

R. v. La, [1997] 2 S.C.R. 680

Hung Duc Vu

Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. La

File No.: 25389.

Hearing and judgment: March 13, 1997.

Reasons delivered: June 26, 1997.

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

on appeal from the court of appeal for alberta

*Criminal law -- Evidence -- Duty to disclose -- Evidence inadvertently lost
-- Whether Crown relieved of duty to disclose.*

*Constitutional law -- Charter of Rights -- Principles of fundamental justice
(s. 7) -- Failure to disclose -- Evidence inadvertently lost -- Whether breach of s. 7 of
Charter -- Canadian Charter of Rights and Freedoms, ss. 7, 24(1).*

The police found the complainant, a thirteen-year-old runaway they were looking for, in a vehicle driven by a man known to them as a pimp. The driver was later charged with sexual assault. One of complainant's conversations was taped at police headquarters in preparation for a secure treatment application and only notes of her date of birth, address and phone numbers were made. The taped conversation was not for any criminal investigation; indeed, the investigation into the accused's activities had not yet started. The constable turned over his report and the written statements, but not the tape of the initial interview, to vice unit detectives for them to investigate the complaints of prostitution and sexual assault. The vice unit detectives spoke with the complainant and that interview was recorded and transcribed. By the time of the preliminary inquiry, the constable had forgotten about the taped initial conversation with the complainant and, some time between the interview and the trial, he misplaced the tape.

At trial, counsel for the accused successfully applied for a stay of proceedings based on the Crown's failure to disclose the initial tape recording. The Court of Appeal allowed an appeal and ordered a new trial. At issue here was whether the Crown is relieved of the duty of disclosure when it has relevant evidence in its possession but later loses it.

Held: The appeal should be dismissed.

Per Lamer C.J. and Sopinka, Cory, Iacobucci and Major JJ.: The Crown's duty to disclose all relevant information in its possession gives rise to an obligation to preserve relevant evidence. When the prosecution has lost evidence that should have been disclosed, the Crown has a duty to explain what happened to it. If the explanation satisfies the trial judge that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached. The Crown fails

to meet its disclosure obligations where it is unable to satisfy the judge and s. 7 of the *Charter* is accordingly breached. Such a failure may also suggest that an abuse of process has occurred. An accused need not establish abuse of process for the Crown to have failed to meet its s. 7 obligation to disclose.

The court, in determining whether the Crown's explanation is satisfactory, should analyse the circumstances surrounding the loss of the evidence. The main consideration is whether the police or the Crown took reasonable steps to preserve the evidence for disclosure. The relevance that the evidence was perceived to have at the time must be considered; the police cannot be expected to preserve everything on the chance that it will be relevant in the future. In addition, even the loss of relevant evidence will not result in a breach of the duty to disclose if the conduct of the police is reasonable. As the relevance of the evidence increases, so does the degree of care for its preservation that is expected of the police.

Here, the Crown's explanation was satisfactory. The tape recording was not made in the course of the criminal investigation and the police officer did not fail to take reasonable steps to preserve the tape.

No abuse of process occurred. Conduct amounting to abuse of process includes the deliberate destruction of material by the police or other officers of the Crown for the purpose of defeating the Crown's obligation to disclose and, even absent proof of improper motive, an unacceptable degree of negligent conduct.

Even where the Crown has not breached its duty to disclose, the loss of a document may be so prejudicial that it impairs the right of an accused to receive a fair trial. To make out a breach of s. 7 of the *Charter* on the ground of lost evidence, the

accused must establish actual prejudice to his or her right to make full answer and defence.

The appropriateness of a stay of proceedings depends upon the effect of the conduct amounting to an abuse of process or other prejudice on the fairness of the trial. This is often best assessed in the context of the trial as it unfolds.

The appellant's right to make full answer and defence was not impaired here. The taped interview was not regarded to be a detailed conversation and was not made for the criminal investigation. More importantly, an alternative source of information was available.

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: The Crown's duty to disclose all relevant and unprivileged material in its possession to the defence is a feature of the common law, in addition to having constitutional underpinnings. Still, the Crown's duty to disclose is not a separate and distinct right under s. 7 of the *Charter*. While broad and complete disclosure is the rule, not every failure to disclose will necessarily amount to a constitutional violation.

The duty to preserve should not be confused with the Crown's duty to disclose. Where the Crown has turned over all relevant material in its possession to the defence, its duty to disclose is exhausted. Where it becomes known that relevant material once in the possession of the Crown or the police has become unavailable, the Crown must explain the circumstances focussing on why this material was not given to the defence.

Where the Crown fails to disclose or where relevant material is not preserved, the constitutional inquiry must be properly grounded. In that regard, the focus will be twofold: (1) did the failure to disclose have an effect upon the accused's right to make full answer and defence; and (2) did the Crown's conduct violate fundamental principles underlying the community's sense of decency and fair play and cause prejudice to the integrity of the judicial system. Where either of these effects are demonstrated on a balance of probabilities, a violation of s. 7 will have been demonstrated. The trial judge will then be entitled to fashion a remedy pursuant to s. 24(1). This should be done in accordance with the principles laid out in *R. v. O'Connor*.

Cases Cited

By Sopinka J.

Considered: *R. v. Stinchcombe*, [1995] 1 S.C.R. 754, aff'g (1994), 88 C.C.C. (3d) 557; *R. v. Carosella*, [1997] 1 S.C.R. 80; **referred to:** *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Egger*, [1993] 2 S.C.R. 451; *R. v. Chaplin*, [1995] 1 S.C.R. 727; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. B. (D.J.)* (1993), 16 C.R.R. (2d) 381; *R. v. Andrew (S.)* (1992), 60 O.A.C. 324; *R. v. François (L.)* (1993), 65 O.A.C. 306; *R. v. Kenny* (1991), 92 Nfld. & P.E.I.R. 318; *R. v. Adams*, [1995] 4 S.C.R. 707; *R. v. Calder*, [1996] 1 S.C.R. 660.

By L'Heureux-Dubé J.

