CASE COMMENT: RECORDS LOST, RIGHTS FOUND: *R.* v. *CAROSELLA*

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The majority decision in the *Carosella* case[1] may seem extraordinary, if not sexist. Because a record-keeper destroyed records relating to a sexual offence, charges against an accused were stayed — even though the records were not created because of any obligation owed to the accused; had not been subject to an order for production; were not taken in circumstances conducive to accuracy; had never been seen, let alone relied on, by police or Crown; and had contents, by the time of litigation concerning the records, that were unknown. Nonetheless, this result was comprehensible, even if not precisely predictable, given the peculiar facts of the case and the majority principles in *O'Connor*.[2] This comment shall review those peculiar facts, the principles supporting the decision, and the significance and implications of the decision.

I. FACTS

Carosella was charged with gross indecency,[3] concerning acts alleged to have taken place between 18 January 1964 and 17 January 1966, when Carosella was a junior high school teacher and the complainant a grade 7 and 8 student in the Windsor, Ontario school that employed Carosella. Charges were not laid against Carosella until 1992.

On 16 March 1992, before the charges were laid, the complainant attended at the Sexual Assault Crisis Centre of Essex County, in Windsor, Ontario (the "Centre"). The Centre provides counselling and other support to complainants in sexual assault cases. The Centre receives funding from the Ontario government pursuant to an agreement with the province which requires the Centre, *inter alia*,

> to develop a close liaison with local health, justice and social services agencies, train and supervise its volunteers, be available for consultations with the Ministry staff, maintain financial records and statistics for submission to 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]

The complainant was interviewed by Peggy Romanello, a Centre social worker, for about one hour and forty-five minutes. Romanello had advised the complainant that whatever she said could be "subpoenaed" and introduced in court. The complainant said that this was "all right." Romanello took about ten pages of notes during the interview

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1 *R.* v. *Carosella* (1997), 112 C.C.C. (3d) 289 (S.C.C.) [hereinafter *Carosella*]

2 *R.* v. *O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.) [hereinafter *O'Connor*].

3 Under s. 149 of the *Criminal Code*, S.C. 1953-54, c. 51, as it was at the material times.

4 *Carosella*, *supra* note 1 at 295 (para. 3) [emphasis in original].

(the "Notes"). After the interview, the complainant contacted the police and the charges were laid against Carosella.[5]

The history of the Notes must be set against the history of the litigation. The Notes were initially preserved by the Centre. They were disclosed to neither the police nor the Crown. Carosella's preliminary inquiry was held in November, 1992. In a statement to the police, disclosed by the Crown, the complainant indicated that she had attended at the Centre.[6] In her preliminary inquiry testimony, the complainant confirmed her attendance at the Centre and said that the Notes had been made.[7] At the conclusion of the preliminary inquiry, Carosella was committed for trial. Nothing of consequence transpired until 1994.

On 6 April 1994, the Board of Directors of the Centre passed a policy motion authorizing the shredding of certain Centre records. Linda Fiorini, the executive director of the Centre, circulated a memorandum to staff outlining the policy. Documents that had been subpoenaed or were the subject of a production application were not to be shredded. Documents in files having "police involvement," though, were to be shredded and relevant computer records were to be altered to eliminate "identifying information." The express purpose of the shredding and record alteration was to prevent production of material to defence counsel. Pursuant to the policy, documents from three to four hundred files were shredded in April, 1994. Among the documents destroyed were the Notes.[8]

In October, 1994 Carosella made a pre-trial application to Ouellette J., the trial judge, for an order requiring production of the Centre's file concerning the complainant. Ouellette J. granted the order on 26 October 1994, on the consent of the Crown, the Centre, and the complainant (the "Production Order").[9]

The Centre duly produced its file, *sans* the Notes. Carosella thereupon requested the continuation of the production application, to determine whether the Centre had complied with the Production Order. In the ensuing *voir dire*, the fate of the Notes was disclosed. The complainant, reportedly, was "upset" when she learned of the Notes' destruction.[10]

Following the *voir dire*, the Crown tendered to Ouellette J., on consent, a collection of documents to establish the factual foundation of the case, including the complainant's statements to the police, statements of certain other witnesses, and the complainant's preliminary inquiry testimony. On the basis of this evidence, Carosella applied for and Ouellette J. granted a stay, on the ground that the destruction of the Notes violated Carosella's rights under ss. 7 and 11(d) of the *Canadian Charter of Rights and*

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5 *Ibid.* at 295 (paras. 4, 11).

6 *Ibid.* at 331 (para. 115).

7 *Ibid.* at 332 (para. 116).

8 *Ibid.* at 296-97 (paras. 7-11). L'Heureux-Dubé J. correctly pointed out that the Crown had nothing to do with the destruction of documents (*ibid.* at 313 (para. 61)).

9 *Ibid.* at 295 (para. 5); see *R.* v. *Carosella* (1994), 35 C.R. (4th) 301 (Ont. Ct. (Gen. Div.)).

10 *Carosella*, *supra* note 1 at 296-97 (paras. 6, 11).

Freedoms.[11] On the Crown's appeal, the Ontario Court of Appeal set aside the stay and directed that the proceedings continue to trial.[12] Carosella appealed to the Supreme Court of Canada. The Supreme Court, by a five to four majority, allowed Carosella's appeal, set aside the Court of Appeal's judgment, and restored the stay. Sopinka J. wrote for the majority, Lamer C.J.C. and Cory, Iacobucci, and Major JJ. concurring. L'Heureux-Dubé J. wrote for the dissent, La Forest, Gonthier, and McLachlin JJ. concurring.

II. PRINCIPLES

Sopinka J.'s judgment may be understood to have three main elements:

(A) Section 7 of the *Charter* provides that "[e]very one has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Carosella's s. 7 rights were engaged in this case.

(B) The right to "fundamental justice" protected by s. 7 includes the accused's right to make full answer and defence. This right is logically prior to its recognition in a disclosure or production application; the right "attaches" to records that are "likely relevant," as soon as they come into existence. In this case, Carosella had full answer and defence interests in and to the Notes. Moreover, in the circumstances, he was entitled to production of the Notes. An accused's right to make full answer and defence is violated if the accused is entitled to production of material, but that material is not available for production. The accused need show no prejudice to establish this violation. Since the Notes were not produced, Carosella's right to make full answer and defence was violated.

(C) A stay is an appropriate remedy for a violation of a *Charter* right only in the "clearest of cases." When the *Charter* violation concerns a failure to produce records, factors relevant to the application of the "clearest of cases" standard include (a) the prejudice caused to an accused by the unavailability of the records; and (b) whether continuing the prosecution would cause irreparable prejudice to the integrity of the judicial system. Sopinka J. found that Carosella suffered significant prejudice because of the absence of the Notes. Furthermore, Sopinka J. found that the relationship of the Centre to the province and the Centre's actions would cause the continuation of the prosecution to undermine confidence in the system of justice. A stay was the appropriate remedy, and Ouellette J.'s order was upheld.

This comment shall discuss these elements of Sopinka J.'s judgment in turn. The complexities besetting each stage of the analysis are daunting. Unfortunately, Sopinka J.'s decision is not a model of analysis — indeed, that may be the primary difficulty

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[11] The *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) [hereinafter the *Charter*]; *Carosella*, *supra* note 1 at 298, 313 (paras. 13, 62).

[12] *R.* v. *Carosella* (1995), 102 C.C.C. (3d) 28 (Ont. C.A.).

with the case. L'Heureux-Dubé J.'s dissent is far more careful and analytical than the majority judgment. Sopinka J. fails to discuss, either properly or at all, many of the important matters raised by L'Heureux-Dubé J. It may be that had Sopinka J. engaged the argument more carefully, the result of the case would have been different.

