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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 self-flagellation 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 fair trial 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*.[1] 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,[2] eyewitness identification evidence,[3] and the obligation on the Crown to call particular witnesses.[4] 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-

quently cited as worthy of respect and preservation, closely followed by (or sometimes included within) references to the importance of the goal of "truth finding", there are clearly assumptions operating about which of the adversaries is to be preferred in a contest of credibility—and in which cases. However, these assumptions are not universally, or even consistently, held by the whole Court.

The Court is frequently divided over evidence issues. The reasoning and writing of the differing opinions is often adversarial in tone, suggesting that the differences are more than doctrinal. The divisions are particularly evident in the different assumptions apparent in the disparate approaches taken to the issues posed by sexual abuse cases.

The Court is frequently divided over evidence issues. The reasoning and writing of the differing opinions is often adversarial in tone, suggesting that the differences are more than doctrinal. The divisions are particularly evident in the different assumptions apparent in the disparate approaches taken to the issues posed by sexual abuse cases. In these cases in particular, assumptions about the veracity and reliability of the facts founding the prosecution serve almost as a bellwether to the approach the Court will take on the legal questions. Without suggesting that this is anything more than an observable tendency, Justices Lamer, Sopinka, Cory, Iacobucci, and Major are frequently on one side of evidence questions, opposed by Justices La Forest, L'Heureux-Dubé, and Gonthier, and, on occasion, McLachlin. The majority position has often been led by the late Mr. Justice Sopinka and, in general, decisions from this majority have tended to support the importance of the appearance of a fair trial for the accused as an important value in itself, but not one that has been particularly grounded in a working presumption of innocence. That, however, appears to change in regard to prosecutions of sexual abuse. In these cases, there appears to be less faith in the foundation facts, and a more lively concern with a presumption of innocence than is the case in regard to criminal prosecutions generally. The minority position, on the other hand, most frequently led by Madame Justice L'Heureux-Dubé, tends to be grounded in a stance of strong support for complainants, particularly vulnerable complainants who have traditionally been effectively excluded from the criminal justice system. This position, however, tends to operate from and thus reinforce a presumption of guilt, based on assumptions about the reliability of the original investigation. Originating in a concern for fragile witnesses, particularly those alleging sexual abuse, this reliance on the prosecution perspective has in turn influenced the positions taken by (some of) these justices on criminal evidence questions generally.

These distinctions, which have been developing over a number of years, are becoming increasingly sharp and it is important to follow the course of these tendencies. To do so is the modest goal of this paper. The discussion proceeds in a straightforward manner, with a close examination of two of the decisions. *Carosella* and *La* are split decisions, and the review of the cases is as attentive to the divisions on the Court as it is to the doctrinal and background assumptions that may be driving the reasons. The paper concludes by returning to the proposition that at least some of the decisions reflect assumptions that serve to treat trials as symbolic forums for "demonstration versus determination" of guilt, and by locating the decisions both historically, and within the claims of the adversary process for fairness and accuracy generally.

THE DISCLOSURE DILEMMA

Disclosure of the prosecution case has always been an important component of a fair trial, particularly when expressed in terms of the right fundamental to fair trials in an adversary system—to know the case one must meet. More recently, however, disclosure has come to include access to material with which to challenge prosecution witnesses and evidence more generally, and to support the defence position where possible. In this expanded meaning of disclosure, difficult questions arise as to what extent the prosecution must assist the defence, in contrast with the more limited duty not to surprise unfairly. The question of what remedy should be granted, and when, for a failure to make disclosure (particularly in this wider sense), is similarly complex. These and other disclosure issues are part of what the Court grapples with in *Carosella* and *Vu (La)*. Ultimately, these are cases which demonstrate conflicts within the ideology of the adversary process as a vehicle for the "search for truth" by forcing the question—"whose truth"?

Carosella[5]

Carosella is another of the "historical sexual abuse"[6] cases to reach the Court in recent years and raises once again the question of disclosure of the complainant's confidential counselling records. This time, however, the issue focuses on the role of those who provide the counselling, and the assumptions that courts are willing to make about that role.

The appellant was charged early in 1992 with committing a gross indecency some thirty years ago, when he was the complainant's teacher. The disclosure and related issues the Court ultimately had to resolve began with a request by the appellant, made after a jury had been selected, for notes of counselling the complainant received from a local rape crisis centre ("the Centre") on March 16, 1992, the day before she made her first complaint to the police. All parties consented to the order which was made by the trial judge on October 26, 1994. It was then learned that the file the Centre produced to the court did not contain any notes of that counselling session (or any of the subsequent sessions), and that the notes could not be produced because they had been shredded in April 1994. When it became known that they were destroyed as part of the Centre's policy to avoid disclosing confidential notes

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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 preemptive 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 position, and that much is left for subsequent decisions to clarify.

