect of the reasons was

not adopted by them. At the highest from the respondent's point of view, this point was left open.

34. In *R. v. Antinello* (1995), 97 C.C.C. (3d) 126 (Alta. C.A.), Kerans J.A. had occasion to consider the above-quoted passage from *O'Connor*, *supra*. At pp. 135-36, Kerans J.A. stated:

With respect, that case dealt with the effort of the accused to defend a stay of proceedings ordered at trial. The "constitutional remedy" that court had in mind in this passage was a judicial stay. The passage, then, seems to me to be about when to grant a stay. So understood, it is not about the burden of proof [\*44] required to prove a Charter breach. This I think is made clearer by a reading of the entire section beginning at p. 133. The court accepted that a stay was appropriate for an abuse of process, and only an abuse of process.

35. In refusing to accede to the submissions of the Crown that the accused was required to prove actual prejudice in making full answer and defence, Kerans J.A. explained, at pp. 134-35:

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 a full answer and defence. In its affirming reasons, published after argument in this case, the Supreme Court again approved this test. [Emphasis in original.]

And at pp. 136-37, Kerans J.A. added:

The Crown ... made the remarkable claim that an accused who alleges a breach of the right to [\*45] make a full answer and defence as a result of non-disclosure must prove that this Crown failing *probably* deprived him of a fair trial. To take that view would mean that the accused, to enforce his right to disclosure, must first show the very thing of which he complains he stands deprived, knowledge of the full significance of what was not revealed. [Emphasis in original.]

36. I agree with this analysis of the principles. It is in accord with this Court's decisions to which I have referred and with the principles in *Stinchcombe*, *supra*. The foundation for the Crown's obligation to produce material which may affect the conduct of the defence is that failure

to do so would breach the constitutional right of the accused to make full answer and defence. As summarized in *R. v. Egger*, [1993] 2 S.C.R. 451, at p. 466, a unanimous decision of this Court:

... the Crown has a duty to disclose to the accused all information reasonably capable of affecting the accused's ability to make full answer and defence, and to do so early enough to leave the accused adequate time to take any steps he or she is expected to take that affect or may affect such right. This obligation [\*46] has constitutional underpinnings deriving from s. 7 of the *Canadian Charter of Rights and Freedoms*...

And, at p. 467:

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

37. The right to disclosure of material which meets the *Stinchcombe* threshold is one of the components of the right to make full answer and defence which in turn is a principle of fundamental justice embraced by s. 7 of the *Charter*. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice. To paraphrase Lamer C.J. in *Tran*, the breach of this principle of fundamental justice is in itself prejudicial. The requirement to show additional prejudice or actual [\*47] prejudice relates to the remedy to be fashioned pursuant to s. 24(1) of the *Charter*.

38. It is immaterial that the right to disclosure is not explicitly listed as one of the components of the principles of fundamental justice. That is true as well of the right to make full answer and defence and other rights. The components of the right cannot be separated from the right itself. An analogy can be made to the s. 10(b) right to counsel. Although s. 10(b) of the *Charter* makes no mention of the right to be informed of the availability of legal aid (or its equivalent), we have treated this requirement as a component of the s. 10(b) guarantee. As a result, an accused can satisfy the court that he or she was denied his or her s. 10(b) right to counsel as a result of the failure of the police to inform him or her as to the availability of legal aid. There is no further onus imposed on the ac-

cused to show that, in addition to the fact that his corollary right to be informed of the availability of legal aid was breached, this resulted in prejudice of such a magnitude that his right to counsel as a whole was also breached.

39. With respect to those who have taken a different [\*48] view, requiring prejudice to be shown is a misapplication of this requirement. As stated in *R. v. Stinchcombe (No. 2) (1994)*, 149 A.R. 167 (C.A.), at p. 174, aff'd [1995] 1 S.C.R. 754:

Before the remedy such as a judicial stay of proceedings can be granted, the accused must establish on a balance of probabilities that the failure to produce or disclose what he seeks has impaired his right to make a full answer and defence or was so oppressive as to amount to an abuse of process. [Emphasis added.]

40. It follows from the foregoing that if the material which was destroyed meets the threshold test for disclosure or production, the appellant's *Charter* rights were breached without the requirement of showing additional prejudice. The Court of Appeal accepted the submission that the propriety of the order for production was not in issue by reason of the fact that both the Crown and the complainant consented to the application for production. As between the Centre and the complainant, it was the latter's consent that was required. The high-handed policy adopted by the Centre appears to ignore the fact that the right to confidentiality resides in the complainants and that [\*49] destruction of records without the consent of the complainants is a violation of that right. Some complainants may wish to waive any right to confidentiality for a variety of reasons including the fact that the records may tend to support the complainant's claim.

41. In my view, the consent was entirely appropriate in this case. Given the circumstances, it is clear that the file would have been disclosed to the Crown. As material in the possession of the Crown, only the *Stinchcombe* standard would have applied. But even if the somewhat higher *O'Connor* standard relating to production from third parties applied, it was met in this case. Once the material satisfied the relevance test of *O'Connor*, the balancing required in the second stage of the test would have inevitably resulted in an order to produce; confidentiality had been waived and the complainant and the Crown consented to production.

42. In *O'Connor*, at para. 22, the majority compared the relative thresholds in the following passage:

In the disclosure context, the meaning of "relevance" is expressed in terms of whether the information may be

useful to the defence (see *Egger, supra*, at p. 467, and *Chaplin*, [\*50] *supra*, at p. 740). In the context of production, the test of relevance should be higher: the presiding judge must be satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify. When we speak of relevance to "an issue at trial", we are referring not only to evidence that may be probative to the material issues in the case (i.e. the unfolding of events) but also to evidence relating to the credibility of witnesses and to the reliability of other evidence in the case. [Emphasis in original.]

43. In this case, the trial judge held that the destroyed notes were likely relevant to an issue in the trial. He stated (at p. 306) that:

The interviews were the subject matter of [the alleged incidents] and the notes taken concerning those incidents. Therefore I find that there is no speculation in coming to the conclusion that the notes of those interviews noted in the documents produced by the Crisis Centre relate to the alleged sexual incidents in this trial and, therefore, are relevant and material and would more likely than not tend to assist the accused. The speculation may relate [\*51] to the details of those notes which we will never know, but that is much different from a finding that the subject matter of the notes is known and is, in fact, material and relevant. [Emphasis added.]

44. The trial judge was certainly entitled to arrive at the conclusion that these notes were relevant and material. The notes were made by the Centre worker at the time of the initial interview of the complainant. On the evidence of the Centre worker, the notes related to the very subject of the trial, the alleged sexual incidents. On that basis, it was open to the trial judge to conclude that the notes were likely relevant, in that they might have been able to shed light on the "unfolding of events", or might have contained information bearing on the complainant's credibility. The notes related to the complainant's initial disclosure of the alleged incidents to the worker at the Crisis Centre; as such, they apparently constituted the first written record of the allegations. That interview lasted for about 1 3/4 hours. Had the notes contained inconsistencies upon which the complainant could be cross-examined, the possibility existed that the notes would have affected the outcome [\*52] of the case in a manner favourable to the appellant.

45. In my view, it is clear that the appellant could have made use of the information in the notes even though it is difficult to specify the precise manner in which the

information could have been used without knowing the contents of the notes. The classic use of such evidence is, of course, to cross-examine the witness on inconsistent statements. Although in this case the complainant could not have been cross-examined on the notes themselves as the notes were not statements of the complainant, they could have afforded a foundation for cross-examination. If the notes indicated an inconsistency with evidence in the witness box, the witness could have been confronted with this inconsistency, and if denied, the statement could have been proved by calling the note-taker.

46. In addition, the notes could have assisted the defence in the preparation of cross-examination questions. They may have revealed the state of the complainant's perception and memory. They might have revealed that some of the complainant's statements resulted from suggestions made by the interviewer. They could have pointed the appellant in the direction of other [\*53] witnesses. The notes may have demonstrated, in addition to the rest of the evidence disclosed to the accused, that he would not have had to testify at the trial, or that he would have had to mount a defence.

47. I conclude from the foregoing that there was abundant evidence before the trial judge to enable him to conclude that there was a reasonable possibility that the information contained in the notes that were destroyed was logically probative to an issue at the trial as to the credibility of the complainant. This information, therefore, would have satisfied the test for disclosure established in *Stinchcombe* but as well the higher test in *O'Connor*. The destruction of this material and its consequent non-disclosure resulted in a breach of the appellant's constitutional right to full answer and defence.

Is a Stay Appropriate?

48. The trial judge found that a stay of proceedings was the appropriate remedy in the circumstances of this case. Section 24(1) of the *Charter* confers upon the court a discretionary power to provide "such remedy as the court considers appropriate and just in the circumstances". See *R. v. Simpson*, [1995] 1 S.C.R. 449. The appropriate [\*54] standard of review of the exercise of a discretionary power was addressed by Gonthier J. in *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. Speaking for the Court, Gonthier J. stated:

The principles enunciated in the *Harper* case [ [1980] 1 S.C.R. 2] indicate that an appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice. In my

opinion, neither of these two circumstances are present in this case.

This Court has affirmed on a number of occasions that the standards of deference applicable in reviewing the decisions of trial judges generally apply equally to the remedial provisions of s. 24. See *R. v. Duguay*, [1989] 1 S.C.R. 93; *R. v. Greffe*, [1990] 1 S.C.R. 755, at p. 783; *R. v. Grant*, [1993] 3 S.C.R. 223; *R. v. Borden*, [1994] 3 S.C.R. 145; *R. v. Silveira*, [1995] 2 S.C.R. 297.