A. APPLICATION OF SECTION 7 OF THE *CHARTER*

An initial difficulty lies with the application of s. 7 *in limine*. Certainly Carosella's liberty interests were engaged, since he faced imprisonment on conviction. But why should the *Charter* apply to the actions of the Centre? Sopinka J. did not deal with this issue. L'Heureux-Dubé J. noted that Sopinka J. did not claim that the relationship of the Centre to the state made it, in effect, a branch, arm, or agent of the state, or that the Centre's actions were "governmental actions" under s. 32 of the *Charter*.[13] L'Heureux-Dubé J. assisted the majority by identifying the basis for the application of the *Charter*: "Essentially ... the *Charter* is engaged by the fact of prosecution itself."[14] That is, prosecution is state action. Carosella was coercively subjected to state-sponsored litigation processes, conducted by and on behalf of the state, and faced penal mechanisms operated by the state. Carosella's claims of *Charter* violations were made in the context of state compulsion. Regardless of the merits of Carosella's claims respecting the Notes, the state was sufficiently involved in the proceedings against him to entitle him to advance arguments under s. 7 of the *Charter*.

B. FULL ANSWER AND DEFENCE AND *O'CONNOR*

The next puzzle was how Carosella could claim a violation of his right to make full answer and defence based on the loss of the Notes, when the Notes had formed no part of the case to be answered, the Centre had owed no obligation to Carosella to make the Notes, the contents of the Notes could not be ascertained, and the Notes no longer existed by the time the trial would have commenced. The element of Sopinka J.'s position addressing these matters had four main aspects:

(i) the Notes did exist, and their existence allowed Carosella's rights to "attach" to the Notes;

(ii) the concept of "fullness" inherent in the right to full answer and defence has a very broad scope — broader than was allowed in the interpretation offered by L'Heureux-Dubé J.;

(iii) the *O'Connor* decision applies to limit the scope of accuseds' interests in records potentially containing evidence; and

(iv) the *O'Connor* tests, suitably modified, were satisfied in this case.

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[13] As will be seen below, Sopinka J. considered the relationship of the Centre to the province to be relevant to the determination of the appropriate remedy.

[14] *Carosella, supra* note 1 at 316 (para. 70).

1. The Notes Did Exist

While the Centre may have been under an obligation to maintain records, that obligation was not owed to the accused, the prosecution, or the Court.[15] The Centre might not have made any records at all. Had it failed to make records, one might suggest that the failure would have been no more significant than the failure of a video camera-toting passerby to make a videotape recording of a crime in progress.[16] The Centre, of course, did make records, but they were not passed on to the police or the Crown. One might argue that, in effect, the situation was just as if the Centre had made no records at all. Why should Carosella's position be any different than if no records had been made? L'Heureux-Dubé J. asked this very question: "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 evidence has been destroyed be any different?"[17] Sopinka J. did not deal with this question, but the position he implicitly adopted may be defended.

To begin with, the Notes did exist. All could agree on that. *Carosella* did not involve speculation about records that were never made. For the majority, the physical existence of the Notes was overlaid with a normative principle, concerning the reach of full answer and defence rights. An accused's right to full answer and defence respecting third party records is not constituted only upon the granting of an order for production, or, moving the timing back slightly, only upon the facts as they existed at the time of an application for a production order. Rather, full answer and defence rights may be constituted as soon as potentially relevant evidence comes into existence. The intersection of fact and principle creates the legal possibility that an accused may have rights respecting "lost" records, records that no longer exist at the time of an application for *Charter* relief.

As a matter of constitutional principle, Sopinka J.'s implicit approach is correct. Our constitutional rights do not arise only when courts recognize them, or only at the time of judicial proceedings. Constitutional rights come first; judicial recognition of those rights follows. Furthermore, our rights may be engaged, even though we do not realize it; it is not (or is not always) a condition of our being entitled to make a rights-claim that we were aware of the facts giving rise to the claim, at the time those facts

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[15] *Ibid.* at 315 (para. 67).

[16] *Carosella*, though, did not concern the situation where records never existed, but should have. It may be that a future case will extend full answer and defence rights to this situation too. Thus, in *R.* v. *Buric* (1997), 114 C.C.C. (3d) 95 (S.C.C.), the police failed to videotape or otherwise record interviews with an important (but credibility-impaired) Crown witness. This failure, by itself, was held not to engage *Carosella*. Sopinka J., writing for the Court in a one-paragraph dismissal of the accused's appeal, did leave open the possibility that had the failure to make a record been deliberate, *Charter* relief might have been available:

> We would only add that reliance was placed on our decision in *R.* v. *Carosella* ... which was decided by this Court after the judgment of the Court of Appeal in this case was rendered. In our view, the principles in that case have no application by reason, *inter alia*, that there is no finding by the trial judge nor any evidence which would justify the conclusion that the police failed to make a record deliberately to avoid production (at 96 (para. 1)).

[17] *Carosella*, *supra* note 1 at 327 (para. 103).

occurred.[18] Carosella should not have been debarred from making a constitutional claim just because the state of affairs in which his rights allegedly arose no longer existed at the time of judicial assessment of his rights claims, or just because he had not known of the Notes while they existed.

L'Heureux-Dubé J. could have conceded that the fact that the Notes did exist was constitutionally significant, in that their existence could be relevant to the evidential foundation for a claimed violation of the right to make full answer and defence. But she might have pointed out there is a logical distance between the fact that the Notes existed (and the claim that Carosella's rights "attached" to the Notes) and the judgment that Carosella was entitled to the Notes, and a further distance to the judgment that the absence of the Notes violated Carosella's right to make full answer and defence. Why should we think that Carosella was entitled to the Notes? Why should we think that their absence violated his constitutional rights? To answer these questions, the scope of the "fullness" of full answer and defence must be plumbed.

2. Full Answer and Defence

The dissent and the majority could have agreed that where records that did exist have been lost, there is always a risk that the records were important and that a result reached at trial could be wrong because of the absence of the records. The dissent and the majority differed, though, on the assessment and allocation of the risk of wrongful conviction. Their differences were founded, ultimately, on their opposed theoretical commitments.

a. The Dissent

Ultimately, the dissent had a "contextual" perspective on the rights of accuseds. The dissent viewed the accused as situated in legally-defined relationships with other criminal justice system participants, including the police, the Crown, complainants, and record-keepers. In a context of finite resources and imperfect human institutions, criminal justice processes have been designed to ensure that accuseds receive fair trials. The dissent was satisfied with the pre-*Carosella* operations of criminal justice processes. Admittedly, the processes were not perfect; wrongful convictions could result. Accuseds have been institutionally compensated for those imperfections, however. L'Heureux-Dubé J. offers as an example the high onus of proof allocated to the Crown, which compensates the accused for practical difficulties in responding to the Crown's case.[19]

The dissent implicitly trusted criminal justice processes to unearth all materials pertinent to a criminal prosecution, and implicitly trusted complainants and other witnesses not to withhold any such materials. Lost records could be safely assumed to

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[18] For example, a person might legitimately claim that his or her rights were violated because of events occurring while that person was asleep or in a coma; or because of an interference with property that was not detected until after the interference had ceased.