Considered: *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Carosella*, [1997] 1 S.C.R. 80; *R. v. Durette*, [1994] 1 S.C.R. 469; *R. v. Khela*, [1995] 4 S.C.R. 201; *R. v. Biscette* (1995), 169 A.R. 81, aff'd [1996] 3 S.C.R. 599; **referred to:** *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. C. (M.H.)*, [1991] 1 S.C.R. 763; *R. v. Cook*, [1997] 1 S.C.R. 1113; *R. v. Douglas*, [1993] 1 S.C.R. 893, aff'g (1991), 5 O.R. (3d) 29; *R. v. T. (L.A.)* (1993), 14 O.R. (3d) 378; *R. v. Peterson* (1996), 106 C.C.C. (3d) 64; *R. v. B. (T.)* (1994), 23 C.R.R. (2d) 355; *R. v. Richer* (1993), 82 C.C.C. (3d) 385, aff'd [1994] 2 S.C.R. 486; *R. v. Jack*, [1994] 2 S.C.R. 310; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451; *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537; *R. v. Stinchcombe*, [1995] 1 S.C.R. 754; *R. v. Chaplin*, [1995] 1 S.C.R. 727; *R. v. Burlingham*, [1995] 2 S.C.R. 206.

Statutes and Regulations Cited

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

Authors Cited

Hendel, Ursula, and Peter Sankoff. "R. v. Edwards: When Two Wrongs Might Just Make a Right" (1996), 45 C.R. (4th) 330.

Mitchell, Graeme G. "Abuse of Process and the Crown's Disclosure Obligation" (1996), 44 C.R. (4th) 130.

Ontario. *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*. G. Arthur Martin, Chairperson. Toronto: The Committee, 1993.

Stuesser, Lee. "Abuse of Process: The Need to Reconsider" (1994), 29 C.R. (4th) 92.

Young, Alan N. *Adversarial Justice and the Charter of Rights: Stunting the Growth of the "Living Tree"* (1997), 39 *Crim. L.Q.* 406.

APPEAL from a judgment of Alberta Court of Appeal (1996), 181 A.R. 192, 116 W.A.C. 192, 105 C.C.C. (3d) 417, allowing an appeal from a stay of proceedings granted by Wilkins J. and ordering a new trial. Appeal dismissed.

Balfour Q. H. Der and Robert J. Batting, for the appellant.

Elizabeth A. Hughes, for the respondent.

//Sopinka J.//

The judgment of Lamer C.J. and Sopinka, Cory, Iacobucci and Major JJ. was delivered by

- 1 SOPINKA J. -- This case raises the issue of whether the Crown has breached its disclosure obligations when through innocent inadvertence it loses evidence that would otherwise be disclosed. The Alberta Court of Appeal set aside the stay entered by the trial judge and ordered a new trial. The appeal to this Court was dismissed at the conclusion of oral arguments with reasons to follow. I find that when the prosecution has lost evidence that should have been disclosed, the Crown has a duty to explain what happened to it. So long as the explanation is satisfactory, it discharges the Crown's constitutional obligation to disclose. There will, however, be a breach of the *Canadian Charter of Rights and Freedoms* if the explanation does not satisfy the trial judge. Moreover, I would not rule out a remedy in the extraordinary case in which a satisfactory explanation is given for the loss of evidence and no abuse of process is found, but the evidence is so important that its loss renders a fair trial problematic.

Facts

2 At around midnight on May 27, 1993, Constables Hollinger and Halford were looking for a 13-year-old runaway, the complainant M.F. They stopped a vehicle whose driver was known to the police as a pimp and found M.F. inside. M.F. was taken to police headquarters by other police officers. She spent the next five hours there. During this time she spoke to the police officers, as well as others, including her mother. Const. Hollinger made a 45-minute tape recording of one of the conversations he had with her. Because the conversation was recorded, Const. Hollinger only made notes of M.F.'s date of birth, address and phone numbers. He did not want to go into a detailed interview with M.F. Around 5:00 a.m., she was taken to Hull Home, a secure youth custody and treatment centre.

3 On June 1, 1993, Const. Hollinger testified at Family Court on an application for a secure treatment order for M.F. He told the court about the 45 minute taped interview, saying that it related to her life on the run and her being forced into prostitution. He said that she was cooperative, but told police a few lies during the interview. He also related her description of some of the things that had been done to her in various hotels, including the Ranger Motel.

4 Following further investigation, Const. Hollinger discovered two other young girls at the Hull Home had also been part of the same prostitution network. On June 3, 1993, Const. Hollinger went to Hull Home and spoke to M.F. and two other 13-year-old girls. He gave each of them police witness statement forms, asking them to write out a statement describing their life on the street. He instructed the Hull Home staff to separate the girls while they wrote their statements. The next day, he returned to Hull Home with

a pre-typed list of questions which he gave to each girl after receiving their written statements.

5 Const. Hollinger turned his report and the written statements over to detectives from the vice unit for them to investigate the complaints of prostitution and sexual assault. However, the tape of the initial interview with M.F. was not turned over to them.

6 In August 1993, the police laid several prostitution-related charges. Four men were charged with the assault of the young girls; the appellant, Vu, was charged with the sexual assault of M.F. only. The vice unit detectives spoke with M.F. on July 8, 1993. That interview was tape recorded and transcribed.

7 By the time of the preliminary inquiry (February 28 -- March 2, 1994), Const. Hollinger had forgotten that he had tape recorded his conversation with M.F. and that she had told him something about the Ranger Motel incident. Some time between the interview and the trial, Const. Hollinger misplaced the tape. Const. Hollinger testified that he had searched for the tape but had not found it.

8 The reason given by Const. Hollinger for the paucity of notes taken by him was that the day after he apprehended M.F., he shot the tire out of a car after a high speed chase and was consequently under investigation. He described it as “quite a stressful time”.

9 At trial, counsel for the accused applied for a stay of proceedings based on the Crown’s failure to disclose the tape recording made by Const. Hollinger of the first complainant. Wilkins J. granted the application for a stay of proceedings. On appeal, the Court of Appeal allowed the appeal and ordered a new trial.

Judgments Below

Alberta Court of Queen's Bench

10 Wilkins J. discussed the conflicting interests between the alleged victims and society in seeing that those who are accused are brought to trial with that of the right of the accused to make full answer and defence. He rejected the Crown's suggestion that M.F.'s evidence not be called since this would not address the prejudice to the other accused.

