faith violation premised upon a deliberate attempt to circum­vent Charter rights.

Ultimately, the results reached in Feeney and Stillman may be proper and justifiable; however, respect for the Charter will diminish if the pattern of readily providing remedies for guilty mur­derers continues to be the stock and trade of Supreme Court decisions. Beyond the inconsistencies which hover around the periphery of the Collins/Stillman test, the ma­jor shortcoming of this test is the failure to incorporate an element of proportionality into the framework of analysis. Conscripted evidence should not be automatically excluded without some consideration of the seriousness of the offence and the seriousness of the violation, and the analysis of the seriousness of the violation for non-conscripted evi­dence should not be done in a factual vacuum which does not factor in the seriousness of the offence. Professor Paciocco explains how the principle of proportionality should be employed in the deter­mination of whether to ex­clude probative evidence: “The principle of proportion­ality requires courts to make the decision whether to ex­clude evidence by comparing the severity of the breach and the seriousness of the consequences of excluding the evi­dence, given all of the circum­stances and the long-range interests of the administration of justice. The attraction of the principle is that it enables the complex mix of competing in­terests to be measured on a case by case basis. This is of value because the exclusion of evidence has both costs and benefits. Sometimes the costs simply outweigh the benefits. Where this is so, the evidence should not be excluded. The exclusion of evidence should not become some kind of self­flagellation in which we, as a society, inflict disproportio­nate pain on ourselves to show the depth of our repentance for having violated the Charter rights of the accused. The fact is that so long as propor­tionality is eschewed com­pletely in 'fair trial' cases, even minor, technical violations will result in the loss of critical evi­dence against serious offend­ers. What public interest is there in doing that? The fair­trial dichotomy is simply too rigid to allow for the rational assessment of the competing interest that are presented when exclusionary decisions come to be made”.

Upon a review of the activ­ist and progressive stand taken by the Supreme Court in the 1997 term, one can say with certainty that the reports of the death of the Charter were greatly exaggerated. As Shakespeare has said, “the law hath not been dead, though it hath slept”. However, if 1997 represents the waking of this sleeping giant known as the Charter, we may have to con­front a new problem regarding the ever-widening gap be­tween the judicial approach to rights violations and the com­munity views as to when con­stitutional remedies are war­ranted.

Clearly, the views of the majority cannot and should not govern the approach to constitutional adjudication; however, failure to bridge the gap between reasonable community views and the Collins/Stillman test can only serve to foster contempt for Charter values. Although few people are naive enough to believe that the enactment of the Char­ter was the first step in creat­ing a legal utopia, many peo­ple would believe that employ­ing the Charter to protect Mr. Stillman and Mr. Feeney has already brought about a legal dystopia.

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THE DISCLOSURE DILEMMA: 1997
DECISIONS ON EVIDENCE

BY DIANNE L. MARTIN

Assumptions about the truth, or not, of criminal complaints were particularly visible in the Supreme Court’s 1997 deci­sions on evidentiary issues. This is so because of some longstanding trends in the ju­risprudence which are now reaching their logical conclu­sions, but also because of the nature of the cases and the is­sues. Criminal cases have dominated the law of evidence for some time and this term is no different. The key evidence decisions all concerned crimi­nal prosecutions, with the ex­ception of M. (A.) v. Ryan. However, Ryan, although it is a civil case involving an action for sexual abuse brought by a patient against her psychia­trist, is an important decision in the criminal law context as well. The case itself, and the approach taken in the judge­ment, demonstrates the extent to which civil and criminal law rules of evidence are merging, particularly in cases involving allegations of sexual abuse by persons in authority. It also advances the discussion of one of the more difficult issues to be decided by the Court, that is, resolution of the con­flicting interests engaged by the issue of access to confiden­tial records of therapy or coun­selling concerning a com­plainant/witness. That trou­bling issue is considered this term in the context of discov­ery of the prosecution case generally and, in particular, in terms of determining what the appropriate remedy should be when the Crown fails or is un­able to make full disclosure.

Disclosure was not the only issue to be considered, how­ever. Other decisions raise im­portant questions about the admissibility of illegally ob­tained evidence, eyewitness identifi­cation evidence, and the obligation on the Crown to call particular witnesses. Nonetheless, regardless of the primary issue involved, all of the decisions demonstrate a concern with preserving con­victions or, more precisely, with supporting the choices of prosecuting agencies, in a way that demonstrates consider­able confidence in the essen­tial propriety of those choices. Although the tenets of the adversary process are fre-
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THE DISCLOSURE DILEMMA, from page 97

in cases of possible “police involvement”, the trial judge granted a stay of proceedings based on the disclosure breach.

