R. *v.* O'Connor, [1995] 4 S.C.R. 411

**Hubert Patrick O'Connor** *Appellant*

*v.*

**Her Majesty The Queen** *Respondent*

and

**The Attorney General of Canada, the Attorney General for Ontario, the Aboriginal Women's Council, the Canadian Association of Sexual Assault Centres, the DisAbled Women's Network of Canada, the Women's Legal Education and Action Fund, the Canadian Mental Health Association and the Canadian Foundation for Children, Youth and the Law** *Interveners*

**Indexed as: R. *v.* O'Connor**

File No.: 24114.

1995: February 1; 1995: December 14.

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 british columbia

*Criminal law -- Evidence -- Disclosure -- Accused charged with sexual offences -- Defence counsel obtaining pre-trial order requiring Crown to disclose*

*complainants' entire medical, counselling and school records -- Trial judge ordering stay of proceedings owing to non-disclosure and late disclosure by Crown -- Court of Appeal allowing Crown's appeal and ordering new trial -- Whether stay of proceedings appropriate remedy for non-disclosure by Crown of information in its possession.*

*Criminal law -- Evidence -- Medical and counselling records -- Procedure to be followed where accused seeks production of records in hands of third parties.*

The accused was charged with a number of sexual offences. Defence counsel obtained a pre-trial order requiring that the Crown disclose the complainants' entire medical, counselling and school records and that the complainants authorize production of such records. The Crown applied to a different judge for directions regarding the disclosure order and for the early appointment of a trial judge. After a trial judge had been appointed, the Crown again sought directions regarding the disclosure order. By this time many of the impugned records had come into its possession. The trial judge made it clear that he was to be provided promptly with therapy records relating to all four complainants. The accused later applied for a judicial stay of proceedings based on non-disclosure of several items. Crown counsel submitted that the two Crown prosecutors were handling the case from different cities, and that there were difficulties concerning communication and organization. She asserted that the non-disclosure of some of the medical records was due to inadvertence on her part, and that she had "dreamt" the transcripts of certain interviews had been disclosed. She submitted that uninhibited disclosure of medical and therapeutic records would revictimize the victims, and suggested that the disclosure order exhibited gender

bias. The trial judge dismissed the application for a stay, finding that the failure to disclose certain medical records had been an oversight. He noted, however, that the letters written by Crown counsel to the counsellors had unacceptably limited the scope of the disclosure to only those portions of the records which related directly to the incidents involving the accused. This resulted in the full therapy records not being disclosed to the defence until just before the trial. He concluded that while the conduct of the Crown was "disturbing", he did not believe that there was a "grand design" to conceal evidence, nor any "deliberate plan to subvert justice". In light of the difficulties encountered during discovery, Crown counsel then agreed to waive any privilege with respect to the contents of the Crown's file and to prepare a binder in relation to each of the complainants containing all information in the Crown's possession relating to each of them. On the second day of the trial, counsel for the accused made another application for a judicial stay of proceedings based largely on the fact that the Crown was still unable to guarantee to the accused that full disclosure had been made. The trial judge stayed proceedings on all four counts. He noted the constant intervention required by the court to ensure full compliance with the disclosure order and found that the Crown's earlier conduct had created "an aura" that had pervaded and ultimately destroyed the case. The Court of Appeal allowed the Crown's appeal and directed a new trial. This appeal raises the issues of (1) when non-disclosure by the Crown justifies an order that the proceedings be stayed and (2) the appropriate procedure to be followed when an accused seeks production of documents such as medical or therapeutic records that are in the hands of third parties.

*Held* (Lamer C.J. and Sopinka and Major JJ. dissenting): The appeal should be dismissed.

(1) *Stay of Proceedings*

*Per* La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: There is no need to maintain any type of distinction between the common law doctrine of abuse of process and *Charter* requirements regarding abusive conduct. Where an accused seeks to establish that non-disclosure by the Crown has violated s. 7, 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. Such a determination requires reasonable inquiry into the materiality of the non-disclosed information. 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 trial. Once a violation is made out, the court must fashion a just and appropriate remedy, pursuant to s. 24(1). Where the adverse impact upon the accused's ability to make full answer and defence is curable by a disclosure order, then such a remedy, combined with an adjournment where necessary to enable defence counsel to review the disclosed information, will generally be appropriate. There may, however, be exceptional situations where, given the advanced state of the proceedings, it is simply not possible to remedy the prejudice. In those "clearest of cases", a stay of proceedings will be appropriate. When choosing a remedy for a non-disclosure that has violated s. 7, the court should also consider whether the Crown's breach of its disclosure obligations has violated fundamental principles

underlying the community's sense of decency and fair play and thereby caused prejudice to the integrity of the judicial system. If so, it should be asked whether this prejudice is remediable, having regard to the seriousness of the violation and to the societal and individual interests in obtaining a determination of guilt or innocence.

While the Crown's conduct in this case was shoddy and inappropriate, the non-disclosure cannot be said to have violated the accused's right to full answer and defence. The whole issue of disclosure in this case arose out of the order requiring that the Crown "disclose" records in the hands of third parties and that the complainants authorize production of such records. This order was issued without any form of inquiry into their relevance, let alone a balancing of the privacy rights of the complainants and the accused's right to a fair trial, and was thus wrong. The Crown was ultimately right in trying to protect the interests of justice, and the fact that it did so in such a clumsy way should not result in a stay of proceedings, particularly when no prejudice was demonstrated to the fairness of the accused's trial or to his ability to make full answer and defence. Even had a violation of s. 7 been found, this cannot be said to be one of the "clearest of cases" which would mandate a stay of proceedings.

*Per* Cory and Iacobucci JJ.: While the actions of Crown counsel originally responsible for the prosecution of this case were extremely high-handed and thoroughly reprehensible, the Crown's misdeeds were not such that, upon a consideration of all the circumstances, the drastic remedy of a stay was merited.

*Per* Lamer C.J. and Sopinka and Major JJ. (dissenting on this issue): A stay of proceedings was appropriate here. The Crown's conduct impaired the accused's ability to make full answer and defence. The impropriety of the disclosure order if any does not excuse the Crown's failure to comply with it until immediately before the trial. The Crown never took proper action regarding the objections it had. If it could not appeal the order it should have returned to the issuing judge to request variation or rescission. The letters from the Crown prosecutor to the therapists narrowed the scope of the order. As soon as the order was clarified for the therapists, complete records were disclosed, suggesting that had the letters contained an accurate description of the order, compliance would have occurred at a much earlier time. The Crown also breached its general duty to disclose all relevant information. Each time disclosure was made in this case it was the result of the defence having to raise the matter in court. The conduct of the Crown was such that trust was lost, first by the defence, and finally by the trial judge. It is of little consequence that a considerable amount of the non-disclosed material was ultimately released piecemeal to the defence prior to the trial. The effect of continual discovery of more non-disclosed evidence, coupled with the Crown's admission that disclosure was possibly incomplete, created an atmosphere in which the defence's ability to prepare was impaired. The Crown's delay in making disclosure and its inability to assure the trial judge that full disclosure had been made even after commencement of the trial were fatal to the proceedings. The continual breaches by the Crown made a stay the appropriate remedy. Proceedings had become unworkable and unfair. Remedies under s. 24(1) of the *Charter* are properly in the discretion of the trial judge. This discretion should not be interfered with unless the decision was clearly unreasonable.

The same breaches of the disclosure order, the general duty of disclosure and the undertaking to disclose files to the defence which impaired the accused's right to make full answer and defence also violated fundamental principles of justice underlying the community's sense of fair play and decency. The trial judge showed admirable tolerance for the behaviour of the Crown but in the end had no choice but to order a stay. When a criminal trial gains notoriety because of the nature of the offence, the parties charged or any other reason, there is an added burden in the paramount interest of ensuring fairness in the process. In this case, the fact that the offences alleged were many years in the past and that the accused had a high profile in the community called for a careful prosecution to ensure fairness and the maintenance of integrity in the process. The conduct of the Crown during the time the trial judge was involved, as well as in the months before his appointment, was negligent, incompetent and unfair. The trial judge was in the best position to observe the conduct of the Crown and its effect on the proceedings. He found that the trial had become so tainted that it violated fundamental principles underlying the community's sense of fair play and decency and that the accused was impaired in his ability to make full answer and defence.

(2) *Production of Records in the Possession of the Crown*

*Per* Lamer C.J. and Sopinka J.: The Crown's disclosure obligations established in *Stinchcombe* are unaffected by the confidential nature of therapeutic records when the records are in the possession of the Crown. The complainant's privacy interests in therapeutic records need not be balanced against the right of the accused to make full answer and defence in the context of disclosure, since concerns relating to privacy or privilege disappear where the documents in

question have fallen into the Crown's possession. The complainant's lack of a privacy interest in records that are possessed by the Crown counsels against a finding of privilege in such records. Fairness must require that if the complainant is willing to release this information in order to further the criminal prosecution, then the accused should be entitled to use the information in the preparation of his or her defence. Moreover, any form of privilege may be forced to yield where such a privilege would preclude the accused's right to make full answer and defence. Information in the possession of the Crown which is clearly relevant and important to the ability of the accused to raise a defence must be disclosed to the accused, regardless of any potential claim of privilege that might arise. While the mere existence of therapeutic records is insufficient to establish the relevance of those records to the defence, their relevance must be presumed where the records are in the Crown's possession.

*Per* Cory and Iacobucci JJ.: The principles set out in the *Stinchcombe* decision, affirmed in *Egger*, pertaining to the Crown's duty to disclose must apply to therapeutic records in the Crown's possession, as found by Lamer C.J. and Sopinka J.

*Per* Major J.: The Crown's disclosure obligations established in *Stinchcombe* are unaffected by the confidential nature of therapeutic records in its possession, as found by Lamer C.J. and Sopinka J.

*Per* La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: This appeal does not concern the extent of the Crown's obligation to disclose private records in its possession, or the question whether privacy and equality interests

may militate against such disclosure by the Crown. These issues do not arise in this appeal and were not argued before the Court. Any comment on these questions would be strictly *obiter*.

(3) *Production of Records in the Possession of Third Parties*

*Per* Lamer C.J. and Sopinka J.: When the defence seeks information in the hands of a third party (as compared to the state), the onus should be on the accused to satisfy a judge that the information is likely to be relevant. In order to initiate the production procedure, the accused must bring a formal written application supported by an affidavit setting out the specific grounds for production. However, the court should be able, in the interests of justice, to waive the need for a formal application in some cases. In either event, notice must be given to third parties in possession of the documents as well as to those persons who have a privacy interest in the records. The accused must also ensure that the custodian and the records are subpoenaed to ensure their attendance in the court. The initial application for disclosure should be made to the judge seized of the trial, but may be brought before the trial judge prior to the empanelling of the jury, at the same time that other motions are heard. In the disclosure context, the meaning of "relevance" is expressed in terms of whether the information may be useful to the defence. In the context of production, the test of relevance should be higher: the presiding judge must be satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify. While "likely relevance" is the appropriate threshold for the first stage of the two-step procedure, it should not be interpreted as an onerous burden upon the accused. A relevance threshold, at this stage, is simply a

requirement to prevent the defence from engaging in speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming requests for production.

Upon their production to the court, the judge should examine the records to determine whether, and to what extent, they should be produced to the accused. In making that determination, the judge must examine and weigh the salutary and deleterious effects of a production order and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence. In balancing the competing rights in question, the following factors should be considered: (1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record; (3) the nature and extent of the reasonable expectation of privacy vested in the record; (4) whether production of the record would be premised upon any discriminatory belief or bias; and (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record. The effect on the integrity of the trial process of producing, or failing to produce, the record, having in mind the need to maintain consideration in the outcome, is more appropriately dealt with at the admissibility stage and not in deciding whether the information should be produced. As for society's interest in the reporting of sexual crimes, there are other avenues available to the judge to ensure that production does not frustrate the societal interests that may be implicated by the production of the records to the defence. In applying these factors, it is also appropriate to bear in mind that production of third party records is always available to the Crown provided it can obtain a search warrant.

*Per* Cory and Iacobucci JJ.: The procedure suggested by Lamer C.J. and Sopinka J. for determining whether records in the possession of third parties are likely to be relevant was agreed with, as were their reasons pertaining to the nature of the onus resting upon the accused and the nature of the balancing process which must be undertaken by the trial judge.

*Per* Major J.: The substantive law and the procedure recommended by Lamer C.J. and Sopinka J. in obtaining therapeutic records from third persons were agreed with.

*Per* La Forest, L'Heureux-Dubé and Gonthier JJ. (dissenting on this issue): Private records, or records in which a reasonable expectation of privacy lies, may include medical or therapeutic records, school records, private diaries and social worker activity logs. An order for production of private records held by third parties does not arise as a remedy under s. 24(1) of the *Charter* since, at the moment of the request for production, the accused's rights under the *Charter* have not been violated. Nonetheless, when deciding whether to order production of private records, the court must exercise its discretion in a manner that is respectful of *Charter* values. The constitutional values involved here are the right to full answer and defence, the right to privacy, and the right to equality without discrimination.

Witnesses have a right to privacy in relation to private documents and records which are not part of the Crown's "case to meet" against the accused. They are entitled not to be deprived of their reasonable expectation of privacy except in accordance with the principles of fundamental justice. Since an applicant seeking

production of private records from third parties is seeking to invoke the power of the State to violate the privacy rights of other individuals, the applicant must show that the use of the State power to compel production is justified in a free and democratic society. The use of State power to compel production of private records will be justified in a free and democratic society when the following criteria are met: (1) it is shown that the accused cannot obtain the information sought by any other reasonable means; (2) production that infringes privacy must be as limited as reasonably possible to fulfil the right to make full answer and defence; (3) the arguments urging production rest on permissible chains of reasoning, rather than upon discriminatory assumptions and stereotypes; and (4) there is proportionality between the salutary and deleterious effects of production. The measure of proportionality must reflect the extent to which a reasonable expectation of privacy vests in the particular records, on the one hand, and the importance of the issue to which the evidence relates, on the other. Moreover, courts must remain alive to the fact that, in certain cases, the deleterious effects of production may demonstrably include negative effects on the complainant's course of therapy, threatening psychological harm to the individual concerned and thereby resulting in a concomitant deprivation of the individual's security of the person.

The first step for an accused who seeks production of private records held by a third party is to obtain and serve on the third party a *subpoena duces tecum*. When the subpoena is served, the accused should notify the Crown, the subject of the records, and any other person with an interest in the confidentiality of the records that the accused will ask the trial judge for an order for their production. Then, at the trial, the accused must bring an application supported by

appropriate affidavit evidence showing that the records are likely to be relevant either to an issue in the trial or to the competence to testify of the subject of the records. If the records are relevant, the court must balance the salutary and deleterious effects of ordering that the records be produced to determine whether, and to what extent, production should be ordered.

The records at issue here are not within the possession or control of the Crown, do not form part of the Crown's "case to meet", and were created by a third party for a purpose unrelated to the investigation or prosecution of the offence. It cannot be assumed that such records are likely to be relevant, and if the accused is unable to show that they are, then the application for production must be rejected as it amounts to nothing more than a fishing expedition. The burden on an accused to demonstrate likely relevance is a significant one. It would be insufficient for the accused to demand production simply on the basis of a bare, unsupported assertion that the records might impact on "recent complaint" or the "kind of person" the witness is. Similarly, the applicant cannot simply invoke credibility "at large", but must rather provide some basis to show that there is likely to be information in the impugned records which would relate to the complainant's credibility on a particular, material issue at trial. Equally inadequate is a bare, unsupported assertion that a prior inconsistent statement might be revealed, or that the defence wishes to explore the records for "allegations of sexual abuse by other people". Similarly, the mere fact that a witness has a medical or psychiatric record cannot be taken as indicative of the potential unreliability of the evidence. Any suggestion that a particular treatment, therapy, illness, or disability implies unreliability must be informed by cogent evidence, rather than stereotype, myth or prejudice. Finally, it must not be presumed that the mere fact that a witness

received treatment or counselling after a sexual assault indicates that the records will contain information that is relevant to the defence. The focus of therapy is vastly different from that of an investigation or other process undertaken for the purposes of the trial. While investigations and witness testimony are oriented toward ascertaining historical truth, therapy generally focuses on exploring the complainant's emotional and psychological responses to certain events, after the alleged assault has taken place.

If the trial judge decides that the records are likely to be relevant, then the analysis proceeds to the second stage, which has two parts. First, the trial judge must balance the salutary and deleterious effects of ordering the production of the records to the court for inspection, having regard to the accused's right to make full answer and defence, and the effect of such production on the privacy and equality rights of the subject of the records. If the judge concludes that production to the court is warranted, he or she should so order. Next, upon their production to the court, the judge should examine the records to determine whether, and to what extent, they should be produced to the accused. Production should only be ordered in respect of those records, or parts of records, that have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice or by the harm to the privacy rights of the witness or to the privileged relation. The following factors should be considered in this determination: (1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record; (3) the nature and extent of the reasonable expectation of privacy vested in the record; (4) whether production of the record would be premised upon any discriminatory belief or bias; (5) the potential prejudice to the complainant's

dignity, privacy or security of the person that would be occasioned by production of the record; (6) the extent to which production of records of this nature would frustrate society's interest in encouraging the reporting of sexual offences and the acquisition of treatment by victims; and (7) the effect on the integrity of the trial process of producing, or failing to produce, the record, having in mind the need to maintain consideration in the outcome. Where a court concludes that production is warranted, it should only be made in the manner and to the extent necessary to achieve that objective.

A preliminary inquiry judge is without jurisdiction to order the production of private records held by third parties. The disclosure order in the present case did not emanate from a preliminary inquiry judge, but was issued in response to a pre-trial application by the defence. Even a superior court judge, however, should not, in advance of the trial, entertain an application for production of private third party records. Such applications should be heard by the judge seized of the trial, rather than a pre-trial judge. In addition, it is desirable for the judge hearing an application for production to have had the benefit of hearing, and pronouncing upon, the defence's earlier applications, so as to minimize the possibility of inconsistency in the treatment of two similar applications. More generally, applications for production of third party records should not be entertained before the commencement of the trial, even by the judge who is seized of the trial. First, the concept of pre-trial applications for production of documents held by third parties is alien to criminal proceedings. Second, if pre-trial applications for production from third parties were permitted, it would invite fishing expeditions, create unnecessary delays, and inconvenience witnesses by requiring them to attend court on multiple occasions. Moreover, a judge is not in

a position, before the beginning of the trial, to determine whether the records in question are relevant, much less whether they are admissible, and will be unable to balance effectively the constitutional rights affected by a production order.

Since the right of the accused to a fair trial has not been balanced with the competing rights of the complainant to privacy and to equality without discrimination in this case, a new trial should be ordered.

*Per* McLachlin J. (dissenting on this issue): L'Heureux-Dubé J.'s reasons were concurred in entirely. The test proposed strikes the appropriate balance between the desire of the accused for complete disclosure from everyone of everything that could conceivably be helpful to his defence, on the one hand, and the constraints imposed by the trial process and privacy interests of third parties who find themselves caught up in the justice system, on the other, all without compromising the constitutional guarantee of a trial which is fundamentally fair. The *Charter* guarantees not the fairest of all possible trials, but rather a trial which is fundamentally fair. What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. What the law demands is not perfect justice, but fundamentally fair justice.

**Cases Cited**

By L'Heureux-Dubé J.

**Referred to:** *R. v. O'Connor* (1994), 90 C.C.C. (3d) 257; *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Jewitt*, [1985] 2 S.C.R. 128; *R. v. Keyowski*, [1988] 1 S.C.R. 657, aff'g (1986), 28 C.C.C. (3d) 553; *R. v. Mack*, [1988] 2 S.C.R. 903; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Scott*, [1990] 3 S.C.R. 979; *R. v. Power*, [1994] 1 S.C.R. 601; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Beare*, [1988] 2 S.C.R. 387; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Potvin*, [1993] 2 S.C.R. 880; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Elshaw*, [1991] 3 S.C.R. 24; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Morin*, [1992] 1 S.C.R. 771; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155; *Cunningham v. Canada*, [1993] 2 S.C.R. 143; *R. v. Levogiannis*, [1993] 4 S.C.R. 475; *R. v. Xenos* (1991), 70 C.C.C. (3d) 362; *R. v. Burlingham*, [1995] 2 S.C.R. 206; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Chaplin*, [1995] 1 S.C.R. 727; *R. v. Gingras* (1992), 71 C.C.C. (3d) 53; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Osolin*, [1993] 4 S.C.R. 595; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Pohoretsky*, [1987] 1 S.C.R. 945; *R. v. Dyment*, [1988] 2 S.C.R. 417; *McInerney v. MacDonald*, [1992] 2 S.C.R. 138; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Roe*

*v. Wade*, 410 U.S. 113 (1973); *R. v. Plant*, [1993] 3 S.C.R. 281; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Gratton*, [1987] O.J. No. 1984 (QL); *R. v. Callaghan*, [1993] O.J. No. 2013 (QL); *R. v. Barbosa* (1994), 92 C.C.C. (3d) 131; *Carey v. Ontario*, [1986] 2 S.C.R. 637; *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505; *R. v. Garofoli*, [1990] 2 S.C.R. 1421; *R. v. Durette*, [1994] 1 S.C.R. 469; *Baron v. Canada*, [1993] 1 S.C.R. 416; *R. v. Thompson*, [1990] 2 S.C.R. 1111; *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. K. (V.)* (1991), 4 C.R. (4th) 338; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *R. v. C. (B.)* (1993), 80 C.C.C. (3d) 467; *R. v. Davison, DeRosie and MacArthur* (1974), 20 C.C.C. (2d) 424; *Doyle v. The Queen*, [1977] 1 S.C.R. 597; *Caccamo v. The Queen*, [1976] 1 S.C.R. 786; *Skogman v. The Queen*, [1984] 2 S.C.R. 93; *Re Regina and Arviv* (1985), 19 C.C.C. (3d) 395, leave to appeal refused, [1985] 1 S.C.R. v; *R. v. Darby*, [1994] B.C.J. No. 814 (QL); *R. v. Egger*, [1993] 2 S.C.R. 451; *Patterson v. The Queen*, [1970] S.C.R. 409; *Re Hislop and The Queen* (1983), 7 C.C.C. (3d) 240, leave to appeal refused, [1983] 2 S.C.R. viii; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3.