49. In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77, La Forest J. cited with approval the following passage from *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130, [\*55] at p. 138:

The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

These principles were reaffirmed by this Court in *Reza v. Canada*, [1994] 2 S.C.R. 394, at pp. 404-5.

50. It is only after reaching the conclusion that the discretion has not been exercised in accordance with these principles that an appellate court is entitled to exercise a discretion [\*56] of its own. See *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110.

51. The Court of Appeal was of the view that the trial judge erred in finding that the appellant's right to make full answer was breached. This was the basis for the intervention by the Court of Appeal in reversing the exercise by the trial judge of his discretion under s. 24(1). I have concluded that the Court of Appeal erred in this regard and that therefore this is not a valid reason for review of

the trial judge's decision. Moreover, I am of the view that the trial judge did not misdirect himself nor is his decision clearly wrong. Indeed, I am of the view that he reached the right result.

52. A judicial stay of proceedings has been recognized as being an extraordinary remedy that should only be granted in the "clearest of cases". In her reasons in *O'Connor*, L'Heureux-Dube J. stated (at para. 82) that:

It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system [\*57] if the prosecution were continued.

53. The trial judge, in determining that a stay of proceedings was an appropriate remedy in the circumstances of this case, instructed himself in accordance with the standard in *Young*, *supra*, that the power to grant a stay is one that should only be exercised in the clearest of cases. That is the standard adopted by this Court. He further noted that credibility was a major issue in the case, and that as a result, the destruction of the documents was very significant. The trial judge stated (at p. 308) that:

Here the alleged incidents with which the accused is confronted occurred some 30 years ago and I find that the accused has been seriously prejudiced, being deprived of his basic right of the opportunity to cross-examine the complainant on previous statements made by her as to the very incidents of sexual misconduct between her and the accused which are the subject matter of the indictment.

That deprivation was caused by the deliberate actions of employees of the Sexual Assault Crisis Centre in destroying the complainant's file without her consent, solely for the purpose of presenting [*sic*] the opportunity for cross examination [\*58] by the accused in this trial and which would more than likely have assisted the accused in his defence. The accused has had his ability to make full answer and defence substantially impaired by the destruction of the complainant's file and, therefore, I find that his rights have been infringed under ss. 7 and 11(d) of the *Charter* and it would be unfair to allow the prosecution to proceed where the accused has been deprived of that opportunity to cross-examine the complainant on statements previously made when substantially the whole of the Crown's case is based on the credibility of the complainant. [Emphasis added.]

54. In addition to the factors mentioned by the trial judge in considering the propriety of a stay of proceedings, there are other factors in this case which, in my view, merit con-

sideration. As noted above, the notes taken by the Centre worker represented the first detailed account of the alleged incidents. The notes constituted the only written record of the alleged incidents which were not created as a result of an investigation. The only other statements by the complainant were to the police and at the preliminary inquiry. The social worker Romanello [\*59] had no recollection whatever of what was said to her. As for the complainant, even if she could recall she would not likely admit that what was said was inconsistent with her present testimony. As a result, any possibility of contradiction of the complainant by reference to her previous account was destroyed.

55. An additional important factor is the absence of any alternative remedy that would cure the prejudice to the ability of the accused to make full answer and defence. No alternative remedy was suggested by the Court of Appeal. This is one of the two factors mentioned by L'Heureux-Dube J. in the portion of her reasons to which I have referred. The other factor is irreparable prejudice to the integrity of the judicial system if the prosecution were continued.

56. These two factors are alternatives. The presence of either one justifies the exercise of discretion in favour of a stay. The presence of the first factor cannot be denied. With respect to the second, in my opinion, the complete absence of any remedy to redress or mitigate the consequences of a deliberate destruction of material in order to deprive the court and the accused of relevant evidence would damage the image of [\*60] the administration of justice. In this regard, the Court can take into account that the destruction of documents was carried out by an agency that not only receives public money but whose activities are scrutinized by the provincial government. The agency is required to develop a close liaison with justice agencies and secure material under its control which is not to be disclosed except where required by law. The justice system functions best and instils public confidence in its decisions when its processes are able to make available all relevant evidence which is not excluded by some overriding public policy. Confidence in the system would be undermined if the administration of justice condoned conduct designed to defeat the processes of the court. The agency made a decision to obstruct the course of justice by systematically destroying evidence which the practices of the court might require to be produced. This decision is not one for the agency to make. Under our system, which is governed by the rule of law, decisions as to which evidence is to be produced or admitted is for the courts. It is this feature of the appeal in particular that distinguishes this case from lost evidence [\*61] cases generally.

57. I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment at trial staying the proceedings.

**JUDGMENTBY-2: L'HEUREUX-DUBE J.:**

**JUDGMENT-2:**

58. This appeal puts into question the limitations of the criminal justice system.

59. The criminal justice system, being very much a human enterprise, possesses both the strengths and frailties of humanity. Lacking a flawless method for uncovering the truth, or a crystal ball which can magically recreate events, the court attempts to determine an accused's guilt or innocence based on the evidence before it. This search for justice does not operate perfectly, and in every trial there is likely to be some evidence bearing upon the case which does not appear before the trier of fact. Still, society expects courts of law to ascertain that person's guilt or innocence by way of a trial, and, subject to the uncertainties inherent in any human enterprise, to render a verdict that is true and just. It is a crucial role which should not be abdicated except in the most extreme cases.

60. In this case, a third party has destroyed documents which the appellant alleges are crucial to his defence, and which he cannot proceed [\*62] without. He maintains that, as a result of such destruction, his rights under ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* have been violated. The issue to be addressed in this case, therefore, is in what circumstances a court should intervene to halt a prosecution because of the actions of a third party which lead to materials being unavailable at trial. 61. My colleague has recounted the facts and judgments below and I need not repeat them in detail. In a nutshell, the third party in this case, the Sexual Assault Crisis Centre (the "Centre"), as a matter of policy, decided to destroy notes taken from sexual assault complainants in order to prevent their divulgence to anyone, including the courts, in an effort to guarantee their confidentiality. There is not one iota of evidence suggesting that such destruction was instigated by the Crown in any way.

62. After the preliminary inquiry, at which the complainant testified and was extensively cross-examined, the appellant was ordered to stand trial. Prior to trial, counsel for the appellant made a successful motion for production of the Centre's file on the complainant. When the file was produced, however, [\*63] it became apparent that most of the material contained therein had been removed. A *voir dire* was held which indicated that notes of the complainant's interview with the counsellors at the Centre had

been destroyed, and it was not possible to ascertain their content. By consent, the case to meet was tendered in evidence by the Crown, including the notes and written transcript of the complainant's interview with the police and other evidence including the complainant's testimony at the preliminary inquiry. Based upon this material, the trial judge ruled that the missing notes were relevant and that their unavailability rendered the trial unfair. For those reasons, he ordered a stay of proceedings: (1994), 35 C.R. (4th) 301. The Court of Appeal reversed this finding and ordered the continuation of the trial: (1995), 26 O.R. (3d) 209. This appeal comes to this Court as of right.

63. My colleague has concluded that the stay was in fact the proper result. Essentially, he treats this case as analogous to one of non-disclosure by the Crown. In his view, the destroyed material was relevant, and in not being available for production, the accused's right to make full answer and defence [\*64] was impaired. As he puts it (at paras. 37 and 40):

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

It follows from the foregoing that if the material which was destroyed meets the threshold test for disclosure or production, the appellant's *Charter* rights were breached without the requirement of showing additional prejudice.

64. With regard to the proper remedy, Sopinka J. concludes that the only possible way to repair the loss is to enter a stay of proceedings. In his view, this is one of the "clearest of cases" requiring a stay. He agrees with the trial judge that the documents were extremely significant to the case and concludes that their destruction irreparably prejudiced the appellant. In the alternative, he would institute a stay because there is no way of repairing the harm done to the appellant's rights. As the notes had been destroyed, [\*65] no other remedy could rectify the situation.

65. I disagree with the result reached by my colleague and would dismiss the appeal. I also take a very different approach to the issues raised. For this reason, it seems appropriate at this point to clarify a few matters, in light of the assertions about this case made by Sopinka J.

66. First, in my view, this case has absolutely nothing to

do with disclosure. While Sopinka J. speaks at great length of the "right to disclosure" and the obligation which rests to disclose, I feel constrained to point out that disclosure is a concept which is binding solely upon the Crown, and not upon the public at large. As Sopinka J. himself stated in *R. v. Chaplin*, [1995] 1 S.C.R. 727, at para. 21:

This Court has clearly established that the Crown is under a general duty to disclose all information, whether inculpatory or exculpatory, except evidence that is beyond the control of the prosecution, clearly irrelevant, or privileged. [Italics in original; underlining added.]

See also: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Egger*, [1993] 2 S.C.R. 451; *R. v. Durette*, [1994] 1 S.C.R. 469; *R. v. Stinchcombe (No. 2)* [\*66] (1994), 149 A.R. 167 (C.A.), aff'd [1995] 1 S.C.R. 754. This duty to disclose does not extend to third parties. Nor does it impose an obligation upon the Crown to comb the world for information which might be of possible relevance to the defence. I agree with Professor Gilmour, "Counselling Records: Disclosure in Sexual Assault Cases" in J. Cameron, ed., *The Charter's Impact on the Criminal Justice System* (1996), 239, at p. 243, that it is unwise to treat situations where material is in the hands of third parties as automatically engaging *Stinchcombe*, as this "can lead one to misperceive or oversimplify the issues...[and] assume a unity in obligations and responsibilities between the Crown and the complainant that is simply not an accurate description, either factually or analytically".