11 Wilkins J. found that each of the accused had established, on a balance of probabilities, that their respective rights to cross-examination of M.F. and the other witnesses would be impaired by not having access to the tape-recording, any transcript or other material notes of the initial interview. This case differed from the authorities cited because here there was no evidence or material from which the Crown could demonstrate substantial disclosure of this vital information. It no longer existed and he could not order the Crown to produce it. Consequently, a stay of proceedings was the only remedy for non-disclosure by the Crown which could negate the prejudice caused by the non-disclosure.

12 Wilkins J. rejected entirely the submission by counsel for one of the defendants that there was an abuse of process on the part of the Crown. He was satisfied that no improper motive could be attributed to the Crown or the police in connection with the loss of the tape.

Alberta Court of Appeal (1996), 181 A.R. 192

13 The court was of the view that the trial judge erred in finding that the Crown had breached a duty to disclose. As the Crown could only disclose what it has in its possession or control, it could not disclose the tape recording because of its inadvertent loss. The court held that while they did not wish to find that the police did not have a duty to preserve evidence and statements taken by them, perfection was not required. The inadvertent loss of a statement should not lead to a stay of proceedings any more than the failure of a police officer to take complete notes or to record each conversation with a witness. The Crown had disclosed to the defence all that it had in its possession with respect to the three young witnesses, including detailed written and taped statements.

14 The court found that because there was no breach by the Crown of its duty to disclose, they did not need to deal with the issue of whether there was evidence before the trial judge on which he could conclude on a balance of probabilities that the accuseds' right to make full answer and defence was so seriously impaired as to justify a stay of proceedings. The test to be applied came from *R. v. Stinchcombe* (1994), 88 C.C.C. (3d) 557 ("*Stinchcombe (No. 2)*"). The court noted that no one asked Const. Hollinger whether the written statements of the complainant were substantially different from those in the taped statement. The court disagreed with the trial judge's statement that there was a legal obligation on the police to make a complete record of the initial oral complaint of a complainant. It would normally be impractical to do so. Witnesses were often emotionally upset or required medical attention. It would be sufficient if the police officer obtained a written statement or an oral statement reduced to writing within a reasonable period of time, unless the evidence established on a balance of probabilities that the oral statement was materially different, in some particular other than lack of detail, from that later given in writing.

Issues

- 15 1. Is the Crown relieved of the duty of disclosure when it has in its possession relevant evidence but later loses that evidence?
2. Did the trial judge err in entering a stay of proceedings?

Analysis

Discharge of the Duty to Disclose in Lost Evidence Cases

16 Since this Court's decision in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 ("*Stinchcombe (No. 1)*"), the obligation of the Crown to disclose all relevant information in its possession, whether inculpatory or exculpatory, whether the Crown intends to rely on it or not, has been well established. Witness statements raised a special problem in that case. We found that police notes should be disclosed if they exist, and if they do not, a "will say" statement based on the information in the Crown's possession and summarizing the anticipated evidence of the witness should be disclosed; see p. 344.

17 This Court recognized that the Crown's duty to disclose gives rise to an obligation to preserve relevant evidence in *R. v. Egger*, [1993] 2 S.C.R. 451, at p. 472, where we noted that the Crown may be obliged to retain blood samples beyond the three-month statutory period in order to comply with the disclosure requirements resulting from *Stinchcombe (No. 1)*.

18 The issue of the Crown's disclosure obligations where evidence has been lost arose during the new trial ordered by this Court in *Stinchcombe (No. 1)*. The police had

misplaced a tape recording of an interview with a witness. During the interview, the witness had expressed doubts about the accuracy of her earlier testimony. The officer who interviewed her had died of a brain tumour. However, the Crown disclosed a transcript of the interview. In setting aside the stay of proceedings entered by the trial judge, the Alberta Court of Appeal noted that it is information contained in witness statements that must be disclosed, not the original statement: *Stinchcombe (No. 2)*, *supra*. This Court agreed, [1995] 1 S.C.R. 754, at para. 2:

The Crown can only produce what is in its possession or control. There is no absolute right to have originals produced. If the Crown has the originals of documents which ought to be produced, it should either produce them or allow them to be inspected. If, however, the originals are not available and if they had been in the Crown's possession, then it should explain their absence. If the explanation is satisfactory, the Crown has discharged its obligation unless the conduct which resulted in the absence or loss of the original is in itself such that it may warrant a remedy under the *Canadian Charter of Rights and Freedoms*.

19 A similar principle was expressed in *R. v. Chaplin*, [1995] 1 S.C.R. 727, at para. 25:

In situations in which the existence of certain information has been identified, then the Crown must justify non-disclosure by demonstrating either that the information sought is beyond its control, or that it is clearly irrelevant or privileged.

20 This obligation to explain arises out of the duty of the Crown and the police to preserve the fruits of the investigation. The right of disclosure would be a hollow one if the Crown were not required to preserve evidence that is known to be relevant. Yet despite the best efforts of the Crown to preserve evidence, owing to the frailties of human nature, evidence will occasionally be lost. The principle in *Stinchcombe (No. 2)*, *supra*, recognizes this unfortunate fact. Where the Crown's explanation satisfies the trial judge that the evidence has not been destroyed or lost owing to unacceptable negligence,

the duty to disclose has not been breached. Where the Crown is unable to satisfy the judge in this regard, it has failed to meet its disclosure obligations, and there has accordingly been a breach of s. 7 of the *Charter*. Such a failure may also suggest that an abuse of process has occurred, but that is a separate question. It is not necessary that an accused establish abuse of process for the Crown to have failed to meet its s. 7 obligation to disclose.

21 In order to determine whether the explanation of the Crown is satisfactory, the Court should analyse the circumstances surrounding the loss of the evidence. The main consideration is whether the Crown or the police (as the case may be) took reasonable steps in the circumstances to preserve the evidence for disclosure. One circumstance that must be considered is the relevance that the evidence was perceived to have at the time. The police cannot be expected to preserve everything that comes into their hands on the off-chance that it will be relevant in the future. In addition, even the loss of relevant evidence will not result in a breach of the duty to disclose if the conduct of the police is reasonable. But as the relevance of the evidence increases, so does the degree of care for its preservation that is expected of the police.