By McLachlin J.

**Referred to:** *R. v. Harrer*, [1995] 3 S.C.R. 562.

By Cory J.

**Referred to:** *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. Egger*, [1993] 2 S.C.R. 451.

By Lamer C.J. and Sopinka J. (dissenting)

*A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536; *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. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. R. (L.)* (1995), 39 C.R. (4th) 390; *Morris v. The Queen*, [1983] 2 S.C.R. 190; *R. v. Preston*, [1993] 4 All E.R. 638; *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505; *R. v. Garofoli*, [1990] 2 S.C.R. 1421; *Carey v. Ontario*, [1986] 2 S.C.R. 637; *R. v. Durette*, [1994] 1 S.C.R. 469; *R. v. Ross* (1993), 79 C.C.C. (3d) 253; *R. v. Ross* (1993), 81 C.C.C. (3d) 234; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. R.S.* (1985), 19 C.C.C. (3d) 115; *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419; *R. v. Norman* (1993), 87 C.C.C. (3d) 153; *R. v. Hedstrom* (1991), 63 C.C.C. (3d) 261; *Toohey v. Metropolitan Police Commissioner*, [1965] 1 All E.R. 506; *R. v. Ryan* (1991), 69 C.C.C. (3d) 226.

By Major J. (dissenting)

*R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 7, 8 to 14, 11(*b*), (*d*), 15, 24(1), (2).

*Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, s. 5.

*Civil Code of Quebec*, S.Q. 1991, c. 64, arts. 35, 36.

*Criminal Code*, R.S.C., 1985, c. C-46, ss. 276(3) [rep. & sub. 1992, c. 38, s. 2], 487(1)(*b*) [rep. & sub. c. 27 (1st Supp.), s. 68(1); repl. 1994, c. 44, s. 36], 545, 548(1), 581, 698, 700(1), Part XXII.

*European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, Art. 8.

*International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, Art. 17.

United States Constitution, Fourteenth Amendment.

*Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), Art. 12.

**Authors Cited**

Canada. Committee on Sexual Offences Against Children and Youths. *Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youths*, vol. 1. Ottawa: Minister of Supply and Services Canada, 1984.

Choo, Andrew L.-T. "Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited", [1995] *Crim. L.R.* 864.

Cross, Sir Rupert. *Cross on Evidence*, 7th ed. By Sir Rupert Cross and Colin Tapper. London: Butterworths, 1990.

Firsten, Temi. "An Exploration of the Role of Physical and Sexual Abuse for Psychiatrically Institutionalized Women" (1990), unpublished research paper, available from Ontario Women's Directorate.

*Halsbury's Laws of England*, vol. 17, 4th ed. London: Butterworths, 1976.

Paciocco, David M. "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991), 15 *Crim. L.J.* 315.

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

Stuesser, Lee. "Reconciling Disclosure and Privilege" (1994), 30 C.R. (4th) 67.

Wigmore, John Henry. *Evidence in Trials at Common Law*, vol. 1, 3rd ed. Boston: Little, Brown & Co., 1940.

APPEAL from a judgment of the British Columbia Court of Appeal (1994), 89 C.C.C. (3d) 109, 42 B.C.A.C. 105, 67 W.A.C. 105, 20 C.R.R. (2d) 212, 29 C.R. (4th) 40, reversing a decision of the British Columbia Supreme Court (1992), 18 C.R. (4th) 98, ordering a stay of proceedings. Appeal dismissed, Lamer C.J. and Sopinka and Major JJ. dissenting.

*Christopher M. Considine, Daniel R. McDonagh* and *David M. Paciocco*, for the appellant.

*Malcolm D. Macaulay, Q.C.*, and *Andrea Miller*, for the respondent.

*Robert J. Frater*, for the intervener the Attorney General of Canada.

*Susan Chapman* and *Miriam Bloomenfeld*, for the intervener the Attorney General for Ontario.

*Sharon D. McIvor* and *Elizabeth J. Shilton*, for the interveners the Aboriginal Women's Council, the Canadian Association of Sexual Assault Centres, the DisAbled Women's Network of Canada and the Women's Legal Education and Action Fund.

*Frances M. Kelly*, for the intervener the Canadian Mental Health Association.

*Brian Weagant* and *Sheena Scott*, for the intervener the Canadian Foundation for Children, Youth and the Law.

The following are the reasons delivered by

LAMER C.J. and SOPINKA J. (dissenting) --

I. Introduction

1 This case, along with the companion decision in *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536, raises the issue of whether and under what circumstances an accused is entitled to obtain production of sexual assault counselling records in the possession of third parties. It also raises the issue of when a stay of proceedings is the appropriate remedy for non-disclosure by the Crown of information in its possession which is neither clearly irrelevant nor privileged. On the latter issue, we agree with the reasons of Justice Major.

2 As for the issue of the production of therapeutic records, we have had the benefit of reading the reasons of our colleague Justice L'Heureux-Dubé, and we are in general agreement with her reasons on the issues of privacy and privilege. We wish, however, to make the following comments regarding the procedure to be followed for the disclosure and production of therapeutic records.

## II. Analysis

### 1. *Introduction*

3 The issues raised in the present appeal relate primarily to the production of therapeutic records beyond the possession or the control of the Crown. Generally speaking, this issue concerns the manner in which the accused can obtain production of therapeutic records from the third party custodian of the documents in question. Although issues relating to the disclosure of private records in the possession of the Crown are not directly engaged in this appeal, we nevertheless feel that some preliminary comments on that issue would provide a useful background to a discussion of therapeutic records in the possession of third parties.

As a result, we begin our analysis with a brief consideration of the disclosure obligations of the Crown where therapeutic counselling records are in the Crown's possession or control. From there, we will move on to consider the case where such records remain in the hands of third parties and the production of those records is sought by the accused.

2. *Records in the Possession of the Crown*

(a) The Application of *Stinchcombe*

4 The principles regarding the disclosure of information in the possession of the Crown were developed by this Court in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. In that case, it was determined that the Crown has an ethical and constitutional obligation to the defence to disclose all information in its possession or control, unless the information in question is clearly irrelevant or protected by a recognized form of privilege.

5 The Crown's duty to disclose information in its possession is triggered when a request for disclosure is made by the accused. When such a request is made, the Crown has a discretion to refuse to make disclosure on the grounds that the information sought is clearly irrelevant or privileged. Where the Crown chooses to exercise this discretion, the Crown bears the burden of satisfying the trial judge that withholding the information is justified on the grounds of privilege or irrelevance.

6 The foregoing principles were settled by this Court's decision in *Stinchcombe* and affirmed in *R. v. Egger*, [1993] 2 S.C.R. 451, and *R. v. Chaplin*, [1995] 1 S.C.R. 727, and are not subject to challenge in this appeal. However, it is important to consider whether therapeutic records of the kind at issue in this appeal should be subject to a different disclosure regime than other kinds of information in the possession of the Crown. In answering this question, the Court must consider whether the Crown's disclosure obligations should be tempered by a balancing of the complainant's privacy interests in therapeutic records against the right of the accused to make full answer and defence. In our view, a balancing of these competing interests is unnecessary in the context of disclosure.

(b) Privacy and Privilege

7 As our colleague L'Heureux-Dubé J. points out, sexual assault counselling records relate to intimate aspects of the life of the complainant. As a result, therapeutic records attract a stronger privacy interest than many other forms of information that may be in the Crown's possession. One could accordingly argue that the intensely private nature of therapeutic records affects the Crown's obligation to disclose such material to the defence, or that disclosure by the Crown is not required owing to some form of privilege that may attach to the information contained in the records. In our view, however, concerns relating to privacy or privilege disappear where the documents in question have fallen into the possession of the Crown. We are accordingly of the opinion that the Crown's well-established duty to disclose all information in its possession is not affected by the confidential nature of therapeutic records.

8 In our view, it would be difficult to argue that the complainant enjoys an expectation of privacy in records that are held by the Crown. In discussing the nature of a complainant's privacy interest in therapeutic records, L'Heureux-Dubé J. points out that such records often relate to "intensely private aspects" of the complainant's personal life, and describe thoughts and feelings "which have never even been shared with the closest of friends or family" (para. 112). With respect, we agree that important privacy interests attach to counselling records in the situation described by our colleague. However, where the documents in question have been shared with an agent of the state (namely, the Crown), it is apparent that the complainant's privacy interest in those records has disappeared. Clearly, where the records are in the possession of the Crown, they have become "the property of the public to be used to ensure that justice is done" (*Stinchcombe*, *supra*, at p. 333). As a form of "public property", records in the possession of the Crown are simply incapable of supporting any expectation of privacy. As a result, there is no "privacy interest" to be balanced against the right of the accused to make full answer and defence.

9 The complainant's lack of a privacy interest in records that are possessed by the Crown counsels against a finding of privilege in such records. As stated above, it is somewhat inconsistent to claim that therapeutic records are sufficiently confidential to warrant a claim of privilege even after this confidentiality has been waived for the purpose of proceeding against the accused. Obviously, fairness must require that if the complainant is willing to release this information in order to further the criminal prosecution, then the accused should be entitled to use the information in the preparation of his or her defence.

10 In deciding that the complainant waives any potential claim of privilege where therapeutic records are provided to the Crown, we recognize that any such waiver must be "fully informed" in order to defeat an attempted claim of privilege. Clearly, one could make the argument that the complainant would not have turned the documents over to the Crown had he or she been aware that the accused could be given access to the records. However, this problem is easily solved by placing an onus upon the Crown to inform the complainant of the potential for disclosure. Where the Crown seeks to obtain the records in question for the purpose of proceeding against the accused, the Crown must explain to the complainant that the records, if relevant, will have to be disclosed to the defence. As a result, the complainant will be given the opportunity to decide whether or not to waive any potential claim of privilege prior to releasing the records in question to the agents of the state.

11 Finally, it must be recognized that any form of privilege may be forced to yield where such a privilege would preclude the accused's right to make full answer and defence. As this Court held in *Stinchcombe* (at p. 340), a trial judge may require disclosure "in spite of the law of privilege" (emphasis added) where the recognition of the asserted privilege unduly limits the right of the accused to make full answer and defence. As a result, information in the possession of the Crown which is clearly relevant and important to the ability of the accused to raise a defence must be disclosed to the accused, regardless of any potential claim of privilege that might arise.

(c) Relevance

12 In commenting on the nature of therapeutic records, L'Heureux-Dubé J. has made it clear that the relevance of such records to the preparation of the defence cannot be presumed. As L'Heureux-Dubé J. states in her decision (at para. 144):

> ... it must not be presumed that the mere fact that a witness received treatment or counselling after a sexual assault indicates that the records will contain information that is relevant to the defence. The focus of therapy is vastly different from that of an investigation or other process undertaken for the purposes of the trial.

With respect, we agree with the proposition that the mere existence of therapeutic records is insufficient to establish the relevance of those records to the defence. However, we are of the opinion that the relevance of such records must be presumed where the records are in the possession of the Crown. Generally speaking, the Crown would not obtain possession or control of therapeutic records unless the information the records contained was somehow relevant to the case against the accused. While one could make the argument that the Crown simply wished to peruse the records in question in order to ensure that they contained no relevant information, this cannot affect the Crown's obligation to disclose. If indeed the Crown merely surveyed the records and found them to contain no relevant material, the Crown would retain the opportunity to prove the irrelevance of the records on a *Stinchcombe* application by the defence. Clearly, the Crown is in a better position than the accused to discharge any onus regarding the relevance of the records, as the Crown retains possession and control of the information.

(d) Conclusion

13 For each of the foregoing reasons, we are of the view that the Crown's disclosure obligations established in the *Stinchcombe* decision are unaffected by the confidential nature of therapeutic records. Where the Crown has possession or control of therapeutic records, there is simply no compelling reason to depart from the reasoning in *Stinchcombe*: unless the Crown can prove that the records in question are clearly irrelevant or subject to some form of public interest privilege, the therapeutic records must be disclosed to the defence.

14 Having concluded that the principles of *Stinchcombe* are applicable in the context of therapeutic records within the Crown's possession, it remains to be determined what procedures for production will apply where the counselling records in question are possessed by third parties. Our views as to the appropriate procedure in that situation are discussed below.

3. *Records in the Hands of Third Parties*

(a) The Application of *Stinchcombe*

15 As stated earlier, this Court's decision in *Stinchcombe* set out the general principle that an accused's ability to access information necessary to make full answer and defence is now constitutionally protected under s. 7 of the *Canadian Charter of Rights and Freedoms*. The rationale for this constitutional protection stems from the basic proposition that 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": *Stinchcombe*, at p. 336.

16 *Stinchcombe* and its progeny were decided in the context of disclosure, where the information in question was in the possession of the Crown or the police. In that context, we held that an accused was entitled to obtain all of the information in the possession of the Crown, unless the information in question was clearly irrelevant. However, *Stinchcombe* recognized that, even in the context of disclosure, there are limits on the right of an accused to access information. For example, when the Crown asserts that the information is privileged, the trial judge must then balance the competing claims at issue. In such cases, the information will only be disclosed where the trial judge concludes that the asserted privilege "does not constitute a reasonable limit on the constitutional right to make full answer and defence" (*Stinchcombe*, at p. 340).

17 In our opinion, the balancing approach we established in *Stinchcombe* can apply with equal force in the context of production, where the information sought is in the hands of a third party. Of course, the balancing process must be modified to fit the context in which it is applied. In cases involving production, for example, we are concerned with the competing claims of a constitutional right to privacy in the information on the one hand, and the right to full answer and defence on the other. We agree with L'Heureux-Dubé J. that a constitutional right to privacy extends to information contained in many forms of third party records.

18 In recognizing that all individuals have a right to privacy which should be protected as much as is reasonably possible, we should not lose sight of the possibility of occasioning a miscarriage of justice by establishing a procedure which unduly restricts an accused's ability to access information which may be

necessary for meaningful full answer and defence. In *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 611, we recognized that:

> Canadian courts ... have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be convicted.

Indeed, so important is the societal interest in preventing a miscarriage of justice that our law requires the state to disclose the identity of an informer in certain circumstances, despite the fact that the revelation may jeopardize the informer's safety.

(b) The First Stage: Establishing "Likely Relevance"

19 When the defence seeks information in the hands of a third party (as compared to the state), the following considerations operate so as to require a shifting of the onus and a higher threshold of relevance:

(1) the information is not part of the state's "case to meet" nor has the state been granted access to the information in preparing its case; and

(2) third parties have no obligation to assist the defence.

In light of these considerations, we agree with L'Heureux-Dubé J. that, at the first stage in the production procedure, the onus should be on the accused to satisfy a judge that the information is likely to be relevant. The onus we place on the

accused should not be interpreted as an evidential burden requiring evidence and a *voir dire* in every case. It is simply an initial threshold to provide a basis for production which can be satisfied by oral submissions of counsel. It is important to recognize that the accused will be in a very poor position to call evidence given that he has never had access to the records. *Viva voce* evidence and a *voir dire* may, however, be required in situations in which the presiding judge cannot resolve the matter on the basis of the submissions of counsel. (See *Chaplin*, *supra*, at p. 744.)

20 In order to initiate the production procedure, the accused must bring a formal written application supported by an affidavit setting out the specific grounds for production. However, the court should be able, in the interests of justice, to waive the need for a formal application in some cases. In either event, however, notice must be given to third parties in possession of the documents as well as to those persons who have a privacy interest in the records. The accused must also ensure that the custodian and the records are subpoenaed to ensure their attendance in the court. The initial application for disclosure should be made to the judge seized of the trial, but may be brought before the trial judge prior to the empanelling of the jury, at the same time that other motions are heard. In this way, disruption of the jury will be minimized and both the Crown and the defence will be provided with adequate time to prepare their cases based on any evidence that may be produced as a result of the application.

21 According to L'Heureux-Dubé J., once the accused meets the "likely relevance" threshold, he or she must then satisfy the judge that the salutary effects of ordering the documents produced to the court for inspection outweigh the deleterious effects of such production. We are of the view that this balancing should be undertaken

at the second stage of the procedure. The "likely relevance" stage should be confined to a question of whether the right to make full answer and defence is implicated by information contained in the records. Moreover, a judge will only be in an informed position to engage in the required balancing analysis once he or she has had an opportunity to review the records in question.

(c) The Meaning of "Likely" Relevance

22 In the disclosure context, the meaning of "relevance" is expressed in terms of whether the information may be useful to the defence (see *Egger*, *supra*, at p. 467, and *Chaplin*, *supra*, at p. 740). In the context of production, the test of relevance should be higher: the presiding judge must be satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify. When we speak of relevance to "an issue at trial", we are referring not only to evidence that may be probative to the material issues in the case (i.e. the unfolding of events) but also to evidence relating to the credibility of witnesses and to the reliability of other evidence in the case. See *R. v. R. (L.)* (1995), 39 C.R. (4th) 390 (Ont. C.A.), at p. 398.

23 This higher threshold of relevance is appropriate because it reflects the context in which the information is being sought. Generally speaking, records in the hands of third parties find their way into court proceedings by one of two procedures. First, under s. 698(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, a party may apply for a subpoena requiring a person to attend where that person is likely to give material evidence in a proceedings. Pursuant to s. 700(1) of the *Code*, the subpoena is only available for those records in the custodian's possession "relating

to the subject-matter of the proceedings". The second method of obtaining production of documents is to apply for a search warrant pursuant to s. 487(1) of the *Code*. Under s. 487(1)(*b*) a search warrant will be issued where a justice is satisfied that there is in a building, receptacle or place "anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence ...". Consequently, under either of these schemes the individual seeking access to third party records must satisfy a neutral arbiter that the records are relevant to the proceedings in question. We agree with L'Heureux-Dubé J. that the appropriate procedure to follow is via the *subpoena duces tecum* route.

24 While we agree that "likely relevance" is the appropriate threshold for the first stage of the two-step procedure, we wish to emphasize that, while this is a significant burden, it should not be interpreted as an onerous burden upon the accused. There are several reasons for holding that the onus upon the accused should be a low one. First, at this stage of the inquiry, the only issue is whether the information is "likely" relevant. We agree with L'Heureux-Dubé J. that considerations of privacy should not enter into the analysis at this stage. We should also not be concerned with whether the evidence would be admissible, for example as a matter of policy, as that is a different query (*Morris v. The Queen*, [1983] 2 S.C.R. 190). As the House of Lords recognized in *R. v. Preston*, [1993] 4 All E.R. 638, at p. 664:

> ... the fact that an item of information cannot be put in evidence by a party does not mean that it is worthless. Often, the train of inquiry which leads to the discovery of evidence which is admissible at a trial may include an item which is not admissible....

A relevance threshold, at this stage, is simply a requirement to prevent the defence from engaging in "speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming" requests for production. See *Chaplin*, *supra*, at p. 744.

25 Second, by placing an onus on the accused to show "likely relevance", we put the accused in the difficult situation of having to make submissions to the judge without precisely knowing what is contained in the records. This Court has recognized on a number of occasions the danger of placing the accused in a "Catch-22" situation as a condition of making full answer and defence (see, for example, *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505, at pp. 1513-14; *R. v. Garofoli*, [1990] 2 S.C.R. 1421, at pp. 1463-64; *Carey v. Ontario*, [1986] 2 S.C.R. 637; and *R. v. Durette*, [1994] 1 S.C.R. 469). In *Durette*, at p. 499, Sopinka J., for a majority of the Court, held:

> The appellants should not be required to demonstrate the specific use to which they might put information which they have not even seen.

Similarly, La Forest J. in *Carey*, at p. 678, held in commenting on the lower court's decision which denied the applicant access to cabinet documents because his submissions, according to that court, were no more than "a bare unsupported assertion ... that something to help him may be found":

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

We are of the view that the concern expressed in these cases applies with equal force in the case at bar, where the ultimate goal is the search for truth rather than the suppression of potentially relevant evidence.

26 L'Heureux-Dubé J. questions the "Catch-22" analogy in the context of production. In her view, there is no presumption of materiality because the records are not created nor sought by the state as part of its investigation. However, it should be remembered that in most cases, an accused will not be privy to the existence of third party records which are maintained under strict rules of confidentiality. Generally speaking, an accused will only become aware of the existence of records because of something which arises in the course of the criminal case. For example, the complainant's psychiatrist, therapist or social worker may come forward and reveal his or her concerns about the complainant (as occurred in *R. v. Ross* (1993), 79 C.C.C. (3d) 253 (N.S.C.A.), and *R. v. Ross* (1993), 81 C.C.C. (3d) 234 (N.S.C.A.)). In other cases, the complainant may reveal at the preliminary inquiry or in his or her statement to the police that he or she decided to lay a criminal charge against the accused following a visit with a particular therapist. There is a possibility of materiality where there is a "reasonably close temporal connection between" the creation of the records and the date of the alleged commission of the offence (*R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 673) or in cases of historical events, as in this case, a close temporal connection between the creation of the records and the decision to bring charges against the accused.