67. It is crucial to recall, therefore, that in the case at bar, the Centre is a third party, a party which has no obligation to preserve evidence for prosecutions or otherwise. Its policy decisions are for itself to determine and not for the Crown, the accused or the courts to interfere with, so long as it acts within the confines of the law. In this case, when the notes were destroyed, [\*67] the Centre had not received any subpoena or court order to produce such notes. Whether its policy of destruction was appropriate is not for us to decide.

68. In addition, this case should not be confused with what was at issue in *R. v. O'Connor*, [1995] 4 S.C.R. 411, although that case is useful in sorting out some of the interests at stake here. Still, this is not, strictly speaking, a case about the production of records. In *O'Connor*, this Court sets out a procedure which had to be met before a third party could be compelled to produce private therapeutic records. It was not necessary to deal with the issue that is before the Court here, specifically: what will happen when the material is no longer available to be produced. In this case, the Centre, to the extent it was able, complied with the order to produce. The complaint of the appellant

is with regard to what happened prior to the issuance of the order, specifically, the destruction of the documents.

69. At first glance, in the absence of a disclosure violation, the appellant's allegation strictly concerns the actions of the Centre and there would appear to be no government action which would trigger the *Charter* [\*68] 's application: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229. Nevertheless, in *O'Connor*, *supra*, at para. 104, I spoke of how the *Charter* could be engaged in cases where the Crown was not specifically implicated:

Though the right to full answer and defence is generally asserted in the context of material non-disclosure by the Crown, we must recall that a purposive approach to the *Charter* requires that due consideration also be given to the effect of the exercise of discretion on an individual's rights. In particular, an effects-oriented approach to s.7 dictates that when an accused is unable to make full answer and defence to the charges brought against him as a result of his inability to obtain information that is material to his defence, it is of little concern whether that information is in the hands of the state or in the hands of a third party. The effect is still potentially to deprive an individual of his liberty while denying him the ability to make full answer and defence. [Emphasis in original.]

70. Essentially, in these instances, the *Charter* is engaged by the fact of [\*69] the prosecution itself. Where the Crown pursues a prosecution which would result in an unfair trial, this constitutes state action for the purposes of the *Charter*. This situation differs considerably from that in which the accused merely makes a request for disclosure from the Crown. It remains to determine the standard which should be applied in answering the key question at issue in this case: when does the unavailability of material previously held by a third party translate into a violation of an accused's rights? It is to this question I now turn.

#### Lost Evidence

71. Does an accused automatically have the right to every piece of potentially relevant evidence in the world? My colleague suggests that this is in fact the case. Despite the difference between this situation and cases of disclosure, as previously outlined, he suggests that there will be a breach of the right to full answer and defence and therefore an unfair trial anytime material is unavailable that would have been disclosed if in the hands of the Crown. Therefore, whenever information in the hands of a third party has the reasonable possibility of being of some use



to the defence (as per *Stinchcombe* [\*70] , *supra*) the fact that it is unavailable immediately causes a violation of the *Charter*. In my view, the adoption of this rationale could quite possibly lead one to the conclusion that there has never been a fair trial in this country. It goes against the grain of this Court's *Charter* jurisprudence and is contrary to basic underlying notions of how the criminal justice system actually operates.

72. While the production of every relevant piece of evidence might be an ideal goal from the accused's point of view, it is inaccurate to elevate this objective to a right, the non-performance of which leads instantaneously to an unfair trial. In my view, the words of McLachlin J. in *O'Connor*, *supra*, at paras. 193-94, are quite instructive in this regard:

... the *Canadian Charter of Rights and Freedoms* guarantees not the fairest of all possible trials, but rather a trial which is fundamentally fair: *R. v. Herrer*, [1995] 3 S.C.R. 562. What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies [\*71] which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice, but fundamentally fair justice.

Perfect justice in the eyes of the accused might suggest that an accused person should be shown every scintilla of information which might possibly be useful to his defence. From the accused's perspective, the catalogue would include not only information touching on the events at issue, but anything that might conceivably be used in cross-examination to discredit or shake a Crown witness. When other perspectives are considered, however, the picture changes. The need for a system of justice which is workable, affordable and expeditious; the danger of diverting the jury from the true issues; and the privacy interests of those who find themselves caught up in the justice system — all these point to a more realistic standard of disclosure consistent with fundamental fairness. That, and nothing more, is what the law requires.

73. The impossibility of achieving this so-called 'perfection' has consistently been recognized in the evidence gathering process as [\*72] well as at the trial stage. In virtually every criminal case, an accused will not be able to gather all of the evidence that he or she would like. Potential witnesses may be impossible to locate, the weapon used to commit the crime may not have been

found by police invariably, there will be some piece of evidence relevant to the case that will be unavailable. The justice system would grind to a halt if an accused had only to show that a missing piece of evidence was relevant to the case in order to establish a violation of s. 7 and obtain a remedy under s. 24(1).

74. The *Charter* does not entitle an accused to a 'perfect' trial, in which every piece of relevant information which might or might not affect the defence is diligently piled at the defence's door. An accused is entitled to a fair trial, where relevant, unprivileged material gathered by the Crown is disclosed, while evidence in the hands of third parties, after a balancing of considerations, is produced in appropriate cases. Where evidence is unavailable, the accused must demonstrate that a fair trial, and not a perfect one, cannot be had as a result of the loss.

75. In my view, for the appellant to suggest that [\*73] he is unable to receive a fair trial because of the destroyed notes, he must be able to demonstrate that there was actually some harm to his position. It is not enough to speculate, as my colleague proposes, that there is the potential for harm, as the notes might somehow have proved useful. As I hope to demonstrate, such a standard is completely inappropriate. I note in passing, however, that I agree with Sopinka J. that in determining any potential impact upon the appellant's rights, the conduct of the Centre in this case is of no importance. It is only the measuring of the effect of the loss which concerns us at this stage. If there is no harm to the appellant's interests, the motives behind the destruction do not provide the prejudice necessary to cause an unfair trial.

76. A long line of jurisprudence has affirmed that an accused has a responsibility to establish a real likelihood of prejudice to his defence as a result of an absence of relevant material. In fact, appellate courts in this country are virtually unanimous in their treatment of these situations. The Ontario Court of Appeal, for example, has consistently held that there "must be an air of reality that the [\*74] missing evidence would in fact and in a material way assist the accused": *R. v. A. (D.)* (1995), 76 C.C.C. (3d) 1, at p. 8; *R. v. Santocono* (1996), 28 O.R. (3d) 630. It has also been stated that what must be demonstrated "on a balance of probabilities is that the missing evidence creates a prejudice of such magnitude and importance that it can be fairly said to amount to a deprivation of the opportunity to make full answer and defence": *R. v. B. (D.J.)* (1993), 16 C.R.R. (2d) 381 (Ont. C.A.), at p. 382. In *R. v. A. (D.)*, *supra*, at p. 9, Dubin C.J.O. adopted the reasoning of Campbell J. in *R. v. Finta* (Ont. S.C., April 24, 1990 (unreported)) who stated:

The defence does, however, have a burden to show that the lost evidence is likely to preclude a fair trial. It is a first step in discharging that burden to show what the evidence is, to show that there is more than a basis in speculation to say what, in fact, the lost evidence is or that the lost witness would, in fact say. A burden to show that the lost evidence is relevant and material. A burden to show that it is substantial or significant in the sense it is not trivial or frivolous or tenuous. It is a first [\*75] step of this motion to show that the lost evidence would more likely than not tend to rebut some evidence of the Crown's case or would more likely than not tend to assist the accused.

If the evidence points to the innocence of the accused that would, of course, satisfy this pre-condition but it is not necessary the evidence go that far and actually point to the innocence of the accused as opposed to merely assisting the accused or tending to rebut some evidence or some element of the Crown's case.

It is, however, with those cautions, necessary to make some assessment of the potential value to the accused of the lost evidence. If there is no demonstration that the evidence would help him or if it appears that the evidence might just as easily hurt the accused more than it would help him, that tends to rebut any claim that its loss would preclude a fair trial to the accused.

There must be an air of substantial reality about the claim that any particular piece of lost evidence or all of it cumulatively together would actually assist the accused in his defence. If there is no such air of substantial reality, it cannot be said the delay which caused the loss of evidence is likely [\*76] to preclude a fair trial for the accused. [Emphasis added.]

77. In *R. v. Dieffenbaugh* (1993), 80 C.C.C. (3d) 97, a unanimous British Columbia Court of Appeal determined that real prejudice was an essential part of finding that an accused had been deprived of his rights to a fair trial and the ability to make full answer and defence. In that case, the police began an investigation in 1983 with regard to several complaints of sexual assault against the accused made by two teenagers. For reasons unknown, and despite a recommendation to the contrary by the police, the Crown declined to proceed with charges. The matter was revived in 1989, but it was determined that the original police file containing statements from the witnesses had been destroyed in accordance with a standard procedure. The court recognized that the production of the statements 'might' have been of assistance, but nevertheless refused to order a stay as requested by the accused. In its view, no real prejudice had been demonstrated as the accused was still able to cross-examine the officers and the witnesses involved, and there was no evidence indicat-

ing the file contained evidence favourable to the accused. [\*77] See also: *R. v. L. (P.S.)* (1995), 103 C.C.C. (3d) 341 (B.C.C.A.); *R. v. Gately* (1992), 74 C.C.C. (3d) 468 (B.C.C.A.); *R. v. Halcrow* (1993), 80 C.C.C. (3d) 320 (B.C.C.A.).