[19] *Ibid.* at 328 (para. 105).

be irrelevant. The accused should therefore have the burden of establishing that lost records would have affected the result at trial in the accused's favour. If the accused could not discharge that burden, the accused could be assumed to have had access to all necessary resources to defend himself or herself, and the result reached at trial in the absence of the records could be safely assumed to have been a proper result. If the dissent bore any distrust, it was toward accuseds, who seem to have been presumed to have hostile, illegitimate strategies respecting other participants in the justice system. Accuseds must be kept from engaging in "fishing expeditions" designed to land materials impairing the credibility of witnesses on immaterial matters.[20]

Thus, L'Heureux-Dubé J. held that the courts should recognize a violation of the right to make full answer and defence only if the accused could show, on a balance of probabilities, that he or she has suffered prejudice to his or her ability to make a defence. In this case, Carosella would have had to have shown, on a balance of probabilities, that the unavailability of the Notes in fact created a real likelihood of prejudice or caused actual harm to his defence. L'Heureux-Dubé J. wrote that "[i]n my view, for [Carosella] to suggest that 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."[21] She reiterated this point, with emphasis: "*a measuring of actual prejudice is necessary to demonstrate that this right has actually been affected.*"[22]

Substantial case authority supported L'Heureux-Dubé J.'s approach.[23] Indeed, Hutchison has commented that the line of authority relied on by L'Heureux-Dubé J. had been thought to be the settled law of "lost evidence applications" not only for Ontario, or Canada, but the continent.[24] The Canadian authorities had turned, in part, on a characterization of rights to full answer and defence as "derivative" or "non-autonomous" rights.[25] This characterization was based on the observation that full answer and defence (and, *a fortiori*, disclosure and production) are not expressly referred to in the *Charter*, but are implied, at a distance, from the express s. 7 right not to be deprived of life, liberty, or security of the person, except in accordance with the principles of fundamental justice. The derivative nature of these rights was considered to entail that a "simple breach" of these rights did not entitle an accused to a remedy; prejudice had to be shown.

In L'Heureux-Dubé J.'s estimation, the burden on the accused to show actual prejudice should not be lowered. The accused is not entitled to a "perfect" trial, only

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20 *Ibid.* at 331 (para. 114).

21 *Ibid.* at 317 (para. 75).

22 *Ibid.* at 325 (para. 99) [emphasis in original].

23 *Ibid.* at 318-22 (paras. 76-80, 82-86).

24 S. Hutchison, "Issues in Criminal Evidence, Procedure and the *Charter*: An Update on 1996-97 Developments" (Toronto: Ontario Court of Justice (Gen. Div.) Spring Seminar, 9 May 1997) at db gold (QL), RP/97- 026, paras. 2-3, and note 2. See, for example, *R.* v. *D.A.* (1993), 76 C.C.C. (3d) 1 (Ont. C.A.); and *R.* v. *MacDonnell* (1997), 114 C.C.C. (3d) 145 (N.S.C.A.), rev'd. (1997), 114 C.C.C. (3d) 153 (S.C.C.) [hereinafter *MacDonnell*].

25 *Carosella, supra* note 1 at 326 (para. 100).

a "fair" one.[26] By implication, a fair trial is achieved under the *status quo*. Lowering the accused's burden would upset the equilibrium of rights and resources constituted under current criminal justice processes. An accused's rights would be excessive, relative to the position of complainants, witnesses, and other criminal justice system actors. The accused would have an "unfair" advantage. Furthermore, lowering the burden would have chaotic results: "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;"[27] "[s]etting the threshold for a finding of an unfair trial too low would lead to innumerable stays."[28]

b. The Majority

The majority joined issue with the dissent on multiple levels.

At the most abstract level, the majority did not adopt a contextual perspective, but focused on the more isolated relationship between the individual and the state. The majority adopted the liberal view that state interference with an individual's life, liberty, and security of the person should be restricted to the greatest extent possible, so individuals should be granted access to the greatest scope of resources available to fend off the state. The scope of full answer and defence should be judged from the standpoint of an accused facing a prosecution. Whether the ability to answer and defend is "full" depends on whether the accused has access to all resources that may be relevant to meet the case against the accused. The boundaries of "fullness," then, are defined by the case against the accused. The majority, moreover, was less trusting than the dissent. The majority was not as ready as the dissent to assume that all information has been provided to the accused, or that all complainants and witnesses have been fully forthcoming. Lost records could not be safely presumed to be irrelevant. The majority did not go so far as to presume a lack of trustworthiness or to institutionalize mistrust; but because the majority had a lower expectation of reliability, it considered that accuseds should have a lower standard of proof on the issue of whether lost records were necessary to make full answer and defence than the standard advocated by the dissent.

Sopinka J. opposed the notion that full answer and defence rights are violated only if prejudice is shown. In his view, this approach confuses right and remedy. The issue of the degree of prejudice suffered by an accused should not be assessed in the context of determining whether a *Charter* right has been violated, but in the context of determining the appropriate remedy for the violation of the *Charter* right.[29]

On the case authority level, Sopinka J. rejected the "derivative" characterization of the rights to full answer and defence and the requirement of proof of prejudice that accompanied it. He held that the rights to full answer and defence, including the rights

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[26] *Ibid.* at 312, 317 (paras. 59, 74).
[27] *Ibid.* at 321-22 (para. 85).
[28] *Ibid.* at 323 (para. 89).
[29] *Ibid.* at 302 (para. 27).

to disclosure and production, are of equal constitutional stature to the express *Charter* rights. The "unexpressed" rights are not "derivative" rights, but are "components" of fundamental justice.[30] Hence, violations of the right to full answer and defence, including the rights to disclosure or production, are violations of the accused's constitutional rights, without a requirement that the accused also show prejudice. Sopinka J. pointed out, by way of analogy, that the Supreme Court has read into the s. 10(b) right to counsel the requirements to provide information concerning Legal Aid and *Brydges* duty counsel. If the accused's informational entitlements are violated by the simple non-provision of the requisite information, the accused's *Charter* rights have been violated, without any necessity for the accused to demonstrate prejudice as a result of the non-provision of information. The violation lies in the failure to respect the accused's constitutional rights, not in the severity of the violation of the accused's rights.[31]

Sopinka J. did not respond directly to the contention that the majority position gave accuseds an unfair allocation of rights, given the position of other criminal justice system participants. Sopinka J. could have responded to this contention by pointing out that the accused's "equilibrium" is differentially affected by prosecution. The position of others fades away from analytical prominence, because the accused has been singled out for potential punishment. The accused, and no one else, is put in the special position of facing the loss of life, liberty, and security of the person. The actions of the state, in selecting the accused for differential treatment, dictate that the accused's interests should have priority in a fairness analysis.

Sopinka J. did counter L'Heureux-Dubé J.'s notion of fairness with one of his own. Operating from the perspective of the accused facing criminal charges, Sopinka J. considered the imposition of a burden of establishing actual prejudice to be unfair to accuseds. The burden would be unfair, because accuseds lack the information that they would require to satisfy the burden; the information that they would require to satisfy the burden is the information that they do not have and are seeking.[32]

Sopinka J.'s implicit answer to L'Heureux-Dubé J.'s floodgates argument lies in the application of *O'Connor*. Applied properly, the *O'Connor* tests will limit claims respecting lost documents. It should be noted that this move by Sopinka J. was an innovation. Through this move, he linked the "lost evidence" authorities with the third party production authorities. These lines of authority had previously been distinct.[33]

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30 *Ibid.* at 306 (paras. 37-38).

31 *Ibid.* at 306 (para. 38).

32 *Ibid.* at 301-304 (paras. 26, 29-31).