27 In *R. v. Morin*, [1988] 2 S.C.R. 345, at p. 370, we recognized that "[i]t is difficult and arguably undesirable to lay down stringent rules for the determination of the relevance of a particular category of evidence". Consequently, while we will not

attempt to set out categories of relevance, we feel compelled to respond to some of the statements expressed by our colleague. L'Heureux-Dubé J. suggests in her reasons that "the assumption that private therapeutic or counselling records are relevant to full answer and defence is often highly questionable" (para. 109) and that "the vast majority of information noted during therapy sessions bears no relevance whatsoever or, at its highest, only an attenuated sense of relevance to the issues at trial" (para. 144). With respect, we disagree. L'Heureux-Dubé J.'s observation as to the likelihood of relevance belies the reality that in many criminal cases, trial judges have ordered the production of third party records often applying the same principles we have enunciated in this case. The sheer number of decisions in which such evidence has been produced supports the potential relevance of therapeutic records.

28 Moreover, in *Osolin, supra,* this Court recognized the importance of ensuring access to the kind of information at issue in this appeal. In *Osolin*, we ordered a new trial where the accused had been denied an opportunity to cross-examine regarding the psychiatric records of the complainant. Those records contained the following entry (at p. 661):

> She is concerned that her attitude and behaviour may have influenced the man to some extent and is having second thoughts about the entire case.

Cory J., for the majority, held, at p. 674, that:

> ...what the complainant said to her counsellor ... could well reflect a victim's unfortunate and unwarranted feelings of guilt and shame for actions and events that were in no way her fault. Feelings of guilt, shame and lowered self-esteem are often the result of the trauma of a

> sexual assault. If this is indeed the basis for her statement to the counsellor, then they could not in any way lend an air of reality to the accused's proposed defence of mistaken belief in the complainant's consent. However, in the absence of cross-examination it is impossible to know what the result might have been.

29 By way of illustration only, we are of the view that there are a number of ways in which information contained in third party records may be relevant, for example, in sexual assault cases:

(1) they may contain information concerning the unfolding of events underlying the criminal complaint. See *Osolin, supra,* and *R. v. R.S.* (1985), 19 C.C.C. (3d) 115 (Ont. C.A.).

(2) they may reveal the use of a therapy which influenced the complainant's memory of the alleged events. For example, in *R. v. L. (D.O.),* [1993] 4 S.C.R. 419, at p. 447, L'Heureux-Dubé J. recognized the problem of contamination when she stated, in the context of the sexual abuse of children, that "the fear of contaminating required testimony has forced the delay of needed therapy and counselling". See too *R. v. Norman* (1993), 87 C.C.C. (3d) 153 (Ont. C.A.).

(3) they may contain information that bears on the complainant's "credibility, including testimonial factors such as the quality of their perception of events at the time of the offence, and their memory since". See *R. v. R. (L.), supra,* at p. 398; *R. v. Hedstrom*

(1991), 63 C.C.C. (3d) 261 (B.C.C.A.); *R. v. Ross* (1993), 81 C.C.C. (3d) 234 (N.S.C.A.); *Toohey v. Metropolitan Police Commissioner*, [1965] 1 All. E.R. 506 (H.L.).

As a result, we disagree with L'Heureux-Dubé J.'s assertion that therapeutic records will only be relevant to the defence in rare cases.

(d) The Role of the Judge at the Second Stage: Balancing Full Answer and Defence and Privacy

30 We agree with L'Heureux-Dubé J. that "upon their production to the court, the judge should examine the records to determine whether, and to what extent, they should be produced to the accused" (para. 153). We also agree that in making that determination, the judge must examine and weigh the salutary and deleterious effects of a production order and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence. In some cases, it may be possible for the presiding judge to provide a judicial summary of the records to counsel to enable them to assist in determining whether the material should be produced. This, of course, would depend on the specific facts of each particular case.

31 We also agree that, in balancing the competing rights in question, the following factors should be considered: "(1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record in question; (3) the nature and extent of the reasonable expectation of privacy vested in that record; (4) whether production of the record would be premised upon any discriminatory belief or bias" and "(5) the potential prejudice to the

complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question" (para. 156).

32 However, L'Heureux-Dubé J. also refers to two other factors that she believes must be considered. She suggests that the judge should take account of "the extent to which production of records of this nature would frustrate society's interest in encouraging the reporting of sexual offences and the acquisition of treatment by victims" as well as "the effect on the integrity of the trial process of producing, or failing to produce, the record, having in mind the need to maintain consideration in the outcome" (para. 156). This last factor is more appropriately dealt with at the admissibility stage and not in deciding whether the information should be produced. As for society's interest in the reporting of sexual crimes, we are of the opinion that there are other avenues available to the judge to ensure that production does not frustrate the societal interests that may be implicated by the production of the records to the defence. A number of these avenues are discussed by the Nova Scotia Court of Appeal in *R. v. Ryan* (1991), 69 C.C.C. (3d) 226, at p. 230:

> As the trials of these two charges proceed, there are a number of protective devices to allay the concerns of the caseworkers over the contents of their files. The trial judge has considerable discretion in these matters. It is for the trial judge to determine whether a ban shall be placed on publication. It is for the trial judge to decide whether spectators shall be barred when evidence is given on matters that the trial judge deems to be extremely sensitive and worth excluding from the information available to the public. High on the list is, of course, the matter of relevance. Unless the evidence sought from the witness meets the test of relevancy, it will be excluded. The trial judge is able to apply the well-established rules and tests to determine whether any given piece of evidence is relevant.

We are also of the view that these options are available to the judge to further protect the privacy interests of witnesses if the production of private records is ordered.

33 Consequently, the societal interest is not a paramount consideration in deciding whether the information should be provided. It is, however, a relevant factor which should be taken into account in weighing the competing interests.

34 In applying these factors, it is also appropriate to bear in mind that production of third party records is always available to the Crown provided it can obtain a search warrant. It can do so if it satisfies a justice that there is in a place, which includes a private dwelling, anything that there are reasonable grounds to believe will afford evidence of the commission of an offence. Fairness requires that the accused be treated on an equal footing.

III. Conclusion and Disposition

35 Although the parties have obviously failed to observe the above procedures for the production of third party records, it is unnecessary to determine whether or not a production order was warranted in this case. In our view, Major J. is correct in holding that the impropriety of the production order at issue in this appeal "does not excuse the conduct of the Crown after the order was made" (para. 222). As a result, whether or not production was warranted in this case, the conduct of the Crown in refusing to comply with the production order is inexcusable, and warrants a stay of the proceedings against the accused. We are therefore in

complete agreement with the reasoning and conclusions of Major J., and would accordingly hold that this appeal should be allowed.

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

36 L'HEUREUX-DUBÉ J. -- Two issues are raised by this appeal. First, when does non-disclosure by the Crown justify an order that the proceedings which are the subject matter of the non-disclosure be stayed? Second, what is the appropriate procedure to be followed when an accused seeks production of documents such as medical and/or therapeutic records that are in the hands of third parties?

37 Strictly speaking, leave has only been sought to this Court from the decision of the British Columbia Court of Appeal in *R. v. O'Connor* (1994), 89 C.C.C. (3d) 109, which addressed the question of the appropriateness of a stay. However, much of the non-disclosure and late disclosure that formed the basis for the stay of proceedings that is the subject of this appeal related directly to disagreement over the appropriateness of the pre-trial disclosure order made by Campbell A.C.J. As a result, those reasons must be read together as a whole with *R. v. O'Connor* (1994), 90 C.C.C. (3d) 257 ("*O'Connor (No. 2)*"), in which the Court of Appeal provided guidelines for future applications for production of medical records held by third parties. Given the national importance of establishing guidelines for such production (in light of the absence of legislative intervention), and the fact that this matter was fully argued before us, it is appropriate for this Court to provide some assistance to lower courts in this respect. Besides, the question is squarely raised in another appeal which was heard by this Court and in which judgment is rendered

concurrently with this one: *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536. As a preliminary matter, however, it is necessary to set out the facts and judgments relevant to each of the two issues raised in this case.

I. Abuse of Process

A. *Facts and Judgments*

38 The appellant, Hubert Patrick O'Connor, is a Bishop of the Roman Catholic Church. In the 1960s, he was the principal of a native residential school in Williams Lake. As a result of incidents alleged to have taken place between 1964 and 1967 in the Williams Lake area, the appellant was charged in February 1991 with two counts of rape and two counts of indecent assault. Each count arose in relation to a separate complainant. The four complainants, P.P, M.B., R.R., and A.S., were all former students employed by the school and under the direct supervision of the appellant.

39 A preliminary inquiry was held in Williams Lake on July 3 and 4, 1991, and, on June 4, 1992, defence counsel applied for, and obtained, an order from Campbell A.C.J. requiring disclosure of the complainants' entire medical, counselling and school records. Defence counsel justified its disclosure request on the need to test the complainants' credibility, as well as to determine issues such as recent complaint and corroboration. The order reads as follows:

> THIS COURT ORDERS that Crown Counsel produce names, addresses and telephone numbers of therapists, counsellors, psychologists or psychiatrists who have treated any of the complainants with respect to allegations of sexual assault or sexual abuse.

> THIS COURT FURTHER ORDERS that the complainants authorize all therapists, counsellors, psychologists and psychiatrists who have treated any of them with respect to allegations of sexual assault or sexual abuse, to produce to the Crown copies of their complete file contents and any other related material including all documents, notes, records, reports, tape recordings and videotapes, and the Crown to provide copies of all this material to counsel for the accused forthwith.
>
> THIS COURT FURTHER ORDERS that the complainants authorize the Crown to obtain all school and employment records while they were in attendance at St. Joseph's Mission School and that the Crown provide those records to counsel for the accused forthwith.
>
> THIS COURT FURTHER ORDERS that the complainants authorize the production of all medical records from the period of time when they were resident at St. Joseph's Mission School as either students or employees.

At the time this order was made, the Crown did not have in its possession any files of any persons who had treated any of the complainants in relation to allegations of sexual assault or sexual abuse. Nor, for that matter, were submissions heard from, or was notice given to, any of the complainants or guardians of the records sought by the defence.

40 On July 10, 1992, the Crown applied before Low J. of the British Columbia Supreme Court for directions regarding the disclosure order and for the early appointment of a trial judge. The court was informed that the complainants were not prepared to comply with the order of Campbell A.C.J., as the Crown wished to argue the point before the trial judge. On September 21, 1992, moreover, the Crown made an application before Oppal J. to change the venue of the trial back to Williams Lake. This application was dismissed. In the course of its submissions, the Crown noted that it intended to argue before the trial judge that the therapists' notes subject to the disclosure order of Campbell A.C.J. ought not

to be disclosed on public policy grounds. The court expressed surprise at the fact that the order of Campbell A.C.J. was not being complied with.

41 Thackray J. was subsequently appointed the trial judge. On October 16, 1992, the appellant applied for a judicial stay of proceedings before Thackray J. on the basis that pre-charge delay made it impossible to make full answer and defence. At the same time, the Crown sought directions from the trial judge regarding the disclosure order of Campbell A.C.J. By this time, however, many of the impugned records had come into the Crown's possession. The trial judge made it clear that he was to be provided promptly with therapy records relating to all four complainants. Thackray J. was provided with the clinical notes of Dr. Ingimundson, the psychologist treating P.P. He reviewed these notes and they were provided to defence counsel. Crown counsel further informed the court that the therapist for M.B. had been instructed to forward all records to the Crown. On October 22, 1992, Thackray J. released written reasons dismissing the appellant's application for a stay of proceedings.

42 On October 30, 1992, the appellant applied by way of writ of *certiorari* to quash the committal of the appellant to stand trial on one count of the indictment. On November 5, 1992, the trial judge released written reasons dismissing the appellant's application. During the course of those proceedings, however, the Crown produced the notes of M.B.'s therapist, Dr. Cheaney, to the court for review. The Crown requested, however, that the court not release the records to the defence before hearing an application on that point from Crown counsel Wendy Harvey. The trial judge assented to this request.

43 On November 19, 1992, the appellant applied pursuant to s. 581 of the *Criminal Code*, R.S.C., 1985, c. C-46, for an order that the indictment be declared void *ab initio* for failure to provide sufficient detail. This application was dismissed by Thackray J. in reasons filed November 24, 1992. The appellant also once again raised the issue of the non-disclosure of the medical records of M.B. The Crown opposed the disclosure of the records on the ground that they were not relevant, but Thackray J. ordered that they be disclosed to the defence forthwith. Appellant's counsel also requested disclosure of the diary of the complainant R.R., for which it had already been provided with a synopsis. The trial judge took possession of the diary for review and expressed concern that the Crown was taking so long to comply with the order of Campbell A.C.J., given that the trial was scheduled to commence in 10 days.

44 On November 26, 1992, the appellant made another application for a judicial stay of proceedings based on non-disclosure of several items, including the following: the medical records of the complainants, the transcript of an interview between Crown counsel and the complainant M.B., the transcript of an interview between Crown counsel and witness M.O. containing statements contradictory to testimony given by the complainant M.B. and corroborative of the evidence of the appellant, and the diary of the complainant R.R.

45 In the course of submissions during this application, Crown counsel Wendy Harvey submitted that the two Crown counsel, herself and Mr. Greg Jones, were handling the prosecution from different cities, and that there were difficulties concerning communication and organization. She asserted that the non-disclosure of some of the medical records was due to inadvertence on her part, and that she

had "dreamt" the transcripts of the interviews with M.B. and M.O. had been disclosed. Ms. Harvey submitted that uninhibited disclosure of medical and therapeutic records would revictimize the victims, and suggested that the order of Campbell A.C.J., and the request of defence counsel for disclosure of the therapy records of the complainants, exhibited gender bias.

46 In oral reasons delivered Friday, November 27, 1992, Thackray J. dismissed the application for a judicial stay, finding that the failure to disclose the records of Dr. Hume, R.R.'s physician, had been an oversight. He further found that M.O.'s evidence had been known to the defence for some time and that no prejudice to the accused had been demonstrated by its non-disclosure. He declined to disclose the complete diaries of the complainant R.R. on the basis that the summaries provided to the defence, as well as the excerpts already in their possession, were sufficient. He noted, however, that the letters written by Ms. Harvey to the counsellors had unacceptably limited the scope of the disclosure to only those portions of the records which related directly to the incidents involving the accused. This resulted in the full therapy records not being disclosed to the defence until after November 26. He concluded that while the conduct of the Crown was "disturbing", he did not believe that there was a "grand design" to conceal evidence, nor any "deliberate plan to subvert justice". He was not convinced that the Crown's conduct would lead the public to hold the system of justice in disrepute. While dismissing the application for a judicial stay of proceedings, Thackray J. condemned in no uncertain terms Ms. Harvey's inability to distinguish "between her personal objectives and her professional responsibilities".

47 Over the weekend of November 28, in light of the difficulties encountered during discovery, Crown counsel agreed to waive any privilege with respect to the contents of the Crown's file and to prepare a binder in relation to each of the complainants containing all information in the Crown's possession relating to each of them. This agreement contemplated giving the defence copies of documents which would not ordinarily be disclosed, including Crown counsel's personal notes and work product, some of which were on computer. At the pre-trial conference held that Monday, Ms. Harvey informed the trial judge that appellant's counsel were now in possession of all the notes that she had prepared in connection with the case.

48 The trial began on Wednesday, December 2, 1992. The Crown's first witness was Dr. Van Dyke, a socio-cultural anthropologist. Its second witness was Margaret Gilbert, a former student at St. Joseph's Mission School. Her evidence dealt primarily with the layout of the school. On the second day of the trial, the Crown called the complainant P.P. In the course of direct examination, the Crown sought to have the witness give her evidence by drawing. Appellant's counsel objected. Discussions revealed that the witness had, during the course of witness preparation that weekend, made a drawing of this nature for Crown counsel that had not been disclosed to defence counsel. That drawing was obtained from the Crown office and the appellant took the position that it represented a materially different version of this complainant's allegations. The Crown disagreed with that assessment. The trial judge refused to allow the witness to testify through the use of drawings. At the end of the day, the Crown had not yet completely finished its examination-in-chief of this witness.

49 When the trial resumed the following day, appellant's counsel informed the court that, at the conclusion of the previous day's proceedings, the Crown had provided the appellant with another eight sets of drawings prepared by the various complainants in the presence of Crown counsel. Crown counsel Wendy Harvey was not present in court, and no explanation was given for her absence. Court was adjourned for one hour. When the trial resumed, Ms. Harvey was still not present. Appellant's counsel made another application for a judicial stay of proceedings based largely on the fact that the senior prosecutor, Mr. Jones, was still unable to guarantee to the appellant that full disclosure had been made. Over the objection of appellant's counsel, the trial judge granted Mr. Jones' request for a further adjournment until the afternoon session.

50 When court resumed that afternoon, Wendy Harvey was present. The Crown submission, however, was put forward by Mr. Jones. He acknowledged that the binders which had been provided to appellant's counsel as a result of the agreement reached over the weekend of November 28 were not complete, and that the staff had omitted to download Ms. Harvey's computer files. One of the undisclosed documents was the complete version of a Crown interview with P.P. which had been partially disclosed to the defence on November 25. After reviewing some of the undisclosed notes, the Crown indicated that it did not believe that the notes revealed anything "new". Mr. Jones then indicated to the court that Ms. Harvey's complete computer files were in the process of being downloaded but that, in light of what had just happened, he could not guarantee that everything had been appropriately disclosed to the appellant at that time. He took the position, however, that the undisclosed notes contained nothing material, and encouraged the trial judge to engage in an inquiry of their materiality. These statements

applied to all four counts on the indictment. Thackray J. indicated that he would give judgment on December 7 on defence counsel's motion for a stay. Although he indicated he would give counsel the opportunity to make further submissions if any other developments occurred, no further submissions were made by either side.

51 On December 7, 1992, Thackray J. handed down a judicial stay of proceedings on all four counts: (1992), 18 C.R. (4th) 98. He distinguished this application from previous applications for a stay of proceedings on the basis that the trial was now under way and witnesses had already been called by the Crown and cross-examined by the defence. Thackray J. found that had the diagrams of the complainant P.P. been disclosed prior to testimony, they might have affected the preparation of the case by the defence. While P.P. had not yet been cross-examined, Thackray J. found it unacceptable that defence counsel was put in the position of preparing the cross-examination without all the relevant documents. He therefore concluded that the accused had suffered prejudice, although he conceded that the extent of this prejudice could not be measured. He noted the constant intervention required by the court to ensure full compliance with the order of Campbell A.C.J. and found that the Crown's earlier conduct had created "an aura" that had pervaded and ultimately destroyed the case. In his view, this was now "one of the clearest of cases", and to allow the case to proceed would tarnish the integrity of the court.

52 The British Columbia Court of Appeal allowed the Crown's appeal and directed a new trial: (1994), 89 C.C.C. (3d) 109, 42 B.C.A.C. 105, 67 W.A.C. 105, 20 C.R.R. (2d) 212, 29 C.R. (4th) 40. It reviewed the case law on abuse of process and

concluded that there was no settled view on whether the common law doctrine had or had not been subsumed within s. 7 of the *Canadian Charter of Rights and Freedoms*. It noted, however, that the focus of the common law doctrine of abuse of process had historically been on maintaining the integrity of the court's process whereas the focus of the *Charter* was on the rights of the individual. It also noted the seemingly different standards of proof and remedies under the two regimes. It therefore concluded that the common law doctrine of abuse of process continued to exist independently of s. 7 of the *Charter*, although there may be significant overlap between the two.

53 After noting that some ambiguity remained as to the required elements of abuse of process, the Court of Appeal concluded that in order to establish an abuse of process, as opposed to a "mere" violation of a *Charter* right, an accused must demonstrate conduct on the part of the Crown that is so oppressive, vexatious or unfair as to contravene our fundamental notions of justice and thus to undermine the integrity of our judicial process. It further noted that the discretion to order a stay may be exercised only in the "clearest of cases", meaning that the trial judge must be convinced that, if allowed to continue, the proceedings would tarnish the integrity of the judicial process.

54 The court then turned to the scope and extent of the Crown's obligation to disclose information, as set out in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. It concluded that the right of an accused to full disclosure by the Crown is an adjunct of the right to make full answer and defence and that disclosure is not, itself, a constitutionally protected right. As such, a simple non-disclosure, in and of itself, would not necessarily constitute a *Charter* violation. A *Charter* violation would only be made

out when the accused demonstrated that a document which should have been disclosed (i.e. there was a reasonable possibility that it could assist in making full answer and defence) had on a balance of probabilities prejudiced or had an adverse effect on the accused's ability to make full answer and defence. In some circumstances, the only appropriate remedy for such non-disclosure might be a stay of proceedings. The Court of Appeal further held that a material non-disclosure, without more, could never amount to a common law abuse of process. In its view, only when non-disclosure was motivated by an intention on the part of the Crown to deprive the accused of a fair trial could an abuse of process arise.

55 Applying these principles to the case at bar, the Court of Appeal concluded that the trial judge erred in failing to inquire into the materiality of the non-disclosed information before ordering the stay of proceedings. As such, it could not be said that a violation of the accused's s. 7 rights had occurred, nor that the conduct of the Crown amounted to an abuse of process.

56 The court noted that the trial judge had felt that a stay was necessary because of the "aura" which had been created by the earlier non-disclosures in respect of the order of Campbell A.C.J. It noted that the trial judge had found (in the judgment of November 27) that there was no "grand design" in this non-disclosure to subvert the fair trial rights of the accused. It also noted that the Crown had tried to rectify the earlier disclosure problems by waiving all privilege and giving the defence the entire contents of their file. The court thus concluded that there was no evidence that the Crown's inept handling of the case was motivated by an intention to deprive the accused of a fair trial. As such, the trial judge had erred in entering a stay of proceedings on the basis of the common law abuse of process.