78. Appellate courts in Nova Scotia, Manitoba, Saskatchewan, Newfoundland, and Quebec have also reached the conclusion that the accused must demonstrate prejudice; see for example: *R. v. MacDonnell* (1996), 148 N.S.R. (2d) 289; *R. v. D. (D.L.)* (1992), 77 C.C.C. (3d) 426 (Man. C.A.); *R. v. Ledinski* (1995), 102 C.C.C. (3d) 445 (Sask. C.A.); *R. v. G. (W.G.)* (1990), 58 C.C.C. (3d) 263 (Nfld. C.A.); *R. v. Lupien* (1995), 68 Q.A.C. 253.

79. More importantly, this Court has also set a high threshold in cases where the accused alleges that certain materials are unavailable which would affect his or her defence. In *R. v. Finta*, [1994] 1 S.C.R. 701, the accused was charged with war crimes which took place 45 years prior during World War II. He argued that since such a lengthy period of time had passed between the date of the actions giving rise to the charges and the date of trial, there was bound to be prejudice resulting in a breach of his rights under ss. 7 and 11(d) of the *Charter* [\*78]. This ground of appeal was unanimously dismissed. Cory J., for a unanimous Court on this point, stated (at p. 875):

In the present case, I am unable to see any merit to the respondent's arguments that he suffered prejudice as a result of the pre-charge delay. Indeed, it is far more likely that the delay was more prejudicial to the Crown's case than it was to that of the defence. Defence counsel was entitled to argue that the witnesses' memories had become blurred with the passage of 45 years. Further, the documentary and physical evidence that the respondent now complains is not available was probably destroyed during World War II. Thus it is difficult to accept the respondent's assertion that any documentary or physical evidence that would have been available within a few years after the war has since been lost. [Emphasis added.]

80. This judgment recognized that there needed to be actual prejudice demonstrated before a breach of the accused's rights could be found. It was obvious on the facts of that case that some materials relevant to the accused's case were no longer available as they had been destroyed in World War II. It could, of course, have been argued [\*79] that an unknown, yet potentially immense number of documents at one time possessed in the hands of Nazi Germany could have been of some use to the defence, on the test proposed by my colleague. Still, as there was no prejudice shown by the accused, the Court declined to find a breach of the *Charter*.

81. The common thread of each of the cases listed above is that if each one were revisited today using the model proposed by Sopinka J., it would reveal a violation of the accused's right to full answer and defence. None of the accused would have received a fair trial, as some materials which might have been of use to them (or equally might not have been of use) were unavailable for reasons completely out of the hands of the Crown. In my view, such a result would make a 'fair' trial extremely difficult, and in many cases impossible, to obtain.

82. It is interesting to compare how this area of the law has developed in the United States. A great deal of jurisprudence has emerged involving cases of lost or destroyed evidence, centering upon the "Due Process" clause of the Fourteenth Amendment. Still, the analysis is similar to our own, as this clause has been interpreted to "require [\*80] that criminal defendants be afforded a meaningful opportunity to present a complete defense": *California v. Trombetta*, 467 U.S. 479 (1984), at p. 485. For the most part, however, the case law has focused solely upon the prosecution's duty to preserve evidence, rather than situations involving third parties. Still, the authorities have almost uniformly required either a showing of actual prejudice or of bad faith (by the prosecution), and occasionally both. The law in cases of missing evidence was summed up in *United States v. Fletcher*, 801 F.2d 1222 (10th Cir. 1986), at p. 1225:

... the possibility that the evidence might have been exculpatory is not sufficient under *Trombetta*. Absent evidence of police or prosecutorial bad faith or misconduct, dismissal of an indictment is warranted only if the missing evidence possesses an exculpatory value that was apparent before the evidence was destroyed. *Trombetta* also requires a finding that the defendant would be unable to obtain comparable evidence by other reasonably available means.

83. Similarly, the rule has recently been set out in the following way by one state Supreme Court in *State v. Wittenbarger*, [\*81] 880 P.2d 517 (Wash. 1994), at p. 521:

It is clear that if the State has failed to preserve "material exculpatory evidence" criminal charges must be dismissed. Recognizing that the right to due process is limited, however, the [United States Supreme] Court has been unwilling to "impos(e) on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." [ *Arizona v. Youngblood*, 488

*U.S. 51 (1988)*, at p. 58.] A showing that the evidence might have exonerated the defendant is not enough.

See also: *Arizona v. Youngblood*, 488 U.S. 51 (1988); *People v. Beeler*, 891 P.2d 153 (Cal. 1995); *State v. Morales*, 657 A.2d 585 (Conn. 1995); *State v. Garcia*, 643 A.2d 180 (R.I. 1994).

84. For the most part, however, there is considerable doubt as to whether an accused is even able to raise a constitutional motion to suppress in cases where the evidence has been lost or destroyed by a third party where no government involvement is demonstrated: *United States v. Castro*, 887 F.2d 988 (9th Cir. 1989); *Smith v. Secretary of New Mexico Department of Corrections*, 50 [\*82] F.3d 801 (10th Cir. 1995); *People v. Webb*, 862 P.2d 779 (Cal. 1993). Indeed, one U.S. court was even faced with a situation remarkably similar to the one before us in the case at bar. In *State v. Waite*, 484 A.2d 887 (R.I. 1984), at p. 891, a rape crisis center destroyed notes taken by a counsellor in an interview with a sexual assault complainant. The accused made a motion to suppress the complainant's testimony, arguing that he had been irreparably prejudiced by the loss. The motion was unanimously dismissed, Shea J. stating:

...there is no indication that the state acted in bad faith or was negligent. The records were destroyed by employees of the Rape Crisis Center at the direction of its board of directors. The state is not responsible for the actions of a private agency that destroys its own records. At no time were these records within the possession, custody or control of the state. The defendant's simple assertion that the records were destroyed while the state "stood idly by" is not enough to warrant a finding of either bad faith or negligence. Furthermore, in the absence of any factual basis from defendant, any prejudice alleged from the loss of the records [\*83] of notes of conversations between the counselor and the victim is mere speculation. Therefore, denial of defendant's motion was proper. [Emphasis added.]

85. Essentially, the American courts have required the accused to demonstrate prejudice as a result of the loss of evidence. Most jurisdictions have gone even further and required bad faith on the part of the state as well. The reason for such a standard is similar to that expressed in the Canadian jurisprudence: materials can be easily lost and setting too low a standard for dismissal would bring the justice system to a halt. The sheer volume of judgments in the U.S. on this subject exemplifies this reality.

86. To a certain extent, the loss of material is quite inevitable, and penalizing the prosecution for each and every loss would have serious repercussions. One type of case which would surely prove difficult to prosecute is where charges are, for some reason, delayed for a lengthy period in being brought forward. It is inevitable that some relevant evidence will be lost in these situations. Although this Court has ruled on a number of occasions that delay alone is not a sufficient reason to halt a prosecution (see, [\*84] for example, *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091), the effect of the reasons of my colleague would inexorably cause that very result.

87. One of the other difficulties involves extending the 'relevancy' threshold to all third parties. It is not difficult to imagine some rather bizarre results which could occur. Suppose that two co-accused, who I shall refer to as A and B, are charged with a complicated fraud scheme. In order to try to cover his tracks, A shreds a personal diary which detailed how the scheme operated. While A could not benefit from the destruction of this diary, B would be entitled to a stay of proceedings. The documents were undoubtedly relevant, in that there was a possibility that they would have been of some use to the defence (although it is of course equally or even more likely that they were inculpatory), and as B cannot say what was in them, the unavailability itself would mandate a stay, without any inquiry into whether the absence of the materials prejudiced B in any way.

88. The problem is exacerbated by a lack of available remedies in situations of this kind. While Sopinka J. attempts to distinguish the issues of right and remedy, they are closely [\*85] related in cases of missing evidence. My colleague finds that "the absence of any alternative remedy that would cure the prejudice to the ability of the accused to make full answer and defence" (para. 55) in and of itself justifies the exercise of discretion in favour of a stay. In this sense, on the test set out by Sopinka J., there is never any weighing of prejudice to the accused's case. In his view, once a finding is made that the accused's rights have been violated, the absence of an alternative remedy and inability of the court to reconstruct the material, necessitate a stay. This demonstrates the difficulty of setting too low a threshold for finding a breach of the right to full answer and defence. Once a court has made the determination that the accused cannot properly exercise this right, and hence defend him or herself to the fullest extent possible, it will be reluctant to continue with the trial. Using the test proposed by my colleague, the finding of a breach in and of itself makes an analysis of prejudice somewhat extraneous.

89. Setting the threshold for a finding of an unfair trial

too low would lead to innumerable stays, contrary to the "clearest of cases" standard [\*86] set by this Court in *O'Connor, supra*, and *R. v. Power*, [1994] 1 S.C.R. 601. The irony is that these stays will most often occur in the most serious and complex types of investigations. As criminal schemes become more voluminous and intertwined, the likelihood that some materials will go missing increases greatly.

90. The situations listed above demonstrate why adopting the test proposed by my colleague would be unwise. Moreover, I do not subscribe to his view that such a result is mandated by established methods of assessing *Charter* violations, as stated in his reasons (at para. 27):

This Court has consistently taken the position that the question of the degree of prejudice suffered by an accused is not a consideration to be addressed in the context of determining whether a substantive *Charter* right has been breached. The extent to which the *Charter* violation caused prejudice to the accused falls to be considered only at the remedy stage of a *Charter* analysis.