33 Hutchison, *supra* note 24 at para. 7.

3. Limiting Full Answer and Defence: *O'Connor's* Two-Stage Test

The joint decision of Lamer C.J.C. and Sopinka J. in *O'Connor* established a two-stage test for the production of third party records to accuseds.[34] The first stage requires the accused to adduce some evidence from which the judge may infer that there is a reasonable possibility that the record in question contains relevant information.[35] Some comments on this first stage test are as follows:

(i) Relevance means "logically probative of a fact-in-issue" in the litigation, not merely "useful to the defence" (the test for Crown disclosure).[36]

(ii) "Facts-in-issue" include not only the "material issues" in the case — the "unfolding of events" — but the testimonial competence of witnesses, the credibility of witnesses, and the reliability of evidence.[37] Neither the *O'Connor* majority nor Sopinka J. in *Carosella* restricted the scope of credibility to credibility concerning the material issues; hence, contrary to L'Heureux-Dubé J.'s view, records are relevant if they relate to the credibility of witnesses "at large."[38]

(iii) An accused need not show that the information in the record *is* relevant to the fact-in-issue; the accused need only show that the information *may be* relevant, or that there is a reasonable possibility that the information is relevant.

(iv) The standard of proof allocated to the accused to show the reasonable possibility of relevance is "not onerous." The low standard is the product of the intersection of practical realities and the right to make full answer and defence. An accused may have evidence concerning the contents of a record — whether from

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34 Cory, Iacobucci, and Major JJ. concurred with Lamer C.J.C. and Sopinka J. respecting these procedural issues. Parliament responded to *O'Connor* with Bill C-46, which came into force on 12 May 1997 as S.C. 1997, c. 30, adding, *inter alia*, new ss. 278.1 - 278.89 to the *Criminal Code* [hereinafter Bill C-46], which governs not only third party production (as did *O'Connor*), but Crown disclosure (*Criminal Code*, s. 278.2). The constitutionality of Bill C-46, it should be noted, is questionable (D.M. Paciocco, "Bill C-46 Should Not Survive Constitutional Challenge" (1997) 18:2 *Criminal Lawyers Association Newsletter* 25 (reprinted from (1996), 3 S.O.L.R. 185)).

35 *Carosella*, *supra* note 1 at 307 (para. 42). The application for production is made before the trial judge following the service of a *subpoena duces tecum* on the record holder and the provision of notice to all interested parties. *O'Connor*, *supra* note 2 at 18-19 (paras. 19, 22). Bill C-46 establishes rules concerning the timing of applications for production, the form and contents of application documents, service and notice, and the form of subpoena to be used (*Criminal Code*, s. 278.3).

36 *O'Connor*, *supra* note 2 at 18-19 (paras. 19, 22).

37 *Ibid.*

38 *Carosella*, *supra* note 1 at 308-309, 330-31 (paras. 46, 113); *O'Connor*, *supra* note 2 at 19 (para. 22). "The law of evidence is replete with examples of rules that find relevance and hence allow for proof of the prior antecedents *(sic)* of witnesses.... It simply cannot be said that third party records are not likely to be relevant when, given their general nature, they are likely to contain information about the general credibility of the complainant" (Paciocco, *supra* note 34 at 27). For a retrograde and contrary view, see *R.* v. *O.(D.A.)* (1997), 114 C.C.C. (3d) 374 at 379 (para. 20) (B.C.C.A.), McEachern C.J.B.C. Bill C-46, however, provides that credibility "at large" is not, by itself, a ground for a finding of likely relevance (*Criminal Code*, s. 278.3(4)(e)).

Crown disclosure, preliminary inquiry evidence, or third parties — showing that the records contain relevant information. More probably, an accused has no evidence respecting the contents of records, precisely because the accused has never seen them, and no one will tell the accused about them. If the "likely relevance" standard were "onerous," many accuseds would be in the impossible position of having to provide information about records, when what they are seeking is just that information.

(v) Because of the practical difficulties attending proof of the contents of records, evidence and inferences respecting "likely relevance" may be indirect and circumstantial. The circumstances surrounding the creation of records may provide a basis for the inference that the records contain relevant information.

The non-existence of a previously-existing record at the time of the application creates practical but not conceptual difficulties. Practically, it may simply be more difficult for an accused to tender proof respecting a "lost" document than respecting one that continues to exist.

If the accused satisfies the first stage test, the accused has demonstrated that he or she has an interest in the record in question. One might say that the accused has demonstrated that his or her right to full answer and defence has "attached" to the record. At this point, though, the accused's right has not been "perfected." The accused has not established entitlement to the record, or entitlement to its production. If an accused could only satisfy the first stage test, but the record could not be produced, the accused could not claim a violation of his or her rights. The accused would have established no entitlement to what was lost.

The accused's entitlement to the record is determined at the second stage of the *O'Connor* analysis. If the accused satisfies the first stage test and the record is in existence, the judge should order the record to be produced to the court. The judge should then review the record, and, to determine whether it should be produced to the accused, balance the interests of the accused against the interests of the complainant in the record. In this balancing, the following factors should be considered:

(i) the extent to which the record is necessary for the accused to make full answer and defence;

(ii) the probative value of the record;

(iii) the nature and extent of the reasonable expectation of privacy vested in that record;

(iv) whether production of the record would be premised on any discriminatory belief or bias; and

(v) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by the production of the record.[39]

The first two factors focus on the accused's interests, the latter three on the complainant's interests. Two factors not considered at this balancing stage are the extent to which production of the record would frustrate social interests in encouraging the reporting of sexual offences and the acquisition of treatment by victims, which should be considered by the judge when imposing conditions on the production of the records; and the effect of production (or non-production) on the integrity of the trial process, which should be considered by the judge when determining whether records that have been produced should be admitted as evidence.[40] If the judge finds that the record should be produced, at that point the accused's full answer and defence right can be said to have be "perfected." The accused now has an entitlement respecting the record.

The second stage test must be slightly amended where the record has been lost before the application. The issue is not whether the balancing does favour the accused, but whether the balancing would have favoured (or did favour) the accused at the time that the record was lost. The time of disappearance must be the key time. If, at that time, balancing would not have favoured production, the accused could not be said to have lost anything to which he was entitled.

4. Full Answer and Defence, *O'Connor* and the Notes

The dissent could concede that the *O'Connor* tests should be applied to the Notes, but still deny that those tests were satisfied in the circumstances. L'Heureux-Dubé J. denied that the Notes had been shown to contain likely relevant information or that the balancing test was satisfied; Sopinka J. considered both tests to have been satisfied.

a. Likely Relevance

The Notes had ceased to exist. No one could recall their contents. Carosella could not provide any direct evidence respecting them. How, then, could Carosella show that there was a reasonable possibility that the Notes contained relevant information? A significant split emerged between the majority and the dissent on the approach to this issue. L'Heureux-Dubé J. emphasized the weakness of the evidential support for a finding of likely relevance. Her focus was on evidence directly concerning the contents of the Notes. Sopinka J. imposed much less onerous evidential requirements. He was

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39 *O'Connor*, *supra* note 2 at 23-24 (para. 31).

40 *Ibid.* at 24 (para. 32). Bill C-46 modifies the second stage of *O'Connor*. It requires the judge to perform the balancing analysis before requiring the production of the records to the judge for review (*Criminal Code*, s. 278.5). It adds back into the balance the matters excluded by *O'Connor* — the social interests in encouraging the reporting of sexual offences and the acquisition of treatment by victims, and the effect of production on the integrity of the trial process (*Criminal Code*, ss. 278.5(2)(f), (g), and (h)). Bill C-46 also requires the judge to perform the balancing analysis again before requiring production of the documents to the accused (*Criminal Code*, s. 278.7).

less concerned with the particular contents of the Notes than with the type of circumstances in which the Notes arose.

In L'Heureux-Dubé J.'s estimation, "[t]here is no basis whatsoever to conclude that [the Notes] were 'likely relevant.'" L'Heureux-Dubé J. considered the following:

(i) No one could recall, when giving testimony, the contents of the Notes. Romanello did recall that her conversation with the complainant "related to" the alleged sexual assault, but she could not recall what was said.