57 The court then commented briefly on the question of whether an alternative remedy would have been available under the *Charter*. It concluded that since no determination as to the materiality of the records was made, a stay could not be sustained under s. 24(1). Since it did not appear that any permanent or irremediable damage had been done to the accused's ability to make full answer and defence as a result of any non-disclosures or late disclosures that were in fact material, the accused's rights could have been protected by an adjournment, by recalling witnesses who had already testified, or by declaring a mistrial if those would not suffice.

B. *Analysis of Abuse of Process*

58 I agree with the Court of Appeal that it would be pointless to order a new trial on the basis that there was no abuse of process if a stay ought nevertheless to have prevailed under ss. 7 and 24(1) of the *Charter*. It is therefore necessary to clarify the relationship between the common law and the *Charter* in this respect, both in order to dispose effectively of the question raised in this case and to provide guidance to courts facing similar situations involving non-disclosure in the future.

(i) The Relationship Between Abuse of Process and the *Charter*

59 The modern resurgence of the common law doctrine of abuse of process began with the judgment of this Court in *R. v. Jewitt*, [1985] 2 S.C.R. 128. In *Jewitt*, the Court set down what has since become the standard formulation of the test, at pp. 136-37:

> Lord Devlin has expressed the rationale supporting the existence of a judicial discretion to enter a stay of proceedings to control prosecutorial behaviour prejudicial to accused persons in *Connelly v. Director of Public Prosecutions*, [1964] A.C. 1254 (H.L.) at p. 1354:
>
> > Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or who are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.
>
> I would adopt the conclusion of the Ontario Court of Appeal in *R. v. Young, supra*, and affirm that "there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive and vexatious proceedings". I would also adopt the caveat added by the Court in *Young* that this is a power which can be exercised only in the "clearest of cases". [Emphasis added.]

The general test for abuse of process adopted in that case has been repeatedly affirmed: *R. v. Keyowski*, [1988] 1 S.C.R. 657, at pp. 658-59, *R. v. Mack*, [1988] 2 S.C.R. 903, at p. 941, *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667, *R. v. Scott*, [1990] 3 S.C.R. 979, at pp. 992-93, and most recently in *R. v. Power*, [1994] 1 S.C.R. 601, at pp. 612-15.

60 After considering much of this case law, the Court of Appeal concluded that the preponderance of cases favoured maintaining a distinction between the *Charter* and the common law doctrine of abuse of process. The Court of Appeal may, in my view, have underestimated the extent to which both individual rights to trial fairness and the general reputation of the criminal justice system are fundamental concerns underlying both the common law doctrine of abuse of process and the *Charter*. This, for the following reasons.

61 First, while the *Charter* is certainly concerned with the rights of the individual, it is also concerned with preserving the integrity of the judicial system. Subsection 24(2) of the *Charter* gives express recognition to this dual role. More significantly, however, this Court has, on many occasions, noted that the principles of fundamental justice in s. 7 are, in large part, inspired by, and premised upon, values that are fundamental to our common law. In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503, Lamer J. (as he then was) observed:

> ...the principles of fundamental justice are to be found in the basis tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, *i.e.*, ss. 8 to 14, and the character and larger objects of the *Charter* itself. It provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters. [Emphasis added.]

See also *R. v. Beare*, [1988] 2 S.C.R. 387, at p. 406; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 929 (*per* Gonthier J., dissenting on other grounds). The common law doctrine of abuse of process is part and parcel of those fundamental values. It is, therefore, not surprising that in *R. v. Potvin*, [1993] 2 S.C.R. 880, at p. 915 (*per* Sopinka J.), the majority of this Court recognized that the court's power to remedy abuses of its process now has constitutional status.

62 Conversely, it is equally clear that abuse of process also contemplates important individual interests. In "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept" (1991), 15 *Crim. L.J.* 315, at p. 331, Professor Paciocco suggests that the doctrine of abuse of process, in addition to

preserving the reputation of the administration of justice, also seeks to ensure that accused persons are given a fair trial. Arguably, the latter is essentially a subset of the former. Unfair trials will almost inevitably cause the administration of justice to fall into disrepute: *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Elshaw*, [1991] 3 S.C.R. 24. See also A. L.-T. Choo, "Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited", [1995] *Crim. L.R.* 864, at p. 865. What is significant for our purposes, however, is the fact that one often cannot separate the public interests in the integrity of the system from the private interests of the individual accused.

63 In fact, it may be wholly unrealistic to treat the latter as wholly distinct from the former. This Court has repeatedly recognized that human dignity is at the heart of the *Charter*. While respect for human dignity and autonomy may not necessarily, itself, be a principle of fundamental justice (*Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 592, *per* Sopinka J. for the majority), it seems to me that conducting a prosecution in a manner that contravenes the community's basic sense of decency and fair play and thereby calls into question the integrity of the system is also an affront of constitutional magnitude to the rights of the individual accused. It would violate the principles of fundamental justice to be deprived of one's liberty under circumstances which amount to an abuse of process and, in my view, the individual who is the subject of such treatment is entitled to present arguments under the *Charter* and to request a just and appropriate remedy from a court of competent jurisdiction.

64 The overlap between prejudice to the individual and prejudice to the system was noted, for instance, in *Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 947, where

Lamer J. stated that, in certain cases, a *Charter* stay might be appropriate to remedy a violation of s. 11(*b*) even where there was no demonstrated prejudice to the fairness of the trial. More recently, in *R. v. Morin*, [1992] 1 S.C.R. 771, at p. 786 (*per* Sopinka J.), and p. 812 (*per* McLachlin J.) this Court recognized that, although the primary purpose of s. 11(*b*) is the protection of the individual rights of the accused, there is also a secondary interest of society as a whole in the prompt, humane, and fair trial of those accused of crimes. Equally apposite are the remarks of Wilson J. in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1354, who noted that a contextually sensitive approach to *Charter* rights requires that the private interests reflected therein also be evaluated from the standpoint of the public interests that underlie those private rights. Given that many, if not most, of the individual rights protected in the *Charter* also have a broader, societal dimension, it is therefore consistent with both the purpose and the spirit of the *Charter* to look, in certain cases, beyond the possibility of prejudice to the particular accused, to clear cases of prejudice to the integrity of the judicial system.

65 For this reason, the principles of fundamental justice, including the "fairness of the trial", necessarily reflect a balancing of societal and individual interests: *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 539 (*per* La Forest J.); *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155, at p. 198 (*per* Cory J.); *Cunningham v. Canada*, [1993] 2 S.C.R. 143; *R. v. Levogiannis*, [1993] 4 S.C.R. 475, at p. 486. As such, they reflect both individual and societal interests. In my view, it is undisputable that the preservation of the integrity of the judicial system is one of these interests.

66 Second, I would note the beginnings of a strong trend toward convergence between the *Charter* and traditional abuse of process doctrine. In *R. v. Xenos* (1991), 70 C.C.C. (3d) 362 (Que. C.A.), for instance, the accused had been charged with arson and attempting to defraud an insurance company. It emerged in cross-examination that the Crown's key witness had arranged with the insurers to be paid $50,000 by the insurers if the accused was convicted. The trial judge found an abuse of process, but declined to order a stay. Rather, in convicting the accused, he said that he had ignored this evidence. The Court of Appeal agreed in principle with the trial judge that a stay was not the only remedy for an abuse of process and went on to rule that the appropriate remedy was in fact to exclude the witness's testimony in a new trial before a different judge. This case is an excellent example, in my mind, of how courts are becoming increasingly bold and innovative in finding appropriate remedies in lieu of stays for abuses of process. Professor Stuesser points out in "Abuse of Process: The Need to Reconsider" (1994), 29 C.R. (4th) 92, at p. 99, moreover, that the common law in the United Kingdom and Australia urges judges to look at lesser remedies before entering stays of proceedings. He argues that these authorities support the view that even under the common law, the remedy for abuse of process is no longer only a stay of proceedings.

67 I recognize that this Court has consistently, albeit implicitly, considered abuse of process separately from the *Charter*. In *Conway*, *supra*, it considered abuse of process separately from the s. 11(*b*) considerations arising from the accused facing a third trial. In *Scott*, *supra*, in the context of an immediate stay by the Crown upon the posing by defence counsel of a question which would have revealed the identity of a police informer, the majority again considered abuse of process

separately from an examination of whether the accused's s. 11(*b*) rights had been violated by the Crown's subsequent reinitiation of the proceedings. Finally, in *Power*, *supra*, it found no abuse of process in the Crown's failure to call further evidence after the trial judge had excluded a key breathalyzer sample and did not address the possibility of a *Charter* violation at all. In my view, however, the issues addressed in each of these three cases could have been addressed equally effectively under the *Charter*. In none of these decisions did the majority of this Court actively turn its mind to the interaction between the *Charter* and the common law doctrine of abuse of process. On the only occasion that it did, moreover, it expressly declined to address the issue: *Keyowski*, *supra*, at pp. 660-61. On the other hand, in *Mack*, *supra*, this Court commented at pp. 939-40 and again at p. 976 upon the strong parallels that exist between the two regimes.

68 I also recognize that, despite these strong parallels, the common law and *Charter* analyses have often been kept separate because of the differing onus of proof upon the accused under the two regimes. In *R. v. Keyowski* (1986), 28 C.C.C. (3d) 553 (Sask. C.A.), at pp. 561-62, for instance, it was noted that while the burden of proof under the *Charter* was the balance of probabilities, the burden under the common law was the "clearest of cases". It is important to remember, however, that even if a violation of s. 7 is proved on a balance of probabilities, the court must still determine what remedy is just and appropriate under s. 24(1). The power granted in s. 24(1) is in terms discretionary, and it is by no means automatic that a stay of proceedings should be granted for a violation of s. 7. On the contrary, I would think that the remedy of a judicial stay of proceedings would be appropriate under s. 24(1) only in the clearest of cases. In this way, the threshold for obtaining

a stay of proceedings remains, under the *Charter* as under the common law doctrine of abuse of process, the "clearest of cases".

69 Remedies less drastic than a stay of proceedings are of course available under s. 24(1) in situations where the "clearest of cases" threshold is not met but where it is proved, on a balance of probabilities, that s. 7 has been violated. In this respect the *Charter* regime is more flexible than the common law doctrine of abuse of process. However, this is not a reason to retain a separate common law regime. It is important to recognize that the *Charter* has now put into judges' hands a scalpel instead of an axe -- a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system. Even at common law, courts have given consideration to the societal (not to mention individual) interests in obtaining a final adjudication of guilt or innocence in cases involving serious offences. In *Conway*, *supra*, at p. 1667, for instance, I elaborated upon the essential balancing character of abuse of process in the following terms:

> [Abuse of process] acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings. [Emphasis added.]

I see no reason why such balancing cannot be performed equally, if not more, effectively under the *Charter*, both in terms of defining violations and in terms of

selecting the appropriate remedy to perceived violations. See, by analogy, *Morin*, *supra*.

70 For these reasons, I conclude that the only instances in which there may be a need to maintain any type of distinction between the two regimes will be those instances in which the *Charter*, for some reason, does not apply yet where the circumstances nevertheless point to an abuse of the court's process. Because the question is not before us, however, I leave for another day any discussion of when such situations, if they indeed exist, may arise. As a general rule, however, there is no utility in maintaining two distinct approaches to abusive conduct. The distinction is one that only lawyers could possibly find significant. More importantly, maintaining this somewhat artificial dichotomy may, over time, create considerably more confusion than it resolves.

71 The principles of fundamental justice both reflect and accommodate the nature of the common law doctrine of abuse of process. Although I am willing to concede that the focus of the common law doctrine of abuse of process has traditionally been more on the protection of the integrity of the judicial system whereas the focus of the *Charter* has traditionally been more on the protection of individual rights, I believe that the overlap between the two has now become so significant that there is no real utility in maintaining two distinct analytic regimes. We should not invite schizophrenia into the law.

72 I therefore propose to set down some guidelines for evaluating, first, whether there has been a violation of the *Charter* that invokes concerns analogous to those traditionally raised under the doctrine of abuse of process and, second, the

circumstances under which the remedy of a judicial stay of proceedings will be "appropriate and just", as required by s. 24(1) of the *Charter*.

(ii) Section 7, Abuse of Process and Non-disclosure

73 As I have already noted, the common law doctrine of abuse of process has found application in a variety of different circumstances involving state conduct touching upon the integrity of the judicial system and the fairness of the individual accused's trial. For this reason, I do not think that it is helpful to speak of there being any one particular "right against abuse of process" within the *Charter*. 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.

74 Non-disclosure by the Crown normally falls within the second category described above. Consequently, a challenge based on non-disclosure will generally require a showing of actual prejudice to the accused's ability to make full answer and defence. In this connection, 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. Once a violation is made out, a just and appropriate remedy must be found.

(iii) The Appropriate Remedy to a s. 7 Violation for Non-disclosure

75 Where there has been a violation of a right under the *Charter*, s. 24(1) confers upon a court of competent jurisdiction the power to confer "such remedy as the court considers appropriate and just in the circumstances". Professor Paciocco, *supra*, at p. 341, has recommended that a stay of proceedings will only be appropriate when two criteria are fulfilled:

(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and

(2) no other remedy is reasonably capable of removing that prejudice.

I adopt these guidelines, and note that they apply equally with respect to prejudice to the accused or to the integrity of the judicial system.

76 As I have stated, non-disclosure will generally violate s. 7 only if it impairs the accused's right to full answer and defence. Although it is not a precondition to a disclosure order that there be a *Charter* violation, a disclosure order can be a remedy under s. 24(1) of the *Charter*. Thus, where the adverse impact upon the

accused's ability to make full answer and defence is curable by a disclosure order, then such a remedy, combined with an adjournment where necessary to enable defence counsel to review the disclosed information, will generally be appropriate.

77 There may, however, be exceptional situations where, given the advanced state of the proceedings, it is simply not possible to remedy through reasonable means the prejudice to the accused's right to make full answer and defence. In such cases, the drastic remedy of a stay of proceedings may be necessary. Although I will return to this matter in my discussion on the disclosure of records held by third parties, we must recall that, under certain circumstances, the defence will be unable to lay the foundation for disclosure of a certain item until the trial has actually begun and witnesses have already been called. In those instances, it may be necessary to take measures such as permitting the defence to recall certain witnesses for examination or cross-examination, adjournments to permit the defence to subpoena additional witnesses or even, in extreme circumstances, declaring a mistrial. A stay of proceedings is a last resort, to be taken when all other acceptable avenues of protecting the accused's right to full answer and defence are exhausted.

78 When choosing a remedy for a non-disclosure that has violated s. 7, the court should also consider whether the Crown's breach of its disclosure obligations has also violated fundamental principles underlying the community's sense of decency and fair play and thereby caused prejudice to the integrity of the judicial system. If so, it should be asked whether this prejudice is remediable. Consideration must be given to the seriousness of the violation and to the societal and individual interests in obtaining a determination of guilt or innocence. Although some of the

most salient considerations are discussed immediately below, that discussion is by no means exhaustive.

79 Among the most relevant considerations are the conduct and intention of the Crown. For instance, non-disclosure due to a refusal to comply with a court order will be regarded more seriously than non-disclosure attributable to inefficiency or oversight. It must be noted, however, that while a finding of flagrant and intentional Crown misconduct may make it significantly more likely that a stay of proceedings will be warranted, it does not follow that a demonstration of *mala fides* on the part of the Crown is a necessary precondition to such a finding. As Wilson J. observed for the Court in *Keyowski, supra,* at p. 659:

> To define "oppressive" as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine.... Prosecutorial misconduct and improper motivation are but two of many factors to be taken into account when a court is called upon to consider whether or not in a particular case the Crown's [conduct] amounts to an abuse of process.

80 Another pertinent consideration will be the number and nature of adjournments attributable to the Crown's conduct, including adjournments attributable to its failure to disclose in a timely manner. Every adjournment and/or additional hearing caused by the Crown's breach of its obligation to disclose may have physical, psychological and economic consequences upon the accused, particularly if the accused is incarcerated pending trial. In all fairness, however, the Crown may also seek to establish by evidence that the accused is in the majority group of persons who benefit from a delay in the proceedings because they do not want an early trial: *Morin*, *supra*, at pp. 802-3.

81 Finally, in determining whether the prejudice to the integrity of the judicial system is remediable, consideration must be given to the societal and individual interests in obtaining a determination of guilt or innocence. It goes without saying that these interests will increase commensurately to the seriousness of the charges against the accused. Consideration should be given to less drastic remedies than a stay of proceedings (see for example *R. v. Burlingham*, [1995] 2 S.C.R. 206, 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).

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

(iv) Summary

83 Where life, liberty or security of the person is engaged in a judicial proceeding, and it is proved on a balance of probabilities that the Crown's failure to make proper disclosure to the defence has impaired the accused's ability to make full answer and defence, a violation of s. 7 will have been made out. In such circumstances, the court must fashion a just and appropriate remedy, pursuant to s. 24(1). Although the remedy for such a violation will typically be a disclosure

order and adjournment, there may be some extreme cases where the prejudice to the accused's ability to make full answer and defence or to the integrity of the justice system is irremediable. In those "clearest of cases", a stay of proceedings will be appropriate.

C. *Application to the Facts*

84 The motion which prompted Thackray J.'s pronouncement of a stay of proceedings was the fifth such motion since the trial judge was seized of the case. It was only the second, however, that related in any way to non-disclosure by the Crown. The first motion for a stay based upon non-disclosure, which Thackray J. rejected in reasons delivered on November 27, pertained to non-disclosures relating to the order of Campbell A.C.J., which in turn governed the production of materials which were almost exclusively in the hands of third parties. Much of the delayed disclosure by the Crown of the complainants' medical and therapeutic records, even after the order of Campbell A.C.J., seems to have been genuinely motivated by a desire to protect the privacy interests of the complainants, and not to compromise the rights of the accused. Some of the non-disclosure was attributable to simple incompetence. Thackray J. concluded as much when he noted that there was no evidence to suggest any "grand design by the Crown to conceal evidence" (p. 105). Although, for reasons which appear below, I agree that the scope and nature of the disclosure order were unacceptably broad, I agree with the Court of Appeal that a more appropriate route for the Crown to have taken would have been to apply for a variation of the original disclosure order, in which the Crown would have sought greater accommodation for the privacy interests of the individual complainants involved.

85 Nonetheless, due in part to an undertaking by the Crown on November 28 to disclose to the defence its complete files on the case, there is no dispute that the order of Campbell A.C.J. had been fully complied with by the Crown at the time of the fifth application by the defence for a stay of proceedings. This fifth application was founded upon the non-disclosure of a full transcript of a witness interview which had previously only partly been disclosed to the defence, the non-disclosure of several diagrams produced by witnesses in the course of their preparations with the Crown, and the failure of Crown counsel to be able to assure the court on the third day of the trial that all relevant documents in Ms. Harvey's computer files had been fully disclosed to the defence. Defence counsel exhorted the trial judge to consider, as well, the previous disclosure difficulties encountered by the defence.

86 In granting the stay of proceedings on December 7, Thackray J. concluded that the Crown's previous uncooperativeness in response to Campbell A.C.J.'s disclosure order had created an "aura" which ultimately pervaded and destroyed the case. In the November 27 ruling refusing the fourth application for a stay, however, Thackray J. had ruled that although the Crown's excuses for non-disclosure were "limp" and indicative of incompetence, there was no evidence to suggest any "grand design by the Crown to conceal evidence" (p. 105). Given that the order of Campbell A.C.J. had been fully complied with by the time of the fifth application for a stay, it is unclear what changed the trial judge's mind about the Crown's conduct in relation to that non-disclosure. Rather, it would appear that Thackray J. attached greatest significance to the fact that, notwithstanding that the trial had now begun, Crown counsel could still not provide the court with an

assurance that all relevant information had been disclosed. This may have been the straw that broke the proverbial camel's back.

87 The frustration of the trial judge, forced on several occasions to intervene in order to further the disclosure process, is certainly understandable. As I have already noted, the Crown's failure to comply fully with the disclosure order of Campbell A.C.J. must not be regarded lightly. At the same time, however, we must place the considerable disclosure difficulties within their proper context. The considerable disclosure difficulties related almost entirely to the following: (1) materials which were not in the Crown's possession at the time of the making of the original disclosure order and which consequently, for reasons that I shall discuss below, the Crown is not under any obligation to produce; and (2) work product which, provided that it contains no material inconsistencies or additional facts not already disclosed to the defence, the Crown would also not ordinarily be obliged to disclose, were it not for the undertaking which it gave to the defence the weekend before the beginning of the trial. This was not a case where the Crown failed, for whatever reason, to disclose the fruits of an investigation undertaken by agents of the state. Much confusion was attributable to the fact that the law regarding the disclosure of third parties' private records was highly uncertain, and nobody was quite sure what to do.

88 In agreeing on November 28 to hand over its complete files in the case, the Crown may unwittingly have promised more than it could realistically deliver in such a short time, given the lack of computer literacy of one of the Crown counsel, the complexities involved in the preparation of the case, and the fact that the prosecution was being run from two different cities. These are, as the trial judge

noted, "limp" excuses. Nonetheless, although the Crown, as an officer of the court, must always strive to fulfil its undertakings, the fact that the imperfect compliance which ultimately triggered the granting of the stay was with respect to a voluntary undertaking by the Crown rather than with respect to an order of the trial judge or a clear legal obligation is a factor that should not be ignored.