[Carosella] appears to be crystal clear that at issue is the denial to the defence of material to which they (now) have a constitutionally guaranteed right. The material was disclosable; it was not produced; a breach has therefore occurred and a remedy must be granted.

In February 1997, a 5-4 majority of the Supreme Court of Canada held that the stay of proceedings was appropriate. The majority (Sopinka J., writing for Lamer C.J.C., Cory, Iacobucci, and Major JJ.) appears to elevate the duty on the Crown to disclose their case to the defence, to the level of a constitutional right enjoyed by an accused. The language seems clear, both as to the right and the entitlement to a remedy. Upon demonstration that they have been denied disclosable material, the defence is entitled to a remedy, with no further showing of prejudice.

The decision appears to be crystal clear that at issue is the denial to the defence of material to which they (now) have a constitutionally guaranteed right. The material was disclosable; it was not produced; a breach has therefore occurred and a remedy must be granted.

Given the difficulty in establishing prejudice, it appears clear that the primary ground upon which the granting of a stay was upheld is the mere fact of non-disclosure. The trial judge had concluded that the notes “would more likely than not tend to assist the appellant”, but this conclusion is not well supported by the evidence, as the worker who made them had no recollection of their contents. Sopinka J. struggled with that rather bald conclusion, but in the end, however, he accepted it. His reasons indicate that he did so because he was prepared to make some rather speculative assumptions about how the counselling session progressed and how it would differ from a police interview. First, he argued that the notes might have given the appellant (unspecified) ammunition for cross-examination. Next, he claimed that the notes might have “revealed the state of the complainant’s perception and memory” or might have pointed the appellant to other witnesses. There is no discussion as to why the notes made by the Centre might contain such information when it was not contained in the lengthy statements given to police. There is no attempt to articulate why these notes would reveal the state of the complainant’s memory in a way that the police interview would not. One is left to speculate that the majority assumes that a complainant will admit to weaknesses in her recollection and doubts about her allegations when speaking to a counsellor, but that this will not occur (or will not be recorded) when she speaks to the police. However, Sopinka J. was clear that the defence need not be forced to speculate about possible uses of the destroyed material in order to establish that there has been a breach of a constitutionally protected right. To force them to do so would be to force them into an impossible “catch-22” position.

It is quite clear that the majority is at least equally concerned with the destruction of the notes, and the intent behind it, as with the actual effect of that destruction on the rights of the accused. Similarly, the effect of the conduct on the appearance of justice to the accused supersedes any requirement that an actual injustice be established.

One can be forgiven for reading the majority as strengthening disclosure rights. There is almost no hint that the key to the decision is not the defence’s loss of disclosable material, but rather the conduct of the Centre. However, as becomes obvious in subsequent decisions, the majority in Carosella are less interested in supporting the presumption of innocence and providing the defence with tools to challenge the prosecution case, than they are with “punishing” the Centre for its efforts to thwart anticipated disclosure and/or discovery orders. Although expressed in the language of disclosure rights, the majority are clearly angered by the Centre’s pre-emptive action, which is treated as a form of contempt, bordering on a criminal obstruction of justice.

It is quite clear that the majority is at least equally concerned with the destruction of the notes, and the intent behind it, as with the actual effect of that destruction on the rights of the accused. Similarly, the effect of the conduct on the appearance of justice to the accused supersedes any requirement that an actual injustice be established.

La Forest, L’Heureux-Dubé, Gonthier, and McLachlin JJ. dissented in the result, and in the approach taken by the majority to the facts, the issues, and the law. They do not accept that a third party, a member of the public at large, can be bound by the Crown’s disclosure obligations, nor that the records are sufficiently relevant or weighty that their absence from the trial must result in a stay of the proceedings, without a showing of actual prejudice. The distinction between third parties and the prosecution is rigorously maintained, in contrast with the majority’s reasoning which attempted to cast the Centre as an agent of the state. L’Heureux-Dubé J. frames the ultimate issue on that distinction, while personalizing the claim for relief as one involving the assertion of a case of actual prejudice.

This characterization of the appellant’s position is somewhat disingenuous, and stems more from the position of the majority than from Carosella or his counsel. The majority had
attempted, not particularly successfully, to clothe the notes with some actual relevance and thus to identify some actual, as contrasted with speculative, prejudice occasioned by their destruction. L’Heureux-Dubé J. is particularly successful in challenging this proposition. In the place of bald assertions of relevance and probative worth, and speculation about prejudice, L’Heureux-Dubé J. sets out the state of the record on the notes, reproducing the relevant testimony.

