File No. EB-2017-0007

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance and Payment of an Administrative Penalty against Planet Energy (Ontario) Corp. (ER-2011-0409) (GM-2013-0269)

BOOK OF AUTHORITIES OF BOARD ENFORCEMENT STAFF
(Planet Energy Motion for Third Party Records)

July 14, 2017

STOCKWOODS LLP
Barristers
Toronto-Dominion Centre
TD North Tower, Box 140
77 King Street West, Suite 4130
Toronto ON M5K 1H1

Andrea Gonsalves (52532E)
Tel: 416-593-3497
andreag@stockwoods.ca

Justin Safayeni (58427U)
Tel: 416-593-3494
justins@stockwoods.ca

Tel: 416-593-7200
Fax: 416-593-9345

Lawyers for the Ontario Energy Board Enforcement Staff

TO: **STIKEMAN ELLIOTT LLP**
Barristers and Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Glenn Zacher LSUC # 43625P
Tel: 416-869-5688
gzacher@stikeman.com

Mel Hogg LSUC # 48076E
Tel: 416-869-6826
Fax: 416-947-0866
mhogg@stikeman.com

Lawyers for Planet Energy

AND TO: [redacted]

AND TO: [redacted]

AND TO: [redacted]

AND TO: [redacted]

I N D E X

Indexed as:

R. v. O'Connor

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.

[1995] 4 S.C.R. 411

[1995] 4 R.C.S. 411

[1995] S.C.J. No. 98

[1995] A.C.S. no 98

1995 CanLII 51

File No.: 24114.

Supreme Court of Canada

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.

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By L'Heureux-Dubé J.

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By McLachlin J.

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By Cory J.

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

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By Major J. (dissenting)

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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.

Solicitors for the appellant: Considine & Lawler, Victoria. Solicitors for the respondent: Cardinal Edgar Emberton & Macaulay, Victoria. Solicitor for the intervener the Attorney General of Canada: Robert J. Frater, Ottawa. Solicitors for the intervener the Attorney General for Ontario: Miriam Bloomenfeld, Janet Gallin and Susan Chapman, Toronto. Solicitors 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: Sharon D. McIvor, Ottawa, and Elizabeth J. Shilton, Toronto. Solicitor for the intervener the Canadian Mental Health Association: Frances Kelly, Vancouver. Solicitor for the intervener the Canadian Foundation for Children, Youth and the Law: Brian Weagant, Toronto. Solicitor appointed by the Court as amicus curiae: Elizabeth Bennett, Q.C., Peck Tammen Bennett, Vancouver.

[Editor's note: An errata was published at [2016] 1 S.C.R., Part 4, page iv. The change indicated therein has been made to this document and the text of the errata as published in S.C.R. is appended to the judgment.]

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 or 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 whether the defence can be limited in its attempts to obtain production of private records held by third parties, but how 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 despite 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 further 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.

* * * * *

Errata, published at [2016] 1 S.C.R., Part 4, page iv

[1995] 4 S.C.R., p. 455, para. 59, line 27 of the English version. Read "oppressive or vexatious proceedings" instead of "oppressive and vexatious proceedings".

Law Society Tribunal
Tribunal du Barreau

LAW SOCIETY TRIBUNAL
HEARING DIVISION

Citation: *Law Society of Upper Canada v. Resetar,* 2015 ONLSTH 103
Date: June 18, 2015
Tribunal File No.: LCN33/14 and LRS73/14

BETWEEN:

The Law Society of Upper Canada

Applicant/Respondent

- and -

Tracey Marie Resetar (Foster)

Respondent/Applicant

Before: David A. Wright (Chair)
Susan Richer
John Spekkens

Heard: November 3, 4 and 25, 2014 in Toronto, Ontario

Appearances: Jan Parnega-Welch, for the Applicant/Respondent
Respondent/Applicant, assisted by Duty Counsel, Marcy Segal, on November 4 and 25, 2014
Peter M.B. Eberhard, for Dr. Carolyn Ambrowitz
Sharon Wilmot, for William Blair
Nada Nicola-Howorth, for Dr. Treena Wilkie

Summary:
RESETAR (FOSTER) – Summonses – The Lawyer, who was the subject of a conduct application, brought a second application for an order discharging or varying a 2007 Order that suspended her indefinitely until she proved that she was fit to practise law – The principal evidence at the 2007 incapacity hearing was the report of a psychiatrist retained by the Society to provide an opinion as to the Lawyer's capacity – A psychologist conducted testing that formed the basis for that opinion – The summonses that the Lawyer caused to be issued with respect to these two individuals were quashed – The documents sought from them did not meet the threshold of "likely relevance" in relation to either application – Challenges to the evidence presented in 2007 were neither fresh evidence nor a suggestion of a material change in circumstances since then – A third summons against the police chief also was quashed – Many of the documents sought were not the type of records that would be expected to be in the possession of the police and were not likely relevant.

Disclosure – The Lawyer's motion for disclosure from the Society included 177 specific requests, of which the Society had refused all but nine – The Society had already provided the Lawyer with a substantial amount of disclosure – Although disclosure relates to facts and evidence, not positions, many of the Lawyer's disclosure requests asked the Society to identify specific pieces of evidence or authorities it relied upon in support of specific propositions, or sought evidence that disproved a specific proposition put forward by the Lawyer – Other disclosure requests sought information that was not in the Society's possession, or appeared to contest the Superior Court's findings and sought the Society's justification for relying upon them – The motion was dismissed.

Joinder – The Lawyer, who was the subject of a conduct application, brought a second application for an order discharging or varying a 2007 Order that suspended her indefinitely until she proved that she was fit to practise law – Deciding on joinder of the two applications was not appropriate at this time – It would be preferable to determine the order and process by which the two applications would be heard through a process of case management, which might include hearing preliminary motions together – The joinder motion was therefore dismissed, without prejudice to either party's right to request, in the case management process, that part or all of the proceedings be joined.

REASONS FOR DECISION ON MOTIONS

INTRODUCTION

[1] David A. Wright (for the panel):– These reasons relate to motions in two applications involving the Lawyer, Tracey Marie Foster (also known as Tracey Marie Resetar). In the first application the Law Society alleges that the Lawyer committed professional misconduct by failing to respond to requests and conduct unbecoming a licensee as a result of her actions in administering an estate and subsequent litigation. In the second, the Lawyer seeks an order discharging or

varying a 2007 Order that suspended her indefinitely until she provided medical evidence to the satisfaction of the Director of Professional Regulation that she is fit to practise law. The Lawyer filed the second application several months after the Law Society brought the first one.

[2] There are various motions before us. Several relate to the Lawyer's requests for disclosure in both applications from the Law Society and from non-parties The Society opposes the motion for disclosure. The Lawyer issued summonses to three individuals requiring disclosure from them. The summonsed individuals move to quash the summonses. The Lawyer has brought cross-motions to strike two of the summonsed individuals' motions to quash.

[3] The Lawyer also asks that the proceeding be heard in the absence of the public, with the exception that she may provide any materials received in the absence of the public to the Organization of American States or such other hypernational human rights body to which she may apply.

[4] Finally, the Lawyer asks that the two applications be joined and heard together or in the alternative, one after the other, with the reinstatement application proceeding first. The Law Society opposes this motion.

[5] The Lawyer lives in Turkey and attended the motion hearing remotely with the consent of all parties, by teleconference and later by Skype. Due to connection difficulties, argument on the last motion was completed several months later in writing, again on consent. The written materials and oral submissions were extensive. We have considered all of the parties' arguments. These reasons focus on the chain of reasoning essential to our conclusion.

[6] During the hearing, we granted the summonsed individuals' motions to quash the summonses, without costs and dismissed the Lawyer's cross-motions to strike those motions, with reasons to follow. These are our reasons for those orders and our conclusions and reasoning on the other issues raised in the motions.

THE APPLICATIONS AND THEIR STATUTORY CONTEXT

[7] One of the key issues in deciding the motions is the scope of the issues that have been and can be raised in each application. Therefore, we begin with a brief discussion of each in its statutory context.

The Law Society's Application

[8] The Law Society's application, issued on March 24, 2014, alleges both professional misconduct and conduct unbecoming a licensee contrary to s. 33 of the *Law Society Act*, R.S.O. 1990, c. L.8, as amended (the "Act"). A lawyer commits conduct unbecoming if he or she does something in his or her personal or private capacity that tends to bring discredit upon the legal profession.

[9] The Law Society alleges that during a period of a little over a year, from 2007 to 2008, the Lawyer committed conduct unbecoming by misappropriating over $175,000 of funds of the estate of a family member, misapplying over $40,000 from that estate, converting an estate asset to her personal use, and failing to account properly for the administration of the estate. It also alleges that she failed to comply with various court orders made following litigation related to the estate. Finally, it alleges that she committed professional misconduct by holding money in trust while suspended and failing to co-operate with a Law Society investigation.

[10] There was extensive litigation about the Lawyer's actions and accounting as estate trustee before the Superior Court of Justice: see *de Vries v. Resetar*, 2010 ONSC 2602; leave to appeal dismissed 2010 ONSC 4678. In 2008 she was removed as trustee and ordered to formally pass her accounts. The Court found in 2010 that she did not do so in a timely and succinct manner and ordered her to pay a bond of $300,000 to be held until after the trial for the passing of the accounts. The Court's view was that "on the face of her own accounting, there is a *prima facie* case of wrongdoing" (2010 ONSC 4678 at para. 56).

[11] The Law Society states that it will not take the position at the hearing that the Lawyer is bound by any of the findings of the Superior Court. Rather, it will seek to admit them and rely upon them together with other evidence in support of its allegations of conduct unbecoming. The Lawyer takes the position that they should not be admitted and asserts that her rights were violated in multiple ways during the Court proceedings and are violated by the Hearing Division *Rules of Practice and Procedure*. These issues will be decided at a later stage.

The Lawyer's Application

[12] The Lawyer's application, brought under s. 49.42 of the Act, stems from a decision by a hearing panel in June of 2007 finding that she was incapacitated and incapable of meeting her obligations as a licensee, and ordering that she be suspended indefinitely until she provides medical evidence to the satisfaction of the Director of Professional Regulation that she is fit to practise law. The panel's order reflected a joint submission by the Lawyer, who was represented by counsel, and the Law Society. The panel's brief reasons are reported at *Law Society of Upper Canada v. Resetar*, 2007 ONLSHP 71.