89 Finally, although the non-disclosure of the diagrams prepared by the witnesses, as well as certain of Ms. Harvey's computer files, apparently contravened the Crown's good faith undertaking to the defence, it was unclear whether any of this information contained materially different versions of that which had already been disclosed to the defence. In fact, while Mr. Jones did concede that he could not assure the court that full disclosure had been made in conformity with the Crown's undertaking, he resolutely took the position, after having reviewed some of the impugned documents, that none of the undisclosed records were material. Nor, for that matter, was there any evidence of improper motive on the part of the Crown. I hasten to add that a finding that the non-disclosures were material might have supported an inference that the Crown was actively hiding information that was material to the defence. In the instant case, however, absent any inquiry into the materiality of the non-disclosures, the most that can be said is that the non-disclosures arose as a result of inadvertence or lack of communication on the part of the two Crown counsel, or because Crown counsel undertook to bite off more voluntary disclosure than it could chew. There is no proof, moreover, that any delays were attributable to Crown non-disclosure. If indeed there were such delays, then it is relevant to note that, since the accused was not incarcerated pending trial, these delays would not have prolonged the duration of the accused's imprisonment.

90 Bearing these factors in mind, I would make the following conclusions. First, although the Crown's conduct was shoddy and inappropriate, the non-disclosure cannot be said to have violated the accused's right to full answer and defence. Contrary to the impression held by the trial judge, a review of the transcripts reveals that the Crown did not at any time concede either materiality or prejudice to the defence. The most the Crown admitted was that defence counsel might be at a disadvantage because it had only had a short time during which to review the most recently disclosed documents. At its highest, moreover, the prejudice actually identified by the trial judge was that the non-disclosed diagrams were relevant in that they might have affected the preparation of the cross-examination of one of the witnesses. Cross-examination of that witness had not yet even begun. Although I am sympathetic to the difficulties of preparing an effective cross-examination, I cannot agree that an accused's right to full answer and defence has probably been infringed merely because of the possibility that a cross-examination of a witness, which has not yet begun, may have to be reformulated. Without any inquiry into the materiality of the non-disclosed information, it was, therefore, impossible for the trial judge to conclude that the non-disclosure had, on the balance of probabilities, prejudiced the accused's ability to make full answer and defence.

91 Second, it must be recalled that the whole issue of disclosure in this case arose out of Campbell A.C.J.'s order requiring that the Crown "disclose" records in the hands of third parties and that the complainants authorize production of such records. This order was issued without any form of inquiry into their relevance, let alone a balancing of the privacy rights of the complainants and the accused's right to a

fair trial. We all agree that this order was wrong. Although the error was compounded by the Crown's inept and ineffective efforts to have this order reviewed and modified, it is clear, at the end of the day, that the Crown was right in trying to protect the interests of justice. The fact that it did so in such a clumsy way should not result in a stay of proceedings, particularly so when no prejudice was demonstrated to the fairness of the accused's trial or to his ability to make full answer and defence. Thus, even if I had found a violation of s. 7, this cannot be said to be one of the "clearest of cases" which would mandate a stay of proceedings.

92 To summarize, I am satisfied that the evidence in the present case did not support the finding of a violation under s. 7 of the *Charter* and, moreover, it did not reasonably support Thackray J.'s view that the only appropriate course of action under the circumstances was to stay the proceedings against the accused.

## II. Production of Private Records

### A. *Judgment of the Court of Appeal*

93 On May 16, 1994, the Court of Appeal released additional reasons in *O'Connor (No. 2)*, *supra*. In those reasons, it set out guidelines governing applications for production of medical records of potential witnesses, which are not in the possession of the Crown. It recommended a two-stage procedure (at p. 261):

> At the first stage, the applicant must show that the information contained in the medical records is likely to be relevant either to an issue in the proceeding or to the competence of the witness to testify.

> If the applicant meets this test, then the documents meeting that description must be disclosed to the court.
>
> The second stage involves the court reviewing the documents to determine which of them are material to the defence, in the sense that, without them, the accused's ability to make full answer and defence would be adversely affected. If the court is satisfied that any of the documents fall into this category, then they should be disclosed to the parties, subject to such conditions as the court deems fit.

The court noted that it would often only be possible to make the ultimate determination as to relevance and materiality at the point in the trial when the issue to which the information is said to be relevant or material is addressed.

94 The court then held that while a liberal interpretation of the word "relevant" is to be encouraged, due regard must also be had for other legitimate legal and societal interests, notably the privacy interests of complainants in sexual assault cases and the danger that the evidence will be unprobative and misleading. As such, consideration should be had for this Court's remarks in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, as well as for the factors set out in s. 276(3) of the *Criminal Code*.

95 The Court of Appeal then reviewed grounds for disclosure which, in its view, would not meet the test for relevance. It would be insufficient, for instance, to invoke credibility "at large". A simple submission that the records may relate to "recent complaint" would be equally inadequate. So, too, would be a claim that the defence hopes to find lack of corroboration or the existence of a prior inconsistent statement, since this would amount to a fishing expedition into a person's private records. Equally insufficient would be an assertion of relevance based on the mere fact that a witness has received counselling or psychiatric assistance as a consequence of an alleged sexual assault. The fact of having received such

counselling could not, moreover, justify a conclusion that the witness's evidence may be unreliable.

96 The Court of Appeal then turned to a consideration of appropriate procedures to guide the parties on an application for pre-trial production of medical records held by third parties. It made the following points (at pp. 267-68):

-- the application for disclosure should ideally be supported by affidavits;

-- notice should be given to Crown counsel, to the third party in possession, and to the complainant or other witness with a privacy interest in the records;

-- the application should be heard by the trial judge whenever possible;

-- at the hearing, persons with an interest in the records are entitled to present argument relating to issues of privacy and privilege, and to give evidence with respect to the relevance and materiality of the records in question;

-- the judge will review the records to determine materiality, a procedure which may be done *in camera* or under a publication ban where the materials involved are of a sensitive nature;

-- if the threshold test is not met, the records shall be sealed and retained in the file in the event they need to be reviewed later;

-- any party to the original application may apply for a variation of the disclosure or non-disclosure order on proper grounds, and further application may be made if new evidence arises subsequently.

The court declined to discuss the issue of privilege, both because full disclosure was made in this case, and because no basis in relevance or materiality was established for the production of the records.

B. *Analysis of Production Guidelines*

97 Determining the nature and extent of production to the defence of a complainant's medical and therapeutic records, as well as any other documents in which the complainant holds a reasonable expectation of privacy, is a difficult and potentially value-laden exercise. I commend the initiative taken by the Court of Appeal in setting down its thoughtful approach to the issue. It can be seen that I approve of and adopt many of their observations and suggestions in the forthcoming pages.

98 As a preliminary matter, it should be noted that the issue before us relates to the production of private records held by third parties. We are not concerned here with the extent of the Crown's obligation to disclose private records in its possession, or with the question whether privacy and equality interests may militate against

such disclosure by the Crown. Although my colleagues Lamer C.J. and Sopinka J. deal with these questions at great length in their reasons, I prefer not to pronounce on these issues as they do not arise in this appeal and were not argued before us. Any comment on these questions would be strictly *obiter*.

99 The question of production of private records not in the possession of the Crown arises in a wide variety of contexts. Although many of these contexts involve medical and therapeutic records of complainants to sexual assault, it will become apparent that the principles and guidelines outlined herein are equally applicable to any record, in the hands of a third party, in which a reasonable expectation of privacy lies. Although the determination of when a reasonable expectation of privacy actually exists in a particular record (and, if so, to what extent it exists) is inherently fact- and context-sensitive, this may include records that are medical or therapeutic in nature, school records, private diaries, and activity logs prepared by social workers, to name just a few. For the sake of convenience, information that is generically of this nature shall hereafter be referred to as "private records held by third parties".

(i) Basic Principles Governing Disclosure and Production

100 The basic principles governing disclosure were most recently summarized by this Court in *R. v. Chaplin*, [1995] 1 S.C.R. 727. It is now clearly established that the Crown is under a general duty to disclose all information, whether inculpatory or exculpatory, except evidence that is beyond the control of the prosecution, clearly irrelevant, privileged or subject to a right of privacy. However, where the Crown disputes the existence of the information sought by the defence, then the defence

must first establish a basis which could enable the presiding judge to conclude that there is in existence further material which may be useful to the accused in making full answer and defence: *Chaplin*, *supra,* at pp. 743-45.

101 Though the obligation on the Crown to disclose has found renewed vigour since the advent of the *Charter*, in particular s. 7, this obligation is not contingent upon there first being established any violation of the *Charter*. Rather, full and fair disclosure is a fundamental aspect of the Crown's duty to serve the Court as a faithful public agent, entrusted not with winning or losing trials but rather with seeing that justice is served: *Stinchcombe*, *supra*, at p. 333. For this reason, as I have already mentioned, although a disclosure order can be a constitutional remedy, the obligation on the Crown to disclose all information in its possession that is not clearly irrelevant, privileged or subject to a right of privacy undoubtedly has force independent of any violation of the accused's s. 7 rights. Because of the Crown's unique obligations, both to the court and to the public, it, alone, owes a duty to disclose to the defence. This duty does not extend to third parties. Similarly, the obligation upon the Crown to disclose all relevant material does not extend to records which are not within its possession or control. See, also, *R. v. Gingras* (1992), 71 C.C.C. (3d) 53 (Alta. C.A.).

102 Given that there is no duty on third parties to disclose, it has been suggested that s. 698 of the *Code* provides the basis upon which a court may order production of third parties' private records. In particular, ss. 698 and 700 authorize the issuance of a *subpoena ad testificandum* or a *subpoena duces tecum* to any person that is likely to give material evidence. With respect, however, I believe that this

argument rests on a misunderstanding of the nature of the subpoena powers in s. 698.

103 Although a *subpoena duces tecum* requires that a witness who is the object of the subpoena bring the requested documents into court, the subpoena does not automatically call for an order requiring the documents to be produced to the court for inspection, let alone to the defence. Production will only be ordered if the documents are likely to be relevant and if production is appropriate, having regard to all of the relevant considerations. In exercising its discretion to order production, the court must, of course, have regard to the *Charter* rights of the accused and the other interests at stake, including any claims of privilege or a right to privacy which the subject or guardian of the records might successfully assert in respect of those documents.

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

105 An order for production of private records held by third parties does not arise as a remedy under s. 24(1) of the *Charter* since, at the moment of the request for production, the accused's rights under the *Charter* have not been violated. Nonetheless, when deciding whether to order production of private records, the court must exercise its discretion in a manner that is respectful of *Charter* values: *Dagenais*, *supra*, at p. 875. In particular, the nature, scope and breadth of the production order will ultimately depend upon a balancing of *Charter* rights which seeks to ensure that any adverse effects upon one right is proportionate to the salutary effects of the constitutional objective being furthered: *Dagenais*, at p. 890.

(ii) The Competing Constitutional Rights at Issue

106 In formulating an approach to govern production of private records held by third parties, it is important to appreciate fully the nature of the various interests at issue. I will describe briefly each of the three constitutional rights that I believe to be implicated in this analysis: (1) the right to full answer and defence; (2) the right to privacy; and (3) the right to equality without discrimination.

(a) *The Right to a Fair Trial*

107 Much has been written about the right to a fair trial. An individual who is deprived of the ability to make full answer and defence is deprived of fundamental justice. However, full answer and defence, like any right, cannot be considered in the abstract. The principles of fundamental justice vary according to the context in which they are invoked. For this reason, certain procedural protections might be constitutionally mandated in one context but not in another: *R. v. Lyons*, [1987] 2

S.C.R. 309, at p. 361. Moreover, though the Constitution guarantees the accused a fair hearing, it does not guarantee the most favourable procedures imaginable: *Lyons*, *supra*, at p. 362. Finally, although fairness of the trial and, as a corollary, fairness in defining the limits of full answer and defence, must primarily be viewed from the point of view of the accused, both notions must nevertheless also be considered from the point of view of the community and the complainant: *E. (A.W.)*, *supra*, at p. 198. There is no question that the right to make full answer and defence cannot be so broad as to grant the defence a fishing licence into the personal and private lives of others. The question is therefore not <u>whether</u> the defence can be limited in its attempts to obtain production of private records held by third parties, but <u>how</u> it can be limited in a manner that accords appropriate constitutional protection to all of the constitutional rights at issue.

108 When the defence seeks production of third party records whose contents it is not aware of, the defence is obviously in a position of some difficulty. In assessing whether this difficulty poses a threat of constitutional proportions to the accused's ability to make fair answer and defence, however, one thing must be borne in mind. Given that these records are not in the possession of the Crown and have not constituted a basis for its investigations, they do not, by definition, constitute part of the state's "case to meet" against the accused. Unlike sealed wiretap packages, which represent the fruits of state investigation of the accused, private records in the hands of third parties are not subject to such a presumption of materiality.

109 I would note, finally, that an important element of trial fairness is the need to remove discriminatory beliefs and bias from the fact-finding process: *Seaboyer*, *supra*. As I pointed out in *R. v. Osolin*, [1993] 4 S.C.R. 595, at pp. 622-23, for

instance, the assumption that private therapeutic or counselling records are relevant to full answer and defence is often highly questionable, in that these records may very well have a greater potential to derail than to advance the truth-seeking process:

> ...medical records concerning statements made in the course of therapy are both hearsay and inherently problematic as regards reliability. A witness's concerns expressed in the course of therapy after the fact, even assuming they are correctly understood and reliably noted, cannot be equated with evidence given in the course of a trial. Both the context in which the statements are made and the expectations of the parties are entirely different. In a trial, a witness is sworn to testify as to the particular events in issue. By contrast, in therapy an entire spectrum of factors such as personal history, thoughts, emotions as well as particular acts may inform the dialogue between therapist and patient. Thus, there is serious risk that such statements could be taken piecemeal out of the context in which they were made to provide a foundation for entirely unwarranted inferences by the trier of fact.
>
> [Emphasis added.]

(b) *The Right to Privacy*

110 This Court has on many occasions recognized the great value of privacy in our society. It has expressed sympathy for the proposition that s. 7 of the *Charter* includes a right to privacy: *Beare*, *supra*, at p. 412; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at p. 369, *per* La Forest J. On numerous other occasions, it has spoken of privacy in terms of s. 8 of the *Charter*: see, e.g., *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Pohoretsky*, [1987] 1 S.C.R. 945; *R. v. Dyment*, [1988] 2 S.C.R. 417. On still other occasions, it has underlined the importance of privacy in the common law: *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, at pp. 148-49; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

111 On no occasion has the relationship between "liberty", "security of the person", and essential human dignity been more carefully canvassed by this Court than in the reasons of Wilson J. in *R. v. Morgentaler*, [1988] 1 S.C.R. 30. In her judgment, she notes that the *Charter* and the right to individual liberty guaranteed therein are tied inextricably to the concept of human dignity. She urges that both "liberty" and "security of the person" are capable of a broad range of meaning and that a purposive interpretation of the *Charter* requires that the right to liberty contained in s. 7 be read to "guarantee[] to every individual a degree of personal autonomy over important decisions intimately affecting their private lives" (p. 171). Concurring on this point with the majority, she notes, as well, that `security of the person' is sufficiently broad to include protection for the psychological integrity of the individual.

112 Equally relevant, for our purposes, is Lamer J.'s recognition in *Mills, supra,* at p. 920, that the right to security of the person encompasses the right to be protected against psychological trauma. In the context of his discussion of the effects on an individual of unreasonable delay contrary to s. 11(*b*) of the *Charter*, he noted that such trauma could take the form of

> stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.

If the word "complainant" were substituted for the word "accused" in the above extract, I think that we would have an excellent description of the psychological traumas potentially faced by sexual assault complainants. These people must contemplate the threat of disclosing to the very person accused of assaulting them

in the first place, and quite possibly in open court, records containing intensely private aspects of their lives, possibly containing thoughts and statements which have never even been shared with the closest of friends or family.

113 In the same way that this Court recognized in *Re B.C. Motor Vehicle Act*, *supra*, that the "principles of fundamental justice" in s. 7 are informed by fundamental tenets of our common law system and by ss. 8 to 14 of the *Charter*, I think that the terms "liberty" and "security of the person" must, as essential aspects of a free and democratic society, be animated by the rights and values embodied in the common law, the civil law and the *Charter*. In my view, it is not without significance that one of those rights, s. 8, has been identified as having as its fundamental purpose "to protect individuals from unjustified state intrusions upon their privacy" (*Hunter*, *supra*, at p. 160). The right to be secure from unreasonable search and seizure plays a pivotal role in a document that purports to contain the blueprint of the Canadian vision of what constitutes a free and democratic society. Respect for individual privacy is an essential component of what it means to be "free". As a corollary, the infringement of this right undeniably impinges upon an individual's "liberty" in our free and democratic society.

114 A similarly broad approach to the notion of liberty has been taken in the United States. In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), at pp. 571-72, the United States Supreme Court affirmed that "liberty" was a "broad and majestic term" and that "[i]n a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed". More significant for our purposes, the right to privacy was expressly found to reside in the term "liberty" in the Fourteenth Amendment in the landmark case of *Roe v. Wade*, 410 U.S. 113

(1973). In a similar vein, the right to personal privacy has also received recognition in international documents such as Article 17 of the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, Article 12 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), and Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221.

115 Privacy has traditionally also been protected by the common law, through causes of action such as trespass and defamation. In *Hill*, *supra*, which dealt with a *Charter* challenge to the common law tort of defamation, Cory J. reiterates the constitutional significance of the right to privacy (at para. 121):

> ...reputation is intimately related to the right to privacy which has been accorded constitutional protection. As La Forest J. wrote in *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 427, privacy, including informational privacy, is "(g)rounded in man's physical and moral autonomy" and "is essential for the well-being of the individual". The publication of defamatory comments constitutes an invasion of the individual's personal privacy and is an affront to that person's dignity. The protection of a person's reputation is indeed worthy of protection in our democratic society and must be carefully balanced against the equally important right of freedom of expression. [Emphasis added.]

116 Quebec, for its part, has inserted into its new *Civil Code*, S.Q. 1991, c. 64, arts. 35 and 36, which read as follows:

> 35. Every person has a right to the respect of his reputation and privacy.
>
> No one may invade the privacy of a person without the consent of the person or his heirs unless authorized by law.
>
> 36. The following acts, in particular, may be considered as invasions of the privacy of a person:
>
> (1) entering or taking anything in his dwelling;

(2) intentionally intercepting or using his private communications;

(3) appropriating or using his image or voice while he is in private premises;

(4) keeping his private life under observation by any means;

(5) using his name, image, likeness or voice for a purpose other than the legitimate information of the public;

(6) using his correspondence, manuscripts or other personal documents.

As well, s. 5 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, reads:

**5.** Every person has a right to respect for his private life.

117 It is apparent, however, that privacy can never be absolute. It must be balanced against legitimate societal needs. This Court has recognized that the essence of such a balancing process lies in assessing reasonable expectation of privacy, and balancing that expectation against the necessity of interference from the state: *Hunter*, *supra*, at pp. 159-60. Evidently, the greater the reasonable expectation of privacy and the more significant the deleterious effects flowing from its breach, the more compelling must be the state objective, and the salutary effects of that objective, in order to justify interference with this right. See *Dagenais*, *supra.*

118 In *R. v. Plant*, [1993] 3 S.C.R. 281, albeit in the context of a discussion of s. 8 of the *Charter*, a majority of this Court identified one context in which the right to privacy would generally arise in respect of documents and records (at p. 293):

> In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual. [Emphasis added.]

Although I prefer not to decide today whether this definition is exhaustive of the right to privacy in respect of all manners of documents and records, I am satisfied that the nature of the private records which are the subject matter of this appeal properly brings them within that rubric. Such items may consequently be viewed as disclosing a reasonable expectation of privacy which is worthy of protection under s. 7 of the *Charter*.

119 The essence of privacy, however, is that once invaded, it can seldom be regained. For this reason, it is all the more important for reasonable expectations of privacy to be protected at the point of disclosure. As La Forest J. observed in *Dyment*, *supra*, at p. 430:

> ...if the privacy of the individual is to be protected, we cannot afford to wait to vindicate it only after it has been violated. This is inherent in the notion of being secure against unreasonable searches and seizures. Invasions of privacy must be prevented, and where privacy is outweighed by other societal claims, there must be clear rules setting forth the conditions in which it can be violated. [Emphasis in last sentence added.]

In the same way that our constitution generally requires that a search be premised upon a pre-authorization which is of a nature and manner that is proportionate to the reasonable expectation of privacy at issue (*Hunter*, *supra*; *Thomson Newspapers*, *supra*), s. 7 of the *Charter* requires a reasonable system of "pre-authorization" to

justify court-sanctioned intrusions into the private records of witnesses in legal proceedings. Although it may appear trite to say so, I underline that when a private document or record is revealed and the reasonable expectation of privacy therein is thereby displaced, the invasion is not with respect to the particular document or record in question. Rather, it is an invasion of the dignity and self-worth of the individual, who enjoys the right to privacy as an essential aspect of his or her liberty in a free and democratic society.

(c) *The Right to Equality Without Discrimination*

120 Unlike virtually every other offence in the *Criminal Code*, sexual assault is a crime which overwhelmingly affects women, children and the disabled. Ninety percent of all victims of sexual assault are female: *Osolin*, *supra*, at p. 669, *per* Cory J. Moreover, studies suggest that between 50 and 80 percent of women institutionalized for psychiatric disorders have prior histories of sexual abuse (T. Firsten, "An Exploration of the Role of Physical and Sexual Abuse for Psychiatrically Institutionalized Women" (1990), unpublished research paper, available from Ontario Women's Directorate). Children are most highly vulnerable (*Sexual Offences Against Children* (the Badgley Report), vol. 1 (1984)).