In R. v. La (or Vu), the divisions apparent in Carosella are maintained as the Court continues to consider some of the difficult questions left unresolved or problematic in that decision, including the scope of the apparently new direction the Court was taking in regard to disclosure.

This is a strong argument. However, L’Heureux-Dubé J. does not rest her case solely on the factual frailty of the majority opinion. She goes further, and argues that in order to establish that there has even been a breach on any constitutionally protected rights, the accused must prove that there has been prejudice to the right to make full answer and defence, or establish that this is one of the “clearest of cases” of abuse of process which thereby necessitates a stay. Just as the majority were not fully persuasive in arguing for the relevance and materiality of the lost evidence, the minority is not entirely successful on this point. No real effort is addressed to the difficult issue of just how the defence might “prove” abuse of process in such a case, or demonstrate prejudice to the degree required when the material that might permit that showing is unavailable.

In the result, both sets of reasons are somewhat troubling; the majority’s, for its apparent willingness to engage in rather broad speculation about what of relevance may have taken place in an initial interview at a Rape Crisis Centre; the minority’s, for the almost insurmountable burden it is prepared to impose on the defence which has been denied material that, at the very least, might have been helpful in the difficult task of defending events alleged to have taken place some thirty years ago. What is quite clear is that the issues posed in Carosella have not been successfully resolved by either branch, and that much is left for subsequent decisions to clarify. La?

In R. v. La (or Vu), the divisions apparent in Carosella are maintained as the Court continues to consider some of the difficult questions left unresolved or problematic in that decision, including the scope of the apparently new direction the Court was taking in regard to disclosure. The answer is partial. La concerns important, disclosable evidence (a taped interview with the chief Crown witness in charges of sexual assault and child prostitution) developed and lost by the police. The original stay of proceedings based on non-disclosure of this tape is reversed. Clearly the Court in La resiles from the apparently sweeping protection for disclosure expressed in Carosella, and no new approach to disclosure problems caused by the police emerges. An intriguing, related question concerns what is happening to the common law remedy of abuse of process; although somewhat beyond the scope of this analysis, this question is also addressed again.

Sopinka J. (for Lamer, C.J.C., Cory, Iacobucci, and Major J.J.) posed the issue as a question as to whether or not there was a breach of disclosure at all when “through innocent inadver tence” the prosecution loses the relevant evidence. He thus commences the reasons from the conclusion that the primary issue will be, in effect, the intention of the prosecution in regard to the evidence, and not the effect of its loss, although effect may be considered in the alternative. A (new) constitutional duty to explain the reason for the failure to disclose is swiftly identified as a prerequisite to a conclusion that a breach has occurred.

This new explanatory duty on the Crown apparently replaces, or at least refines, the constitutional entitle ment to disclosure accorded to the accused in Carosella. This new explanatory duty is located in a duty to preserve evidence gathered which does not apparently yet extend to a duty on the police to obtain evidence, for example by making an accurate record of it.

continued on page 100
confidential counselling sessions, like those in Carosella, is, of course, a matter of considerable debate, and, per O'Connor, must be assessed with a considerable amount of care. Neither relevance nor disclosure of such material can simply be assumed as this passage implies, particularly when the records do not exist and their specific contents are unknown. Because the records are in the hands of third parties, and because of the confidentiality and other policy constraints generated by their nature (a therapeutic, confidential counselling relationship), disclosure (as compared to production to the court) is by no means automatic, as it would be in the case of police investigative files. The most that might be said is that records such as those in Carosella might be ordered produced to the trial judge (in contrast with being disclosed to the defence) so that actual relevance might be determined.

However, the second point of distinction has more weight. That is, that the reason that the records could not be produced to the court to be considered for disclosure to the defence is that they were destroyed deliberately to prevent that very determination. In the rather inflated terms of Carosella: “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”.

Although the interests of the accused, as well as the public interest in determining the truth of the allegation, are the same regardless of the reason for the lost evidence, the Court introduces a supervisory aspect to the determination, reminiscent of that used in section 24(2) of the Charter. Once again the reason for the loss is critical: “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”.

The Court’s decision to dispose of this case as it did, based on a particular vision of the adversarial nature of criminal proceedings, effectively confirms that some adversaries are more equal than others, and that other is the Crown.

There is a residual right, however, or more accurately an opportunity, to demonstrate actual prejudice. When an accused has been denied the disclosure to which he is entitled but the prosecution explanation for that loss is acceptable to the trial judge, he may still obtain a remedy if he “establishes” either that the circumstances of the loss amount to an abuse of process, or that the right to make full answer and defence is thereby impaired. The judgment does not articulate the standard of proof for establishing the conditions for either of these alternative remedies, but it is apparently lower than “the clearest of cases” test previously associated with the abuse of process doctrine.