91. With respect, I disagree. While it is true that, with regard to certain rights, a degree of prejudice can be inferred, such is not always the case. Indeed, with regard to most *Charter* [\*87] rights, the accused must demonstrate some degree of prejudice before the court can reach a determination that a violation has occurred. In other words, an accused cannot argue that he is unable to have a fair trial, to take one example, in a vacuum. He or she must show the effect of a designated action which purportedly violates his rights. This effect is the prejudice. The aforementioned case of *Finta, supra*, is one such example. In that situation, the delay in prosecuting the accused was not itself sufficient to establish a violation of the *Charter*. Actual prejudice needed to be shown. Moreover, it involved a weighing assessment to determine whether the accused had suffered serious enough prejudice to convince the Court that a violation had taken place.

92. I agree with Sopinka J. that with the right to the assistance of an interpreter and, to a lesser degree, the right to counsel, the court can infer the necessary degree of prejudice. But the same is not necessarily true where the accused alleges a violation of ss. 7 and 11(d) of the *Charter*. In such a case, a violation is not so easily found, and the accused will often have to demonstrate harm to his [\*88] or her interests before a breach can be established. This is so for a very simple reason: ss. 7 and 11(d) encompass extremely broad and multifaceted concerns, and not every action by the state will automatically trigger a violation. To demonstrate that a breach has actually occurred often demands a finding and measuring of the

prejudice suffered.

93. For example, in *R. v. Potvin*, [1993] 2 S.C.R. 880, this Court recognized that appellate delay could lead to a violation of s. 7 of the *Charter*. As Sopinka J. wrote in that case, the length of the delay was not an automatic indicator of a violation of the accused's rights. In order to demonstrate a violation in cases of systemic delay, the accused needed to show that he had suffered some "real prejudice". In my view, implicit in this terminology is that a court will have to weigh the specific concerns in each individual case. 94. This is also the consistent approach which has been taken to cases involving pre- and post-charge trial delay. In *R. v. Morin*, [1992] 1 S.C.R. 771, Sopinka J., for a majority of the Court, found that the degree of prejudice suffered by the accused was a very real factor to measure in determining [\*89] whether pre-trial delay had caused a violation of s. 11(b). While he found that a certain degree of prejudice could be inferred from the delay itself, he made it clear that, in most cases, a breach of the right would not often be found without a finding of prejudice (at pp. 801 and 803):

... in an individual case, prejudice may be inferred from the length of the delay. The longer the delay, the more likely that such an inference will be drawn. In circumstances in which prejudice is not inferred and is not otherwise proved, the basis for the enforcement of the individual right is seriously undermined.

As discussed previously, the degree of prejudice or absence thereof is also an important factor in determining the length of institutional delay that will be tolerated. The application of any guideline will be influenced by this factor. [Emphasis added.]

95. Sopinka J. has consistently applied this very standard in determining whether or not the substantive right in s. 11(b) has actually been violated. In *R. v. Sharma*, [1992] 1 S.C.R. 814, for example, he applied the legal tests set out in *Morin* and arrived at the following conclusion (at p. 830):

[\*90] Applying the factors discussed above, particularly the actions of the accused, the paucity of prejudice and the guideline concerning institutional delay and taking into account the interests designed to be protected, particularly the relative seriousness of the charge, I conclude that the delay herein was not unreasonable. Thus, the rights of the accused under s. 11(b) have not been violated... [Emphasis added.]

96. This approach to assessing prejudice is by no means confined to cases involving delay. In *R. v. Vermette*, [1988] 1 S.C.R. 985, the accused, an inspector with the RCMP, was charged with the theft of certain political documents. The matter received a great deal of media and public scrutiny, and as it involved allegations concerning two major political parties, even received considerable attention in the National Assembly. During one question period the Premier of Quebec made a number of comments which disparaged both a defence witness and the accused. The remarks received widespread publicity and as a result the accused argued that he could not receive a fair trial, as he was entitled under s. 11(d) of the *Charter*, because prospective jurors [\*91] would be prejudiced against him.

97. La Forest J., for the majority, ruled that it was speculative to conclude that this was in fact the case, as it had not been determined that the accused had been prejudiced to the extent that he could not have a fair trial. He essentially adopted the views of Beauregard J.A. in the Court of Appeal (1984), 16 C.C.C. (3d) 532, [1984] C.A. 466, who stated that despite the actions of the Premier, it was inaccurate to conclude that the accused's fair trial had been usurped (at p. 540 C.C.C.):

[translation] ...I am of the humble view that it has not been proved that it would have been impossible to constitute an impartial jury within a reasonable time. It cannot be presumed that, by applying the mechanisms provided at law to guarantee the impartiality of the jurors, in Montreal in the fall of 1982, 12 persons could not be found who would be ready to swear under oath that they had no preconceived idea of the innocence or guilt of the respondent (whether they knew of the events in the National Assembly or not) and who could swear to render a verdict in accordance with only the evidence at trial.

98. In accepting this submission, La Forest J. stated [\*92] (at p. 992):

It is only at the stage when the jury is to be selected that it will be possible to determine whether the respondent can be tried by an impartial jury. This does not therefore involve substituting our opinion for that of the judge. As Beauregard J. notes, there is no evidence indicating that it will be impossible to select an impartial jury in a reasonable time. This is rather a matter of speculation. [Emphasis added.]

(See on this point: D. Martin, "Rising Expectations: Slippery Slope or New Horizon? The Constitutionalization of Criminal Trials in Canada" in

J. Cameron, ed., *The Charter's Impact on the Criminal Justice System* (1996), at pp. 108-9.)

99. Essentially, these cases have all determined that some measuring of prejudice is necessary in order for an accused to demonstrate that he or she has actually suffered a violation of *Charter* rights. As I said earlier, while some actions will allow a court to infer the necessary degree of prejudice, this is not uniformly so. In many cases where the accused alleges that a particular government action has deprived him or her of a fair trial, or of his or her liberty not in accordance with fundamental [\*93] justice, a measuring of actual prejudice is necessary to demonstrate that this right has actually been affected. Given the nature of the action which is being challenged in the present case the actual pursuing of the prosecution it seems quite appropriate to require a demonstration of prejudice.

100. Indeed, in *O'Connor, supra*, I maintained that a finding of prejudice was necessary to demonstrate a violation of the *Charter* in cases of non-disclosure by the Crown. In this regard, cases of missing evidence are quite similar to the scenario outlined in that case. As I stated (at para. 74):

... 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 [\*94] 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 establishes 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. (Italics in original; underlining added.)

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 [\*95] 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. I would note, moreover, that inferences or conclusions about the propriety of the Crown's conduct or intention are not necessarily relevant to whether or not the accused's right to a fair trial is infringed. The focus must be primarily on the effect of the impugned actions on the fairness of the accused's trial. [Emphasis added.]

101. *O'Connor*, of course, dealt with a situation where an accused was deprived of evidence as a result of the Crown's failure to meet its obligation to disclose all relevant evidence. Nevertheless, the analysis in both situations is actually quite similar. Where material is unavailable, the focus should be on discovering how the accused has suffered as a result. The threshold should be no lower where an accused is deprived of material because of the actions [\*96] of a third party; indeed, in my view, because of the many concerns I have already detailed, the rationale for such a threshold is actually stronger in these instances.

102. In these types of cases, however, a popular refrain from the accused is that he or she is unable to show how the evidence would affect the defence since he or she has not seen the material. Indeed, this is one of the primary rationales employed by Sopinka J. in his reasons. I have already addressed to a certain extent why this is not a compelling argument. At this juncture, I merely wish to add a few points.

103. First, we must recall that this was not information in the possession of the Crown. It is not presumptively relevant, and there is no statutory or other obligation on the third party to maintain the material. If the accused is unable to offer some concrete basis upon which to persuade the court that the evidence was material to his defence, its loss should not trouble him. It is as if the documents never existed. We must recall that where there is no burden upon a person to even record evidence, the non-existence of it cannot possibly cause a violation of

the *Charter*. Why should cases where this [\*97] evidence has been destroyed be any different? *R. v. La (1996)*, 105 C.C.C. (3d) 417 (Alta. C.A.); Martin, *supra*, at p. 116. Moreover, where third parties were in possession, the inability to show how the documents would have helped the defence, will often demonstrate how the material would not even have surpassed the "likely relevance" standard for production in the first place.

104. Second, I find the comments of Professor MacCrimmon, "Trial by Ordeal" (1996), 1 *Can. Crim. L.R.* 31, at pp. 50-51, who was commenting upon the distinct but related issue of the threshold to have third party records produced to the court set out in *O'Connor*, quite persuasive. Essentially, she states that we cannot look at this issue in a vacuum, but must keep in mind the varied objects of the criminal justice system and the way it operates on analogous issues:

Placing an evidentiary burden on accused to establish the relevance of the contents of records they have not seen may seem to be unfair if viewed in isolation. In a perfect world of fully rational decision-makers and adequate investigatory resources for both the prosecution and the defence, it may well be that all information should [\*98] be disclosed. But in the current system where the accused does not have the right to all information, any proposal to disclose or not to disclose must be placed in the context of other limits on disclosure of information and investigatory resources. There are existing limits on the right to information and "the traditional understanding of the role of the police ... has not required the police to become defence investigators". The information must be relevant. There is no right to compel witnesses to talk to the defence before the trial. There is no right to a preliminary inquiry. There are several instances in which a higher threshold than a mere assertion of relevance by the defence has been required. The level of the threshold varies depending on the importance attached to the interests adversely affected by automatic disclosure. The accused must establish that a publication ban is necessary for a fair trial. The defence may not call Crown counsel as a witness unless they can show "there is a real basis for believing that it is likely the witness can give material evidence". There is a higher standard for intrusion in places where there is a high expectation of privacy, such [\*99] as law or media offices which require, for instance, an exploration into whether alternative sources have been exhausted. [Emphasis added.]