(ii) Romanello was not cross-examined in detail in the *voir dire* respecting her usual interview practices — which, as evidence of habit, might have been evidence of the nature of the interview with the complainant.[41]

(iii) Romanello's testimony in the *voir dire* was that the Notes were only a summary, as opposed to a verbatim account of the interview, and that the complainant never reviewed the Notes to confirm their accuracy.[42]

(iv) In her statement, the complainant told the police only that she had spoken with Romanello respecting the "procedure to be taken to lay charges against Nick Carosella." She did not say that she described the alleged incidents in detail to Romanello.[43]

(v) The complainant was never questioned about the nature of the discussion with Romanello.

(vi) In the preliminary inquiry, the following exchange occurred:

> Q [defence counsel]: "... 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 [complainant]: "Yes, sir."[44]

L'Heureux-Dubé J. observed that the complainant's answer was ambiguous (as was the question). She may have been referring to telling the story or to Romanello taking notes. This ambiguous exchange was the only evidence that the complainant did tell Romanello the "whole story." "As this was the *only* reference to the substantive details of the counselling sessions," L'Heureux-Dubé J. continued, "I think it takes a major leap of faith to arrive at any conclusion about what was actually related."[45]

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41 *Carosella, supra* note 1 at 333-34 (para. 119); on the issue of habit as evidence of conduct on a particular occasion, see *R.* v. *Watson* (1996), 108 C.C.C. (3d) 310 (Ont. C.A.), Doherty J.A.

42 *Carosella, supra* note 1 at 333-34 (para. 119).

43 *Ibid.* at 332 (para. 115).

44 *Ibid.* at 332 (para. 116).

45 *Ibid.* at 333 (para. 117).

In astonishing contrast, Sopinka J. claimed that there was "abundant evidence" that the Notes contained information that was likely relevant.[46] Sopinka J. stated that the complainant told Romanello the "whole story"[47] (evidently taking L'Heureux-Dubé J.'s "leap of faith"), and referred to four further potential circumstantial indicators of the presence of likely relevant information. First, Romanello testified that the interview "related to" the alleged assault. Second, the interview lasted about one and three-quarter hours.[48] Third, the interview was the complainant's first known discussion of the incidents in question, and immediately preceded her lodging her complaint with the police. Fourth, the Notes were made by Romanello at the time of her interview with the complainant.[49] The timing of the creation of the Notes in relation to the dates of the alleged offences (the mid-1960s) and the lodging of the complaints (shortly after the interview with Romanello in 1992), was a circumstantial indicator of likely relevance described in *O'Connor*. In the case of "historical" charges, where a record is made shortly before charges are laid, there is a practical "presumption" (in the sense of "natural inference") of relevance: "There is a possibility of materiality where ... in cases of historical events ... [there is] a close temporal connection between the creation of the records and the decision to bring charges against the accused."[50]

Sopinka J. identified facts-in-issue respecting which the Notes might have contained relevant information. The Notes might have shed light on the "unfolding of events"; contained information bearing on the complainant's credibility; contained information inconsistent with the complainant's testimony; revealed "the state of the complainant's perception and memory"; revealed "that some of the complainant's statements resulted from suggestions made by [Romanello]"; pointed Carosella "in the direction of other witnesses"; or demonstrated, when considered with other evidence in the case, that Carosella "would not have had to testify at trial, or that he would have had to mount a defence."[51]

The different approaches of the dissent and majority to the likely relevance issue reflected their different theoretical commitments. Since the dissent presumed the adequacy of the system and the perfidy of accuseds, accuseds should be faced with a substantial barrier to the making of successful applications respecting lost evidence. Presumptively, accuseds do not need the information lost; presumptively, accuseds have no legitimate use for the information. On the other hand, from the standpoint of the accused facing the powerful state, making the likely relevance burden too onerous would allow illegitimate convictions and state interferences with liberty. If every state intrusion on the individual is, to some degree, suspect, then there is always a small probability that information exists that has been neither disclosed nor produced that

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46 *Ibid.* at 308 (para. 44).

47 *Ibid.* at 295 (para. 4).

48 L'Heureux-Dubé J. remarked that "[w]hile 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 this is a course which should be followed" (*ibid.* at 335 (para. 121)).

49 *Ibid.* at 308 (para. 44).

50 *O'Connor*, *supra* note 2 at 21-22 (para. 26).

51 *Carosella*, *supra* note 1 at 308-309 (paras. 44-46).

could aid the accused. The accused should not be blocked from finding this information.

One might suggest that Sopinka J.'s findings do not rest only on his liberalism and suspicion of state action, but betray assumptions hostile to women. From the mere fact that the complainant spoke with Romanello, Sopinka J. was apparently willing to infer that information was disclosed that was harmful to the prosecution and useful to the defence. Sopinka J. seems to have presumed that the complainant's testimony differed from her discussions with Romanello, and that the complainant may not have disclosed all relevant information in her testimony. Sopinka J. apparently came close to assuming that the complainant was unreliable, for no better reason than that she was a complainant. Moreover, Sopinka J. impugned Romanello, without cause, by intimating that she contaminated the complainant's testimony.

Despite these appearances, Sopinka J.'s decision was not anti-woman. Sopinka J. was right not to assume that the Notes would only have benefited the complainant, or that the complainant would testify consistently with the Notes. These assumptions would violate the presumption of accuseds' innocence protected under s. 11(d) of the *Charter*, by assuming that complainants are credible, and by imposing a burden on accuseds to raise doubts about complainants' testimony.[52] Since there could be no presumption of the complainant's credibility, given the general circumstances of the Notes, an inference could be drawn that the Notes contained information that was probably relevant to her testimony. Moreover, Sopinka J.'s speculations about the possible uses of the Notes were merely meant to show the sorts of facts-in-issue to which the contents of the Notes might have been relevant. He did not assert that any of his speculations reflected the reality of the Notes.[53] In fact, Sopinka J.'s comments were only a recitation of illustrative uses of information contained in third party records drawn from the *O'Connor* decision.[54]

While Sopinka J.'s decision was not animated by anti-woman sentiments, the fact remains that it does set the standard for proof of likely relevance at a very low level. As *O'Connor* warned and this case demonstrates, the standard is not "onerous." Some consolation may be drawn from the realization that the likely relevance test is only the first test that the accused must satisfy. For an accused to claim entitlement to records, the balancing test must also be resolved in the accused's favour.

b. Balancing

The balancing factors focusing on the accused's interests did not run strongly in Carosella's favour. The probative value of the Notes was low. "[T]hese notes would have constituted evidence of the lowest possible quality," wrote L'Heureux-Dubé J.[55] L'Heureux-Dubé J. and Sopinka J. agreed that even were they available, the Notes

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52 *R.* v. *W.S.* (1994), 90 C.C.C. (3d) 242 (Ont. C.A.), Finlayson J.A.

53 *Carosella*, *supra* note 1 at 308 (para. 45).

54 *O'Connor*, *supra* note 2 at 22-23 (para. 29).