[13] The principal evidence at the 2007 incapacity hearing was a medical report of Dr. Treena Wilkie, a clinical psychiatrist who was retained by the Law Society to provide an opinion as to the Lawyer's capacity. Testing that formed the basis for the opinion was conducted by Dr. Carolyn Abramowitz, a psychologist.

[14] In these public reasons, we will provide limited details of the report and underlying events in view of their highly personal nature. Dr. Wilkie concluded that Ms. Resetar had a significant psychiatric disorder of at least moderate severity and was

unable to fulfil her obligations as a lawyer and that this had been the case for at least several years. She noted that if the Lawyer received appropriate psychological and pharmacological treatment there was a relatively good prognosis. She noted, however, that this disorder could be difficult to treat because the individual generally has limited insight into the disorder.

[15] Under s. 37 of the Act, both today and when the capacity application was heard, a "licensee is incapacitated for the purposes of the Act if, by reason of physical or mental illness, other infirmity or addiction to or excessive use of alcohol or drugs, he or she is incapable of meeting any of his or her obligations as a licensee." Various types of orders, including a suspension, can be made under s. 40. Under s. 49.32, an order in a capacity application can be appealed to the Appeal Division (known in 2007 as the Appeal Panel).

[16] Section 49.42 allows a licensee to request an order discharging or varying a suspension (a "reinstatement application"):

> If an order made under this Act suspended a licensee's licence or restricted the manner in which a licensee may practise law or provide legal services, the licensee may apply to the Tribunal for an order of the Hearing Division discharging or varying the order to suspend or restrict on the basis of fresh evidence or a material change in circumstances.

[17] The Lawyer's reinstatement application, as amended, is over 30 pages. It seeks: reinstatement, together with various orders under the *Canadian Charter of Rights and Freedoms*; a stay of the conduct application; and an order striking various sections of the Act and the *Rules of Practice and Procedure*.

[18] The central aspects of the Lawyer's application are summarized below. It makes various allegations about incompetence and corruption of various judges, lawyers, medical professionals and Law Society employees that need not be repeated here. The Lawyer argues that:

- the 2007 suspension order, and a practice review that preceded it, are discriminatory on the basis of sex and disability and violated the Lawyer's rights to equality and security of the person under the Charter:
- the 2007 suspension was unlawful;
- requiring her to obtain medical evidence in order to end the suspension is discriminatory on the basis of sex;
- there are concerns about the complaints in the previous matter and the credibility and character of the complainants;
- the capacity application was based on her refusal to participate in a

practice review in which she should never have been required to participate;

- Dr. Wilkie was unqualified and based her opinion upon information obtained from the Lawyer's former family physician, who was negligent and engaged in illegal and unethical activities;
- the capacity application was fraught with procedural errors;
- Dr. Wilkie was negligent in her report, wrong in concluding that events the Lawyer reported had not happened and the Lawyer can prove that these events occurred;
- Dr. Wilkie failed to consider the illegal or wrongful conduct of multiple members of the judiciary;
- the Lawyer's counsel at the capacity hearing was incompetent;
- the Lawyer has fresh evidence related to ongoing sexual harassment;
- the Lawyer has current medical evidence confirming her ability to practise law;
- the Society has engaged in various forms of misconduct in relation to her.

THE SCOPE OF A REINSTATEMENT APPLICATION

[19] Many of the Lawyer's allegations in her reinstatement application and her disclosure requests are broad and challenge what happened in 2007. At the heart of the issues before us is the proper scope of what can be raised on a reinstatement application as "fresh evidence" or a "material change in circumstances." If the disclosure requests relate to information that is not relevant to either application, they must be denied. To do so, we must address the statutory interpretation of s. 49.42.

The Modern Approach to Statutory Interpretation

[20] We apply the modern approach to statutory interpretation articulated by the Supreme Court of Canada. Words are "to be read in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of the legislature": *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 18; R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1.

Interpreting Section 49.42

[21] Considering the words of s. 49.42 in their statutory context and in light of the scheme and purpose of the Act, they are not intended as a mechanism to challenge the basis for a previous decision that led to a suspension or restriction. Rather, the provision allows a licensee to show that circumstances have changed since the suspension or restriction, either because there is fresh evidence not available at the time of the suspension or restriction or a change in circumstances that demonstrates it is no longer necessary. It is focused on what has changed since the original suspension or restriction. A reinstatement application, in our view, is not an opportunity to contest the original decision. That is the role of an appeal. There are several factors that lead us to that conclusion.

The Words "Fresh Evidence" and "Material Change in Circumstances"

[22] We begin with the words in s. 49.42, which specify that a reinstatement application must be based on "fresh evidence or a material change in circumstances". The words "fresh" and "change" themselves both suggest the need for the application to be based on new information that was not available earlier.

[23] The term "fresh evidence" reflects a concept used in appellate law, and while it may have a different meaning in a reinstatement application, its interpretation in the other context is relevant. Fresh evidence is not admissible on appeal unless it could not have been obtained through due diligence at the hearing: see *Law Society of Upper Canada v. Kesavan*, 2014 ONLSTA 17 at paras. 80-83. This suggests an interpretation of the statutory language requiring that fresh evidence be something new, rather than a challenge to the basis for the previous decision that could have been raised at the time.

Purposes of the Act

[24] We turn next to the purposes of the Act. Section 4.2 includes principles the Society, including the Law Society Tribunal as an independent administrative tribunal within it, should apply in making regulatory decisions:

> 4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:
>
> 1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
>
> 2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
>
> 3. The Society has a duty to protect the public interest.

4. The Society has a duty to act in a timely, open and efficient manner.

5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.

[25] These provisions suggest the need for Tribunal processes to be just, accessible, timely, transparent, efficient and proportionate to the issues, and for the protection of the public interest to be a significant consideration.

[26] An indefinite right to challenge the basis for the decision that imposed a suspension or restriction would not fulfil these purposes. Permitting relitigation of the underlying order so long as the suspension remained in place would be neither efficient nor timely, and would not respect the importance of finality in Tribunal proceedings.

The Scheme of the Act

[27] The Act contains a robust appeal mechanism. It allows parties to appeal from the Hearing Division to the Appeal Division (s. 49.32) and, in conduct and capacity matters, to the Divisional Court from the Appeal Division (s. 49.38). An appeal may be brought no matter what the penalty, whereas a reinstatement application can only be made if there is a suspension or restriction. There is no principled reason, in our view, that the Legislature would provide a separate avenue for appeal of a decision when it resulted in a suspension or restriction. It is a more likely interpretation that the provision is designed to deal with circumstances in which, taking the facts and reasoning in the previous decision as binding, new evidence or circumstances show a change.

The Importance of Finality

[28] Finally, in interpreting s. 49.42 we give important consideration to the value of finality under the common law. Doctrines such as *res judicata*, issue estoppel, and abuse of process emphasize the importance of treating decisions as final, in particular in the court or tribunal in which they were made and when the same parties are involved. It is unlikely that the Legislature would have departed from this principle without specific language.

Ineffective Assistance of Counsel

[29] The Lawyer argues that the fact she has made a claim for ineffective assistance of counsel makes all evidence that bears on the previous capacity application relevant, and entitles her to disclosure to show that decision was incorrect. We

respectfully disagree. First, in our view, ineffective assistance of counsel at the previous proceeding is not a ground that can be raised in a reinstatement application. While evidence about alleged ineffective assistance of counsel may be admitted as fresh evidence on appeal, this is because ineffective assistance of counsel is a proper ground of appeal. In an appeal, parties challenge the original decision. On a reinstatement application, however, the previous decision is binding and the licensee must base the request for reinstatement on changes or new information that has been obtained since that time.

[30] Were the Lawyer's argument to this effect to be accepted, licensees who are suspended or whose practice is restricted (but not others) would be able to raise the alleged ineffectiveness of counsel many years after the original proceeding. This would be neither fair nor proportionate justice, nor respect the need for finality of decisions. Reinstatement applications are not a basis for allegations of ineffective assistance of counsel.

Conclusion Regarding Interpretation of Section 49.42

[31] Considering the words of s. 49.42 in their context, we find that submissions arguing that a previous decision was incorrect or challenging the evidence underlying it, are not relevant to a reinstatement application under s. 49.42 of the Act. Reinstatement applications must be based on new or changed circumstances. They are not appeals. Therefore, the Lawyer's allegations challenging the previous proceeding are not properly raised in a reinstatement application. This conclusion is significant, in particular to the disclosure motions, since the issue will be whether the documents sought are relevant to the new or changed circumstances being relied upon in the Lawyer's application.

CONTESTING THE 2007 PROCEEDINGS IN THE CONDUCT APPLICATION

[32] The Lawyer also suggests that she is entitled to production of documents underlying the 2007 proceedings because the Court referred to the suspension in the decisions in the estate matter. At para. 15 of *de Vries*, 2010 ONSC 2602, the Court notes that had she advised of her suspension when she was appointed estate trustee, she would not have been appointed or she would have been required to post a bond. The Court also questioned whether she was entitled to take certain actions in light of the suspension. None of the Court's comments addressed or depended on the validity of the suspension; they related to the fact that the Lawyer had been suspended.

[33] The primary issues in the conduct application are whether the Lawyer misappropriated or misapplied funds, converted an asset to her own use and whether she failed to respond to the Law Society as required by the *Rules of Professional Conduct*. The correctness of the 2007 suspension is not properly before us in the conduct application. In addition, unless either party takes the

position that any conduct unbecoming or misconduct was affected by her health (the opposite of the position the Lawyer has taken), her health is irrelevant to the conduct application.

THE LAWYER'S CROSS-MOTIONS

[34] We turn now to the specifics of the various motions before us. First, the Lawyer has filed cross-motions asking that the motions of Dr. Abramowitz and Chief of Police William Blair to quash the summonses against them be struck because they did not provide affidavits on the motion in their own names; the affidavits filed were sworn by others. She argues that a motion to quash a summons requires "best evidence" in the form of an affidavit from the person summonsed. She states that she should have the opportunity to cross-examine each of them. She relies upon, among other authorities, *Re Eagleson*, 1996 CanLII 535 (ON LST) for the proposition that the witness summonsed must show that they do not have relevant evidence to give.