105. In addition, this 'burden' is also appropriate when one takes into consideration certain fundamental concepts inherent to the criminal justice system. It is based on

the idea that all of the relevant evidence in the possession of the Crown should generally be made available to the accused, and that the accused should be permitted to lead other relevant evidence to rebut the Crown's case. Difficulty may well be experienced by an accused in gathering rebuttal evidence. However, as the respondent points out, the potential for such difficulty is likely one of the reasons why the prosecution bears the heavy onus of proving all aspects of guilt beyond a reasonable doubt. In that regard, the criminal system has always taken into consideration that it will occasionally be difficult for an accused to demonstrate innocence, and has removed the need to do this, by putting a high onus of proof upon the Crown.

106. In summary, there are ample legal and policy reasons for placing the onus upon the accused to demonstrate that he or she has suffered [\*100] a real likelihood of prejudice. The burden is not an unmanageable one, and is consistent with established jurisprudence. It is not proper to state that a *Charter* right has been violated and that a fair trial cannot be had based on pure speculation. This is not a route which should be taken.

107. It follows that I adopt the standard which has historically been followed by this Court in *Finta* and appellate courts across the country. For missing evidence to cause a violation of the *Charter*, the accused must demonstrate upon a balance of probabilities that the absence of the evidence denies them a fair trial. For this to happen, there must be a real likelihood of prejudice to the right to full answer and defence, in that the evidence if available would have been more likely than not to assist the accused. For the reasons enumerated earlier, speculation in this regard should not be encouraged.

#### Application to the Case at Bar

108. I would begin by stating that as far as the application of the law set out above to the particular facts of this case is concerned, I am in substantial agreement with the reasons of the Court of Appeal.

109. First, in reversing the decision [\*101] of the trial judge, the Court of Appeal correctly found that the decision of the trial judge was improperly motivated by his dissatisfaction with the conduct of the Centre. As the trial judge stated at one point (at pp. 307-8):

... every accused is entitled to a fair trial, which is the foundation of our criminal justice system, and where the evidence establishes, as it does in the present case, a blatant and systematic process evolved by the director of the Crisis Centre, either with or without the direction of her superiors, to suppress, distort, and destroy files con-

taining information from the complainants to avoid that information from being produced in court according to law in aid of the defence of an accused person, that is the process which could well result in an innocent person being convicted of a crime which he did not commit.

In this instance the director and/or her superiors were not prepared to allow our system of justice to operate. She and/or they took it upon themselves to be judge and jury and to dispose of files which they knew had "police involvement", for the reason only that it had "police involvement".

Further on, he compounded this error by assessing [\*102] the prejudice to the accused by focusing on the reasons for the destruction of the documents rather than their usefulness at trial (at p. 308):

The accused has been deprived of that opportunity by the destruction of the complainant's files and as I have previously found, it is not an answer to say that we do not know what was in the file because they have been destroyed, because then that encourages and condones the actions of those who have prevented an accused from being able to properly examine the complainant on statements previously made by her on the very incidents upon which the indictment is based.

110. It is clear that the trial judge did not properly consider whether or not the appellant had actually suffered a violation of his *Charter* rights by measuring the prejudice caused by the absence of the impugned material, and in not doing so, he erred.

111. Did the absence of the material in question here violate the appellant's *Charter* rights? I am of the view that any loss was no more than a mere speculative risk to the appellant's rights, and that, as the Court of Appeal found, no "realistic appraisal of the probable effect of the lost notes can support the conclusion [\*103] that the accused's right to make full answer and defence was compromised" (p. 215).

112. Furthermore, my assessment of the situation leads me to conclude that, based on this Court's decision in *O'Connor*, if a proper inquiry into the need for the documents had been held, these notes would not even have met the standard for production to the trial judge. There is no basis whatsoever to conclude that they were "likely relevant", aside from the bare assertion of counsel that the material could somehow have been used to cross-examine the complainant. While I agree with the Court of Appeal that this is not precisely what needs to be consid-

ered at this point, it goes without saying that if this lower standard is not met, the more difficult onus of showing prejudice to the appellant's fair trial interest will also not be satisfied.

113. In *O'Connor*, this Court made it clear that production of material from a third party necessitated a higher threshold than what would be required if it were in the Crown's possession. An accused, in making a request for production, should not be allowed to undertake a general fishing expedition into the records of a third party. This would completely [\*104] undermine the entire purpose of *O'Connor*. While Lamer C.J. and Sopinka J. wrote in that case that the standard of likely relevance could be satisfied by demonstrating that the evidence could impact upon the credibility of witnesses, this reference cannot have been intended to mean the credibility of the witness "at large", but must have been referring to their credibility on the issues before the court. As I stated in *O'Connor*, "[t]here is no question that the right to make full answer and defence cannot be so broad as to grant the defence a fishing licence into the personal and private lives of others" (para. 107). Furthermore, I added (at paras. 142 and 144):

The burden on an accused to demonstrate likely relevance is a significant one. For instance, it would be insufficient for the accused to demand production simply on the basis of a bare, unsupported assertion that the records might impact on "recent complaint" or the "kind of person" the witness is. Similarly, the applicant cannot simply invoke credibility "at large", but must rather provide some basis to show that there is likely to be information in the impugned records which would relate to the complainant's credibility [\*105] on a particular, material issue at trial. Equally inadequate is a bare, unsupported assertion that a prior inconsistent statement might be revealed, or that the defence wishes to explore the records for "allegations of sexual abuse by other people". Such requests, without more, are indicative of the very type of fishing expedition that this Court has previously rejected in other contexts. See, in the context of cross-examination on sexual history, *Osolin, supra*, at p. 618, *per* L'Heureux-Dube J. dissenting, and *Seaboyer, supra*, at p. 634, *per* McLachlin J. for the majority; in the context of search and seizure, *Baron v. Canada, [1993] 1 S.C.R. 416, at p. 448, per* Sopinka J. for the Court, and *Hunter, supra*, at p. 167, *per* Dickson J. (as he then was) for the Court; in the context of wiretaps and their supporting affidavits, *Chaplin, supra*, at p. 746, *per* Sopinka J. for the Court, *Durette, supra*, at p. 523, *per* L'Heureux-Dube J. dissenting, *R. v. Thompson, [1990] 2 S.C.R. 1111, at p. 1169, per* La Forest J. dissenting, and *R. v. Duarte, [1990] 1 S.C.R. 30, at p. 55, per* La Forest J. for the majority. See [\*106] also *Cross on Evidence* (7th ed.



1990), at pp. 51 *et seq.*; *Halsbury's Laws of England* (4th ed. 1976), vol. 17, para. 5, at p. 7.; *Wigmore on Evidence* (3rd ed. 1940), vol. 1, para. 9, at pp. 655 *et seq.*

Finally, it must not be presumed that the mere fact that a witness received treatment or counselling after a sexual assault indicates that the records will contain information that is relevant to the defence. The focus of therapy is vastly different from that of an investigation or other process undertaken for the purposes of the trial. While investigations and witness testimony are oriented toward ascertaining historical truth — namely, the facts surrounding the alleged assault — therapy generally focuses on exploring the complainant's emotional and psychological responses to certain events, after the alleged assault has taken place. Victims often question their perceptions and judgment, especially if the assailant was an acquaintance. Therapy is an opportunity for the victim to explore her own feelings of doubt and insecurity. It is not a fact-finding exercise. Consequently, the vast majority of information noted during therapy sessions bears [\*107] no relevance whatsoever or, at its highest, only an attenuated sense of relevance to the issues at trial. Moreover, as I have already noted elsewhere, much of this information is inherently unreliable and, therefore, may frustrate rather than further the truth-seeking process. Thus, although the fact that an individual has sought counselling after an alleged assault may certainly raise the applicant's hopes for a fruitful fishing expedition, it does not follow, absent other evidence, that information found in those records is likely to be relevant to the accused's defence. [Emphasis in original.]

114. In my view, the request made here amounted to no more than what I stated should not be permitted: a fishing expedition in the hopes of uncovering a prior inconsistent statement. Despite the finding of the trial judge, there is absolutely nothing on the record to suggest that there was any discussion between the complainant and the counsellor about the actual details of the events themselves. The appellant, based on the evidence tendered during the *voir dire*, failed to even satisfy the likely relevance threshold.

115. The motion for production, which, in fairness, was made [\*108] before this Court's reasons in *O'Connor*, said that the grounds for the application were that the documents were "relevant to a material issue in the defence of the accused". Frankly, I fail to see upon what basis this conclusion was reached. The defence initially became aware of the fact that the complainant had attended at the Centre from the disclosure of a statement made by the complainant to the police which mentioned

it. The relevant portion of the statement stated:

On March 16, 1992, I attended the Sexual Abuse Crisis Centre in Windsor and met with Peggy Romanello, a counsellor. The reason I met with her was to find out the procedure to be taken to lay charges against Nick Carosella for sexual abuse when I was 14 and 15 years old. [Emphasis added.]

116. At the preliminary inquiry, counsel for the appellant questioned the complainant on the details of those meetings. The only testimony at the preliminary inquiry which actually touched on this issue went as follows:

Q. All right. The day that you went down to the sexual assault centre, did you make that decision yourself that particular day ...

A. It was a joint decision with my husband and myself.

Q. All right. [\*109] And he - he took you down, drove you down, or did you go by yourself?

A. I believe I went by myself.

Q. So you got there... But you arrived there and you spoke to this person there?

A. Peggy Romanello.

Q. Peggy Romanello. And did you then - when you were speaking to Peggy Romanello, did she sit down and, you know, when you told her the whole story, did she make some notes?