55 *Carosella*, *supra* note 1 at 335-36 (para. 125).

could not have been directly used to cross-examine the complainant, since the Notes were not made or vetted by her.[56] It is true that if the complainant had testified inconsistently with the Notes, she could have been confronted with the inconsistency; if she had denied the inconsistency, the Notes might have been proved through Romanello.[57] L'Heureux-Dubé J. observed, however, that the probative value of any inconsistency would have been low, since the Notes were merely a summary, not a verbatim account of the interview.[58]

On the necessity issue, L'Heureux-Dubé J., with evident exasperation, stated that "I am at a loss to see how [the absence of the Notes] could have occasioned [Carosella] any prejudice whatsoever, especially given the evidence at the *voir dire* and the multitude of other materials available to cross-examine the complainant."[59] In particular, Carosella had materials with which he could test the credibility of the complainant. Carosella had copies of the complainant's statements to the police, the first of which was made shortly after speaking with Romanello.[60] Carosella had the opportunity to cross-examine both the complainant and Romanello in the preliminary inquiry.[61]

Sopinka J. did not confront L'Heureux-Dubé J.'s view of the record in the balancing context, presumably because he had found that the balancing test had been satisfied in Carosella's favour by the complainant's waiver of confidentiality by consenting to the Production Order.[62] When discussing the prejudice relevant to the stay remedy, however, Sopinka J. indicated that he did not perceive L'Heureux-Dubé J.'s alternatives to be real alternatives. The Notes were the only records not created as a result of the investigation of the complaint. Romanello had claimed memory loss respecting the Notes, and so could not provide information concerning the Notes' contents. The complainant, he observed, would not be likely to admit to discrepancies between her testimony and the contents of the Notes.[63] He held that "any possibility of contradiction of the complainant by reference to her previous account was destroyed."[64]

Sopinka J. considered the factors focusing on the complainant's interests to be no obstacle to balancing in favour of Carosella. The peculiar facts of the case assisted Carosella. Sopinka J. could effortlessly conclude that the second stage test was satisfied: "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

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56 *Ibid.* at 308, 335 (paras. 45, 125); see the *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 10; and *R.* v. *Cherpak* (1978), 42 C.C.C. (2d) 166n (Alta. S.C. (A.D.)), leave to app. to S.C.C. ref'd. (1978), 42 C.C.C. (2d) 166; *R.* v. *Handy* (1978), 45 C.C.C. (2d) 232 (B.C.C.A.).

57 *Carosella, supra* note 1 at 308 (para. 45).

58 *Ibid.* at 335-36 (para. 125).

59 *Ibid.* at 335 (para. 122).

60 *Ibid.* at 336 (para. 126).

61 *Ibid.*

62 *Ibid.* at 307 (para. 41).

63 *Ibid.* at 311 (para. 54).

64 *Ibid.*

and the Crown consented to production."[65] The Centre presumably did not consent to the production of the Notes but only to the production of the pertinent file, which, at the time of consent, lacked the Notes; its lack of consent, though, was immaterial. The interests of the public, represented through the Centre, were not to be addressed in the second stage balancing, but when considering the types of conditions to be imposed on production[66]

Sopinka J.'s conclusion that the Crown and complainant contemplated and acceded to the production of the Notes through the Production Order was probably accurate. There is an issue, however, as to whether the waiver of privilege occurred at the proper time. Where documents have been lost, the issue should be whether the accused was entitled to those documents at the time of loss, not later. Again, on the peculiar facts, Carosella probably could have satisfied the balancing test at the time the Notes were destroyed. The complainant had indicated to Romanello before the Notes were created that it would be "all right" for the Notes to be produced. Sopinka J. found that she would have consented to production.[67]

The majority's view prevailed. The *O'Connor* tests had been satisfied and Carosella's right to make full answer and defence had been violated. But with this battle won, there was still the war to be lost. Many an accused has made out a *Charter* violation, only to be left without significant remedy. Over the protestations of the dissent, however, Carosella succeeded in securing the most potent remedy, a stay.

C. THE STAY REMEDY

If an accused's *Charter* rights have been violated, the accused may apply for a remedy under s. 24 of the *Charter*. Subsection 24(1) confers on the court a discretionary power to provide "such remedy as the court considers appropriate and just in the circumstances."[68] Courts have a wide range of remedies that could apply respecting lost documents, including adjournments, the exclusion of evidence tendered by the Crown which was closely integrated with the missing material, the restriction of the inferences to be drawn respecting particular issues, and, most drastically, a stay of proceedings against an accused.[69] Carosella argued that a stay was the appropriate and just remedy in his circumstances. Ouellette J. and the majority of the Supreme Court agreed. The dissent did not.

Both the majority and dissent understood a judicial stay to be an extraordinary remedy that should only be granted in the "clearest of cases." The Supreme Court has recognized two main types of "clear cases" justifying a stay — first, cases where the prejudice arising from a *Charter* violation cannot be remedied; and second, cases where

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65 *Ibid.* at 307 (para. 41).

66 One might reflect that the Centre did damage its own position by consenting. It was too clever by half.

67 *Carosella*, *supra* note 1 at 307 (para. 41).

68 *Ibid.* at 309 (para. 48).

69 See *ibid.* at 337 (para. 131).

irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.[70] The latter basis for a stay, where a prosecution "undermines the moral integrity of the system," is referred to by L'Heureux-Dubé J. as the "'residual category' of abuse of process."[71] The majority and dissent differed on whether this case was one of the "clearest of cases." The majority held that Carosella's circumstances justified a stay; the dissent did not. Sopinka J.'s position had three bases.

Sopinka J. first applied the general principles of appellate review of trial courts' discretionary remedies. Generally, an appeal court should extend deference to a judge's exercise of discretion. An appeal court should not interfere with a judge's exercise of discretion, just because it would have exercised the discretion differently. An appeal court is justified in reversing the judge's determination only where the judge has misdirected himself or herself, or where the judge's decision is so clearly wrong as to amount to an injustice.[72] Sopinka J. held that Ouellette J. had neither misdirected himself nor granted an order that created an injustice. Ouellette J. instructed himself in accordance with the "clearest of cases" standard. He properly attended to the relevant considerations. Hence, his order should stand. This was Sopinka J.'s strongest ground for affirming the stay. Sopinka J. went on, however, to claim not only that the stay was a remedy available within the proper ambit of Ouellette J.'s discretion, but that the stay was the right result in the circumstances.

Sopinka J.'s second basis for supporting the stay remedy was his finding that the destruction of the Notes caused irreparable prejudice to Carosella.[73] Sopinka J. agreed with Ouellette J. that credibility was an important issue in the case, as the Crown's case was built on the complainant's credibility. The loss of the documents impaired Carosella's ability to cross-examine the complainant. Hence, the destruction of the Notes was significant.[74] Sopinka J. pointed to additional factors supporting the propriety of the stay remedy: the Notes were the first detailed accounts of the incidents in question; the Notes were the only records not created as a result of the investigation of the complaint; Romanello had no recollection of what was said to her; and "[a]s for the complainant, even if she could recall she would not likely admit that what was said was inconsistent with her present testimony."[75] Sopinka J. found that "any possibility of contradiction of the complainant by reference to her previous account was destroyed."[76] Sopinka J. could detect no alternative remedy that would cure the prejudice caused to Carosella by the loss of the Notes.[77]

L'Heureux-Dubé J. denied that Carosella suffered any prejudice from the absence of the Notes; her analysis of the evidence denying satisfaction of the *O'Connor* tests applied here too. She pointed out a further difficulty with Sopinka J.'s reasoning. He

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70 *Ibid.* at 310, 337 (paras. 52, 130).
71 *Ibid.* at 338 (para. 134).
72 *Ibid.* at 309-10 (paras. 48-51).
73 *Ibid.* at 310 (para. 51).
74 *Ibid.* at 310-11 (para. 53).
75 *Ibid.* at 311 (para. 54).
76 *Ibid.*
77 *Ibid.* at 311 (para. 55).

appeared to consider the same factors on the remedy issue as on the balancing issue. In her view, the consequence would be that whenever an accused could establish satisfaction of the *O'Connor* tests respecting lost records, the accused would automatically be granted a stay: "the finding of a breach in and of itself makes an analysis of prejudice somewhat extraneous."[78] Sopinka J.'s approach, however, can be defended against this form of criticism. Although the same factors (the same evidence) may be considered at two different stages of analysis, it does not follow that if the evidence satisfies the tests applicable at the first stage of analysis, it also satisfies the tests applicable at the second stage. At the first stage, the (bare) fact of violation is at issue; at the second stage — the remedy stage — the severity or extent of the violation is at issue. It is one thing for a person's rights to be violated, another for that violation to be sufficiently serious to warrant the remedy of a stay. Evidence supporting a finding of a violation of constitutional rights may not support a finding that the violation was serious; prejudice is not an inevitable inference from violation. Sopinka J. does not make the remedy stage of analysis of the evidence superfluous.