[35] The summonses were issued to obtain documentary evidence from non-parties under the process set out in *R. v. O'Connor*, [1995] 4 SCR 411. Records in the possession of non-parties must be obtained in this manner because the Law Society Tribunal has no explicit statutory authority to obtain records from non-parties other than the power to issue a summons under s. 12 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. Under *O'Connor* as applied at the Tribunal, if the non-party whose records are sought wishes to contest their disclosure, it may bring a motion to quash the summons: see *Law Society of Upper Canada v. Spiegel*, 2014 ONLSTH 225 at para. 14.

[36] The onus is on the person seeking records from a non-party to establish the threshold of "likely relevance": see, for example, *O'Connor* at para. 19; *Ramos v. Ontario (Independent Police Review, Director)*, 2012 ONSC 7347 at para. 14; *R v. Harris*, [1994] OJ No 1875 (Ont. C.A.). The analysis of whether the records sought are likely relevant does not depend on either the content of the affidavits or potential cross-examination. Our resolution of these motions depends on an analysis of whether what the Lawyer seeks is likely relevant. Moreover, in the case of Chief Blair, there is no suggestion that he has any personal knowledge of the matters at issue. There was no unfairness in proceeding based on the materials as filed and no need for the individuals to be cross-examined to ensure fairness. The cross-motions were therefore dismissed.

THE SUMMONSES TO DRS. WILKIE AND ABRAMOWITZ

[37] The Lawyer seeks materials from Drs. Wilkie and Abramowitz because she wishes to challenge both the accuracy of the assessment that led to the 2007 order and their qualifications and neutrality. Dr. Wilkie is the psychiatrist who produced the report in 2007 and Dr. Abramovitz is a psychologist who administered standardized tests.

[38] The summons to Dr. Wilkie seeks the following:

1. Complete copy of Dr. Treena Wilkie's file pertaining to her assessment of Tracey Foster on behalf of The Law Society of Upper Canada.

2. Complete résumé for Dr. Treena Wilkie.

3. Copy of Dr. Treena Wilkie's Individual Income Tax Returns and Notices of Assessment filed with or issued by the Canada Revenue Agency commencing 3 years before her assessment of Tracey Foster and continuing to date, evidencing her income from any government in Canada as a private assessor.

4. Where her tax returns do not disclose her income from governments in Canada, a copy of any and all accounts issued by Dr. Treena Wilkie in her private practice to any government authority commencing 3 years before the date of her assessment of Tracey Foster to date to evidence the profit she has made from her pro-police and government positions.

[39] The documents sought from Dr. Abramowitz are identical except that she does not seek her résumé.

[40] The documents sought do not meet the threshold of likely relevance in relation to either application. Although the Lawyer has included statements about the 2007 proceeding and report in her pleading, those assertions do not raise matters that are properly the basis for a reinstatement application. Further, the Law Society is not seeking to rely on the evidence of Dr. Wilkie or Dr. Abramovitch at the hearing. Challenges to the evidence presented in 2007 are neither fresh evidence nor a suggestion of a material change in circumstances since then. Contesting the basis for the 2007 order is not likely relevant to the issues that can be raised in a reinstatement application, nor to whether the Lawyer committed conduct unbecoming as estate trustee or professional misconduct in failing to respond to the Law Society. The motions to quash were therefore allowed.

[41] Dr. Abramowitz sought costs of the motion, while Dr. Wilkie did not. We acknowledge the stress this motion likely caused Dr. Abramowitz and the costs incurred to quash the summons. However, in the particular circumstances of this motion, including the nature of the 2007 proceeding to which it is connected, the fact that the Lawyer is now living outside the country, the similarity between the written arguments made by separate counsel on behalf of Dr. Abramowitz and Dr. Wilkie and the relatively brief appearance to quash the summons, we exercised our discretion not to award costs.

THE SUMMONS TO CHIEF WILLIAM BLAIR

[42] The Lawyer issued a summons to William Blair, then Chief of the Toronto Police Service. It seeks 37 documents that relate to two incidents involving the Toronto Police Service (TPS) alleged to have occurred in 2003 and 2004. We understand that the Lawyer takes the position they are relevant because Dr. Wilkie's 2007 report concludes or assumes that these incidents were not real. If she shows that the incidents in fact occurred, the Lawyer argues, this will help demonstrate that Dr. Wilkie's diagnosis, as well as her conclusion that the Lawyer was not capable of practising law, were both wrong.

[43] Many of the documents sought, such as: hospital records, data from cellular phone towers, credit card records from a restaurant, private security footage and information about employees of businesses and organizations, are not the type of records that are expected to be in TPS possession. This is confirmed in the affidavit filed by a civilian employee of the TPS who searched its records, and states that some do not exist. Moreover, those to whom they relate were not given notice that they were sought.

[44] However, none of what is sought is likely relevant to the reinstatement application. It relates to events before the 2007 order was made, and therefore it is not likely relevant to whether there has been a material change in circumstances. It could have been obtained prior to the consent order in 2007, and therefore it is not fresh evidence that could not have been obtained through reasonable diligence at the time. The motion to quash the summons was therefore granted. The Chief does not seek costs and none are awarded.

DISCLOSURE FROM THE LAW SOCIETY

[45] We turn next to the Lawyer's motion for disclosure from the Law Society. The motion has 177 specific requests. The Law Society has refused all but nine of them. We begin our analysis with the factual and legal background to the requests, and then address the specific information the Lawyer has asked us to order disclosed.

[46] The Law Society has already provided the Lawyer with the equivalent of three boxes or 20 volumes of disclosure, in both hard copies and CDs. This includes a 40-page investigation report.

[47] The Law Society is obliged to disclose all relevant evidence or information in its possession, in accordance with the obligations in *R v. Stinchcombe*, [1991] 3 SCR 326. This disclosure obligation relates to the facts or the "fruits of the investigation" and does not cover the analysis or review done by investigators or counsel: *Law Society of Upper Canada v. James*, 2014 ONLSTH 41 at paras. 21-24.

[48] Tribunal proceedings must respect the duty of procedural fairness, which includes

the ability to know the case to be met. As the Lawyer argues, the factors in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras. 21-26 suggest a high level of procedural fairness: the nature of the Tribunal is similar to a judicial process, the statutory scheme and rules contemplate a trial-like procedure, the interest in question (practising a profession) is recognized as significant, and the Tribunal's procedural choices suggest a traditional procedure.

[49] A high standard of fairness, however, does not mean unlimited procedure, nor does it mean that a licensee is entitled to disclosure in the form of answers to any questions she has about the Law Society's position on any issue at any stage of the process. There are multiple mechanisms for the licensee to know the case to be met:

- the requirement for the Law Society to disclose all relevant documents in its possession under *Stinchcombe*;
- the requirement that particulars of the allegations be set out by the Law Society in the Notice of Application (Form 9A);
- the requirement that the Law Society advise the subject of the proceeding of every document upon which it intends to rely, and provide a signed witness statement or summary of evidence for every witness it intends to call (Rule 19.01);
- the ability to serve a Request to Admit the truth of a fact or the authenticity of a document under Rule 20 to determine whether particular facts are contested;
- at a conduct hearing, the Law Society proceeds first, and the licensee is not obligated to respond until having heard the Law Society's case.

[50] As noted in *James*, disclosure relates to facts and evidence, not positions. The Lawyer's disclosure requests, which she numbered as 1-163, 166-168, 170, 172, 175 and 177, ask that the Law Society identify specific pieces of evidence or authorities it relies upon in support of specific propositions. Many seek evidence that disproves a specific proposition put forward by the Lawyer. Others seek information that is not in the Law Society's possession. Some appear to contest the Superior Court's findings and seek the Law Society's justification for relying upon them. Several examples give a sense of these requests:

> 2. Any and all legal authority that the Licensee was required to post a de facto bond after the issuance of the Certificate of Appointment of an Estate Trustee with a Will and after removal as an Estate Trustee.

5. Any and all evidence that the Licensee's omission in failing to provide an initial Capital Disbursements Statement was not an error.

9. Any and all evidence disproving that at the time of the Licensee's removal as Estate Trustee that she had purchased an airline ticket destined to purchase a business on behalf of the Estate in Florida.

25. Any and all evidence or legal authority indicating that estate litigation can lawfully be resolved on the basis of prima facie assertions, without facts, and without utilization of pre-trial civil procedures provided for [in] the Rules of Civil Procedure and without a trial of the matter?

35. Any and all evidence indicating what expenses were incurred after July 12, 2007 that the court deemed to be improper (para 71 of Endorsement).

43. Any and all evidence and legal authority indicating that a Licensee is not entitled to collect [her] receivables while suspended or improperly suspended due to a human rights violations [*sic*], Charter violation and Bill of Rights violation.

48. Any and all evidence indicating that members of the judiciary of the Ontario Superior Court of Justice were not unlawfully intercepting telecommunications of litigants, including solicitor and client communications, and including evidence pertaining directly to the involvement of Justice Pardu in that practice.

114. Any and all evidence indicating what the average rental price for a single family home having 3, 4 or 5 bedrooms was in Florida generally, and Orlando specifically, either on the open market or through the section 8 housing program from 2007 forward in time by year.

138. Any and all evidence or authority indicating that the decisions of *Lister and Co. v. Stubbs* and *Carlton Estate* mentioned in the Endorsement give rise to a lawful requirement that the Licensee disclose her personal income tax returns with all supporting documentation, deliver a net worth statement or attend pre-trial an examination in aid of execution.

163. Evidence that the facts stated in each paragraph of Notice of Application LRS73-14 is not true.

[51] None of these is a request for evidence or information in the Law Society's possession that the licensee does not already have, and therefore is not the type of disclosure to which she is entitled. Nor are responses to these questions required for the Lawyer to understand the case to be met. The Law Society has outlined the

allegations in the Notice of Application, provided the documents it has obtained as a result of its investigation, and will provide, in accordance with the *Rules of Practice and Procedure*, a will-say for each of its witnesses before the hearing. The Lawyer will have a complete opportunity to know the case she will have to meet. Moreover, if any of the allegations are not sufficiently detailed to understand, she can request particulars. There is no right for a party to demand the other party's position on specific propositions.

[52] Request 164 seeks videotape surveillance footage for the Society's member services wicket and audio recordings. Requests 165 and 169 request computer records relating to the licensee's lack of access to its computer system and portal. While the Lawyer has pleaded in her reinstatement application that the Law Society engaged in illegal and improper conduct regarding the Lawyer in relation to its membership directory and website, this pleading, and the related evidence sought, are not relevant to the issues before the Tribunal in either application. They do not relate to whether she committed professional misconduct or conduct unbecoming or whether there has been fresh evidence or a material change in circumstances relating to her capacity. Similarly, requests 169 and 171 seek information about communications between the Law Society and the Toronto Police Service that appear to relate to allegations in the reinstatement pleading about the Law Society's conduct, not material changes in circumstances or fresh evidence relating to her capacity.