A. Yes, sir.

Q. And.

A. She told me that whatever I said would possibly be subpoenaed for court.

Q. Mm-hmm.

A. And I said that was quite all right.

Q. So she made some notes?

A. Yes, sir.

Q. Did she ever give you copies of those notes?

A. No, sir.

Q. So after those – the note taking, did she ask you to sign the statement? Like did you sign a document there or go over the notes that she made from what you had told her?

A. I'm not sure if I signed anything.

Q. Okay. But she certainly made notes?

A. Yes, sir.

...

Q. Did you have any contact with Romanello after that?

A. Yes, sir.

Q. How many occasions would you have met with her?

A. I'm not sure. I went to see her on a number of occasions.

Q. Can you give me an approximate number? I'm not going to hold [\*110] you to it, I promise.

A. I don't know because she had to leave to – she was having an operation. And there was a few times I went to see her, and then I went a couple of times after that with someone else. [Emphasis added.]

117. The appellant points to the portion of the testimony which I have underlined above, where the complainant agreed that she told the counsellor, the "whole story". In my view, this is a rather speculative interpretation of the response. It was counsel for the appellant who said that the complainant told Ms. Romanello the "whole story", in the midst of posing what amounts to two questions at once. The complainant would appear to have been answering 'yes' to the fact that Ms. Romanello made some notes, and not necessarily to the proposition that she related the "whole story". As this was the only reference to the substantive details of the counselling sessions, I think it takes a major leap of faith to arrive at any conclusion about what was actually related.

118. At the point when the order for production was made, this was the totality of evidence available to the court. In my view, this did not get the appellant anywhere near the likely relevance [\*111] threshold. Aside from pure speculation, there is no evidence whatsoever that the complainant ever spoke to the counsellor in depth about the details of the incidents which were before the court. In fact, the only information which speaks about the ac-

tual sessions, in the original police statement, is to the contrary: that the reason for going was to find out how to go about the procedure to lay charges.

119. This information vacuum was not improved upon by the testimony which took place at the *voir dire*. Counsel for the appellant was quite concerned about examining in detail the persons responsible for shredding the records, but seemed uninterested in trying to get to the substance of the conversations between the complainant and the counsellor. While it is true that Ms. Romanello admitted that she had no recollection of the actual conversations between herself and the complainant, the only evidence given about her usual practice of speaking with clients was elicited by the Crown and went as follows:

Q. ... Now the purpose of you keeping some notes, is that so that you can help the person as far as their counselling needs?

A. Yes.

Q. All right. You don't investigate [\*112] the actual or alleged crime, do you?

A. No.

Q. All right. That's not the purpose of you making any records. Is that right?

A. Not at all.

Q. As far as your notes are, is it correct to state that basically it's a summary of what the person is telling you as opposed to a verbatim account?

A. Yes.

Q. All right. You are not in the habit of letting the person, for example in this case [the complainant] look at the notes to confirm that they were accurate. Is that right?

A. No.

Q. She never looked at them, did she?

A. No, she didn't.

Q. All right.

A. Not to my memory, no. [Emphasis added.]

120. This evidence supports the conclusion that any infor-

mation on the actual details of the alleged incidents was likely to have been sketchy and general. Most importantly, counsel for the appellant never asked a question about the details of the conversations to the one person who could have answered whether they were relevant or not: the complainant. My colleague says of the complainant that "even if she could recall she would not likely admit that what was said was inconsistent with her present testimony" (para. 54). This may in fact be true, but [\*113] at the very least the complainant could have given valuable insight into the materiality of the notes, and could have expanded upon whether or not what was spoken of related in detail to the incidents or whether the actual details were merely peripheral to the therapeutic aspect of the meetings as testified to by Ms. Romanello. Such an inquiry is crucial to making the "likely relevance" threshold a meaningful one: see L. Stuesser, "General Principles Concerning Disclosure" (1996), 1 *Can. Crim. L.R.* 1, at p. 13.

121. In my view, the appellant failed to even get over the threshold of likely relevance. While there was some evidence indicating that the complainant spoke of the offence, this is a far cry from saying that there were details given which could have impacted upon her credibility on a material issue if she were to be cross-examined. The appellant failed to establish an evidentiary basis which would allow a court to conclude that these materials met the threshold of likely relevance. While the trial judge and my colleague appear willing to infer from the sheer length of the conversations that there were notes made which could have been of assistance, I do not think [\*114] this is a course which should be followed.

122. In any event, even assuming these notes were "likely relevant" and should have been ordered produced, I am at a loss to see how their absence could have occasioned the appellant any prejudice whatsoever, especially given the evidence at the *voir dire* and the multitude of other materials available to cross-examine the complainant.

123. The trial judge, however, found that there was undoubtedly prejudice occasioned by the loss of the statements. Specifically, he stated (at p. 306): I agree with Crown counsel that we are not to speculate as to what was contained in the destroyed notes, but are we speculating when Mrs. Romanello agrees that her initial interview of the complainant over a period of one hour and 45 minutes, and other interviews, were about the very incidents of victimization sexually of the complainant by the accused as contained in the indictment. The counselling was to be for those incidents. The interviews were the subject matter of those incidents and the notes taken concerning those incidents. Therefore I

find that there is no speculation in coming to the conclusion that the notes of those interviews noted in the [\*115] documents produced by the Crisis Centre relate to alleged sexual incidents in this trial and, therefore, are relevant and material and would more likely than not tend to assist the accused. The speculation may relate to the details of those notes which we will never know, but that is much different from a finding that the subject matter of the notes is known and is, in fact, material and relevant.

124. I have a great deal of difficulty with this conclusion, and agree with the respondent that accepting it would involve a major "leap of logic". First, as set out above, I am not convinced that the material was relevant in the sense desired by the appellant. There was a complete absence of evidence to suggest this was the case.

125. Moreover, these notes would have constituted evidence of the lowest possible quality. They should not be confused with 'statements' upon which the complainant could have been cross-examined. These were notes made by another party. They were not acknowledged as a proper recording by the complainant, and any inconsistency would have suffered from several defects, including the fact that they were merely a summary, and not a detailed recounting of the [\*116] interview. In my view, it is highly likely that anything which did appear inconsistent would have been of such low value given the circumstances that the prejudice from allowing the witness to be cross-examined upon them would have outweighed any potential probative value: *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 634.

126. I go even further. Even if it was somehow demonstrated that the appellant could have cross-examined the complainant on the destroyed notes, or laid a foundation for such cross-examination, their absence does not demonstrate prejudice in the context of this case. As aforementioned, the *Charter* only guarantees a fair trial, and not the most favourable procedure to the accused that could be imagined: *O'Connor*, *supra*; *R. v. Lyons*, [1987] 2 S.C.R. 309. It is clear that the appellant had no shortage of material upon which to test the complainant's credibility. First, the defence had two detailed statements which were given to the police, the first of which was made one day after she attended the Centre. There is nothing to suggest notes made at the Centre would have been materially different from the statements given to the police. In addition, [\*117] the complainant was subject to cross-examination at the preliminary inquiry, in which counsel for the appellant probed deeply into the details of the alleged offence.

127. In light of the multitude of evidence which was available to the accused, it is purely speculative to suggest that anything the complainant said to Ms. Romanello may have been materially inconsistent, and even if it was, that it was not duplicated by what was available to the defence: See regarding this approach: *R. v. Tobin* (1995), 142 N.S.R. (2d) 83 (S.C.); *R. v. Ross*, [1995] O.J. No. 3716 (Gen. Div.); *United States v. Femia*, 9 F.3d 990 (1st Cir. 1993), at p. 994. In addition, given these circumstances, I find it difficult to conclude that the unavailability of some evidence, through no fault of the Crown, or for that matter, the complainant, could have deprived the accused of a fair trial. In my view, for the reasons I have set out above, the appellant did not come anywhere near achieving the onus that was upon him to demonstrate prejudice to his ability to make full answer and defence. I am therefore in agreement with the Court of Appeal that there was no breach of the appellant's rights in this [\*118] regard.

128. Before moving on, I wish to add that I agree with the respondent that the pre-trial motion which took place in this case should be avoided whenever possible: *O'Connor*, *supra*. While the matter proceeded in that way on consent between the Crown and the appellant, an application of this nature should ordinarily be brought at the conclusion of the Crown's case so that a more complete examination into the potential prejudice can be properly assessed: *R. v. Martin* (1991), 63 C.C.C. (3d) 71 (Ont. C.A.), at p. 85, *aff'd* [1992] 1 S.C.R. 838; *R. v. B. (D.J.)*, *supra*; *R. v. Andrew* (1992), 60 O.A.C. 324.

#### Remedy

129. As I have concluded there was no violation in the case at bar, it is not strictly necessary to deal with the application of s. 24(1) here; nevertheless, I wish to briefly comment upon the issue of remedies in missing evidence cases generally.

130. In my view, assessing the proper remedy in a case where missing evidence is shown to affect the accused's right to full answer and defence must be done in its proper context. As aforementioned, it is crucial that the ruling not be made in isolation and that a trial judge consider all [\*119] the evidence in the case before coming to a concrete assessment of the appropriate remedy. In essence, as I stated in *O'Connor*, a stay of proceedings should continue to be a remedy of last resort, and should come into play only in the "clearest of cases" where the prejudice suffered is irreparable, and no other remedy will suffice.

131. The key factor in assessing whether other remedies are possible will be an examination of how the evidence could have potentially impacted upon the Crown's case.