121 It is a common phenomenon in this day and age for one who has been sexually victimized to seek counselling or therapy in relation to this occurrence. It therefore stands to reason that disclosure rules or practices which make mental health or medical records routinely accessible in sexual offence proceedings will have disproportionately invasive consequences for women, particularly those with disabilities, and children. In particular, in determining questions of disclosure of

records of persons allegedly assaulted in institutions where they get psychiatric assistance, the courts must take care not to create a class of vulnerable victims who have to choose between accusing their attackers and maintaining the confidentiality of their records.

122 This Court has recognized the pernicious role that past evidentiary rules in both the *Criminal Code* and the common law, now regarded as discriminatory, once played in our legal system: *Seaboyer*, *supra*. We must be careful not to permit such practices to reappear under the guise of extensive and unwarranted inquiries into the past histories and private lives of complainants of sexual assault. We must not allow the defence to do indirectly what it cannot do directly under s. 276 of the *Code*. This would close one discriminatory door only to open another.

123 As I noted in *Osolin, supra*, at pp. 624-25, uninhibited disclosure of complainants' private lives indulges the discriminatory suspicion that women and children's reports of sexual victimization are uniquely likely to be fabricated. Put another way, if there were an explicit requirement in the *Code* requiring corroboration before women or children could bring sexual assault charges, such a provision would raise serious concerns under s. 15 of the *Charter*. In my view, a legal system which devalues the evidence of complainants to sexual assault by *de facto* presuming their uncreditworthiness would raise similar concerns. It would not reflect, far less promote, "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration" (*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 171).

124 Routine insistence on the exposure of complainants' personal backgrounds has the potential to reflect a built-in bias in the criminal justice system against those most vulnerable to repeat victimization. Such requests, in essence, rest on the assumption that the personal and psychological backgrounds and profiles of complainants of sexual assault are relevant as to whether or not the complainant consented to the sexual contact, or whether the accused honestly believed that she consented. Although the defence must be free to demonstrate, without resort to stereotypical lines of reasoning, that such information is actually relevant to a live issue at trial, it would mark the triumph of stereotype over logic if courts and lawyers were simply to assume such relevance to exist, without requiring any evidence to this effect whatsoever.

125 It is revealing, for instance, to compare the approach often taken to private records in sexual assault trials with the approach taken in three decisions in which private files were sought by defence counsel in situations which did not involve sexual assaults. In *Gingras*, *supra*, the defence in a murder case sought disclosure of the prison file of an important Crown witness, who was serving time in a penitentiary in another province. The credibility of the witness was invoked as being at issue. In addition to finding important irregularities in the disclosure order, the Court concluded that the disclosure request amounted to no more than a fishing expedition and therefore quashed the order, notwithstanding the seriousness of the charge against the accused.

126 In both *R. v. Gratton*, [1987] O.J. No. 1984 (Prov. Ct.), and *R. v. Callaghan*, [1993] O.J. No. 2013 (Ont. Ct. (Prov. Div.)), an accused charged with assault of a police officer sought disclosure of the officer's personnel files and, in particular, any files

relating to complaints or disciplinary actions taken against the officer. In both cases, the justification offered for this disclosure was to show that the officer had a propensity for violence. In both cases, in the absence of any evidence as to the likelihood that the records would contain evidence to the predisposition to violence or unreasonable use of force, the judge refused to give disclosure of those files. The contents of the files were characterized as hearsay, as potentially based on unfounded allegations, and as generally irrelevant. The only disclosure granted was of a file containing details of the formal investigation of the particular complaint filed by the accused in relation to activity which was the subject matter of the charges.

127 I see no reason to treat a sexual assault complainant any differently, or to accord any less respect to her credibility or privacy, than that which was accorded police officers and convicted criminals in the above-mentioned cases.

128 All of these factors, in my mind, justify concluding not only that a privacy analysis creates a presumption against ordering production of private records, but also that ample and meaningful consideration must be given to complainants' equality rights under the *Charter* when formulating an appropriate approach to the production of complainants' records. Consequently, I have great sympathy for the observation of Hill J. in *R. v. Barbosa* (1994), 92 C.C.C. (3d) 131 (Ont. Ct. (Gen. Div.)), to this effect (at p. 141):

> In addressing the disclosure of records, relating to past treatment, analysis, assessment or care of a complainant, it is necessary to remember that the pursuit of full answer and defence on behalf of an accused person should be achieved without indiscriminately or arbitrarily eradicating the privacy of the complainant. Systemic

> revictimization of a complainant fosters disrepute for the criminal justice system. [Emphasis added.]

(iii) Balancing Competing Values

129 As Lamer C.J. recently noted for the majority in *Dagenais*, *supra*, at p. 877, competing constitutional considerations must be balanced with particular care:

> A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict... *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.

Notwithstanding my agreement with this proposition, I would emphasize that the imagery of conflicting rights which it conjures up may not always be appropriate. One such example is the interrelation between the equality rights of complainants in sexual assault trials and the rights of the accused to a fair trial. The eradication of discriminatory beliefs and practices in the conduct of such trials will enhance rather than detract from the fairness of such trials. Conversely, sexual assault trials that are fair will promote the equality of women and children, who are most often the victims.

130 From my earlier remarks, moreover, it should be clear that I am satisfied that witnesses have a right to privacy in relation to private documents and records (i.e. documents and records in which they hold a reasonable expectation of privacy) which are not a part of the Crown's "case to meet" against the accused. They are entitled not to be deprived of their reasonable expectation of privacy except in accordance with the principles of fundamental justice. In cases such as the present

one, any interference with the individual's right to privacy comes about as a result of another person's assertion that this interference is necessary in order to make full answer and defence. As important as the right to full answer and defence may be, it must co-exist with other constitutional rights, rather than trample them: *Dagenais, supra,* at p. 877. Privacy and equality must not be sacrificed willy-nilly on the altar of trial fairness.

131 The proper approach to be taken in contexts involving competing constitutional rights may be analogized from *Dagenais*, at p. 891. In particular, since an applicant seeking production of private records from third parties is seeking to invoke the power of the state to violate the privacy rights of other individuals, the applicant must show that the use of the state power to compel production is justified in a free and democratic society. If it is not, then the other person's privacy rights will have been infringed in a manner that is contrary to the principles of fundamental justice.

132 The use of state power to compel production of private records will be justified in a free and democratic society when the following criteria are applied. First, production should only be granted when it is shown that the accused cannot obtain the information sought by any other reasonably available and effective alternative means. Second, production which infringes upon a right to privacy must be as limited as reasonably possible to fulfil the right to make full answer and defence. Third, arguments urging production must rest upon permissible chains of reasoning, rather than upon discriminatory assumptions and stereotypes. Finally, there must be a proportionality between the salutary effects of production on the accused's right to make full answer and defence as compared with the deleterious

effects on the party whose private records are being produced. The measure of proportionality must reflect the extent to which a reasonable expectation of privacy vests in the particular records, on the one hand, and the importance of the issue to which the evidence relates, on the other. Moreover, courts must remain alive to the fact that, in certain cases, the deleterious effects of production may demonstrably include negative effects on the complainant's course of therapy, threatening psychological harm to the individual concerned and thereby resulting in a concomitant deprivation of the individual's security of the person.

133 All of the above considerations must be borne in mind when formulating an appropriate approach to the difficult issue raised in this appeal. Using these ground rules to structure our analysis, it is now possible to elaborate upon an approach to production of third parties' private records that, it is hoped, will maintain the greatest possible degree of proportionality in reconciling the equally important constitutional concerns of full answer and defence, privacy, and equality without discrimination.

(iv) Procedure for Obtaining Production

134 I would give substance to the general principles elaborated above by way of the following process. The first step for an accused who seeks production of private records held by a third party is to obtain and serve on the third party a *subpoena duces tecum*. When the subpoena is served, the accused should notify the Crown, the subject of the records, and any other person with an interest in the confidentiality of the records that the accused will ask the trial judge for an order for their production. Then, at the trial, the accused must bring an application

supported by appropriate affidavit evidence showing that the records are likely to be relevant either to an issue in the trial or to the competence to testify of the subject of the records. If the records are relevant, the court must balance the salutary and deleterious effects of ordering that the records be produced to determine whether, and to what extent, production should be ordered.

(a) *Subpoena duces tecum and Notice to Interested Parties*

135 The form of the *subpoena duces tecum* and the procedure for its issuance are described in Part XXII of the *Criminal Code*. In particular, a subpoena will not issue unless the applicant shows that the witness is likely to give material evidence in the proceeding: s. 698(1). The function of the subpoena is to summon the witness -- in this case, the guardian of the records -- to court and to require the witness to bring the documents described in the subpoena. It does not, in itself, require the witness to produce the records to the court or to the defence.

136 When the subpoena is served, the accused should give written notice to anyone with an interest in the confidentiality of the records that a motion will be brought for an order for production of the records. Interested persons include the Crown, the person who is the subject of the records, the guardian of the records, and any other person required by statute to be notified. Failure to give notice to all interested parties will be fatal to the application, although the accused may reapply and, as a matter of convenience, notice to the guardian of the records may accompany the *subpoena duces tecum*.

(b) *Application for Production*

137 At the trial, when the accused applies for an order for production of the records, the judge should follow a two-stage approach. First, the accused must demonstrate that the information contained in the records is likely to be relevant either to an issue in the proceedings or to the competence to testify of the person who is the subject of the records. If the information does not meet this threshold of relevance, then the analysis ends here and no order will issue. However, if the information is likely relevant to an issue at trial or to the competence of the subject to testify, the court must weigh the positive and negative consequences of production, with a view to determining whether, and to what extent, production should be ordered. At each stage counsel for all interested parties should be permitted to make submissions.

(1) Relevance

138 At the outset, the accused must establish a basis which could enable the presiding judge to conclude that there is actually in existence further material which may be useful to the accused in making full answer and defence, in the sense that it is logically probative (*Chaplin*, *supra*, at pp. 743-45). In other words, the accused must satisfy the court that the information contained in the records is likely to be relevant either to an issue in the proceeding or to the competence of the subject to testify (*O'Connor No. 2*, *supra*).

139 It may be useful at this stage for the third party guardian of the records to prepare a list of the records in its possession. In an appropriate case, the trial judge may require such a list to be provided to the accused and the other interested parties. This was done, for example, in *Barbosa, supra*, albeit in the somewhat different

context of a request by the Crown to withhold disclosure of records in its own possession. In that decision, Hill J. made the following comments about the utility of an inventory of records (at p. 136):

> The existence of an inventory not only promotes procedural efficiency during argument of an application of this type, but also has the advantage of potentially permitting defence counsel to focus the subject-matter of his application to a population of documents less than the whole of those in the custody of the relevant custodian. On occasion, such an inventory promotes further informal discussions between defence and Crown counsel leading to further disclosure without review by the court.

140 However, I wish to emphasize that, like any other motion, an application for an order for production of private records held by a third party must be accompanied by affidavit evidence which establishes to the judge's satisfaction that the information sought is likely to be relevant. The accused's demonstration that information is likely to be relevant must be based on evidence, not on speculative assertions or on discriminatory or stereotypical reasoning.

141 The Chief Justice and Sopinka J. argue that accused persons are placed in a difficult situation by the requirement that they prove the likely relevance of the documents without having access to them. My colleagues point to the decisions of this Court in *Carey v. Ontario*, [1986] 2 S.C.R. 637, *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505 (especially at pp. 1513-14), *R. v. Garofoli*, [1990] 2 S.C.R. 1421, and *R. v. Durette*, [1994] 1 S.C.R. 469, and conclude that the standard of "likely relevance" should not be interpreted as an onerous burden. I would begin by noting that *Carey* arose in the context of a civil action in which neither the right to full answer and defence nor any constitutional right of privacy were engaged; it therefore has no application here. As for *Dersch*, *Garofoli* and

*Durette*, a majority of this Court held in those cases that an accused is entitled to have access to information used by police to obtain a wiretap authorization because, without such access, the accused cannot realistically challenge the legality of the surveillance. However, in those cases, the accused sought access to records created by the state as part of its investigation; that situation can hardly be compared to the situation of an accused who demands access to therapeutic or other private records created and held by a third party. The records here in question are not within the possession or control of the Crown, do not form part of the Crown's "case to meet", and were created by a third party for a purpose unrelated to the investigation or prosecution of the offence. In my opinion, it cannot be assumed that such records are likely to be relevant, and if the accused is unable to show that they are, then the application for production must be rejected as it amounts to nothing more than a fishing expedition.

142 The burden on an accused to demonstrate likely relevance is a significant one. For instance, it would be insufficient for the accused to demand production simply on the basis of a bare, unsupported assertion that the records might impact on "recent complaint" or the "kind of person" the witness is. Similarly, the applicant cannot simply invoke credibility "at large", but must rather provide some basis to show that there is likely to be information in the impugned records which would relate to the complainant's credibility on a particular, material issue at trial. Equally inadequate is a bare, unsupported assertion that a prior inconsistent statement might be revealed, or that the defence wishes to explore the records for "allegations of sexual abuse by other people". Such requests, without more, are indicative of the very type of fishing expedition that this Court has previously rejected in other contexts. See, in the context of cross-examination on sexual history, *Osolin*, *supra*,

at p. 618, *per* L'Heureux-Dubé J. dissenting, and *Seaboyer*, *supra*, at p. 634, *per* McLachlin J. for the majority; in the context of search and seizure, *Baron v. Canada*, [1993] 1 S.C.R. 416, at p. 448, *per* Sopinka J. for the Court, and *Hunter*, *supra*, at p. 167, *per* Dickson J. (as he then was) for the Court; in the context of wiretaps and their supporting affidavits, *Chaplin*, *supra*, at p. 746, *per* Sopinka J. for the Court, *Durette*, *supra*, at p. 523, *per* L'Heureux-Dubé J. dissenting, *R. v. Thompson*, [1990] 2 S.C.R. 1111, at p. 1169, *per* La Forest J. dissenting, and *R. v. Duarte*, [1990] 1 S.C.R. 30, at p. 55, *per* La Forest J. for the majority. See also *Cross on Evidence* (7th ed. 1990), at pp. 51 *et seq*.; *Halsbury's Laws of England* (4th ed. 1976), vol. 17, para. 5, at p. 7.; *Wigmore on Evidence* (3rd ed. 1940), vol. 1, para. 9, at pp. 655 *et seq.*

143 Similarly, the mere fact that a witness has a medical or psychiatric record cannot be taken as indicative of the potential unreliability of his or her testimony. Any suggestion that a particular treatment, therapy, illness, or disability implies unreliability must be informed by cogent evidence, rather than stereotype, myth or prejudice. For these reasons, it would also be inappropriate for judicial notice to be taken of the fact that unreliability may be inferred from any particular course of treatment. See *R. v. K. (V.)* (1991), 4 C.R. (4th) 338 (B.C.C.A.), at pp. 350-51.

144 Finally, it must not be presumed that the mere fact that a witness received treatment or counselling after a sexual assault indicates that the records will contain information that is relevant to the defence. The focus of therapy is vastly different from that of an investigation or other process undertaken for the purposes of the trial. While investigations and witness testimony are oriented toward ascertaining historical truth -- namely, the facts surrounding the alleged assault --

therapy generally focuses on exploring the complainant's emotional and psychological responses to certain events, after the alleged assault has taken place. Victims often question their perceptions and judgment, especially if the assailant was an acquaintance. Therapy is an opportunity for the victim to explore her own feelings of doubt and insecurity. It is not a fact-finding exercise. Consequently, the vast majority of information noted during therapy sessions bears no relevance whatsoever or, at its highest, only an attenuated sense of relevance to the issues at trial. Moreover, as I have already noted elsewhere, much of this information is inherently unreliable and, therefore, may frustrate rather than further the truth-seeking process. Thus, although the fact that an individual has sought counselling after an alleged assault may certainly raise the applicant's hopes for a fruitful fishing expedition, it does not follow, absent other evidence, that information found in those records is likely to be relevant to the accused's defence.

145 Unlike my colleagues Lamer C.J. and Sopinka J., I would not take the "sheer number" of cases in which production has been ordered in the past as a demonstration of the potential relevance of therapeutic records. Whatever may have been their past practice in this regard, judges should be encouraged to carefully scrutinize claims of relevance in a manner that is sensitive to the therapeutic context and the nature of records created in that context. Without such sensitivity, the danger is great that records having no real relevance will be produced, the search for truth frustrated, and the rights of complainants needlessly violated.

146 In establishing the required evidentiary basis, the applicant may resort to the Crown's disclosure, to its own witnesses, and to cross-examination of the Crown

witnesses at both the preliminary inquiry and the trial. On some occasions, it may also be necessary to introduce expert evidence to lay the foundation for a production application (for instance, expert evidence to the effect that a certain type of therapy may lead to "created memories"). The determination of relevance is a fluid, rather than fixed, process. In consequence, information which cannot be proved relevant at one point during the trial may later become relevant, in which case a further application for production may be warranted. However, regardless of when it is brought, an application for production will not succeed if it is not supported by evidence demonstrating the likely relevance of the records.

147 I would like to make two final observations on the subject of relevance. The first of these relates to the Court of Appeal's comment that relevance should be determined with due regard for "other legitimate legal and societal interests, including the privacy interests of complainants" (*O'Connor (No. 2)*, at pp. 261-62). In my view, the privacy rights of complainants should be considered separately, rather than factored into the analysis of relevance. It is important to remember that the rationale underlying resort to privilege or privacy rights is diametrically opposed to that underlying most ordinary evidentiary rules of exclusion. Privilege and privacy interests would exclude evidence <u>despite</u> the fact that such evidence might further the truth-seeking process. On the other hand, ordinary rules of exclusion are generally motivated by the desire to <u>further</u> the truth-seeking process, in that they tend to exclude evidence which might be unreliable, which might mislead or prejudice the trier of fact, or which might otherwise prejudice the fairness of the trial. Consequently, it is both easier and more intellectually honest to consider privacy and societal interests in a separate, balancing step.

148 However, as I have already noted, consideration for equality is not alien to the objectives of finding the truth and conducting a fair trial. On the contrary, all of these objectives dictate that a court be precluded from drawing inferences on the basis of discriminatory or stereotypical lines of reasoning. For instance, it is impermissible to seek production of records containing reference to other sexual activity to support the inference that because the complainant has engaged in unrelated sexual activity she is more likely to have consented to the activity in question, or less worthy of belief: *Seaboyer*, *supra*.

149 My second observation relates to the competence to testify of the subject of the records. A witness is presumed competent to testify until otherwise shown. Incompetence to testify can be shown in many ways, such as calling a doctor who has treated the witness, which do not require disclosure of private medical records. If competence is the basis for defence counsel's application for production of private medical records, then the court should first consider if there are any other reasonable alternatives of testing the witness's competence which would constitute a lesser invasion into the witness's privacy.

(2) Balancing

150 If the trial judge concludes that the records are not likely to be relevant to an issue in the trial or to the competence to testify of the subject of the records, the application should be rejected. If, on the other hand, the judge decides that they are likely to be relevant, then the analysis proceeds to the second stage, which has two parts. First, the trial judge must balance the salutary and deleterious effects of ordering the production of the records to the court for inspection, having regard

to the accused's right to make full answer and defence, and the effect of such production on the privacy and equality rights of the subject of the records. If the judge concludes that production to the court is warranted, he or she should so order.

151 The Chief Justice and Sopinka J. appear to share my view that the balancing of the effects of production should be undertaken only at this second stage of the procedure, after the records have been found to be likely relevant. However, they contend that the trial judge need not consider competing interests, such as the privacy rights of the subject of the records, before ordering them produced to the court for inspection. This is not my position. What my colleagues fail to recognize is that even an order for production to the court is an invasion of privacy. The records here in question are profoundly intimate, and any violation of the intimacy of the records can have serious consequences for the dignity of the subject of the records and, in some cases, for the course of his or her therapy. Neither the subject nor the guardian of the records should be compelled to violate the intimacy of the records unless the judge has determined, after careful consideration, that the salutary effects of doing so outweigh the damage done thereby.

152 In borderline cases, the judge should err on the side of production to the court. The trial judge, in examining the materials, will guard the privacy of the witness to the best of his or her ability. Nevertheless, reading and vetting large quantities of material that have been ordered produced to the court out of an abundance of caution can impose an excessive burden on judicial resources, especially if only a small proportion of the records produced to the court are ultimately produced to

the defence. Consequently, while borderline cases at this stage should be decided in favour of production to the court, the determination of relevance and balancing should be meaningful, fair and considered. This carefully considered balancing will prevent documents from being needlessly produced.

153 Next, upon their production to the court, the judge should examine the records to determine whether, and to what extent, they should be produced to the accused. This step requires the court anew, but with the benefit of the inspection of the documents, to consider the likely relevance and salutary and deleterious effects as previously but with production to the accused in mind.

154 I have some difficulties with the Court of Appeal's position to the effect that the judge may simply disclose to the defence any evidence which is "material". The problem with such an approach is that it effectively does away with any consideration for privacy, or for larger societal interests. A fair legal system requires respect at all times for the complainant's personal dignity, and in particular his or her right to privacy, equality and security of the person. As the Chief Justice said in *Dagenais*, *supra*, in the context of a publication ban, the common law should not accord pre-eminence to the right to a fair trial, over other constitutionally entrenched rights (at p. 877):

> The pre-*Charter* common law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban. In my view, the balance this rule strikes is inconsistent with the principles of the *Charter*, and in particular, the equal status given by the *Charter* to ss. 2(*b*) and 11(*d*). It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by s. 11(*d*) over those protected by s. 2(*b*). A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of

> two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.