[53] Request 174 seeks the identity of the supervisor of certain Law Society employees. It is not appropriate to order this information disclosed as part of these proceedings as the Lawyer has not shown that it is relevant to the issues before the panel. Of course, this may be information the Law Society would normally provide to a licensee who had dealt with employees and there may be other mechanisms for her to receive it.

[54] Request 176 requests "Particulars regarding the nature of the relationship between Joseph Di Pietro and the person having the same surname employed at the Brampton Courthouse where the Richetti endorsement emanated from." This information is not relevant to the issues before the panel.

[55] For these reasons, the Lawyer's disclosure motion is dismissed.

CLOSED HEARING

[56] The Lawyer filed a motion for a closed hearing. Through discussions at the hearing, the Lawyer clarified that she will seek limitations on full openness only in relation to specific evidence about assaults she states she has experienced. We made various orders at the hearing restricting full openness of this evidence, on consent, in recognition of the protection the law accords complainants that outweighs openness: see *Law Society of Upper Canada v. Xynnis*, 2014 ONLSAP

9 at para. 30.

[57] The motion for a closed hearing is dismissed, since the issue will be dealt with as individual documents and areas of oral evidence arise.

JOINDER

[58] The Lawyer asks that the two applications be joined. The Law Society opposes joinder, and asks that the conduct application be heard before the capacity application. Rule 7.01(1) reads as follows:

> **7.01** (1) On the motion of a party, an order may be made that the merits of two or more proceedings, in whole or in part, be heard at the same time or one immediately after the other if,
>
> (a) the proceedings have a question of fact, law or mixed fact and law in common;
>
> (b) the proceedings involve the same parties;
>
> (c) the proceedings arise out of the same transaction or occurrence or series of transactions or occurrences; or
>
> (d) for any other reason an order ought to be made under this Rule.

[59] This panel is seized of both applications, having heard motions relating to the exclusion of the public from all or part of the hearing: see s. 3(2) of O. Reg. 167/07. The Lawyer has stated that she intends to bring various pre-hearing Charter motions that may relate to both applications, although the motions have not yet been filed. It is not evident now that once the relevant issues are fully defined and clarified, there are questions of fact, law or mixed fact and law in common in relation to the merits of the applications. A further definition of the issues will also help determine how joinder or hearing the applications separately would affect the fair and timely adjudication of the issues.

[60] In our view, deciding on joinder of the two applications would not be appropriate at this time. We find that it would be preferable to determine the order and process by which the two applications will be heard through a process of case management. That may include hearing preliminary motions together. The joinder motion is therefore dismissed, without prejudice to either party's right to request in the case management process that part or all of the proceedings be joined.

[61] The Tribunal Office is requested to schedule a half-day hearing with this panel for the purpose of case management. At that hearing, the dates for the next steps in the proceedings will be determined. The parties should be prepared to identify any

issues they seek to have addressed before the hearings on the merits and why they should be determined before the merits, the order in which issues should proceed and any other case management issues they wish to raise. The Lawyer should advise the Tribunal Office, once this hearing day has been scheduled, whether she wishes to attend by phone or by Skype.

COSTS IN THE MOTIONS INVOLVING THE LAW SOCIETY

[62] It seems to us that the issue of the Law Society's costs, if any, might be best determined at the conclusion of the proceeding together with any other costs issues. If either party seeks to have costs of these motions decided now, they should write to the panel through the Tribunal Office, with a copy to the other side, no later than two weeks from the date of our Order requesting that costs be determined now, and a process will be determined at the next appearance.

ORDERS

[63] Orders were previously made on the motions and cross-motions regarding the summonses as set out above. Our order on the other two motions will provide: (i) that the motions are dismissed; and (ii) that costs will be determined by the panel at the conclusion of the proceeding, unless either party advises the panel through the Tribunal Office, within two weeks of this order, of their request to have the issue of costs decided now.

Case Name:

Ontario College of Teachers v. Shaikh

IN THE MATTER OF the Ontario College of Teachers Act, 1996, and the Regulation (Ontario Regulation 437/97) thereunder; AND IN THE MATTER OF a Motion of the Applicant, Zubair Ahmed Shaikh, OCT, a member of the Ontario College of Teachers. Between Ontario College of Teachers, and Zubair Ahmed Shaikh (Certificate #429630)

2014 LNONCTD 116

2014 LNONECD 116

Ontario College of Teachers Discipline Committee

Panel: Wes Vickers, OCT, Chair; Mel Greif Annilee Jarvis, OCT, Member

Heard: March 21, 2014.
Decision: September 22, 2014.

(37 paras.)

Appearances:

Eli Mogil, for Ontario College of Teachers, assisted by Bev Hodsdon, Law Clerk.

Heather Alden, Ontario Secondary School Teachers' Federation, for Zubair Ahmed Shaikh.

Mira Pilch, for Durham Children's Aid Society.

Gillian Lock, for the Durham Regional Police.

Marc Spector, Independent Legal Counsel.

DECISION ON MOTION FOR PRODUCTION OF THIRD PARTY RECORDS

1 In 2012, a complaint was filed with the Ontario College of Teachers (the "College") alleging that Zubair Ahmed Shaikh (the "Member") made inappropriate comments of a sexual nature to two students ("Student No. 1" and "Student No. 2") while he was a [XXX] at a school under the Kawartha Pine Ridge District School Board (the "School"). The matter was subsequently referred to a hearing before the Discipline Committee.

2 After this referral, Counsel for the Member brought a motion seeking records from the Kawartha Pine Ridge District School Board (the "School Board"), the Durham Regional Police (the "police") and the Durham Children's Aid Society (the "CAS"). Member's Counsel argued that the Member needed access to these third party records in order to make full answer and defence to the serious allegations brought against him.

3 A panel of the Discipline Committee (the "Committee") heard this motion on March 21, 2014. During the hearing, Counsel for the Member argued that records from the School Board, police and the CAS are likely relevant to the disciplinary matter against the Member. However, Counsel for the CAS stated that certain CAS files containing personal information about Student No. 1, her sister [XXX], Student No. 2 and their families should not be produced to the Member. Counsel for the CAS asserted that these documents are irrelevant to the allegations against the Member and that their release would pose serious privacy concerns.

4 The Committee took a two-step approach to this motion:

1. First, the Committee needed to decide whether or not the records the Member were seeking access to were likely relevant to an issue at the hearing. The Committee considered the arguments of the parties and ultimately determined that the School Board, police and CAS records were likely relevant to the matter brought against the Member. On May 23, 2014, the Committee ordered that the records be produced to the Committee.

2. Second, the Committee reviewed the records in order to determine if all, some or none of the information in the records ought to be released to the Member.

5 This decision relates to the second step as noted above.

DECISION

6 Having considered the motion record presented, case law provided and the submissions made by Counsel for the Member, Counsel for the CAS, the representative from the Durham Regional Police and Counsel for the College, the Committee grants the Member's motion for production of the following documents:

1) The following documents from the Kawartha Pine Ridge District School Board:

    a. Documentation regarding the School Board's Children Aid Society's referral to Rebecca Rolfe on December 7, 2011 and thereafter.

b. [XXX] Appointment Book entries dated November 29, 2011 and December 5, 2011.

2) The Durham Regional Police file GO#2008-161683, including the audio-videotape interviews with Student No. 1 and Briar Ransberry and the general occurrence report summarizing these interviews.

3) The Durham Children's Aid Society 2009 and 2011 Investigation File regarding Zubair Shaikh, subject to the redaction of names and personal or sensitive information of individuals who were minors **at the time of the alleged incidents** and who are **peripheral to and not named** in the allegations in the *Notice of Hearing*, and excluding police records.

7 In so doing, the Committee is partially relying on the following undertaking agreed to by Member's Counsel:

1) All records will be held in the Member's Counsel's office only;

2) The Member will not retain electronic or paper copies of the documents; and

3) At the conclusion of the matter, all copies will be returned or destroyed notwithstanding the legal obligations for Counsel to keep a complete file.

8 The Discipline Committee retains the right to determine the proper use of the documents at the hearing.

9 The remainder of the Member's Motion is dismissed.

REASONS FOR DECISION

10 The Committee bore the task of determining whether the School Board, police and CAS records should be produced to the Member. In reaching its decision, the Committee considered the following factors, as outlined by the Supreme Court of Canada in *R v. O'Connor*, [1995] 4 S.C.R. 411 ("*O'Connor*"):

1) Extent to which the record is necessary for the Member to make full answer and defence;

2) Probative value of the record in question;

3) The nature and extent of the reasonable expectation of privacy vested in that record;

4) Whether the production of the record would be premised upon any discriminatory belief or bias; and

5) The potential prejudice to a student's dignity, privacy or security of the person that would be occasioned by the production of the record in question.

School Board Documents

11 The Committee has decided to produce the documentation relating to the School Board's referral to the CAS about Student No. 2's interactions with the Member. For privacy reasons, the Committee has decided to redact Student No. 2's contact information (such as home address and phone number). Since this document otherwise only contains minimal personal information regarding Student No. 2, such as her name, age, and the name of her school, the Committee has determined that the production of this document, as redacted, would not result in any prejudice to her dignity, privacy or security.

12 The Committee also ordered the production of school [XXX] book entries dated November 29, 2011 and December 5, 2011. These entries simply indicate the time and date that students went to see the Member at the [XXX] office. They do not provide any personal or sensitive information that would potentially prejudice student dignity, privacy or security. There is also no reasonable expectation of privacy when it comes to [XXX] sign-in books. Members of a school community could access this information by going to the [XXX] office and signing in for an appointment.

13 Finally, the Committee takes into account the fact that the School Board did not make submissions disputing the Member's request for these records. Moreover, Student No. 1 and Student No. 2 were notified of the Member's motion for production of these records and consented to the production of the School Board's records.

14 In view of the circumstances, the Committee concludes that it is appropriate to release the requested School Board documents to the Member.

Police Records

15 The Committee viewed the entire police file, which included two videos, dated December 18, 2008 and December 23, 2008. The December 18, 2008 video is a record of an interview conducted by Officer Gillian Lock. Student No. 1 is the subject of the interview. Officer Lock asked Student No. 1 to "tell the truth". During the interview, Student No. 1 made reference to her relationship with the Member and described the behaviours noted in the allegations. The video shows that Officer Lock asked specific questions regarding the events that occurred in the school setting. Student No. 1 responded, with details, about her experiences at school.