La[7]

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. One must look to *La* to determine whether *Carosella* should be read almost as an aberration and limited to its facts (an historic sexual assault and a rape crisis centre shredding its files), or whether it forges a new direction in crafting a constitutionally protected *right* to disclosure, with a concomitant right to a remedy. 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 inadvertence" 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 *entitlement* 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. Sopinka J. does, however, recognize that"[t]he right of disclosure would be a hollow one if the Crown were not required to preserve evidence that is known to be relevant". A sliding scale of care is identified—the more relevant and probative, the greater the duty to preserve it from loss—along with a sliding scale of fault. Deliberate destruction by police or Crown officers of material known to be relevant will amount to an abuse of process, but so might "an unacceptable degree of negligent conduct". Thus in *La*, the prosecution's explanation that a tape recording of a complainant's first version of her allegation has been inexplicably forgotten and then lost by a police officer is accepted, while in *Carosella* the prosecution's explanation that a third party, beyond their control and with no duty to make or preserve evidence, has destroyed notes of an interview, is not.

Sopinka J. does not deal with this apparent inconsistency directly. Nor does he offer any guidance as to how the relevance of missing material can be determined, or what background assumptions about relevance will be persuasive. Rather, he distinguishes the two situations in two ways, one more successful than the other. First, he asserts, as if it strengthens the case, that in *Carosella* "the documents which were destroyed were relevant and subject to disclosure under the test in *O'Connor*". The taped interview of the first police interview with a complainant, *before* charges are laid, is obviously relevant, of a high level of reliability, and must be disclosed. In contrast, the degree of relevance of notes from

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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.[8] 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 judgement 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.[9]

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*,[10] 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,[11] limits will be placed on the cross-examination of those witnesses,[12] and expert opinion evidence that supports their credibility will be admitted.[13]

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

commenced prosecutions are against the "correct" accused. Thus the accused in *La,* who was deprived of disclosable material, was required to affirmatively prove that he was prejudiced before claiming a remedy. The operating presumption, in other words, is of guilt. 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. This type of confidence in the reliability of the facts that are used and presented in courts to justify arrest, and the other discretionary powers of criminal justice officials, leading to an operational presumption of guilt, has been evident as an unarticulated but influential background assumption in many of the judgements written about evidence in the past decades.[14] It is clearly apparent in the judgements from the 1997 term.

NOTES

1. [1997] 1 S.C.R. 157. The litigation issue in *Ryan*, as in *Carosella*, is sexual abuse; in *Ryan* by a psychiatrist, in *Carosella* by a teacher. In both the evidence question concerns access to confidential records on the hands of third parties. The leading decision, *R.* v. *O'Connor* [1995], 4 S.C.R. 411, involved a priest/teacher. See J.M. Gilmour & D.L. Martin, "Whose Case is it? Standing and Disclosure in Civil and Criminal Law Contexts", forthcoming.

2. *R.* v. *Stillman,* [1997] 1 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.

5. [1997] 1 S.C.R. 80

6. The label identifies the fact that they deal with allegations about events far in the past.

7. (1997), 148 D.L.R. (4th) (S.C.C.).

8. See, for example, Parliament's efforts to the same end in the new s. 278.1 of the *Criminal Code*.

9. At common law, abuse of process was only available on proof of "the clearest of cases"—a rare circumstance. However, given the reworking of the doctrine in *O'Connor*, the burden of proof for either a *Charter* breach or an abuse of process are now presumably the same—that is, proof on a balance of probabilities. See U. Hendel & P. Sankoff, "*R.* v. *Edwards*: When Two Wrongs Might Just Make a Right" (1995) 45 C.R. (4th) 330.

10. [1991] 3 S.C.R. 326.

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 (L'Heureux-Dubé J. writing concurring reasons for herself and Gonthier J.) 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. *Marquard*, [1993] 4 S.C.R. 223, where expert evidence was permitted to rehabilitate the credibility of a child complainant.

14. For example, the use of statements by prosecution witnesses to police was regularized in *R.* v. *Milgaard* (1971), 2 C.C.C. (2d) 206 (Sask. C.A.); 4 C.C.C. (2d) 566n (S.C.C.), in a judgement which rests on clear assumptions about their truth. More that twenty-five years later, it is learned that not only was Milgaard innocent, but that there are significant doubts about those very statements and how they were obtained by the police: see D. Roberts, K. Makin, "DNA test exonerates Milgaard" *The Globe and Mail* (July 19, 1997) at A1.

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