Sopinka J.'s third basis for supporting the stay remedy was that the facts fell within the "residual category" of abuse of process. Allowing the prosecution to continue in the face of the actions of the Centre would damage the image of the administration of justice. Sopinka J. may have considered the facts relevant to this issue to be the strongest basis for the stay — he wrote that the Centre's conduct distinguished this case from other lost evidence cases.[79] His reasoning on this issue, though, may be the weakest part of his argument. Sopinka J. referred to the links between the Centre and the Ontario government — the Centre received government funding, its activities are scrutinized by the government, it is to develop a close liaison with justice agencies, it is to secure records under its control.[80] The Centre, he claimed, "made a decision to obstruct the course of justice by systematically destroying evidence which the practices of the court might require to be produced."[81] He considered that "[c]onfidence in the system would be undermined if the administration of justice condoned conduct designed to defeat the processes of the court."[82] Given his reference to the links between the Centre and the province, his concern with the type of conduct involved was limited to conduct carried out by persons with a relationship to the state, not to purely private persons.

L'Heureux-Dubé J. denied that the facts fell into the "residual category." To begin with, she argued that the residual category concerns the motives and conduct of the prosecution — including the police, prosecuting authorities, and, in certain circumstances, the complainant — but not the motives of third parties; and "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."[83] In this case, there was no

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78 *Ibid.* at 323 (para. 88).

79 *Ibid.* at 311-12 (para. 56).

80 *Ibid.*

81 *Ibid.*

82 *Ibid.*

83 *Ibid.* at 338 (para. 135) [emphasis in original].

allegation that the police or Crown prosecutors had engaged in any improper action. The Centre was but a witness and third party. L'Heureux-Dubé J. rejected out-of-hand the contention that the Centre's links to the government constituted it as a sort of arm of government. This suggestion, in her view, could not be "seriously entertained."[84] Hence, the conduct of the Centre was irrelevant to a "residual category" stay analysis.

Even if the Centre's conduct were relevant, L'Heureux-Dubé J. held that its conduct was not so "manifestly inappropriate"[85] as to amount to an abuse of process. The Centre did not single out Carosella's file for shredding. It had no *animus* against him.[86] The Notes were shredded in the course of a general records management policy, designed to protect clients' privacy.[87] The Notes were not the subject of a subpoena or court order.[88] The Centre was under no obligation to make or preserve records:

> The Centre created notes for its own purposes. It was under no obligation to do so. Once it did, it had a legitimate property interest in them which it was able to do with as it saw fit. To suggest that the court should be able to enforce a maintenance obligation to property which *might one day be needed* by the courts is a hefty burden indeed.[89]

Sopinka J. had no answer to L'Heureux-Dubé J.'s points. This may be because, at least on this point, she was right.

III. SIGNIFICANCE AND IMPLICATIONS OF THE *CAROSELLA* DECISION

Carosella should be considered in relation to (A) Bill C-46, (B) its lessons for defence counsel, and (C) its implications for record-keepers.

A. EFFECT OF BILL C-46: PRODUCTION OF RECORDS IN SEXUAL OFFENCE PROCEEDINGS

Bill C-46 should not affect *Carosella* applications. The new provisions relate to the production of records, as indicated in ss. 278.2(1) and 278.3(1): a *Carosella* application does not concern production, but a remedy for a violation of the right to make full answer and defence — the relevant records have been lost, and so cannot be produced. Furthermore, under s. 278.2(2), the new provisions apply "where a record *is in the possession or control of any person*": but lost records are in no one's possession or control. Hence, Bill C-46 does not affect the rules established in *Carosella*; in particular, the *O'Connor* tests folded into the *Carosella* analysis will survive Bill C-46. The *Carosella* rules will be with us, at least until Parliament passes anti-*Carosella* legislation that survives *Charter* scrutiny.

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84 *Ibid.* at 340 (para. 139).
85 *Ibid.* at 340 (para. 141).
86 *Ibid.* at 340 (para. 142).
87 *Ibid.*
88 *Ibid.* at 341 (para. 143).
89 *Ibid.* at 341 (para. 144) [emphasis in original].

B. LESSONS FOR DEFENCE COUNSEL

To make a successful *Carosella* application, resulting in a finding of a violation of an accused's full answer and defence rights respecting lost records, an accused must establish the following matters:

(i) records did exist;

(ii) at some point prior to the application, the records were lost;

(iii) the records probably contained information relevant to the case against the accused[90] — and the evidence on this point may be

(a) evidence directly concerning the contents of the records; or

(b) circumstantial evidence respecting the contents of the records; in particular,

(1) evidence of a reasonably close temporal connection between the creation of the records and the time of the alleged offence; and

(2) where the charges relate to "historical" events, evidence of a close temporal connection between the creation of the records and the decision to bring charges against the accused;

(iv) at the time of the loss of the records, on balance, the records would have been produced to the court, as determined with reference to

(a) the probative value of the records;

(b) the extent to which the records were necessary for the accused to make full answer and defence, and whether any alternative means to obtain the information contained or probably contained in the records are available;

(c) the nature and extent of the complainant's reasonable expectation of privacy in the records;

(d) whether production of the records would be based on any discriminatory belief or bias; and

(e) the potential prejudice to the complainant's dignity, privacy, or security of the person that would be occasioned by production.

If these issues are resolved in the accused's favour, the accused is entitled to a remedy under s. 24(2). The nature of that remedy will depend on the severity of the prejudice

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[90] Keeping in mind that the accused's burden on these issues is not onerous.

caused by the loss of the records, and on the nature of the conduct that resulted in the loss of the records.

C. IMPLICATIONS FOR RECORD-KEEPERS

If record-keepers have preserved records sought by an accused, production will be governed by Bill C-46 (so long as it survives *Charter* scrutiny). If record-keepers have disposed of these records, *Carosella* provides the applicable rules. The implications of *Carosella* for record-keepers can be organized into four main groups — implications bearing on (1) the types of records likely to found to be "likely relevant"; (2) record-keepers' roles in protecting clients, including complainants, in production applications; (3) record-keepers' conduct relevant to an accused's application for a stay; and (4) the balancing of legal and therapeutic concerns.

1. Likely Relevance and Records

Carosella does not entail that record-keepers have potential legal obligations respecting every document that is or was in the possession or power of a record-keeper relating to a complainant. *Carosella* extends accuseds' interests only to those documents which were likely to contain information relevant to charges against an accused. It is true that the accused's burden of establishing likely relevance is not onerous, but it is a real burden. An accused cannot establish an interest in documents based only on speculation about the documents' contents.[91]

Record-keepers should bear in mind that the closer the temporal connection between the events at issue and the creation of the records, and, respecting "historical" cases, the closer the temporal connection between the creation of the records and the commencement of criminal proceedings, the stronger the circumstantial suggestion that the records are likely to contain relevant information.