22 What is the conduct arising from failure to disclose that will amount to an abuse of process? By definition it must include conduct on the part of governmental authorities that violates those fundamental principles that underlie the community's sense of decency and fair play. The deliberate destruction of material by the police or other officers of the Crown for the purpose of defeating the Crown's obligation to disclose the material will, typically, fall into this category. An abuse of process, however, is not limited to conduct of officers of the Crown which proceeds from an improper motive. See *R. v. O'Connor*, [1995] 4 S.C.R. 411, at paras. 78-81, *per* Justice L'Heureux-Dubé for the majority on this point. Accordingly, other serious departures from the Crown's

duty to preserve material that is subject to production may also amount to an abuse of process notwithstanding that a deliberate destruction for the purpose of evading disclosure is not established. In some cases an unacceptable degree of negligent conduct may suffice.

23 In either case, whether the Crown's failure to disclose amounts to an abuse of process or is otherwise a breach of the duty to disclose and therefore a breach of s. 7 of the *Charter*, a stay may be the appropriate remedy if it is one of those rarest of cases in which a stay may be imposed, the criteria for which have most recently been outlined in *O'Connor, supra*. With all due respect to the opinion expressed by my colleague Justice L'Heureux-Dubé to the effect that the right to disclosure is not a principle of fundamental justice encompassed in s. 7, this matter was settled in *Stinchcombe (No. 1)*, *supra*, and confirmed by the decision of this Court in *R. v. Carosella*, [1997] 1 S.C.R. 80. In *Stinchcombe (No. 1)* the right to make full answer and defence of which the right to disclosure forms an integral part was specifically recognized as a principle of fundamental justice included in s. 7 of the *Charter*. This was reaffirmed in *Carosella*. In para. 37 I stated on behalf of the majority:

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* [[1994] 2 S.C.R. 951], the breach of this principle of fundamental justice is in itself prejudicial. The requirement to show additional prejudice or actual prejudice relates to the remedy to be fashioned pursuant to s. 24(1) of the *Charter*.

24 The Crown's obligation to disclose evidence does not, of course, exhaust the content of the right to make full answer and defence under s. 7 of the *Charter*. Even where the Crown has discharged its duty by disclosing all relevant information in its

possession and explaining the circumstances of the loss of any missing evidence, an accused may still rely on his or her s. 7 right to make full answer and defence. Thus, in extraordinary circumstances, the loss of a document may be so prejudicial to the right to make full answer and defence that it impairs the right of an accused to receive a fair trial. In such circumstances, a stay may be the appropriate remedy, provided the criteria to which I refer above have been met.

25 It is not necessary to elaborate a test to be used in such cases in order to deal with the case at bar. Suffice it to say that, where the Crown has met its disclosure obligations, in order to make out a breach of s. 7 on the ground of lost evidence, the accused must establish actual prejudice to his or her right to make full answer and defence. This requirement is seen most clearly in lost evidence cases reviewed by my colleague Justice L'Heureux-Dubé in her reasons in *Carosella*, *supra*; see paras. 76-80.

26 The appellant sought to draw a parallel between this case and *Carosella* which was released immediately before the hearing of this appeal. The two cases, however, are clearly distinguishable. In *Carosella*, the documents which were destroyed were relevant and subject to disclosure under the test in *O'Connor*, *supra*. The conduct of the Sexual Assault Crisis Centre destroyed the accused's right under the *Charter* to have those documents produced. That amounted to a serious breach of the accused's constitutional rights and a stay was, in the particular circumstances, the only appropriate remedy. Where, however, the evidence has been inadvertently lost, the same concerns about the deliberate frustration of the court's jurisdiction over the admission of evidence do not arise. As the following passage from the majority judgment (at para. 56) attests, we expressly distinguished the case from the lost evidence cases generally:

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 cases generally. [Emphasis added.]

Timing of the Disposition of the Application for a Stay

27 The appropriateness of a stay of proceedings depends upon the effect of the conduct amounting to an abuse of process or other prejudice on the fairness of the trial. This is often best assessed in the context of the trial as it unfolds. Accordingly, the trial judge has a discretion as to whether to rule on the application for a stay immediately or after hearing some or all of the evidence. Unless it is clear that no other course of action will cure the prejudice that is occasioned by the conduct giving rise to the abuse, it will usually be preferable to reserve on the application. This will enable the judge to assess the degree of prejudice and as well to determine whether measures to minimize the prejudice have borne fruit. This is the procedure adopted by the Ontario Court of Appeal in the context of lost evidence cases. In *R. v. B. (D.J.)* (1993), 16 C.R.R. (2d) 381, the court said at p. 382:

The measurement of the extent of the prejudice in the circumstances of this case could not be done without hearing all the relevant evidence, the nature of which would make it clear whether the prejudice was real or minimal.

Similarly, in *R. v. Andrew (S.)* (1992), 60 O.A.C. 324, the court found at p. 325 that unless the *Charter* violation “is patent and clear, the preferable course for the court is to proceed with the trial and then assess the issue of the violation in the context of the

evidence as it unfolded at trial”. See also: *R. v. François (L.)* (1993), 65 O.A.C. 306; *R. v. Kenny* (1991), 92 Nfld. & P.E.I.R. 318 (Nfld. S.C.T.D.).

28 I would add that even if the trial judge rules on the motion at an early stage of the trial and the motion is unsuccessful at that stage, it may be renewed if there is a material change of circumstances. See *R. v. Adams*, [1995] 4 S.C.R. 707, and *R. v. Calder*, [1996] 1 S.C.R. 660. This would be the case if, subsequent to the unsuccessful application, the accused is able to show a material change in the level of prejudice.

Application to this Case

29 The question thus arises, was the explanation of the Crown satisfactory? In my view, it was. Although the record is scanty, there is no suggestion that Const. Hollinger was negligent in his handling of the tape recording of the interview with M.F. The conversation was not tape-recorded for the purposes of a criminal investigation, but for the secure treatment application. He did not consider it to be a detailed conversation. Const. Hollinger made the tape before the investigation of the activities of the accused began and did not turn it over to the police officer who investigated the charges in issue. Nor was he involved in that investigation. It appears from the record that Const. Hollinger listened to the tape in preparation for his testimony at the secure treatment application hearing. It follows that he took care to preserve the tape, at least until the hearing. The manner of the tape’s subsequent disappearance remains unknown: Const. Hollinger explained that he did not know what had happened to the tape, but that he had searched for it and had been unable to find it. He also testified that he was involved in a fairly stressful and traumatic incident shortly after making the tape, namely, his shooting at a car and the investigation that followed. These factors lead me to the

conclusion that Const. Hollinger did not fail to take reasonable steps in the circumstances to preserve the tape.