It may well be that, although a violation of the *Charter* occurred, its effect was confined to one particular issue, and that a stay is not the necessary remedy. In an appropriate case, the trial judge could consider a variety of remedies. It might, for example, be sufficient in a case to exclude evidence tendered by the Crown which was closely integrated with the missing material. In another situation, the lost evidence might be distinguishable to one particular issue, and although the accused was able to demonstrate that the evidence would have been helpful, it did not necessarily exculpate him. For example, in a case where the accused was charged with murder, the lost evidence, [\*120] at its highest, might only have eliminated the intent to kill. In such a case, it would still be possible to make a determination of the accused's guilt or innocence on a lesser, included offence. Given that there was no violation in this case, there is no need to examine this in detail. These situations are best dealt with as they arise.

132. I note, however, that the American authorities have examined the question of remedies in some detail, and their experience may prove useful in helping to arrive at an appropriate remedy in an individual case. Like ours, the American position is that dismissing charges against an accused, the equivalent of a stay of proceedings, should only occur where no other remedy will suffice. For a helpful summary of some of the remedies which have been proposed in cases of missing evidence, see *People v. Kelly*, 467 N.E.2d 498 (N.Y. 1984); *People v. Sams*, 685 P.2d 157 (Colo. 1984).

#### Abuse of Process

133. Because of my conclusion that the appellant has not demonstrated any prejudice to his right to make full answer and defence, it is necessary for me to address his alternative argument that the Centre's conduct was an abuse of process by virtue [\*121] of being an affront to the judicial system. There are two answers to this argument. In the first place, this "residual category" of abuse of process focuses on the motives and conduct of the prosecution, not on the motives of third parties. In the second place, even if third parties' conduct were relevant, the Centre's conduct was not such an affront to the judicial system that it could be characterized as an abuse of process.

#### *The Residual Category of Abuse of Process and the Conduct of Third Parties*

134. In *O'Connor*, *supra*, at para. 73, I described the "residual category" of abuse of process cases as "address[ing] the panoply of diverse and sometimes unfore-

seeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process" (emphasis added). The question, in other words, is whether the prosecution undermines the moral integrity of the system.

135. It is difficult to see how the conduct of a third party could undermine the moral integrity of a prosecution if it does not affect the fairness [\*122] of the trial. The law recognizes that serious improprieties on the part of the police or prosecuting authorities ulterior motives for a prosecution and entrapment, to name but two examples could be so inconsistent with the community's sense of decency that a remedy for abuse of process is warranted even if the impugned conduct did not affect the fairness of the trial. See D. M. Paciocco, "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991), 15 *Crim. L.J.* 315, at pp. 318-19; A. L.-T. Choo, "Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited", [1995] *Crim. L.R.* 864, at pp. 866-71. However, the conduct of a potential witness or other third party cannot be assimilated to an abuse by the state of its investigatory powers and prosecutorial prerogative.

136. For example, a witness may commit perjury in an effort to obtain the conviction of an accused he or she dislikes. If this is discovered during the trial, it does not become an abuse of process. The jury can disregard the testimony, and appropriate measures can be taken against the witness. Similarly, a witness may breach a court order out of disrespect [\*123] for the judicial system. Here, the proper course of action, where the conduct of a witness undermines the authority of the court and brings the administration of justice into disrepute, is to cite the witness for contempt of court or take other appropriate action. The prosecution itself does not damage the authority of the court, unless the conduct of the third party was such as to compromise the accused's right to a fair trial. Absent such circumstances, the prosecution is not an abuse of process.

137. It is true that there can be an abuse of process where the criminal courts are used by private parties for an improper purpose, such as the collection of a civil debt. See *Rourke v. The Queen*, [1978] 1 *S.C.R.* 1021, at p. 1031, the only decision cited by the appellant on this point. See also Paciocco, *supra*, at p. 319, fn. 12; Choo, *supra*, at pp. 866-67. However, even in such cases, the abuse lies in the use of the judicial process as an instrument of extortion in the realization of a goal beyond the proper scope of a criminal proceeding. The question is not whether some

third party's conduct is reprehensible, but whether the prosecution would undermine the moral [\*124] integrity of the judicial system.

138. This was in fact the finding of this Court in *Vermette, supra*. In that case, as aforementioned, the accused argued that the actions of the Premier of the province in breaching the *sub judice* rule violated his right to a fair trial. He also argued that the continued prosecution constituted an abuse of process. On this point, La Forest J. substantially adopted the reasoning of Beauregard J.A. as to whether the action of someone outside the Attorney General's office could amount to an abuse of process. Specifically, Beauregard J.A. stated (at pp. 540-41 C.C.C.):

With respect to the second submission, I am also of the humble opinion that it has not been proven that the Attorney-General committed an abuse of process.

The mistrial was not caused by any act of the Attorney-General or anyone under his control. The acts of the head of the government, who as a member of the Assembly, infringed the *sub judice* rule to the detriment of the respondent, cannot be attributed to the Attorney-General because he is a member of this same government.

The Attorney-General, conscious that a new trial would certainly cause some prejudice to the [\*125] respondent, weighed this prejudice against the public interest that crime be fought. In light of the nature of the charges in this case and the fundamental rights placed in jeopardy by these crimes. I am not convinced that the Attorney-General used his discretion in an abusive fashion.

139. In the case at bar, we would appear to have a similar situation. The Crown has decided in good faith that it was appropriate to prosecute the appellant in respect of the acts of gross indecency he allegedly committed against the complainant. I share the view of the Court of Appeal that, whatever the motives of the third party Crisis Centre, the Crown was not abusing the court's process. The conduct of a third party cannot, unless it affects the fairness of the trial, disentitle the Crown to proceed with a case which it believes in good faith to be suitable for prosecution.

140. The appellant alternatively attempts to identify government action on the part of the Centre by suggesting that the Centre and the Crown are closely aligned because the Centre receives a major part of its funding from the government and must follow certain guidelines in the process. In my view, the suggestion that [\*126] the Centre can be considered an arm of the Attorney General, or indeed, even a government agency, cannot be seriously

entertained.

*Crisis Centre's Conduct*

141. In any event, I am not convinced that the Crisis Centre's conduct was "manifestly inappropriate" so as to meet the standard of an abuse of process. Of course, given my conclusions on the other issues, it is not necessary to address this point. Nevertheless, strictly as an aside, I would offer the following comments.

142. The Crisis Centre was not acting out of *animus* against this appellant; nor was it acting out of generalized *animus* against persons accused of sexual assault, or at the instigation of the Crown. Rather, the record indicates that the Crisis Centre was implementing a general policy designed to protect its clients' privacy and ensure that women would not be dissuaded from seeking assistance for fear that their private discussions will be communicated to the defence. The fact that this particular complainant had, to a certain extent, waived confidentiality does not affect the validity of the Crisis Centre's general policy. It is entirely legitimate and understandable for a centre to warn its clients [\*127] that their files could be subpoenaed, and to obtain their consent to release the records in such an eventuality, while at the same time taking steps to defend the confidentiality of the records.

143. According to Sopinka J., the conduct of the Crisis Centre is an affront to the justice system and the Crisis Centre is flouting the authority of the courts. In my view, it is important to keep the actions of the Centre in their proper perspective. First, this is not a case where a person shredded documents in respect of which a subpoena or court order had been issued. On the contrary, the Crisis Centre's policy on shredding states that "[w]e cannot shred a document if it has been subpoenaed or there is an application requesting a Court Order."

144. It is also highly significant that the Centre was under no obligation whatsoever to create or maintain records. My colleague appears to suggest that an independent agency cannot destroy materials which might one day be required to be produced to the court. In my view, this type of obligation is completely inappropriate. The Centre created notes for its own purposes. It was under no obligation to do so. Once it did, it had a legitimate [\*128] property interest in them which it was able to do with as it saw fit. To suggest that the court should be able to en-

force a maintenance obligation to property which might one day be needed by the courts is a hefty burden indeed: see Martin, *supra*, at p. 116; Gilmour, *supra*, at p. 256.

145. In this case, the implementing of the policy was confined to cases where there was so-called "police involvement", and this factor in and of itself could perhaps be seen as questionable. Nevertheless, a policy to destroy all notes made with clients could not be seen in the same light.

146. In *O'Connor*, the Court held that complainants' records, if in existence, may be ordered produced. It also articulated a special procedure for determining whether such records should be produced, and, in my view, the *raison d'être* of this procedure was to enhance the protection given to the complainant's privacy. The procedure does not impose a special obligation on therapists and counsellors to create or retain records. Like the holders of any other kind of confidential record, the Centre and other therapists are at liberty to adopt legal policies in conformity with what is, in their [\*129] view, appropriate.

147. Finally, I must comment upon the fact that these agencies have even felt it necessary to go to such lengths. From a quick perusal of lower court judgments, it would appear as if a request for therapeutic records in cases of sexual assault is becoming virtually automatic, with little regard to the actual relevancy of the documents. We have now come to a situation where people trying to help victims have resorted to foregoing the taking of notes or destroying them *en masse* in order to prevent what they see as a grave injustice. It is extremely likely that the therapeutical process for which these notes are actually created is being harmed in their absence; Gilmour, *supra*, at p. 257; MacCrimmon, *supra*, at p. 56.

Disposition

148. In the result, I would dismiss the appeal.

**ORDER:** *Appeal allowed*, La Forest, L'Heureux-Dube, Gonthier and McLachlin JJ. *dissenting*.

**SOLICITORS:** *Solicitor for the appellant:* Bruce Duncan, Toronto.

*Solicitor for the respondent:* The Ministry of the Attorney General, Toronto.