16 The December 23, 2008 video is a record of another interview conducted by Officer Lock. Briar Ransberry ("Ms. Ransberry") is the subject of the interview. Ms. Ransberry was a teacher of History at the School during the time of the alleged events. Officer Lock cautioned Ms. Ransberry about her rights and responsibilities and about the need to tell the truth during the interview, with the admonition that she could be charged with "public mischief". In the interview, Ms. Ransberry provided information about Student No. 1, the Member, her own relationship with the Member, and her understanding of the alleged events.

17 The Committee assessed the videos and the accompanying general occurrence hardcopy and has determined that the entire police file, including both videos and the summary report should be produced to Member's Counsel. In making its determination, the Committee considered the criteria

established in *O'Connor*, as set out above, which were also referred to in *Ontario College of Teachers v. Bussineau*, 2013 LNONCTD 11 at para. 36 ("*Bussineau*"), when dealing with a similar issue.

18 The police records could assist the Member in making full answer and defence. The two videos and its summary are probative in determining the truth of the allegations. The Committee acknowledges that there is no general expectation of privacy in police records.

19 Additionally, there is no element of "discriminatory belief or bias". The Committee took to heart the Supreme Court's admonition to consider elements of discriminatory belief or bias in making its decision on this matter.

20 Finally, the Committee could discern no potential prejudice to dignity, privacy or security of any person by the production of these documents. College Counsel advised the Committee that the College had notified Student No. 1 of the Member's motion. As Student No. 1 had not responded, the Committee proceeded on the assumption that she did not take a position.

21 In its assessment, the Committee looked for elements in the videotapes that could be relevant to further the Member's ability to mount an appropriate defence. This concern addresses the issue of probative value and the extent to which the records of the interviews are necessary. The Committee determined that there is no prejudice to any party as the interviews focused solely on the allegations against the Member.

CAS Records

22 The Committee assessed CAS records relating to its 2009 and 2011 investigations, which included documents dated as recently as 2013. These records were unredacted, and it was the responsibility of the Committee to review them in detail and identify those parts, if any, that required redaction.

23 The records forming part of CAS's 2009 investigation contain significant information relevant to the allegations in the *Notice of Hearing*. They include referral reports, case activity notes, safety assessments, institutional risk assessments, a variety of emails, case summaries, dispositions, letters, records and transcriptions of calls and supervision case notes. With the exception of some redactions, this Committee is ordering that all records relating to this investigation be produced to the parties, including documents that the CAS considers privileged and fast-track notes.

24 In its argument, CAS indicated that it did not wish to release documents connected to discussions that the female students had with CAS workers regarding their personal and family issues or any other issue outside of the allegations regarding the Member's conduct towards Student No. 1 and Student No. 2.

25 Member's Counsel, however, stated that records relating to the students' personal and family issues were relevant for a number of reasons. First, they relate to the unfolding of events, given that Student No. 1 initially sought out the Member to discuss her personal and family problems.

26 Second, they might allow the Member to challenge the allegations and conclusions of the College, such as the assertion in the College's Pre-hearing Memorandum that Student No. 1 decided not to go home one night because of the Member's actions. Member's Counsel stated that a Durham Regional Police report suggests that Student No. 1's decision not to go home may have been related to family issues as opposed to any misconduct on the part of the Member.

27 Third, the College's Pre-hearing Memorandum suggests that classmates of Student No. 1 called her offensive names because of her interactions with the Member. Counsel for the Member, however, asserted that Student No. 1 was called these names because of her alleged behaviour at a party and not because of her alleged relationship with the Member. Member's Counsel submitted that the female students' discussions with the CAS about their personal and family issues could be used to test credibility.

28 The Committee believes that the above information could be relevant in responding to the allegations and finds that the records relating to the student's personal and family issues should be released.

29 Other documents, though, require some redaction. These redactions are noted and made evident in the copies available to Counsel. In its redactions, the Committee was primarily concerned about identifying names and personal or sensitive information of individuals (other than Student No. 1 and No. 2) who were minors at the time of the allegations and who were peripheral to and not named in the *Notice of Hearing*. In our view, the production of that information is not necessary in order for the Member to respond to the allegations.

30 The Committee also closely examined CAS records arising from its 2011 investigation. With the exception of police records contained within this file (which this panel had already received directly from Durham Regional Police and is ordering be produced), this Committee is ordering that all records relating to this investigation be produced to the parties. Most of these records relate to an investigation into the Member's alleged interactions with Student No. 2 and appear to contain limited information about these interactions. These records primarily contain the contact information of witnesses and documents the School administration's efforts to contact those witnesses. They have probative value because either College Counsel or Member's Counsel might want to contact those witnesses in preparing for a discipline hearing. Moreover, having balanced the competing interests, the Committee has determined that the production of these records does not constitute an undue infringement of witnesses' privacy or dignity. There was also no suggestion by anyone, including the CAS, that anybody's security would be threatened by sharing these documents with the Member, and neither Student No. 1 nor Student No. 2 objected to the production of the CAS records.

31 The CAS records dated 2013 consist of police records prepared by the Durham Regional Police as part of its investigation. Because, as part of this decision, this Committee is ordering the production of the police records, it is unnecessary to produce those copies already in the CAS file.

32 The Committee accepts Member's Counsel's argument that the CAS records could be relevant in responding to the allegations. In making its determination, the Committee considered the *O'Connor* criteria set out above and referred to in *Bussineau*. Apart from having Member's Counsel conduct his own supplementary investigation and series of interviews, production of these records is the only appropriate pathway for the Member to make full answer and defence. Additionally, these records and their content would understandably be available for College Counsel thereby "leveling the playing field". The Committee also considered that the CAS records were unique and the information contained therein might not be available in any other form.

33 A careful and detailed review of the CAS records clearly demonstrates their essential probative nature. These records reflect a reasoned collection of all available understandings and observations made by persons aware of the purported situation at the time. The records demonstrate a sig-

nificant overlap of viewpoints and should assist in the testing of credibility in a matter that might find itself in a contested hearing.

34 Since the Committee paid close attention to matters of age and redacted those parts of the CAS records that might seem to threaten privacy of a minor, the issue of the expectation of privacy has been resolved.

35 The Committee also tested the CAS records for cases of extraneous information not specifically necessary to mounting a defence. In instances where seemingly extraneous family and personal information was contained, the Committee paid special attention to examining its nature and gave weight to the possibility of an invasion of privacy. In sum, the items of the 2009 and 2011 CAS reports that were not redacted by the Committee are deemed to be no threat to personal privacy.

36 The Committee took special care to reflect on the possibility of possession of discriminatory belief and the exercise of bias in making its decision. The members of the Committee debated the import of the allowed inclusions and in doing so, actively applied a filter of neutrality. Given the sensitive nature of the CAS records and what they reveal about all persons involved, the redactions made by the Committee reflect its concern for and awareness of issues of prejudice to a student's dignity, privacy and security.

Conclusion

37 The Committee, in ordering the production of the relevant documents, is satisfied that the Member will have the opportunity to make full answer and defence to the allegations against him while adequately protecting the privacy rights of all interested parties. The Committee is confident that this order will ensure the fairness of the hearing for all parties involved.

Wes Vickers, OCT
Chair, Discipline Panel

Mel Greif
Member, Discipline Panel

Annilee Jarvis, OCT
Member, Discipline Panel

1999 CarswellSask 331, [1999] S.J. No. 334, 179 Sask. R. 181

1999 CarswellSask 331
Saskatchewan Court of Queen's Bench

Hanna v. College of Physicians & Surgeons (Saskatchewan)

1999 CarswellSask 331, [1999] S.J. No. 334, 179 Sask. R. 181

In the Matter of an Appeal Pursuant to Section 62 of The Medical Profession Act, 1981

Maher Hanna, Appellant (Applicant) and Council of the College of Physicians and Surgeons of Saskatchewan, Respondent (Respondent)

Baynton J.

Judgment: May 5, 1999
Docket: Saskatoon Q.B.G. 2440/98

Counsel: *R.W. Danyliuk*, for Appellant, Dr. Hanna.
B.E. Salte, for Respondent, Council.

Subject: Public

Headnote

Health law --- Physicians and surgeons — Organization of profession — Discipline by College of Physicians and Surgeons — Unprofessional conduct — Sexual relations with patients

Physician was convicted by disciplinary committee on nine counts of misconduct principally related to acts of sexual nature — Penalty imposed by College included striking physician's name from register for minimum of 12 months and imposing conditions on physician's practice — Physician appealed convictions and penalties imposed — Appeal allowed in part — Evidence tendered reasonably supported convictions on eight counts — Committee erred in concluding that complainant's subjective perception alone was determinative of physician's guilt with respect to one count relating to act of sexual nature — Committee must exercise discretion judicially and would lose jurisdiction were it to abandon its function by basing conviction solely on complainant's perception — In imposing penalty, College failed to properly consider all relevant factors — Physician had not previously been before College on disciplinary matters — Acts complained of were less reprehensible than those involved in most other sentencing cases considered by College — Reduced penalty would satisfy objectives of specific deterrence and protection of public and would not diminish public confidence in College's ability to supervise its members — Period of ineligibility reduced from 12 months to six months.

Health law --- Physicians and surgeons — Organization of profession — Discipline by College of Physicians and Surgeons — Penalty — General

Physician was convicted by disciplinary committee on nine counts of misconduct principally related to acts of sexual nature — Penalty imposed by College included striking physician's name from register for minimum of 12 months and imposing conditions on physician's practice — Physician appealed convictions and penalties imposed — Appeal allowed in part — Evidence tendered reasonably supported convictions on eight counts — Committee erred in concluding that complainant's subjective perception alone was determinative of physician's guilt with respect to one count relating to act of sexual nature — Committee must exercise discretion judicially and would lose jurisdiction were it to abandon its function by basing conviction solely on complainant's perception — In imposing penalty, College failed to properly consider all relevant factors — Physician had not previously been before College on disciplinary matters — Acts complained of were less reprehensible

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Health law --- Physicians and surgeons — Organization of profession — Appeal to court — General

Physician was convicted by disciplinary committee on nine counts of misconduct principally related to acts of sexual nature — Penalty imposed by College included striking physician's name from register for minimum of 12 months and imposing conditions on physician's practice — Physician appealed convictions and penalties imposed — Appeal allowed in part — Evidence tendered reasonably supported convictions on eight counts — Committee erred in concluding that complainant's subjective perception alone was determinative of physician's guilt with respect to one count relating to act of sexual nature — Committee must exercise discretion judicially and would lose jurisdiction were it to abandon its function by basing conviction solely on complainant's perception — In imposing penalty, College failed to properly consider all relevant factors — Physician had not previously been before College on disciplinary matters — Acts complained of were less reprehensible than those involved in most other sentencing cases considered by College — Reduced penalty would satisfy objectives of specific deterrence and protection of public and would not diminish public confidence in College's ability to supervise its members — Period of ineligibility reduced from 12 months to six months.