30 The next question is whether the explanation discloses conduct amounting to an abuse of process. It does not. The trial judge rejected entirely the defence's contention that the conduct of the Crown amounted to an abuse of process, and was not satisfied that any improper motive could be attributed to the Crown or the police. Although the trial judge did not specifically address the issue of negligence, I am satisfied that the tape was lost in circumstances that did not amount to an abuse of process.

31 The appellant argued that his right to make full answer and defence was prejudiced by the loss of the tape on the grounds that the tape would have been useful in cross-examining M.F. In aid of this submission the appellant referred to Const. Hollinger's testimony at the Family Court proceeding that M.F. told "a few lies" during this interview. As well, the appellant claims, prejudice arises because there are inconsistencies between M.F.'s testimony at the preliminary inquiry and that of other witnesses, and the missing statement was made prior to her later written statement, which was made after she had the opportunity to collaborate with other witnesses.

32 I find that the appellant has not established that his right to make full answer and defence has been impaired. A number of factors lead to this conclusion. The interview recorded on the tape was not regarded by Const. Hollinger to be a detailed conversation, and he was investigating a runaway teen, not a prostitution ring. M.F. provided four other statements to the police. She testified at the preliminary inquiry. Most importantly, an alternative source of information is available: Const. Hollinger has already testified that M.F. told "a few lies". That in itself is highly useful to the defence in attacking her

credibility. Const. Hollinger was cross-examined during a *voir dire* at the trial. He was not asked, however, to elaborate on the lies that M.F. told nor whether there were discrepancies between what was said by M.F. on the tape and the statements which were taken subsequently. Until that evidence is heard it is at least premature to allege that the appellant's rights to full answer and defence are seriously prejudiced. Moreover, adopting an optimistic view as to what the tape would have disclosed, it is difficult for me to accept that even a successful cross-examination would be appreciably more damaging to the credibility of M.F. than the evidence of Const. Hollinger that she told a few lies.

33 Finally, I do not accept that the tape would be useful in establishing that the complainants collaborated in their more recent statements or would explain or accentuate inconsistencies in their evidence. The fact of the possibility of collaboration and of the inconsistencies is already in the record and can be relied on by the appellant without the tape. The tape might or might not have disclosed discrepancies which tend to support subsequent collaboration or accentuate the inconsistencies. While this level of relevance would be sufficient to meet the test for disclosure as set out in *Stinchcombe (No. 1)*, it falls far short of establishing a serious impairment of the right to make full answer and defence. Certainly at this stage of the proceedings it is premature to come to such a conclusion.

34 In accordance with the judgment rendered from the bench at the conclusion of the argument of the appeal, the appeal is dismissed.

//L'Heureux-Dubé J.//

The reasons of La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. were delivered by

35 L'HEUREUX-DUBÉ J. -- This appeal addresses the question of how to proceed in instances where the state loses or destroys relevant material in its possession. As such, it raises fundamental *Charter* issues. I have read the reasons of Justice Sopinka and share his conclusion with regard to the disposition of this case. I am unable to agree, however, with the manner in which he characterizes the Crown's duty to disclose as a distinct right of the accused under s. 7 of the *Canadian Charter of Rights and Freedoms*. For this reason, I wish to make the following comments.

36 In a nutshell, my position is that the duty to disclose is exactly that: an obligation resting upon the Crown. It does not constitute, and in my view, has never constituted a separate and distinct right operating on its own as a principle of fundamental justice. On the contrary, the disclosure obligation is necessary because generally the "failure to disclose impedes the ability of the accused to make full answer and defence". *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 ("*Stinchcombe (No. 1)*"), per Sopinka J., at p. 336. To establish the very process of disclosure as a distinct constitutional right would be, in my view, a substantial departure from the jurisprudence in this area and would needlessly complicate this area of law.

37 While this case is primarily concerned with lost evidence which was once in the possession of the Crown, I believe a proper analysis of this issue requires an examination of the relationship of the disclosure duty to s. 7 of the *Charter*.

38 At the outset, however, I would stress that disclosure, as a process, is a necessary and important feature of the Canadian legal landscape. The decision of this Court in

Stinchcombe (No. 1) was a desirable evolution in the law, and one which, for the most part, encouraged a fairer system for accused persons. It also inspired a spirit of openness in the law, which I believe has played a large part in advancing the search for the truth in criminal trials.

39 Nevertheless, I have never thought of *Stinchcombe (No. 1)* as having effected a radical departure from the direction which was being taken in the common law, despite a number of judgments and academic opinions which suggest a contrary opinion. Rather, I agree with Professor Alan N. Young, *Adversarial Justice and the Charter of Rights: Stunting the Growth of the “Living Tree”* (1997), 39 *Crim. L.Q.* 406, at p. 419, that “*Stinchcombe* did not create a new right with respect to disclosure as the common law has always considered full disclosure to be an integral part of the process”. See also *R. v. C. (M.H.)*, [1991] 1 S.C.R. 763.

40 In my view, what *Stinchcombe (No. 1)* truly recognizes is that disclosure is essential to enable the accused to exercise properly his right to make full answer and defence, itself a principle of fundamental justice under s. 7. Additionally, disclosure helps ensure that the accused will have a fair trial, as the possibility of an ambush by the Crown is removed: see for example, *R. v. Cook*, [1997] 1 S.C.R. 1113. There are a number of other practical advantages to full disclosure, not the least of which is the encouragement of early resolution of criminal charges: *Stinchcombe (No. 1)*, at p. 334. See also the *Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (1993), under the Chair of G. Arthur Martin. Still, for constitutional purposes, it is crucial to recall that disclosure is no more than a process, albeit an important one, which exists to further the rights of an accused as set out above.

41 I fully acknowledge, however, that the two concepts have often been mistaken for one and the same. On more than one occasion, courts have spoken of the “right to disclosure”, instead of whether the failure to disclose affected the “right to make full answer and defence”. In my view, while disclosure is a duty which the Crown must adhere to, it does not follow that every failure to disclose will amount to a constitutional violation. As I stated in *R. v. O’Connor*, [1995] 4 S.C.R. 411, 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 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 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 in original.]