2. Protecting Clients in Litigation

While record-keepers should be entitled to offer evidence and argument supporting the complainant's contentions that the records should not be produced, in a lost record application, record-keepers have little opportunity to raise issues relating to other clients or social interests. Arguments about these matters do not belong to the first or second stage of the *O'Connor* analysis. In a production case, the arguments could be raised at

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[91] For example, in the *MacDonnell* case, the accused was charged with murder relating to a death that occurred about 32 years before the Information was laid. At the time of the death, an R.C.M.P. officer (deceased by the time of trial) had investigated and assembled a file. No charges were laid following this investigation. By the time the charge was laid, the file was no longer available. The trial judge refused to find that the accused's right to a fair trial was violated because the file was missing; the accused's claims respecting the file were only "speculative." The trial judge did find that the loss of certain other documents prevented the accused from having a fair trial, and stayed the proceedings. The Nova Scotia Court of Appeal reversed this finding and set aside the stay. The Supreme Court restored the trial judge's disposition, without comment on the ruling respecting the R.C.M.P. file (*MacDonnell*, *supra* note 24).

the stage of consideration of the conditions to be attached to production of records, or in opposition to the admissibility of records as evidence. Since lost records can neither be produced nor admitted, these opportunities for argument do not exist.

One lost evidence tactic record-keepers are well-advised to avoid, if the maintenance of confidentiality is their goal, is to consent to an order for production of lost records, as the record-keeper did in *Carosella.*

Record-keepers may be concerned about what to tell potential complainants before commencing any interviews or keeping any records. In *Carosella,* the record-keeper's advice that the records could be disclosed in court and the complainant's acceptance of that possibility was evidence used to support the finding that the records should be produced to the accused. Record-keepers may worry that pre-interview discussions may prejudice clients in the production application; yet they may also worry that if they fail to warn clients of the possible use of records, they may be derelict in their duties to their clients. Record-keepers must exercise some caution. They should not urge the client to provide, in effect, a "waiver" or renunciation of confidentiality rights (as occurred, in the majority's interpretation, in *Carosella*). Record-keepers could advise clients of potential legal consequences of their communications with the record-keeper, however, without thereby eliminating the confidentiality of subsequent communications and records of those communications. In the *Ryan* case, a psychiatrist warned her client that certain records could subsequently be disclosed in litigation. The Supreme Court held that expressions of concern respecting production did not entail that the communications were not made in confidence, negating privilege in a civil case.[92] Record-keepers should be sure to take all other relevant measures to protect confidentiality, so that an inference cannot be drawn that the records were not intended to be confidential (and so production would not injure any privacy interests).

3. Conduct Supporting Stays of Proceedings

In the context of remedy, record-keepers should ensure that they do not embark on courses of action likely to antagonize the courts and that will support the granting of a stay of proceedings.

Carosella indicates that the closer the ties between an organization and the government, the greater the scrutiny to which its actions will be subjected.

Carosella also warns record-keepers that the closer to connection of records to litigation or potential litigation, the higher the probability that the destruction of the records will result in a remedy favourable to the accused. Certainly record-keepers should not destroy documents that they have been ordered to produce; neither should they destroy documents that are the subject of a production application. Any record-keeper that did so would be exposed to liability for contempt of court or a charge of

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[92] *M.(A).* v. *Ryan* (1997), 143 D.L.R. (4th) 1 at 9-10 (para. 24) (S.C.C.). For further discussion see J. Ross, "Partial Privilege and Full Disclosure in Civil Actions: *M.(A.)* v. *Ryan*" (1997) 35 Alta. L. Rev. 1067.

disobeying a court order. *Carosella* extends its reach beyond these obvious circumstances. If the record-keeper foresees (or should have reasonably foreseen?) that records may be relevant to criminal litigation, the record-keeper should be leary of destroying the records. The difficulty in the *Carosella* case was that the document destruction was aimed precisely at potential litigation files; the record management policy had the purpose of subverting defence access to files. Even L'Heureux-Dubé J. acknowledged the Centre's shortcoming: "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."[93]

Nonetheless, *Carosella* does not entail — nor should it be interpreted to entail — that organizations' legitimate record management practices can be controlled by the courts through the criminal law. Not all records may be preserved by a record-keeper, and different records may be preserved for different lengths of time. Where a record-keeper has a general record management plan, published in advance of litigation, which is not aimed at litigation-bound documents only — with, for example, general rules on time periods for moving files to storage, and time periods for destruction of files following a period of storage — it would be difficult to characterize the destruction of some particular records as bringing the administration of justice into disrepute — as L'Heureux-Dubé J. remarked, "[n]evertheless, a policy to destroy *all* notes made with clients could not be seen in the same light [as the destruction of the litigation-bound notes]."[94]

4. Balancing Legal and Therapeutic Concerns

Does *Carosella* mean that the helping professions, particularly those who assist victims or alleged victims of sexual assault, should not keep records? Does it mean that any records that are created should be only the skimpiest, sketchiest records possible, to avoid assisting accuseds? Record-keepers should not keep more records than are necessary for proper care. The greater the supply of records, the greater the resources which may be exploited by an accused. But records-keepers should keep those records which are necessary for proper care. The main consideration for those in the helping professions — and they do not need to be reminded of this — is to help clients. Proper records may be an important tool for helping clients:

> Medical records are an important tool in the practice of medicine. They serve as a basis for planning patient care; they provide a means of communication between the attending physician and other physicians and with nurses and other professional groups contributing to the patient's care; they furnish documentary evidence of the course of the patient's illness, treatment and response to treatment.... [T]hey serve as the basic document for the medical staff's view, study and evaluation of the medical care rendered to the patient. For these reasons the C.C.H.A. [Canadian Council on Hospital

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93 *Carosella*, *supra* note 1 at 341 (para. 145).

94 *Ibid.* [emphasis in original].

> Accreditation] considers the quality of medical records not only an important indication of the quality of patient care given in a hospital, but a valuable tool to maintain quality care.[95]

If care for clients is carried out with one eye toward litigation, and record-keeping suffers as a result, the quality of care for clients may be diminished.

Record-keepers are caught in a dilemma. If they do not keep proper records, clients suffer. If they do keep proper records, accuseds may get to those records and use those records to damage the clients' positions, and clients suffer. There is no easy way out. The route adopted by the Sexual Assault Crisis Centre in *Carosella* did not have good results for the client, the prosecution, or the justice system. Perhaps the best advice — and it may seem no advice or only cold and distasteful advice — is for record-keepers to do their jobs according to the standards of their profession, and let the criminal justice system look after itself. Perhaps a change in perspective on the criminal law is in order: in its present form, the criminal law does not exist to validate clients' experiences; it does not exist to compensate victims; it does not make right the injury and disorder caused by offenders. Record-keepers and clients should focus on healing and recovery outside of criminal justice processes, and should not rely on the criminal law to contribute in any positive way to these ends. The criminal justice system, it is true, may sometimes help, may sometimes validate, may sometimes right wrongs — and if does, so much the better. But if it does not, we should not be surprised. Until deep changes occur in the criminal law, it will continue to focus on the state and accuseds, and it will continue to disappoint clients, victims, and complainants.

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[95] E.I. Picard & G.R. Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 3d ed. (Toronto: Carswell, 1996) at 400, quoting from *Kolesar* v. *Jeffries* (1976), 59 D.L.R. (3d) 367 at 373 (Ont. H.C.), varied 12 O.R. (2d) 142 (C.A.), aff'd. (1978), 2 C.C.L.T. 170 (S.C.C.), which in turn quoted from the Canadian Council on Hospital Accreditation. The author is indebted to Professor June Ross for this reference.