Table of Authorities

Cases considered by *Baynton J.*:

Barik v. College of Physicians & Surgeons (Saskatchewan) (December 7, 1989), Doc. Q.B. J.C.Y. 123/89 (Sask. Q.B.) — considered

Brand v. College of Physicians & Surgeons (Saskatchewan) (1990), 83 Sask. R. 218 (Sask. Q.B.) — applied

Camgoz v. College of Physicians & Surgeons (Saskatchewan) (1993), 114 Sask. R. 161 (Sask. Q.B.) — applied

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Huerto v. College of Physicians & Surgeons (Saskatchewan), [1994] 9 W.W.R. 457, 124 Sask. R. 33, 117 D.L.R. (4th) 129, 26 Admin. L.R. (2d) 169 (Sask. Q.B.) — applied

Huerto v. Saskatchewan (Minister of Health) (1998), 170 Sask. R. 21, [1999] 1 W.W.R. 471, 8 Admin. L.R. (3d) 287 (Sask. Q.B.) — referred to

Norberg v. Wynrib, [1992] 4 W.W.R. 577, [1992] 2 S.C.R. 226, 92 D.L.R. (4th) 449, 12 C.C.L.T. (2d) 1, 9 B.C.A.C. 1, 19 W.A.C. 1, 138 N.R. 81, 68 B.C.L.R. (2d) 29, [1992] R.R.A. 668 (S.C.C.) — distinguished

Paquin v. League of Educational Administrators, Directors & Superintendents (Saskatchewan) (1996), 145 Sask. R. 172

(Sask. Q.B.) — applied

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Stephen v. College of Physicians & Surgeons (Saskatchewan) (1991), 95 Sask. R. 176 (Sask. Q.B.) — applied

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Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

Medical Profession Act, 1981, S.S. 1980-81, c. M-10.1
Pt. V — referred to

Pt. VI — referred to

s. 6(2)(m) — considered

s. 46 [am. 1993, c. 31, s. 7] — considered

s. 46(o) [rep. & sub. 1993, c. 31, s. 7(a)(iii)] — considered

s. 46(p) [en. 1993, c. 31, s. 7(b)] — considered

s. 50(5) — considered

s. 54 — considered

s. 62(1) [rep. & sub. 1988-89, c. 13, s. 7] — considered

s. 62(3) [rep. & sub. 1988-89, c. 13, s. 7] — considered

s. 69.1 [en. 1988-89, c. 13, s. 8; rep. & sub. 1993, c. 31, s. 24] — considered

Saskatchewan Medical Care Insurance Act, R.S.S. 1978, c. S-29
Generally — referred to

APPEAL by physician of conviction by disciplinary committee on nine counts of misconduct.

***Baynton J.*:**

1 Dr. Hanna was convicted of nine counts of misconduct by a disciplinary hearing committee. Seven of the counts were of a sexual nature, one pertained to the misrepresentation of a patient record and the other was for failure to advise a patient of the risks and benefits of an allergy drug. The penalty imposed by the Council under s. 54 of *The Medical Profession Act, 1981*, S.S. 1980-81, c. M-10.1, as amended (the "Act"), was to strike his name from the register of the College of Physicians and Surgeons without eligibility to have his name restored for a minimum period of twelve months. The conditions of his restoration are that he take counselling, have a female chaperone present for every interaction with female patients and make his medical records available so that his compliance can be audited. He appeals under s. 62(1) of the Act to quash the convictions and alternatively to reduce the term of his suspension.

Issues

2 Dr. Hanna raises numerous grounds of appeal. The primary grounds put forward at the appeal hearing are summarized as follows:

(1) Did the disciplinary hearing committee err in failing to apply the appropriate standard of proof?

(2) Were the convictions against the law and the evidence?

(3) Did systemic racial bias exist and did it affect the outcome of the internal discipline process of the respondent?

(4) Did the disciplinary hearing committee err in denying the appellant access to the psychiatric and psychological records of C.B., one of the complainants?

(5) Was the penalty imposed on Dr. Hanna unjust and excessive?

Facts

3 The seven counts of sexual misconduct for which Dr. Hanna was convicted are summarized as follows. The first four counts (counts numbered 1 to 4 before the committee) arose from one office visit on June 10, 1997 by C.B., one of Dr. Hanna's female patients. Two of these counts involved questions he asked her about her sexual history and her sexual likes and dislikes. The remaining two counts involved his touching her breasts inappropriately and remaining in the room while she partially disrobed pending an examination. A fifth count (count 8 before the committee) arose from one office visit on April 23, 1996 by D.F., another of Dr. Hanna's female patients and involved his touching her breast inappropriately and his attempt to kiss her. A sixth count (count 10 before the committee) arose from one office visit on September 19, 1997 by C.L., another of Dr. Hanna's female patients and involved his pulling the sweatband of her sweat pants that resulted in the partial exposure of her buttocks. A seventh count (count 5 before the committee) arose from one office visit on May 17, 1997 by D. L.-F., another of Dr. Hanna's female patients and involved his touching her on her clothed buttocks and his making a comment that she was putting on weight there.

4 The two additional counts that were not sexual in nature for which Dr. Hanna was convicted arose in connection with his treatment of the patient described in the seventh count. The first of these counts (count 6 before the committee) involved his misrepresentation of a medical record submitted to the College of Physicians and Surgeons on July 28, 1997. The second (count 7 before the committee) involved his failure to advise his patient of the risks and benefits of an allergy drug that was administered to her.

5 The disciplinary hearing committee acquitted Dr. Hanna of a tenth count (count 9 before the committee) that pertained to another female patient. Accordingly the disciplinary hearing committee convicted Dr. Hanna of all the charges brought

against him but one.

Analysis

a. Statutory Provisions

6 Most of the provisions of the Act that are relevant to this appeal are contained in Part V that deals with discipline and in Part VI that deals with appeals. Section 6(2)(m) authorizes the council to enact bylaws that define professional misconduct. Section 46 gives a very broad definition to the terms "unbecoming, improper, unprofessional or discreditable conduct" as well as setting out specific definitions. In particular, s. 46(p) provides that a member is guilty of such conduct by doing or failing to do anything that the council has by bylaw determined to constitute such conduct. Section 46(o) gives a disciplinary hearing committee a wide discretion to determine what constitutes such conduct. The relevant portion of s. 46 provides as follows:

> **46** Without in any way restricting the generality of "unbecoming, improper, unprofessional or discreditable conduct", a person whose name is entered on the register, the education register or the temporary register is guilty of unbecoming, improper, unprofessional or discreditable conduct, where he:
>
> . . . . .
>
> (o) does or fails to do any act or thing where the discipline hearing committee considers that action or failure to be unbecoming, improper, unprofessional or discreditable;
>
> (p) does or fails to do any act or thing where the council has, by bylaw, defined that act or failure to be unbecoming, improper, unprofessional or discreditable.

7 Clause (1)(g) of Bylaw 51 of the College of Physicians and Surgeons contains a detailed definition of "sexual impropriety" and "sexual violation", and does not distinguish between the two phrases. It provides as follows:

> 51. (1) In this section:
>
> . . . . .
>
> (g) "sexual impropriety" and "sexual violation" include, but are not limited to:
>
> (i) acts or behaviours which are seductive or sexually-demeaning to a patient or which reflect a lack of respect for the patient's privacy, such as examining a patient in the presence of third parties without the patient's consent or sexual comments about a patient's body or underclothing;
>
> (ii) making sexualized or sexually-demeaning comments to a patient;
>
> (iii) requesting details of sexual history or sexual likes or dislikes when not clinically indicated;
>
> (iv) making a request to date a patient or dating a patient;
>
> (v) initiation by the physician of conversation regarding the sexual problems, preferences or fantasies of the physician;
>
> (vi) kissing of a sexual nature with a patient;
>
> (vii) physician-patient sex whether initiated by the patient or not;

(viii) conduct with a patient which is sexual or may reasonably be interpreted as sexual such as touching any sexualized body part of a patient except for the purpose of an appropriate examination or treatment;

(ix) touching any sexualized body part of the patient where the patient has refused or withdrawn consent;

(x) sexual acts by the physician in the presence of the patient.

(emphasis added)

8 Section 50(5) of the Act provides that the rules of evidence for a hearing conducted by the discipline hearing committee are the same as in civil cases in the court. Upon a conviction by the discipline hearing committee, s. 54 authorizes the Council to impose a broad range of penalties, including suspension, upon a member who has been found guilty by a discipline hearing committee of unbecoming, improper, unprofessional or discreditable conduct.

9 Section 62(1) gives a right of appeal to the member who is suspended. It reads as follows:

62(1) A person:

(a) whose name is struck from the register, the education register or the temporary register;

(b) who is prohibited from practising in Saskatchewan;

(c) who is suspended from practising or reprimanded; or

(d) whose practice is restricted or who has otherwise been disciplined under section 54;

may appeal in the manner provided in this Part from the decision of the council to the court.

10 Section 62(3) gives the appeal court a wide discretion, including the power to substitute its own decision for that of the council. It reads as follows:

62(3) On hearing the appeal, the court may:

(a) confirm the decision of the council;

(b) vary the decision of the council;

(c) substitute its own decision for that of the council; or

(d) quash the decision of the council;

and may make any order as to costs that it considers appropriate.