42 Contrary to what my colleague has suggested, this position was not invented in *O'Connor*. While my colleague did not address this issue in that case, he has stated here that the right to disclose is, in itself, a right under s. 7 of the *Charter*. Sopinka J. also maintains that the accused's right to disclosure from the Crown has already been recognized by this Court in the cases of *Stinchcombe (No. 1)* and *R. v. Carosella*, [1997] 1 S.C.R. 80, as a distinct principle of fundamental justice. I simply do not agree with Justice Sopinka's interpretation of *Stinchcombe (No. 1)*. With respect to *Carosella*, in that case I was of the view that what was at issue was the destruction of material by a third party; for that reason it was unnecessary for me to even address the relationship between disclosure and the right to make full answer and defence. In my view, a perusal of the case law demonstrates that the position I set out in *O'Connor* is in conformity with established disclosure principles and that it is my colleague who is effecting a radical departure from the standards established by this Court in *Stinchcombe (No. 1)*.

43 In *Stinchcombe (No. 1)*, Sopinka J. on behalf of a unanimous Court outlined a revamped system of disclosure. The precise method chosen for this Crown obligation was based upon a number of legal rationales as well as different policy concerns. The *Charter* was also seen as an important influence, as demonstrated by the following excerpt, at p. 336:

This review of the pros and cons with respect to disclosure by the Crown shows that there is no valid practical reason to support the position of the opponents of a broad duty of disclosure. Apart from the practical advantages to which I have referred, there is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s. 7 of the Canadian Charter of Rights and Freedoms as one of the principles of fundamental justice. (See *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505, at p. 1514.) The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. [Emphasis added.]

44 It is worth noting that there was no mention of a “right to disclosure”. Rather this excerpt emphasizes that it is the right to make full answer and defence which is the focus under s. 7. Moreover, I believe that later in the judgment Sopinka J. explicitly recognized that there is a major difference between the disclosure obligation and the effect of a Crown failure to disclose. Indeed, as he stated in *Stinchcombe (No. 1)*, at p. 348:

What are the legal consequences flowing from the failure to disclose? In my opinion, when a court of appeal is called upon to review a failure to disclose, it must consider whether such failure impaired the right to make full answer and defence. This in turn depends on the nature of the information withheld and whether it might have affected the outcome. [Emphasis added.]

45 This position was also taken by the Ontario Court of Appeal in *R. v. Douglas* (1991), 5 O.R. (3d) 29, a case decided at virtually the same time as *Stinchcombe (No. 1)*. I would note that an appeal from this decision was unanimously dismissed by this Court ([1993] 1 S.C.R. 893) in which the Chief Justice delivered short reasons which did not disagree in principle with the decision of the Court of Appeal. In *Douglas*, the facts revealed that as of the trial date, disclosure had still not been fully made to the defence. Rather than inquiring into the materiality of the evidence, the trial judge immediately stayed the proceedings. The Court of Appeal reversed the decision, and in doing so made the following comments at p. 30 about the relationship between disclosure and the *Charter*:

An accused has a constitutional right to a fair hearing and to make full answer and defence through the combined operation of ss. 7 and 11(d) of the *Charter*. There is, however, no common law right or statutory enactment specifically providing an accused with a right of disclosure of the Crown's case. Timely disclosure is thus not a discrete right in the constitutional sense. The failure to make timely disclosure will not, in all cases, constitute a *Charter* violation.

It is now established that, consistent with those principles of fundamental justice underlying s. 7 of the *Charter*, an accused is entitled to such disclosure as is necessary for the accused to make full answer and defence. See *R. v. Wood* (1989), 51 C.C.C. (3d) 201, 33 O.A.C. 260 (C.A.).

There is no doubt that in some circumstances the evidence may establish that non-disclosure or untimely disclosure gives rise to an infringement of an accused's right to a fair trial in that the accused's right to make full answer and defence is compromised. In our view, the trial judge erred in considering, on the meagre evidence before him in this case, that the respondent's s. 7 rights were violated by the Crown's admittedly late disclosure. In the circumstances of this case, the right protected by s. 7 is the respondent's right to make full answer and defence. The trial judge seems to have assumed that the Crown's late disclosure compromised that right. That assumption was not warranted on the evidence. [Emphasis added.]

See also: *R. v. T. (L.A.)* (1993), 14 O.R. (3d) 378 (C.A.), at p. 382; *R. v. Peterson* (1996), 106 C.C.C. (3d) 64 (Ont. C.A.); *R. v. B. (T.)* (1994), 23 C.R.R. (2d) 355 (B.C.C.A.); *R. v. Richer* (1993), 82 C.C.C. (3d) 385 (Alta. C.A.) aff'd without reference to this point, [1994] 2 S.C.R. 486.

46 Similar reasoning was expressed by this Court in *R. v. Durette*, [1994] 1 S.C.R. 469. In that case, the issue was whether a failure to disclose affidavit material used to support a wiretap authorization was in conflict with the principles enunciated in *Stinchcombe (No. 1)*. For a 4-3 majority, Sopinka J. held that in that particular case, the accused's s. 7 right to make full answer and defence had been infringed. Nevertheless, in his analysis, he clearly stated, at pp. 495 and 498, that this right was not automatically engaged where full disclosure was not made:

The *Charter* guarantee of the right to make full answer and defence requires that, as a general rule, all relevant information in the possession of the state be disclosed to an accused. In order to justify non-disclosure the Crown must bring itself within an exception to that general rule: *Stinchcombe, supra*, at pp. 340-41; and *R. v. Egger*, [1993] 2 S.C.R. 451, at pp. 466-67.

...

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. [Emphasis in the original.]

See also in this regard: *R. v. Jack*, [1994] 2 S.C.R. 310; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, at p. 508, *per* Iacobucci J.; *O'Connor*, *supra*, at paras. 221-40, *per* Major J.