The dissent of Justices La Forest, L’Heureux-Dubé, Gonthier, and McLachlin, written by L’Heureux-Dubé J., concerns the majority’s reasons, not the result. The dissent continues the arguments that divided the Court in Carosella. That is, whether or not the identification of the prosecution’s duty to make disclosure as a distinct constitutional right represents a marked and unwarranted development in doctrine, and to what extent the standard of proof to establish either a breach of section 7 or an abuse of process has changed or should change. In regard to the former, L’Heureux-Dubé J. makes a compelling case that the case law concerning disclosure, from and including the reasons of Sopinka J. in Stinchcombe, did not originally, until Carosella, treat it as a distinct right of the accused guaranteed under section 7 of the Charter.

It is difficult to assess the reason for this change, as Sopinka J. does not acknowledge that one has occurred in his reasons, except to recognize that it was essential to the result in Carosella. The other terrain of dispute, the scope of and remedy for breaches of section 7 of the Charter, and for a finding of an abuse of process, is almost as obscure. However, the effect of the position of the dissent is that it will almost never be possible to establish a case for a remedy for a failure to make disclosure, identifying a concomitant duty on trial judges to assess the explanation and to call the witness themselves in a proper case in the interests of justice.

The Court’s decision to dispose of this case as it did, based on a particular vision of the adversarial nature of criminal proceedings, effectively confirms that some adversaries are more equal than others, and that other is the Crown.

CONCLUSION: THE DEMONSTRATION OF GUILT

In the “guilt assuming” model, the truth-seeking function of the trial is served primarily by devices that limit barriers to the recounting of the “truthful” testimony of prosecution witnesses. Thus accommodation will be made for vulnerable and reluctant witnesses, limits will be placed on the cross-examination of those witnesses, and expert opinion evidence that supports their credibility will be admitted.

Limits will only be imposed on the discretion of prosecution officials when it is clearly demonstrated, through proof on a balance of probabilities, that prosecution conduct has deliberately infringed a Charter right or guarantee, or that it amounts to an abuse of process.

The values of “justice” or “fairness” to the accused, on the other hand, while serving an important legitimation function, will often be required to give way to the public interest, which is defined in terms of the assumption that the validly
CRIMINAL LAW

commenced prosecutions are against the "correct" accused. Thus the accused in La, who was deprived in S.C.R. 607, deals with the admissibility of DNA evidence based on samples obtained illegally from a suspect. Stillman is one of the few cases this term to join criticism of prosecution conduct—in this case by the police—with a remedy. The seizure of physical evidence from the youthful offender without his consent was held by the majority to warrant the exclusion of the evidence.

3. R. v. Nikolovski, [1996] 3 S.C.R. 1197, deals with the use a trial judge may make of a video of a crime when sitting as the trier of fact, in a case where identity is the sole issue and the eyewitness cannot make a positive identification. Although the complainant eyewitness could not identify the accused as his assailant, the Court upheld the trial judge's decision to rely upon her own perception of the proof of identity contained in a video recording of the robbery. The trial judge compared the video to the appearance of the accused and was satisfied as to guilt.

4. R. v. Cook deals with the failure of the Crown to call the victim of the offence as a witness, or to explain the decision to the trial judge.

11. In R. v. Levogiannis, [1993] 4 S.C.R. 475, L'Heureux-Dubé J., writing for the Court, upholds s. 486(2.1) of the Criminal Code which provides for the use of a screen or otherwise to permit "obstructed view testimony", or testimony outside the courtroom entirely in the case of vulnerable witnesses making complaints of sexual abuse. The concern of the accused that such a procedure effectively undermines the presumption of innocence—the reason the witness requires this consideration is because she or he has been abused—is dismissed as a matter that can be dealt with by the trial judge in her or his instructions. Similarly, in R. v. L. (D.O.), [1993] 4 S.C.R. 419, the Court unanimously upheld s. 715.1 of the Criminal Code which makes admissible, if adopted, videotaped complaints of witnesses under the age of eighteen making complaints of sexual abuse or assault. The assumption of investigative reliability is obvious.

12. The limits operate specifically in regard to the cross-examination of complainants in cases of sexual assault. For example, s. 276 of the Criminal Code limits severely any cross-examination on other sexual activity. See also R. v. Seaboyer, [1991] 2 S.C.R. 577.

13. In R. v. B. (G.), [1990] 2 S.C.R. 30, the Court upheld the use of expert opinion evidence about the causal connection between abuse and the behaviour of abused children. See also R. v. Manquard, [1993] 4 S.C.R. 223, where expert evidence was permitted to rehabilitate the credibility of a child complainant.