11 Section 69.1 sets out that the protection of the public is to take priority over the rehabilitation of the member. It reads as follows:

> **69.1** In any proceeding before the competency committee or the discipline hearing committee, in any consideration by the council of a report from either of these committees and in any appeal pursuant to this Act, the protection of the public and the safe and proper practice of medicine shall take priority over the rehabilitation, treatment and welfare of a member.

b. The Standard of Appellate Review

12 The standard of appellate review respecting appeals brought under the Act has been established by numerous cases in the courts of this Province. See: *Stephen v. College of Physicians & Surgeons (Saskatchewan)* (1991), 95 Sask. R. 176 (Sask. Q.B.), *Brand v. College of Physicians & Surgeons (Saskatchewan)* (1990), 83 Sask. R. 218 (Sask. Q.B.), and *Huerto v. College of Physicians & Surgeons (Saskatchewan)* (1994), 124 Sask. R. 33 (Sask. Q.B.). The same standard of appellate review applies to appeals taken under *The Saskatchewan Medical Care Insurance Act*, R.S.S. 1978, c. S-29. *Sothilingam v. Joint Medical Professional Review Committee* (1998), 167 Sask. R. 76 (Sask. Q.B.) and *Huerto v. Saskatchewan (Minister of Health)* (1998), 170 Sask. R. 21 (Sask. Q.B.).

13 The cases all indicate that despite the power of the court to substitute its own decision for that of the council or the disciplinary hearing committee, it should not overturn findings of fact unless they are not supported by the evidence or unless the conclusions reached on the facts are unreasonable. This is especially applicable to findings based on the credibility of witnesses as the tribunal which sees and hears the witnesses is in a better position to assess their credibility than the appeal court which is limited to a transcript of the testimony of those witnesses. *Paquin v. League of Educational Administrators, Directors & Superintendents (Saskatchewan)* (1996), 145 Sask. R. 172 (Sask. Q.B.). Accordingly my role as an appellate judge is not to retry the case, but to critically analyze the evidence to determine whether it reasonably supports each of the convictions of Dr. Hanna by the disciplinary hearing committee respecting the charges brought against him.

c. The Standard of Proof

14 The parties disagree as to the appropriate standard of proof that applies to charges heard by a disciplinary hearing committee. Courts have from time to time utilized different terminology to describe the standard of proof in any given situation. In my view there is but one standard of proof in a civil case, and that is on a balance of probabilities. Even when serious allegations are involved, the standard of proof does not shift to proof beyond a reasonable doubt as is the standard in a criminal case. I adopt the reasoning and the authorities relied on by Klebuc J. in dealing with this issue in *Westfair Foods Ltd. v. U.F.C.W., Local 1400* Q.B. 1117 of 1997, J.C.S., November 13, 1998 [reported (1998), 174 Sask. R. 27 (Sask. Q.B.)]. He concludes in effect that the standard of proof does not shift but what constitutes cogent evidence will vary from one case to another depending on the nature of the matter to be established.

d. The Denial of Access to Psychological Records

15 The discipline hearing committee correctly followed and applied the principles set out in *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.) respecting the application by Dr. Hanna for access to the psychiatric and psychological records of the complainant, C.B. The *O'Connor* case sets out the common law procedure to be followed by a tribunal in dealing with requests for access to confidential records in the possession of a third party. *College of Physicians & Surgeons (Ontario) v. Deitel* (1997), 99 O.A.C. 241 (Ont. Div. Ct.). The disciplinary hearing committee is not a court nor was it determining a criminal charge. Accordingly the provisions of the *Criminal Code* that were enacted in response to the *O'Connor* case to deal with applications by an accused for access to such records do not apply to proceedings before a disciplinary hearing committee. It would have been in error had it purported to follow the procedure set out in the Code instead of the procedure set out in the *O'Connor* case.

16 The disciplinary hearing committee recognized and adopted the two-stage procedure set out in *O'Connor*. It found in favour of Dr. Hanna on the likely relevance first stage test and proceeded to obtain and review the confidential medical records. But it ruled against Dr. Hanna on the second stage test and declined to disclose any of the records to him. The records were sealed and were made available to me as part of the record. I have reviewed them bearing in mind the numerous

considerations set out in *O'Connor*. A balancing of these considerations leaves me with no hesitation in concluding that the disciplinary hearing committee was correct in its decision not to disclose any of the records to Dr. Hanna. There is nothing in them which, if disclosed, could reasonably have assisted Dr. Hanna in his defence. The refusal of the disciplinary hearing committee to disclose any of the records did not impair Dr. Hanna's right to a fair hearing.

e. Bias

17 I reject Dr. Hanna's submissions respecting systemic racial bias. Even if the statistical material tendered by Dr. Hanna is admissible on this appeal, it does not constitute a proper evidentiary basis upon which a finding of systemic racial discrimination can be made. A proper study and analysis of the statistical material is required before it can be relied upon as credible evidence. The statistics alone do not substantiate the allegations.

f. The Seventh Count (count 5 before the Committee)

18 The conviction of Dr. Hanna of the seventh count (the fifth before the disciplinary hearing committee) is not reasonably supported by the evidence. Dr. Hanna's version of the incident leading to the charge was disbelieved by the disciplinary hearing committee and I defer to its finding respecting credibility. But the complainant's own evidence fails to prove the offence charged. She testified that while she was with Dr. Hanna in the examining room chatting and waiting for the allergy tests he had performed on her to take effect, he "just touched my [fully clothed] butt lightly and said that I was putting weight on in that particular area. So I was embarrassed. I didn't say anything. We just talked about other things".

19 The disciplinary hearing committee rejected Dr. Hanna's evidence that the complainant had previously told him she was having trouble losing weight. In concluding that the offence had been made out it had this to say:

> However Dr. Hanna intended his conduct towards D. L.-F. to be interpreted, we accept that she found it demeaning and embarrassing. We find that Dr. Hanna violated the terms of the definition of sexual impropriety in Bylaw 51(l)(g)(ii) and (ix), and we find this charge established under sections 46(o) and 46(p) of *The Medical Profession Act, 1981*.

20 The disciplinary hearing committee erred in concluding that the subjective perception of the complainant, without regard to what Dr. Hanna might have intended or without regard to objective considerations, was determinative of the issue. A conviction for an disciplinary offence of a sexual nature will in most cases result in the suspension of the physician. If convictions could be based on the subjective feelings of the complainant alone, physicians would be placed in an untenable position. They could be suspended from practice for no other reason than the unreasonable perceptions of an overly sensitive patient.

21 A review of the Bylaw indicates that an inherent aspect of the definition of the terms "sexual impropriety" and "sexual violation" is an objective assessment of the conduct in question. See s. 51(1)(g)(viii) for example. The subjective perceptions of a complainant are important but they are not determinative of the nature of specific conduct unless the perceptions are reasonable. Objective considerations as well as subjective ones are involved in determining the nature of the conduct in issue in any given situation. All the circumstances surrounding an alleged incident must be taken into account before it can be determined whether it constitutes "sexual impropriety" or a "sexual violation". The complainant's subjective perception of an incident, unsupported by reasonable grounds, cannot alone determine the nature of the conduct associated with the incident, nor can it reasonably support a conviction for "sexual impropriety" or "sexual violation" under the Bylaw.

22 Nor does the broad discretion given to the disciplinary hearing committee by s. 46(o) of the Act permit it to base a conviction on the complainant's perception alone. Under this provision the disciplinary hearing committee may find a member guilty of unbecoming, improper, unprofessional or discreditable conduct if the member does or fails to do anything "where the discipline hearing committee *considers* that action or failure to be unbecoming, improper, unprofessional or discreditable". The term "considers" denotes that it is the disciplinary hearing committee itself that must determine whether the conduct complained of is improper. A disciplinary hearing committee performs a judicial or quasi-judicial function and any discretion given to it must be exercised judicially. It would fail to do so if it simply accepted the perception of the

complainant without an independent assessment of all relevant factors. As well, the disciplinary hearing committee would lose jurisdiction over the issue if it abandoned its function by leaving it up to the complainant to determine the very issue the committee was struck to decide.

23 A review of the complainant's evidence indicates that the incident was not even perceived herself to be sexual in nature. Nothing was ever said or done to her by Dr. Hanna, either on the date of the incident or on previous occasions when she had been in to see him, that was of a sexual nature. She was obviously highly sensitive and self-conscious about her weight. It was the comment about her weight, not the fleeting touch itself, that embarrassed and offended her. She stated that she was even too embarrassed to talk to her husband about it but discussed it with her friends who told her that they didn't think she was overweight.

24 The disciplinary hearing committee concluded that because the complainant had not consulted Dr. Hanna about her weight, his comment about it was improper. But there was no evidence to enable the disciplinary hearing committee to determine whether the complainant was overweight at the time of the comment. A medical doctor has a professional obligation to advise patients of health concerns whether or not they are raised by the patient. By way of example, a competent and caring doctor would mention his or her concerns to a patient respecting a potential skin cancer even if the patient had consulted the doctor about a cold and might unreasonably take offence at the comment. It is well known that obesity is a primary health concern and a precautionary comment should not subject a doctor to disciplinary proceedings simply because the patient was offended by the comment.

25 It may well be that the complainant is not overweight and that the comment was improper. But there is no onus on Dr. Hanna to disprove the charge brought against him. Cogent and convincing evidence is required to sustain a conviction for a serious disciplinary offence that can result in a suspension from medical practice. The evidence tendered respecting this particular count falls short of that requirement and I accordingly quash the conviction respecting it. I am however satisfied that the evidence tendered reasonably supports the convictions on the remaining counts made by the disciplinary hearing committee and I confirm each of those convictions.

g. Penalty

26 Grotsky J. in *Camgoz v. College of Physicians & Surgeons (Saskatchewan)* (1993), 114 Sask. R. 161 (Sask. Q.B.), at pp. 173-174, sets out eleven factors that should be taken into consideration by the Council in determining an appropriate sentence for a member of the medical profession found guilty of unbecoming, improper, unprofessional and discreditable conduct:

1. The nature and gravity of the proven allegations;

2. The age of the offending physician;

3. The age of the offended patient;

4. Evidence of the frequency of the commission of the particular acts of misconduct within particularly, and without generally, the Province;

5. The presence or absence of mitigating circumstances, if any.

6. Specific deterrence;

7. General deterrence;

8. Previous record, if any, for the same, or similar, misconduct; the length of time that has elapsed between the date of any previous misconduct and conviction thereon; and, the member's (properly considered) conduct since that time;

9. Ensuring that the penalty imposed will, as mandated by s. 69.1 of the Act, protect the public and ensure the safe and proper practice of medicine;

10. The need to maintain the public's confidence in the integrity of the respondent's ability to properly supervise the professional conduct of its members;

11. Ensuring that the penalty imposed is not disparate with penalties previously imposed in this jurisdiction, particularly, and in other jurisdictions in general, for the same, or similar acts of misconduct.