Similarly, as regards the production of private records held by third parties, a balance must be struck that places the *Charter* rights of complainants on an equal footing with those of accused persons.

155 In *Dagenais*, the Court assessed proportionality by examining and weighing the salutary and deleterious effects of the rights infringements in question. I believe that such a process was already implicit in *Seaboyer*, in which this Court sought to achieve a measure of proportionality between the right to privacy and the right to a fair trial. In my view, an analogous approach is appropriate in the disclosure context. Once a court has reviewed the records, production should only be ordered in respect of those records, or parts of records, that have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice or by the harm to the privacy rights of the witness or to the privileged relation. See also Stuesser, "Reconciling Disclosure and Privilege" (1994), 30 C.R. (4th) 67, at pp. 71-72.

156 Although this list is not exhaustive, the following factors should be considered in this determination: (1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record in question; (3) the nature and extent of the reasonable expectation of privacy vested in that record; (4) whether production of the record would be premised upon any discriminatory belief or bias; (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question; (6) the extent to which production of records of this

nature would frustrate society's interest in encouraging the reporting of sexual offences and the acquisition of treatment by victims; and (7) the effect on the integrity of the trial process of producing, or failing to produce, the record, having in mind the need to maintain consideration in the outcome.

157 According to the Chief Justice and Sopinka J., society's interest in encouraging victims of sexual assault to report the offences and to obtain treatment "is not a paramount consideration" (para. 33), and the effect of production on the integrity of the trial process should not be considered at all, in assessing whether the guardians of therapeutic records should be compelled to produce them to the defence. I can see no reason to reduce the relative importance of these factors, let alone exclude them, when balancing the salutary and deleterious effects of a production order.

158 This Court has already recognized that society has a legitimate interest in encouraging the reporting of sexual assault and that this social interest is furthered by protecting the privacy of complainants: *Seaboyer*, *supra*, at pp. 605-6. Parliament, too, has recognized this important interest in s. 276(3)(*b*) of the *Criminal Code*. While *Seaboyer* and s. 276(3)(*b*) relate to the admissibility of evidence regarding the past sexual conduct of the complainant, the same reasoning applies here. The compelled production of therapeutic records is a serious invasion of complainants' privacy which has the potential to deter sexual assault victims from reporting offences or, if they do report them, from seeking treatment.

159 As Lamer C.J. and Sopinka J. observe, measures exist for limiting the extent of the invasion of privacy associated with a production order. However, despite such measures, the compelled production of therapeutic records to the defence remains a serious violation of the complainant's privacy and a deterrent to the reporting of offences and the acquisition of treatment. At the same time, production may affect the integrity of the trial process. Judges must carefully weigh these consequences when deciding whether to make an order for production.

160 As a further argument in favour of a less onerous burden upon the accused, the Chief Justice and Sopinka J. compare the accused to a state agent applying for a search warrant under s. 487(1)(*b*) of the *Criminal Code*. They state that, by virtue of s. 487(1)(*b*), "production of third party records is always available to the Crown" (para. 34) where there are reasonable grounds to believe that evidence will be found. Because the interpretation of s. 487(1)(*b*) is not an issue in this appeal, I will keep my comments to a minimum. However, I must disagree with my colleagues' suggestion that the Crown can always obtain a warrant for production of the therapeutic records of innocent third parties simply by establishing "reasonable grounds". On the contrary, in a decision penned by the Chief Justice (then Lamer J.), this Court has held that a judge may refuse a search warrant, even if the statutory requirement of "reasonable grounds" is met, in order to protect the fundamental rights of innocent third parties: *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at pp. 889-91. Therefore, it should not be assumed that the state could obtain a warrant in respect of intimate records held by innocent third parties as easily as the Chief Justice and Sopinka J. now suggest. Nor, in my view, should the accused be entitled to compel production of such records without a rigorous

inquiry into the relevance of the records and the salutary and deleterious effects of compelling their production.

161 I would add that where the defence seeks to justify disclosure on the basis of anticipated relevance to particular issues, some inquiry is warranted into whether or not these issues are collateral to the real issues at trial. Since the defence cannot pursue inconsistencies on collateral issues, the defence is really no better off having production on that issue. It follows that failure to produce information relating only to collateral issues will not impair the accused's right to full answer and defence. See, e.g., *R. v. C. (B.)* (1993), 80 C.C.C. (3d) 467 (Ont. C.A.); *R. v. Davison, DeRosie and MacArthur* (1974), 20 C.C.C. (2d) 424 (Ont. C.A.).

162 At the opposite end of the spectrum, where material is found that is essential to the accused's ability to make full answer and defence, then justice dictates that this material be produced, even if this information was not argued as a basis for production by the defence. However, in some such cases, sensitivity to the complainant's privacy rights and security of the person might dictate that the complainant be given the option of withdrawing from the prosecution rather than facing production of the records in question.

163 In that vein, where a court concludes that production is warranted, it should only be made in the manner and to the extent necessary to achieve that objective: *Dagenais, supra*. The court should not release classes of records, but rather should inspect each individual record for materiality. Records that are to be produced should be vetted with a view to protecting the witness's privacy, while nonetheless maintaining sufficient detail to make the contents meaningful to the reader. The

judge may, in certain cases, wish to hear submissions on whether the vetting of the records should be assisted by counsel for the complainant, for the guardian of the records, or for the Crown. It will generally be appropriate, moreover, to review the records *in camera*, and to keep the records sealed and in the custody of the registrar. Depending upon the sensitivity of the records, the court should consider prohibiting the making of any reproductions of those records and imposing a publication ban on such terms as are deemed appropriate. In exceptional cases, the court may consider making an order prohibiting defence counsel from discussing the contents of these records with the accused. Finally, I agree with the Court of Appeal that it is appropriate that all records produced to the court but not ultimately to the defence be sealed and retained in the file in the event that they should need to be reviewed later. These procedures are part and parcel of the process of ensuring that privacy rights are minimally impaired while nonetheless furthering the objective of guaranteeing the accused full answer and defence and a fair trial.

(v) Admissibility

164 I cannot emphasize enough that the guidelines outlined above are clearly not synonymous with the test for admissibility of evidence at trial, outlined in *Seaboyer* and in s. 276 of the *Code*. Disclosure and production are broader concepts than admissibility and, as such, evidence which is produced to the defence will not necessarily be admissible at trial.

165 Indeed, in most cases, private records relating to the counselling or treatment of the complainant will be irrelevant and inadmissible hearsay evidence. Notes of

statements made by a complainant in a therapeutic context are inherently unreliable because they are frequently not prepared contemporaneously with the statements, are not intended to be an accurate record of the statements, and are not ratified by the complainant. Moreover, they touch on a variety of topics not relevant to the issues at trial or the complainant's competence to testify. As I have observed earlier in these reasons, there is a real risk that statements having little or no real relevance may be taken out of context as a basis for unwarranted inferences.

166 In any event, the admissibility of the records as evidence must be determined if and when the accused seeks to introduce them. The fact that records have been ordered produced to the defence does not mean that the records are necessarily admissible.

167 I now turn to the last issue argued before this Court, which is the question of the proper forum for an application for production, and the timing of such an application.

(vi) Forum and Timing

(a) *Preliminary Inquiry*

168 In *Doyle v. The Queen*, [1977] 1 S.C.R. 597, this Court stated that the powers of a preliminary inquiry judge are only those conferred either expressly by statute or by necessary implication. Since there is no explicit statutory authority for an order requiring third parties to produce private records to the defence at a preliminary inquiry, the power to make such an order, if it exists, must be necessarily incidental to some other statutory power.

169 The primary function of the preliminary inquiry, which is clearly set out in s. 548(1) of the *Code*, is undoubtedly to ascertain that the Crown has sufficient evidence to commit the accused to trial. See also *Caccamo v. The Queen*, [1976] 1 S.C.R. 786. Over time, however, the preliminary inquiry appears to have taken upon itself an ancillary purpose, which is to afford the accused an opportunity to discover and appreciate the case to be made against him at trial: *Skogman v. The Queen*, [1984] 2 S.C.R. 93. This judicially inspired expansion of the nature and ambit of the preliminary inquiry has been attributed by learned commentators to the historical lack of any formal, institutionalized procedures by which an accused could obtain full and effective disclosure of the Crown's case. (See *Re Regina and Arviv* (1985), 19 C.C.C. (3d) 395 (Ont. C.A.), at p. 403, *per* Martin J.A., leave to appeal refused, [1985] 1 S.C.R. v.)

170 Although preliminary inquiry judges are not permitted to determine the credibility of witnesses, one might hazard to say that the ancillary purpose of "discovery" has lately begun to eclipse the primary purpose of sparing the accused the gross indignity of being placed on trial in circumstances where there is simply insufficient evidence to justify holding the trial at all. One provincial court judge, in the course of a thoughtful discussion on the evolving role of the preliminary inquiry, recently expressed great frustration with this apparent turn of events:

> ...the preliminary hearing or preliminary inquiry has been turned into a nightmarish experience for any provincial court judge. Rules with respect to relevancy have been widened beyond recognition. Cross-examination at a preliminary inquiry now seems to have no limits. Attempts by provincial court judges to limit cross-examination have been perceived by some superior courts as a breach of the accused's right to fundamental justice, a breach of his or her ability to be able to make full answer and defence.

> The present state of the preliminary inquiry is akin to a rudderless ship on choppy waters. The preliminary hearing has been turned into a free-for-all, a living hell for victims of crime and witnesses who are called to take part in this archaic ritual.
>
> (*R. v. Darby*, [1994] B.C.J. No. 814 (Prov. Ct.), at paras. 9 and 10.)

171 Nevertheless, the "discovery" aspect of the preliminary inquiry remains, at most, an incidental aspect of what is in essence an inquiry into whether the Crown's evidence is sufficient to warrant the committal of the accused to trial. We must also recognize that the law of disclosure in Canada changed significantly as a result of this Court's decision in *Stinchcombe, supra*. *Stinchcombe* recognized that a rigorous duty exists on the Crown to disclose to the defence all information in its possession, both inculpatory and exculpatory, which is not clearly irrelevant or privileged. While the Crown retains a discretion as to what is "clearly irrelevant", this discretion is reviewable by the trial judge at the instance of the defence. In short, *Stinchcombe* marked the dawn of a new era in disclosure to the defence, by transforming a professional courtesy into a formal obligation. Failure by the Crown to comply with this obligation may, particularly when motivated by an intention to withhold relevant information, result in the drastic remedy of a stay of proceedings. Consequently, in light of *Stinchcombe* and other decisions of this Court that have elaborated on those disclosure guidelines (*R. v. Egger*, [1993] 2 S.C.R. 451; *Chaplin, supra*), it may be necessary to reassess the extent to which the "discovery" rationale remains appropriate as a consideration in the conduct of the modern-day preliminary inquiry.

172 The more limited question for the purposes of this appeal, however, is whether the judge at a preliminary inquiry may consider applications for production of private records held by third parties.

173 It is beyond doubt that the statutory powers of a preliminary inquiry judge include the power to order witnesses to give evidence. Section 545 of the *Code*, for example, contemplates that a preliminary inquiry judge may require a witness to produce documents. However, the jurisdiction of a judge at a preliminary inquiry must be interpreted in light of the essential purpose of the inquiry, which is to assess whether the Crown has sufficient evidence to warrant committing the accused to trial. The preliminary inquiry judge does not have the power to inquire into other matters, or to order the production of documents which are not related to this assessment.

174 In *Patterson v. The Queen*, [1970] S.C.R. 409, for instance, this Court held that a preliminary inquiry judge had no power to compel production of a statement made to police by a prosecution witness. It is apparent that the Court was of the view that production of such a statement was not related to the purpose of the preliminary inquiry. On behalf of the majority, Judson J. stated (at p. 412):

> The purpose of a preliminary inquiry is clearly defined by the *Criminal Code* -- to determine whether there is sufficient evidence to put the accused on trial. It is not a trial and should not be allowed to become a trial. We are not concerned here with the power of a trial judge to compel production during the trial nor with the extent to which the prosecution, in fairness to an accused person, ought to make production after the preliminary hearing and before trial.

(See also *Re Hislop and The Queen* (1983), 7 C.C.C. (3d) 240 (Ont. C.A.), leave to appeal refused, [1983] 2 S.C.R. viii.) Similarly, I do not see how private records

in the hands of third parties could ever be relevant to the issues at a preliminary inquiry.

175 In addition, it is crucial not to lose sight of the fundamental rationale for allowing an accused to obtain production of private records. The records are not part of the Crown's case against the accused; consequently, the purpose of ordering their production is not to give the accused advance notice of the case to meet. Nor would the records be produced for the purpose of providing possible leads for the defence's own "investigation" -- third parties have no obligation to assist the defence in this manner. Rather, the sole basis on which third parties may be compelled to produce the records to the defence is that it would be unfair for an accused to be convicted if, as a result of evidence having significant probative value being unjustifiably withheld from the defence, the accused were unable to put this evidence before the trier of fact.

176 Since a preliminary inquiry is not a final determination of guilt, this fundamental rationale for ordering production is inapplicable. It follows that, while production of the records at the preliminary inquiry would no doubt be useful to the defence, there is no constitutional imperative at that stage that would justify an infringement of the privacy rights of the subject of the records.

177 For these reasons, I am of the view that a preliminary inquiry judge is without jurisdiction to order the production of private records held by third parties.

(b) *Pre-trial Applications*

178 The disclosure order in the present case, however, did not emanate from a preliminary inquiry judge. Rather, it was issued in response to a pre-trial application by the defence before Campbell A.C.J., who was not seized of the trial. There is no question that Campbell A.C.J. had jurisdiction to make the order requested. However, for the following reasons, it is my view that even a superior court judge should not, in advance of the trial, entertain an application for production of private third party records.

179 In the first place, such applications should be heard by the judge seized of the trial, rather than a pre-trial judge. In *R. v. Litchfield*, [1993] 4 S.C.R. 333, this Court had occasion to examine the reviewability of a pre-trial severance order issued by a judge who was not seized of the trial. Although it noted that the collateral attack rule ordinarily precluded a trial judge from reviewing orders made by judges of concurrent jurisdiction, it concluded that the rationales of the collateral attack rule did not apply in the case of a pre-trial division and severance order. More significantly, for our purposes, it went on to discuss practical and policy reasons why it was most desirable for only the judge seized of the trial to make orders of this nature (at p. 353):

> Not only are trial judges better situated to assess the impact of the requested severance on the conduct of the trial, but limiting severance orders to trial judges avoids the duplication of efforts to become familiar enough with the case to determine whether or not a severance order is in the interests of justice.

Orders for production of private records held by third parties are, in my view, governed by similar logic.

180 In addition, it is desirable for the judge hearing an application for production to have had the benefit of hearing, and pronouncing upon, the defence's earlier applications, so as to minimize the possibility of inconsistency in the treatment of two similar applications. Otherwise, the possibility of such inconsistency raises the spectre of situations in which production is ordered by a pre-trial judge under circumstances later discovered to be unfounded at trial. The privacy rights of the complainant will have been infringed for naught.

181 More generally, for the following reasons, it is my view that applications for production of third party records should not be entertained before the commencement of the trial, even by the judge who is seized of the trial. First, the concept of pre-trial applications for production of documents held by third parties is alien to criminal proceedings. In criminal matters, witnesses can only be compelled to give evidence at trial. A prospective witness is not obliged to cooperate with either the Crown or the defence before the trial, and a court should not compel the witness to provide the defence with a preview of his or her evidence. I am not persuaded that prospective defence witnesses in sexual assault cases should be treated any differently.

182 Second, if pre-trial applications for production from third parties were permitted, it would invite fishing expeditions, create unnecessary delays, and inconvenience witnesses by requiring them to attend court on multiple occasions. Moreover, a judge is not in a position, before the beginning of the trial, to determine whether the records in question are relevant, much less whether they are admissible, and will be unable to balance effectively the constitutional rights affected by a

production order (see *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, and *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3).

183 Proponents of a pre-trial procedure argue that without such a procedure, an accused might not obtain access to important records until it is too late. However, the situation would be no different in any other trial in which a witness has refused to cooperate with the defence. I cannot emphasize enough that the records here in question do not form part of the Crown's case against the accused, and that the accused consequently has no right to advance notice of their contents. Nor does the accused have any right to search the records for potential leads. The sole ground on which third parties may be compelled to produce the records to the defence is if they have probative value in respect of the issues in the trial, or the competence to testify of the subject of the records, that is not significantly outweighed by prejudice to the administration of justice or to the subject's privacy and equality rights. I am not persuaded that this purpose requires that the accused have access to the documents in advance of the trial.

184 For these reasons, I am firmly of the view that applications for production of private records held by third parties should only be entertained at the trial.

III. Summary

185 In summary, on the issue of abuse of process for non-disclosure by the Crown, I conclude that there is no need to maintain any type of distinction between the common law doctrine of abuse of process and *Charter* requirements regarding

abusive conduct. On the facts of this case, no such abusive conduct by the Crown has been demonstrated and a stay of proceedings was not appropriate.

186 On the issue of production of private records held by third parties, courts must balance the right of an accused to a fair trial with the competing rights of a complainant to privacy and to equality without discrimination. Since this exercise has not been done in this case, I agree with the Court of Appeal that a new trial should be ordered.

## IV. Conclusion and Disposition

187 Since I am of the opinion that the Court of Appeal was correct in concluding that the trial judge erred in staying the proceedings against the appellant, I would dismiss the appeal and dispose of this matter in the manner suggested by the Court of Appeal.

The reasons of Cory and Iacobucci JJ. were delivered by

188 CORY J. -- The actions of Crown counsel originally responsible for the prosecution of this case were extremely high-handed and thoroughly reprehensible. Nonetheless, I cannot agree with Justice Major that the misdeeds of the Crown were such that, upon a consideration of all the circumstances of this case, the drastic remedy of a stay was merited. Like Justice L'Heureux-Dubé and the Court of Appeal for British Columbia, I do not think that this is one of those clearest of cases which merits the imposition of the ultimate remedy of a stay.

189 I agree with the result reached by L'Heureux-Dubé J. and many of her conclusions pertaining to privacy and privilege. However, I concur with the reasons of the Chief Justice and Justice Sopinka with respect to their holding that the principles set forth in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, affirmed in *R. v. Egger*, [1993] 2 S.C.R. 451, pertaining to the Crown's duty to disclose must apply to therapeutic records in the Crown's possession.

190 I further agree with the Chief Justice and Sopinka J. as to the procedure they suggest for determining whether records in the possession of third parties are likely to be relevant. As well, I am in agreement with their reasons pertaining to the nature of the onus resting upon the accused and the nature of the balancing process which must be undertaken by the trial judge.

The following are the reasons delivered by

191 MCLACHLIN J. -- I have read the reasons of my colleagues. I concur entirely in those of Justice L'Heureux-Dubé and wish only to add this comment in support of the position she adopts.

192 Discovery on criminal cases must always be a compromise. On the one hand stands the accused's right to a fair trial. On the other stands a variety of contrary considerations. One of these contrary considerations is the protection of privacy of third parties who find themselves, through no fault of their own, caught up in the criminal process. Another is the increase in the length and complexity of trials which exhaustive discovery proceedings may introduce. Both impact adversely and heavily on the public.

193 The task before us on this appeal is to devise a test for the production of records held by third parties which preserves the right of an accused to a fair trial while respecting individual and public interest in privacy and the efficient administration of justice. The key to achieving this lies in recognition that the *Canadian Charter of Rights and Freedoms* guarantees not the fairest of all possible trials, but rather a trial which is fundamentally fair: *R. v. Harrer*, [1995] 3 S.C.R. 562. What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice, but fundamentally fair justice.

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

195 I believe the test proposed by L'Heureux-Dubé J. strikes the appropriate balance between the desire of the accused for complete disclosure from everyone of everything that could conceivably be helpful to his defence, on the one hand, and the constraints imposed by the trial process and privacy interests of third parties who find themselves caught up in the justice system, on the other, all without compromising the constitutional guarantee of a trial which is fundamentally fair.

196 I would dispose of the appeal as proposed by L'Heureux-Dubé J.

The following are the reasons delivered by

197 MAJOR J. (dissenting) -- I have read the reasons of Justice L'Heureux-Dubé, and agree that common law abuse of process has been subsumed in the *Canadian Charter of Rights and Freedoms* and should not be considered separately unless circumstances arise to which the *Charter* does not apply, which is not the case in this appeal. The party alleging abuse of process must prove on a balance of probabilities that a violation of the *Charter* has occurred. Upon proving this, a variety of remedies are available under s. 24(1).

198 With respect, I am unable to agree that a stay of proceedings was not appropriate. The conduct of the Crown in this case both impaired the ability of the accused to make full answer and defence and contravened fundamental principles underlying the community's sense of fair play and decency. This is so having regard to the failure of the Crown to disclose information within its control to alleged offences that were many years old. The remedy of a stay was within the trial judge's discretion and was appropriate under the circumstances.

I. History of Crown Conduct

199 The circumstances giving rise to the complaints in this case occurred between January 1, 1964 and November 1, 1967. The appellant was charged by indictment dated November 6, 1991, 24 years after the last incident alleged. The long delay in charges being laid made the gathering of evidence difficult for both the Crown and defence. Some witnesses were dead or incompetent and some records were lost. The defence was entitled to assistance and consideration as it sought to uncover evidence from so long ago.

200 The case was also unusual in that the accused was, at the time of the alleged offences, a teacher and member of the clergy. Almost 30 years later when the charges had been laid he had become a Bishop of the Roman Catholic Church. It was important that because of the high degree of public interest in the case created by the position of the accused and the nature of the allegations that the accused receive the same treatment by the Crown as any accused person has the right to expect.