47 Shortly thereafter, in *R. v. Khela*, [1995] 4 S.C.R. 201, this Court reflected once again upon the proper analysis in cases of non-disclosure. In that case, the Crown had failed to abide by the terms of an order mandating disclosure of certain pieces of evidence. Nevertheless, Sopinka and Iacobucci JJ., writing joint reasons, declined to find a violation of s. 7. Indeed, they wrote, at para. 18, that “[f]ailure to comply with the obligation to disclose by the Crown could impair the right of the accused to make full answer and defence in breach of s. 7 of the *Charter*” (emphasis added). In my view, this wording is both clear and accurate. It is not in every case of non-disclosure that a violation of the *Charter* will be established.

48 Indeed, recently in *R. v. Biscette* (1995), 169 A.R. 81 (C.A.), *aff’d* [1996] 3 S.C.R. 599, this approach was adopted yet again. There, the Crown failed to disclose several pieces of evidence before a preliminary inquiry, although the evidence was turned over at trial. The defence alleged a breach of s. 7 of the *Charter* but despite the admitted lateness of the Crown’s disclosure, Côté J.A., for the majority, was not convinced that a *Charter* breach had, in fact, occurred. He stated at pp. 84-85:

Counsel for the appellant relies upon the defence's right to get disclosure of information, under the rule in *R. v. Stinchcombe* (#1), [1991] 3 S.C.R. 326.... The right may involve both a common law right and a right under s. 7 of the *Charter*. But the remedy flows from a breach of the right to make full answer and defence (p. 348 S.C.R.). So it is a remedy under the *Charter*.

...

One needs evidence to show a *Charter* breach. Here, we have little or no evidence (as distinguished from mere assertions). For all we know, late disclosure may have been trivial: see *R. v. Stinchcombe* (#2) 1994, . . . 88 C.C.C. (3d) 557 (C.A.), 566 [*aff’d*, [1995] 1 S.C.R. 754.]. [Emphasis added.]

49 An appeal to this Court was dismissed. For a unanimous Court, I stated, at para. 1, that “[w]ith regard to the issue of the late Crown disclosure, we are not persuaded that there was any prejudice to the appellant’s ability to effect his right to full answer and defence, and would dismiss this ground substantially for the reasons of Côté J.A. in the Court of Appeal”.

50 In my view, a common theme runs through these decisions: while the right to make full answer and defence informs the process of disclosure, for an individual accused to engage the *Charter* because of a failure to disclose, he or she must establish that the right to make full answer and defence was actually infringed. In other words, the duty to disclose must be kept analytically distinct from an infringement of the right to make full answer and defence.

51 This theory is also supported by the fact that disclosure is not subject to a fixed set of rules which are the same across the country. On the contrary, as a process, the manner in which disclosure is conducted will vary from province to province and even by region. The key factor is that no matter what process is enacted, it respects the accused’s right to make full answer and defence.

52 The foregoing should not be taken as suggesting that the sole manner in which the accused can demonstrate a *Charter* violation in cases of non-disclosure is to establish an impairment of the right to make full answer and defence. On the contrary, as I stated in *O’Connor, supra*, at para. 73:

Depending on the circumstances, different *Charter* guarantees may be engaged. For instance, where the accused claims that the Crown’s conduct has prejudiced his ability to have a trial within a reasonable time, abuses may be best addressed by reference to s. 11(b) of the *Charter*, to which the jurisprudence of this Court has now established fairly clear guidelines (*Morin, supra*). Alternatively, the circumstances may indicate an infringement of the accused’s

right to a fair trial, embodied in ss. 7 and 11(d) of the *Charter*. In both of these situations, concern for the individual rights of the accused may be accompanied by concerns about the integrity of the judicial system. In addition, there is a residual category of conduct caught by s. 7 of the *Charter*. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable 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.

53 It follows, therefore, that where disclosure is not properly made, even in cases where the accused cannot demonstrate that his or her right to make full answer and defence has been affected, there can be a *Charter* violation if the conduct by the Crown impacts upon the concerns outlined above. One example of this approach can be seen in the joint dissenting opinion of Major and McLachlin JJ. in *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537. While I disagreed with their conclusion in that case, their approach was the correct one. In determining whether a violation of the *Charter* had occurred, the focus (at para. 121) was whether the conduct of the Crown had “violate[d] the fundamental principles that underlie the community’s sense of fair play and decency and constitute[d] an abuse of the court’s process”.

54 In summary, I am of the view that disclosure, as a process, engages different aspects of fundamental justice under s. 7. Nevertheless, I do not believe that every error or omission by the Crown in making disclosure leads automatically to a violation of the *Charter*. While to date, my comments have been directed mainly at cases of non- or late disclosure, I believe the analysis is exactly the same in situations where the Crown fails to preserve adequately relevant material. It is to this area which I now turn.

The Duty to Preserve

55 The Crown’s duty to preserve evidence is also a necessary element of an accused’s right to make full answer and defence, as well as the right to a fair trial. The disclosure duty would have little meaning if the Crown could evade it by destroying or intentionally losing material evidence. In addition, the duty to preserve also engages the fundamental principle that justice must be seen to be done, as well as actually being done. As my colleague points out, in situations where an accused does not suffer any actual harm, there may still be a *Charter* violation if the conduct in failing to preserve evidence “violates the fundamental principles that underlie the community’s sense of fair play and decency”.

56 Still, the duty to preserve should not be confused with the Crown’s duty to disclose. Where, as here, the Crown has turned over all relevant material in its possession to the defence, its duty to disclose is exhausted. As this Court has stated on more than one occasion, “[t]he Crown can only produce what is in its possession or control”: *R. v. Stinchcombe*, [1995] 1 S.C.R. 754 (“*Stinchcombe (No. 2)*”), at p. 755; *R. v. Chaplin*, [1995] 1 S.C.R. 727, at p. 741. As a result, where a loss occurs, I see no value in a further inquiry to see whether the duty to disclose is satisfied.

57 This does not, however, end the matter. I agree with my colleague that where it becomes known to the Court that relevant material once in the possession of the Crown or the police has become unavailable, the Crown must explain the circumstances which led to its absence. The focus of this explanation, however, will be upon the reasons why this material did not make it into the hands of the defence and whether these reasons disclose that an abuse of process has occurred.

58 In cases where no abuse of process is demonstrated, that concludes the inquiry into the lack of disclosure. Still, I agree with my colleague that the accused can attempt to

demonstrate that there is a real likelihood of prejudice to the trial as a result of the loss: *Carosella, supra, per L'Heureux-Dubé J.*

59 In summary, where evidence is no longer in the possession of the Crown, the analysis is exactly the same as in cases where the Crown possesses the material, yet for a variety of reasons, has not disclosed it. For greater clarity, I believe the principles can be summarized in the following way:

(a) The Crown has a duty to disclose. This duty is a feature of the common law, and also has constitutional underpinnings. As a general rule, the Crown must disclose all relevant and unprivileged material in its possession to the defence. Broad and complete disclosure is the rule, not the exception.

(b) Where the Crown fails to disclose and an accused desires a constitutional remedy, the inquiry must be properly grounded. In that regard, the focus will be twofold:

(1) Did the failure to disclose have an effect upon the accused's right to make full answer and defence?

(2) Did the conduct of the Crown in failing to disclose violate fundamental principles underlying the community's sense of decency and fair play and cause prejudice to the integrity of the judicial system? I would note that a deliberate attempt by the Crown to avoid the rules of disclosure as set out in *Stinchcombe* is a factor to be considered under this heading.

(c) Where either of these effects is demonstrated on a balance of probabilities, a violation of s. 7 will have been demonstrated. The trial judge will then be entitled to fashion a remedy pursuant to s. 24(1). This should be done in accordance with the principles laid out in *O'Connor, supra*.

(d) Where, as in the case at bar, the failure to disclose occurred because the evidence in question was lost or destroyed while in the hands of the Crown, the inquiry is generally the same, except that it will be incumbent upon the Crown to explain the absence of the evidence and procedures taken to have it preserved. After this explanation, however, it will be up to the accused to satisfy the trial judge that his or her right to full answer and defence has been impaired, or that an abuse of process has occurred.

60 As stated above, I believe this approach is consistent with the jurisprudence of this Court as well as established constitutional principles. Moreover, I also believe it has the advantage of being practical and easy to follow. To illustrate, I will contrast it with the approach suggested by Sopinka J.

61 My colleague suggests three areas of inquiry where disclosure is not made, or is no longer possible:

(1) Whether the loss has impacted upon the accused's right to make full answer and defence;

(2) Whether the explanation of the Crown discloses a breach of its disclosure obligations, and hence a violation of s. 7; and

(3) Whether an abuse of process has occurred?

62 With respect, I see little value in making the inquiry into non-disclosed evidence a three-tiered process, as examining whether the Crown’s disclosure obligation has been satisfied in a case where the evidence is no longer available seems rather pointless. Clearly, this is a moot point as the evidence can no longer be disclosed. My colleague seems to accept that the inquiry at this point shifts to an assessment of the state actions which led to the loss of the evidence. In my view, this assessment is best made under what is traditionally known as the abuse of process doctrine. I see no need to separate this under a different heading. As I stated in *O’Connor, supra*, at para. 71, “[w]e should not invite schizophrenia into the law.”

63 My colleague also suggests that there is a lower threshold for establishing a violation of the “right to disclosure” than there is for demonstrating an abuse of process. In my view, this is an unacceptable development in the law. Our system has always proceeded on the basis that Crown misconduct should be examined at a certain standard. Essentially, my colleague is establishing two abuse of process regimes, one where there is abuse with regard to the disclosure process, and one encompassing all other situations. In my view, Crown misconduct is Crown misconduct. The same standard should be applied in all cases.

64 I also find it ironic that while my colleague speaks at length of the abuse of process doctrine, I fail to see how such a finding would ever be of any consequence. Clearly, a breach of the “right to disclosure”, and hence a violation of s. 7, would be made out long before an abuse of process.

65 In my view, the abuse of process doctrine, combined with the right to make full answer and defence, is ideally suited to remedying cases where evidence in the hands of the Crown is destroyed. In this regard, I would note that I do not disagree with many of the criteria suggested by my colleague in his reasons. Clearly, these factors will help indicate whether an abuse has actually occurred. I also agree that “an unacceptable degree of negligent conduct” in handling evidence may amount to a violation of s. 7.

66 Additionally, the fear that demonstrating an abuse can only take place in the clearest of cases should no longer be countenanced. Clearly, “the clearest of cases” standard now relates solely to the application of the stay of proceedings remedy: see *O’Connor, supra*. Not every action by the Crown must approach this standard to warrant a s. 7 violation; see for example *R. v. Burlingham*, [1995] 2 S.C.R. 206, at p. 286, where, although I agreed with the majority that the Crown's conduct in disregarding the plea bargain made with the accused did not amount to one of the “clearest of cases” requiring a stay of proceedings, I would have nonetheless found a violation of the accused's rights under s. 7 and substituted a conviction for the lesser included offence which was the object of the plea bargain. As Graeme G. Mitchell favourably noted, the decision of this Court in *O’Connor, supra*, “signals a radical change in the concept of what constitutes an abuse of process”: “Abuse of Process and the Crown’s Disclosure Obligation” (1996), 44 C.R. (4th) 130, at p. 136; see also Lee Stuesser, “Abuse of Process: The Need to Reconsider” (1994), 29 C.R. (4th) 92, at p. 103; Ursula Hendel and Peter Sankoff, “R. v. Edwards: When Two Wrongs Might Just Make a Right” (1996), 45 C.R. (4th) 330, at p. 334. It cannot be said, therefore, that a violation of s. 7 based on an abuse of process will be impossible for an accused to establish in an appropriate case.

67 As is evident, however, I am deeply concerned about lowering the threshold for establishing a s. 7 violation, which I believe is the effect of entrenching a general “right to disclosure”. In my view, violations of s. 7 should be addressed with some degree of seriousness. A finding that an accused has been deprived of his or her life, liberty and security of the person not in accordance with the principles of fundamental justice should not be made lightly. I believe the regime I have outlined above preserves that notion, and also maintains a powerful tool to curb state misconduct as well as unfair trials.

68 On a final note, I would merely comment that to the extent that the reasons of my colleague suggest or leave open the possibility that the actions of a third party can, on their own, amount to an abuse of process, I am unable to agree. In this regard, I would refer to my reasons on this point in *Carosella, supra*.

69 I would dispose of the appeal as suggested by Sopinka J.

Appeal dismissed.

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Solicitor for the respondent: The Attorney General for Alberta, Edmonton.