201 It is important in this case not to isolate instances of Crown conduct which, by themselves, are mere irritations or embarrassments. It is when the incidents are seen as a pattern of conduct that the "aura" mentioned by the trial judge becomes evident and the suggestion of it all being a comedy of errors disappears. It is relevant to summarize the actions and lack thereof by the Crown.

202 In the early stages of investigation Constable Grinstead of the RCMP taped interviews with the complainants. At this point the accused had not yet been

charged. Three of these tapes were disclosed to defence counsel in 1991. There were more tapes in the possession and control of the Crown which were not disclosed at that time.

203 On December 16, 1991, the complainant M.B. and a witness, M.O., made statements to Crown prosecutor Wendy Harvey. The interview with M.O. contained information which tended to conflict with the statement of M.B. and corroborate the story of the accused. This information was not disclosed to the accused until November 25, 1992, 11 months after the initial trial date and five days before the trial date at the time of disclosure.

204 On May 25, 1992, the Crown gave a list of 14 witnesses to the defence with one-line summaries of what the witnesses would say. The accused should have received entire witness statements. The defence raised this matter before Campbell A.C.J. on June 4, 1992.

205 On June 4, 1992, Campbell A.C.J. made the order for disclosure reproduced in the reasons of L'Heureux-Dubé J. The Crown opposed the application for the order but did not make the policy arguments mentioned later by Ms. Harvey and by the interveners in this case other than mentioning that the complainants would have to disclose details of a personal nature. The Crown argued relevance and the fact that the records were not in their possession. The order granted by Campbell A.C.J. was not appealed. As a result of the order and the insufficient disclosure of the witness statements the trial was adjourned to November 30, 1992.

206 On June 16, 1992, Ms. Harvey wrote to two of the complainants' therapists. She included a copy of the order and described it. Her description narrowed the order to include only information related to alleged sexual assaults by the accused.

207 On July 8, 1992, Ms. Harvey wrote to the complainant P.P. stating that the Crown had resisted the application for the disclosure order, that the Crown intended to go before the Justice and ask for direction and that the Crown was not seeking the records of P.P.'s therapist at that time.

208 On September 21, 1992, Oppal J. expressed surprise that the order had not yet been complied with and said that the Crown should disclose the records. On October 16, 1992, Thackray J., who had been appointed trial judge, expressed similar surprise and ordered disclosure again. At that time the trial judge was given the notes of P.P.'s therapists, which he gave to the accused. On October 30, 1992, the Crown informed Thackray J. that further disclosure would be forthcoming.

209 On October 30, 1992, the Crown gave the court the records of M.B.'s therapist, Dr. Cheaney. The Crown asked that these notes not be turned over to the defence until submissions could be made by Ms. Harvey, who was not present on that day. No such submission had been made by November 19, 1992, when the defence raised the matter of the records again. Mr. Jones, for the Crown, made submissions regarding the relevance of the documents in question and mentioned that Ms. Harvey had submissions concerning victimizing the complainants again by disclosing the documents.

210 Thackray J., observing that the trial was to commence in ten days, ordered production of the documents in question. Thackray J. also ruled that a diary which the complainant R.R. had used to refresh her memory at the preliminary hearing was to be given to the court so that he could rule on its relevance.

211 On November 25, 1992, the defence received, in response to a renewed request for disclosure, the transcripts of the M.B. and M.O. interviews as well as two tapes of interviews done by the RCMP early in the investigation. It was also discovered that M.B. had therapists whose names and records had not been disclosed. The files of Dr. Cheaney were found to be incomplete. The defence also received an affidavit sworn by Constable Grinstead which alleged that the defence counsel had not attempted to look at the files held by the RCMP and that all interview tapes had been disclosed the previous year. This information was not correct.

212 On November 26, 1992, the accused applied for a stay of proceedings, based on non-disclosure by the Crown. Ms. Harvey explained the Crown's actions by pointing out that the law had recently changed to overcome myths and biases surrounding victims of sexual assault. She submitted that the order was difficult to enforce given the problems surrounding traditional stereotypes regarding sexual assault. She submitted that the order and the requests of the defence counsel for disclosure exhibited gender bias.

213 Ms. Harvey also submitted that the letters to the therapists included the order and that therefore her faulty summary should not have affected the eventual disclosure of the records. The trial judge pointed out that after the therapists were advised of the true meaning of the order, the full files were disclosed. The trial judge further

pointed out that the complainants had authorized production of the records in question. He said that there was not, in reality, a problem.

214 Thackray J. asked why the Crown had not gone back before Campbell A.C.J. to obtain direction, as Ms. Harvey had indicated was her intention in her letter to P.P. The Crown replied that it had instead sought direction from the trial judge. Thackray J. noted that he had ordered production and that the complainants had been forthcoming after that.

215 Ms. Harvey then explained the delays as partially attributable to the difficulties encountered by having two prosecutors in two places handling the case. She submitted that *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, was a recent decision and that the Crown was still struggling with how to cope with the new disclosure rules. Ms. Harvey said that she knew at the time that M.B. and M.O.'s interview transcripts were information that the defence should have had and incredibly suggested that she must have "dreamt" she gave this information to the defence. Other failures to disclose were attributed to inadvertence.

216 The application for a stay was denied on November 27, 1992. Thackray J. felt the delay could be remedied before trial and ordered the Crown to complete disclosure. He ordered that only a portion of the diary was to be disclosed. Thackray J. said that the Crown submissions were disturbing and commented on the general incompetence and "dilly-dallying" of the Crown. He adjourned the trial to December 1, 1992.

217 On November 28, 1992, the Crown agreed to waive privilege regarding its files and undertook to prepare four binders for the accused containing all information in the Crown's possession. At a pre-trial conference on November 30, 1992, Ms. Harvey indicated that the defence now had all of the notes she had prepared in connection with the case. The trial was adjourned an additional day to allow the accused's counsel time to review the newly disclosed material.

218 On the second day of trial, December 3, 1992, the Crown attempted to have P.P. give evidence through drawings. It was revealed that the Crown possessed several drawings from pre-trial interviews by the complainants. These had not been disclosed to the accused. The Crown turned over eight sets of drawings by the next day but was unable to guarantee that full disclosure had been made.

219 The accused renewed his stay application and the Crown requested an adjournment so that Ms. Harvey could make submissions. On December 4, 1992, Ms. Harvey was present but made no submissions. Mr. Jones said that the binders given to the defence were incomplete and that the Crown could still not guarantee full disclosure had been made. The trial judge gave counsel the weekend to formulate submissions regarding the stay. When the trial resumed on December 7, 1992, no submissions were made and the stay was entered: (1992), 18 C.R. (4th) 98.

II. Effects of the Crown's Conduct

220 The actions by the Crown both impaired the accused's ability to make full answer and defence and contravened fundamental principles of justice underlying the community's sense of fair play and decency. I shall deal with each category.

A. *Full Answer and Defence*

221 The actions of the Crown over time included a failure, until immediately before the trial, to comply with the order of Campbell A.C.J. The respondent submits that this breach is not significant in that the order was improper and was complied with before the trial and the final stay application.

222 The impropriety of the court order if any does not excuse the conduct of the Crown after the order was made. By July 10, 1992, the order had not been complied with, and Low J. was informed that there were problems in getting the complainants to comply. The court continually expressed surprise that the order had not been complied with, and reminded the Crown of its obligation to obey court orders. By October 16, 1992, the records in question were mainly in the possession of the Crown. It was not a complainant objection which barred disclosure but the fact that the Crown disagreed with the order. The order still had not been complied with after six months.

223 The Crown never took proper action regarding the objections it had to the order. If the Crown could not appeal the order it could have, and should have, returned to Campbell A.C.J. to request variation or rescission of the order if as was suggested by them they had reason to do so. The letter from the Crown prosecutor Ms. Harvey to the complainant P.P. suggests that this is what the Crown intended. This failure gives the Crown's submissions about the propriety of the order and policy problems surrounding the order to justify non-compliance little weight.

224 The letters from Ms. Harvey to the therapists narrowed the scope of the order. It is unclear whether this was deliberate, given Ms. Harvey's opinion regarding the order, or whether it was an error. As soon as the order was clarified for the therapists, complete records were disclosed, suggesting that had the letters contained an accurate description of the order, compliance would have occurred at a much earlier time. The letter to the complainant P.P. dated July 8, 1992 displayed an intention to disregard the order.

225 The excuses proffered by the Crown were as the trial judge described them, limp. The recent *Stinchcombe* decision had nothing to do with obeying a court order for disclosure. The problems encountered by the two Crown prosecutors operating in different locations are not unusual and cannot explain the delay in either complying with or applying to vary the order.

226 The fact that by the time of trial the order seems to have been complied with is not much of a mitigating factor. The conduct of the Crown regarding the court order, in combination with their faulty disclosure after the trial began, would make it uncertain that the order had in fact been fully obeyed at the time of trial, notwithstanding what the Crown claimed. On previous occasions the Crown had said that the terms of the order had been fulfilled when this was not true.

227 The Crown also breached the general duty of disclosure as outlined in *Stinchcombe*. At the time *Stinchcombe* was a relatively new decision and prosecutors were still ascertaining the scope of the duty contained therein. However, the concepts

outlined were clear enough: that the Crown had a general duty to disclose all relevant information. Sopinka J. set out the following principles in *Stinchcombe*:

> -- the Crown has a legal duty to disclose all relevant information to the defence;
>
> -- the obligation is subject to a Crown discretion regarding information which is "clearly irrelevant" or subject to privilege, and to the time and manner of disclosure;
>
> -- the Crown's use of the discretion is reviewable by the trial judge, guided by the general principle that information is not to be withheld if there is a reasonable possibility that this will impair the right to make full answer and defence;
>
> -- the absolute withholding of relevant information can only be justified on the basis of a legal privilege.

228 The Crown's breach of this obligation includes the minimal disclosure of witness statements given to the accused on May 25, 1992. This was not proper disclosure as directed in *Stinchcombe*. Defence counsel prepare for cross-examination of Crown witnesses in three ways. They use information obtained at preliminary hearings, information supplied by their own witnesses and by the accused, and by the disclosure in the production of the Crown. The defence was, in this case, impaired to prepare for cross-examination and in gathering rebuttal evidence by the incomplete disclosure.

229 The interviews with M.B. and with M.O. were statements which should have been disclosed. The interview with M.O. was particularly important as she was not called at the preliminary hearing, and her information tended to be exculpatory. The fact that the accused had, through his own sources, discovered the existence of this information has nothing to do with the breach of the duty of disclosure. This information was disclosed only when the defence raised the issue before the trial judge, suggesting that perhaps other information was not disclosed. This is part of the "aura" which the trial judge suggested had been created by December 7, 1992.

230 Each time disclosure was made in this case it was the result of the defence having to raise the matter in court. The defence had to find out about the missing information through alternate means. The defence was left to wonder if information existed about which it knew nothing. In order for the public to have faith in the justice system it must be able to trust Crown counsel to be forthcoming with such information. The conduct of the Crown in this case was such that trust was lost, first by the defence, and finally by the trial judge on December 7, 1992.

231 The drawings at the centre of the final application for a stay of proceedings were not the working papers of Ms. Harvey. Since the intention of the Crown was to have these complainants give evidence in the form of drawings these drawings were witness statements. Even if the drawings were not significantly different from the ones which would have been produced at trial, the defence was entitled to disclosure. The test is not whether the information reveals contradictions, but

merely is the information relevant. This was relevant material.

232 It is of little consequence on the facts of this case that a considerable amount of the non-disclosed material was ultimately released piecemeal to the defence prior to the trial. The effect of continual discovery of more non-disclosed evidence, coupled with the Crown admission that disclosure was possibly incomplete, created an atmosphere in which the defence's ability to prepare was impaired. The defence had to repeatedly renew requests for disclosure on the chance that more information was extant.

233 The breach of the undertaking to the defence by the Crown impaired the ability to prepare a full answer and defence. It does not matter whether this undertaking was unprecedented or whether it went beyond what is expected of the Crown. The defence was entitled to rely on the undertaking, and did rely on it, as the trial commenced without comment. Since the previous breaches of the court order and the general duty had created concern on the part of the accused regarding disclosure, the undertaking by the Crown was an attempt to remedy the situation. The breach of the undertaking had the opposite effect and created a suspicious atmosphere in which the defence could not know what evidence the Crown was going to present.

234 The Crown offered many reasons for delay in disclosure, including a philosophical dispute regarding the court order, differences of opinion regarding relevance, miscommunication between the two Crown prosecutors involved, and

simple forgetfulness. The Crown behaved in a manner consistent with the view that it was not aware of or interested in its obligations to the court or the accused.

235 Many of the explanations offered at different times during the proceedings before Thackray J. appear to be rationalizations for unacceptable conduct after the fact. Each time deficiencies in disclosure were revealed the Crown assured the court that best efforts would be made to complete disclosure. On some occasions the court was told that disclosure was complete when in fact it was not. As the trial judge mentioned, it became embarrassing to observe the Crown counsel attempt to duck its responsibility with excuses such as dreaming that interview transcripts had been disclosed.

236 The respondent submitted that where an accused alleges that non-disclosure has impaired his ability to make full answer and defence, an inquiry into the materiality of the information in question is necessary. This is arguable in a situation involving a single piece of information. Here we have a history of non-disclosure over a year, and, where the disclosure problems are continual, the effects of the non-disclosure must be looked at over the whole period of time in question. This is what the trial judge did. It was not simply the final non-disclosure of drawings or the incomplete binders supplied to the defence which the trial judge considered. He considered the history of Crown conduct outlined above.

237 It has frequently been stated that trial judges usually are in the best position to observe the conduct of both witnesses and counsel for the Crown and the defence. It is particularly true in this case as Thackray J. was seized of the matter by

October 16, 1992, had heard several motions, and had observed the repeated attempts by the defence to obtain disclosure and the repeated attempts by Crown counsel to explain its delay in failing to comply with its obligations. The court had become, in the words of Thackray J., "an integral part of the trial preparation process" (p. 110). The familiarity of the trial judge with the conduct of the Crown and the material in question make further inquiry into materiality of the final non-disclosed material less necessary.

238 The respondent submitted that, at its highest, the prejudice suffered by the defence was merely an effect on the cross-examination of one of the witnesses. This understates the matter; it is not only cross-examination, but rebuttal evidence which is affected by the non-disclosure of information from or about a witness. The Crown's submission fails to consider the cumulative effect of the previous non-disclosures which affected the conduct of the entire defence.

239 The accused faced proceedings in which it had grown unlikely that he would be dealt with fairly by the Crown. The Crown had breached the common law duty of disclosure, the terms of a court order, and undertakings to the defence. The Crown's behaviour had created an atmosphere of mistrust. Defence counsel had repeatedly been taken by surprise, given assurances which were unreliable, and generally left in the dark. This dramatically impaired the accused to present a full answer and defence. The delay of the Crown in making disclosure and its inability to assure the trial judge that full disclosure had been made even after commencement of the trial were fatal to the proceedings.

240 It is the continual breaches by the Crown that made a stay the appropriate remedy. This is not a case where a further order for disclosure and an adjournment was

appropriate. All this had been ordered earlier in the proceedings without success. Proceedings had become unworkable and unfair. Remedies under s. 24(1) of the *Charter* are properly in the discretion of the trial judge. This discretion should not be interfered with unless the decision was clearly unreasonable. The repeated failure of the Crown to comply with its duty to disclose and, laterally, its failure to comply with its own undertakings suggest that if a stay was not granted in this case, it is difficult to imagine a case where a stay would be granted.

B. *Fair Play and Decency*

241 The same breaches of the disclosure order, the duty under *Stinchcombe*, and the undertaking to disclose files to the defence which impaired the accused's right to make full answer and defence also violated fundamental principles of justice underlying the community's sense of fair play and decency. The community would see proceedings as being unfair where the Crown continually failed in its obligations and finally was unable to assure the court that it could ever meet them.

242 The number and nature of adjournments due to the Crown's conduct is a factor to consider because of the consequences to the accused. Not only were adjournments necessary because of non-disclosure, but also because Ms. Harvey, who had requested the opportunity to make submissions regarding disclosure, was either unavailable or unprepared at the appointed time. In two instances Ms. Harvey failed to make the promised submission, thus wasting the adjournment granted for that purpose and the timing of the adjournments was obviously a factor to the trial judge, as several came immediately before and during the trial.

243 I accept the trial judge's view that there was no "grand design" on the part of the Crown; however, the motives of the Crown are still questionable. Ms. Harvey obviously disagreed with the court order. Her actions based on her disagreement were improper. The Crown at times took responsibility for the delays only grudgingly, offering a litany of "limp" excuses.

244 Non-disclosure is not the only conduct of the Crown which violated fundamental principles of fair play and decency. The Crown also displayed an intention to disregard complying with a court order. The Crown breached an undertaking to defence counsel. The Crown gave the court assurances which turned out to be false. While these actions were tied to the issue of disclosure they also stand on their own violating fundamental principles underlying the community's sense of fair play and decency and failed the reasonable expectation of citizens of the expected conduct of the Crown.

245 The affidavit of Constable Grinstead should be considered as well. The affidavit was not explained by the Crown. The affidavit contained information which was false, namely that the defence counsel had not bothered to visit the RCMP in Williams Lake to look at file contents. This conduct by another agent of the Crown added to the "aura" of unfairness expressed by the trial judge.

246 The complete record of non-disclosure, delay, excuses and breaches of obligation by the Crown violated the fundamental principles which underlie the community's sense of fair play and decency. The trial judge showed admirable tolerance for the behaviour of the Crown but in the end had no choice but to order a stay. The case

was "now `one of the clearest of cases'. To allow the case to proceed would tarnish the integrity of the court" (p. 110).

III. Conclusion

247 When a criminal trial gains notoriety because of the nature of the offence, the parties charged or any other reason, there is an added burden in the paramount interest of ensuring fairness in the process. Fairness is a concern in every trial, but in high profile proceedings special attention must be paid because of the danger of extraneous factors interfering with the trial. The judicial system is on display and counsel for the Crown and the accused must take care to ensure the expected standards of conduct in all cases are maintained in the exceptional ones.

248 In this case, the facts of the offences alleged were many years in the past. As well, the accused had a high profile in the community. These ingredients called for a careful prosecution to ensure fairness and the maintenance of integrity in the process.

249 The Crown should have been scrupulous to its obligations to the court and to the accused. Ms. Harvey admitted that this was "a case that require[d] a great deal of diligence and professionalism". On December 7, 1992, it was clear to the trial judge, who had personally witnessed the conduct of the Crown over a three-month period and was aware of earlier failures to disclose, that the trial was no longer fair and could not be redeemed.

250 In summary and in chronological order the Crown impaired the ability of the appellant to prepare a defence in the following way:

1. In 1991 the Crown failed to disclose to the RCMP interviews with the complainants.

2. On December 16, 1991, the Crown failed to disclose statements made by M.B. and M.O. to Wendy Harvey.

3. On May 25, 1992, the Crown failed to disclose the complete witness statements in their possession but substituted one-line summaries.

4. On June 16, 1992, the Crown failed to disclose the letter from Wendy Harvey to therapists narrowing Campbell A.C.J.'s disclosure order of June 4, 1992.

5. On July 8, 1992, the Crown failed to disclose the letter from Crown Counsel Harvey to P.P. stating an intention to disregard the June 4, 1992 order.

6. On September 21, 1992, the Crown failed to comply with the order of Oppal J. who expressed concern and urged compliance.

7. On October 16, 1992, the Crown turned the records of P.P. over to the court. Thackray J. was concerned about the rest of the records and ordered disclosure.

8. On October 30, 1992, the Crown failed to disclose that Dr. Cheaney's records concerning M.B. had been turned over to the court, but not to the defence.

9. On November 19, 1992, the Crown failed to disclose its remaining records.

10. On November 30, 1992, the Crown waived privileges and produced four binders of material based on an undertaking to the defence to disclose its whole file. The Crown indicated disclosure was now complete.

11. On December 3, 1992, the Crown discovered that it possessed drawings by the complainants which had not been disclosed. The Crown agreed it was now unable to say that full disclosure had been made.

12. On December 4, 1992, the Crown admitted that the binders it turned over to the defence were incomplete.

251 The conduct of the Crown during the time Thackray J. was involved, as well as in the months before his appointment, was negligent, incompetent and unfair. While

I am content to accept Thackray J.'s interpretation of the Crown's behaviour as being without deliberate intent some concerns remain, particularly in regard to the continual avoidance of compliance with the court order of June 4, 1992.

252 The trial judge was as stated in the best position to observe the conduct of the Crown and its effect on the proceedings. He found that the trial had become so tainted that it violated fundamental principles underlying the community's sense of fair play and decency and that the accused was impaired in his ability to make full answer and defence.

253 The trial judge carefully balanced the competing public interest in prosecuting offences with the need for a fair trial. He recognized that an order for a stay could be seen as a technicality, but concluded that in these unusual circumstances it was the appropriate, and only, remedy. He held that "[e]very citizen is entitled to the protection of the law, and to have the law meticulously observed" (pp. 110-11). I agree and would allow the appeal and restore the stay of proceedings.

254 I concur with the Chief Justice and Justice Sopinka that the Crown's disclosure obligations established in *Stinchcombe* are unaffected by the confidential nature of therapeutic records in its possession. I agree with the substantive law and the procedure recommended in obtaining such records from third persons.

*Appeal dismissed,* LAMER C.J., SOPINKA *and* MAJOR JJ. *dissenting*.

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