27 In the subsequent case of *Paquin v. League of Educational Administrators, Directors & Superintendents (Saskatchewan)*, *supra*, Grotsky J. summarized the law respecting the standard of appellate review respecting disciplinary penalties imposed by tribunals. He refers to a decision of Osborn J. in *Barik v. College of Physicians & Surgeons (Saskatchewan)* (December 7, 1989), Doc. Q.B. J.C.Y. 123/89 (Sask. Q.B.), who declined to intervene to vary a sentence imposed on a medical doctor. These cases acknowledge that the peers of a professional person are in the best position to determine an appropriate sentence. The appellate court cannot lightly interfere with such a sentence and cannot substitute its own view of what is an appropriate sentence unless the sentencing tribunal has made an error that justifies intervention.

28 The case before me is somewhat different in that I have quashed one of the convictions that was before the Council when it determined Dr. Hanna's sentence. But I doubt this would have significantly influenced the penalty imposed by the Council. As it gave no reasons for imposing the penalty that it did, I must speculate on its conclusions respecting each of the eleven factors it was required to consider as a whole. The written sentencing submission and recommendation to the Council did not enumerate the eleven factors. Instead, it emphasized only the general deterrence, specific deterrence and protection of the public factors. Even so, the suspension recommendation was a range of 6-12 months. The Council imposed the maximum of the range suggested. In doing so it erred in failing to properly consider and balance the eleven factors.

29 Before going on to deal with these factors, it is necessary to set out some background information respecting Dr. Hanna and the nature of the convictions. Dr. Hanna was 59 years of age at the time of the convictions. He had been practising medicine in Saskatchewan for almost 20 years. Prior to that time he practised in the United Kingdom for 7 years and before that in Egypt for 6 years. He has not previously been before the College on disciplinary matters and had a clear record until he was convicted of these charges. He has a wife and two teen-aged children. The disciplinary convictions and resulting suspension, regardless of its length, will have devastating consequences to his personal reputation and any future practice he may resume after his suspension ends. He has had to pay costs to the College in excess of $25,000 and the other conditions imposed on him will continue to regulate and restrict any future practice he may resume.

30 It is important to note that although there are eight convictions, all relate to three complainants and by and large arose on three separate dates. The sexual conduct, although serious, was less reprehensible than that involved in most of the comparative sentencing cases considered by the Council. All the complainants were adults. Dr. Hanna had no previous record. His conviction and suspension and the conditions imposed on him, ensured that the public would be protected and that its confidence in the integrity of the College's ability to properly supervise its members would be maintained. Although the need for a suspension was obvious to address the concerns of specific and general deterrence in the circumstances of the case, what was in issue was the appropriate length of the suspension to be imposed. That in turn depended in part on the length of suspensions previously imposed on convicted members in cases involving comparable conduct.

31 The written submission presented to the Council stated that the "primary" factor to be considered was the protection of the public. This is not what s. 69.1 states nor does that statement accurately reflect the purport of the eleven sentencing factors that must be considered. The written submission commented on the seriousness of Dr. Hanna's conduct in the light of a discussion of *Norberg v. Wynrib* (1992), 92 D.L.R. (4th) 449 (S.C.C.). The conduct of the doctor in that case in preying on the weakness of a drug addict by exchanging drugs for sexual favours, is vastly different from the conduct of Dr. Hanna in this case. Finally the written submission suggested that the appropriate sentencing precedent was the case of Dr. Sood who was suspended for six months. Again the conduct of Dr. Sood was more serious than that of Dr. Hanna. A general review of the precedents submitted to the Council illustrate that very few of them resulted in a suspension of one year or more and that in each of those few cases, the conduct in question was more serious than that of Dr. Hanna. Most cases involving similar or less serious conduct resulted in suspensions of three to six months.

32 Presumably the Council was unduly influenced by The Final Report of the Task Force on Sexual Abuse of Patients commissioned by The College of Physicians and Surgeons of Ontario which was attached to the written sentencing submission presented to the College. The report recommended the creation of two distinct levels of sexual abuse: "sexual

impropriety" and "sexual violation". The penalty recommended in connection with the former included a suspension or a lesser penalty. The penalty recommended in connection with the latter was a mandatory revocation of licence for five years. The report was put to the Council as if Dr. Hanna's conduct fell within the "sexual violation" categorization even though the Bylaw under which he was convicted makes no distinction between these two terms. In any event, based on the definitions in the report, Dr. Hanna's conduct falls primarily within the less serious category of offence rather than within the more serious category.

33 Considering all eleven sentencing factors, including the protection of the public, general and specific deterrence and comparable sentences, a period of six months before he is elligible to have his name restored to the register and the imposition of the stringent conditions previously specified, is an appropriate sentence in the circumstances.

Conclusion

34 The appeal against the conviction on count 5 respecting C.L.-F. is allowed and the conviction is quashed. The appeal is denied respecting the other convictions. The appeal against the sentence respecting the ineligibility period of one year is allowed and a sentence of a period of ineligibility of six months, with the same conditions as imposed previously, is substituted. As there has been mixed success, there is no award of costs.

Appeal allowed in part.

SA Capital Corp. v. Brooks, as Executor of the Estate of Mander, Deceased, et al.
Sbaraglia v. RSM Richter Inc. et al.
[Indexed as: SA Capital Corp. v. Mander Estate]

110 O.R. (3d) 765

2012 ONSC 2800

Ontario Superior Court of Justice,

Pattillo J.

May 23, 2012

Securities regulation -- Full answer and defence -- Disclosure -- Production of third party records -- Moving party facing allegations of serious breaches of Securities Act -- Moving party seeking order requiring court-appointed receiver to disclose documents and information obtained by it in course of court-ordered investigation -- Principles and procedures set out in R. v. O'Connor concerning production of third party records applying to motion -- General rule that court-ordered receiver is not required to provide documents or information to others beyond what is contained in its reports being subordinate to right of accused person to production in order to make full answer and defence -- Moving party only entitled to production of documents which were "likely relevant" to Ontario Securities Commission's allegations and his defences.

In the course of its investigation into the affairs of M and his company, who were allegedly carrying on a Ponzi scheme, a court-appointed receiver compelled production of documents from parties with knowledge of the affairs of M and his companies, including their lawyers and accountants. The receiver suggested that an investigation should be undertaken of S, his wife and their companies. The Ontario Securities Commission ("OSC") applied successfully for the appointment of a receiver over S's companies. The OSC then commenced proceedings against S, alleging that he had breached the Securities Act, R.S.O. 1990, c. S.5 by committing fraud and misleading the OSC staff. S brought a motion for an order compelling the receiver to provide him with certain documents and information obtained by the receiver during the investigations of S, M and their companies. He claimed that he was entitled to production of the requested documents and information in order to make full answer and defence.

Held, the motion should be granted in part.

The principles set out in R. v. O'Connor and R. v. McNeil concerning the production of third party records applied to S's motion. The protection granted to a court-appointed receiver from having to provide information or documents regarding the receivership to others beyond what is contained in its reports cannot operate to interfere with or defeat an accused's right to production in order to make full answer and defence. S was required to follow the procedure set out in O'Connor and to establish that the documents and information sought were likely to be relevant in the OSC proceeding. He met the "likely relevant" requirement with respect to some, but not all, of the requested material.

Cases referred to

R. v. McNeil, [2009] 1 S.C.R. 66, [2009] S.C.J. No. 3, 2009 SCC 3, 246 O.A.C. 154, 238 C.C.C. (3d) 353, EYB 2009-153175, J.E. 2009-174, 301 D.L.R. (4th) 1, 383 N.R. 1, 62 C.R. (6th) 1; R. v. O'Connor, [1995] 4 S.C.R. 411, [1995] S.C.J. No. 98, 130 D.L.R. (4th) 235, 191 N.R. 1, [1996] 2 W.W.R. 153, J.E. 96-64, 68 B.C.A.C. 1, 103 C.C.C. (3d) 1, 44 C.R. (4th) 1, 33 C.R.R. (2d) 1, 29 W.C.B. (2d) 152, apld [page766]

Other cases referred to

Anvil Range Mining Corp. (Re), [2001] O.J. No. 1125, 21 C.B.R. (4th) 194, 104 A.C.W.S. (3d) 16 (S.C.J. (Commercial List)); Battery Plus Inc. (Re), [2002] O.J. No. 261, [2002] O.T.C. 55, 31 C.B.R. (4th) 196, 111 A.C.W.S. (3d) 213 (S.C.J. (Commercial List)); Bell Canada International Inc. (Re), [2003] O.J. No. 4738, 2003 CanLII 22640, 126 A.C.W.S. (3d) 790 (S.C.J. (Commercial List)); Deloitte & Touche LLP v. Ontario (Securities Commission), [2003] 2 S.C.R. 713, [2003] S.C.J. No. 62, 2003 SCC 61, 232 D.L.R. (4th) 1, 179 O.A.C. 1, 13 Admin. L.R. (4th) 1, 126 A.C.W.S. (3d) 164; Impact Tool & Mould Inc. (Re), [2007] O.J. No. 5492, 41 C.B.R. (5th) 112 (S.C.J.); R. v. Stinchcombe, [1991] 3 S.C.R. 326, [1991] S.C.J. No. 83, 130 N.R. 277, [1992] 1 W.W.R. 97, 83 Alta. L.R. (2d) 193, 120 A.R. 161, 68 C.C.C. (3d) 1, 8 C.R. (4th) 277, 18 C.R.R. (2d) 210, 14 W.C.B. (2d) 266

Statutes referred to

Canadian Charter of Rights and Freedoms, s. 7

Criminal Code, R.C.S. 1985, c. C-46

Securities Act, R.S.O. 1990, c. S.5, ss. 11(1), 127 [as am.], 129(1) [as am.]

MOTION for the production of third party records.

Kevin D. Toyne and Richard Niman, for Peter Sbaraglia, moving party.

Matthew P. Gottlieb and Shannon Beddoe, for receiver Duff & Phelps Canada Restructuring Inc.

Jennifer M. Lynch, for Ontario Securities Commission.

Evan Cobb, for applicant SA Capital Growth Corp.

Frank Lamie, for Tonin & Co. LLO and Peter Tonin.

PATTILLO J.: --

Introduction

[1] This motion raises the question of whether a court-appointed receiver should be required to disclose documents and information obtained by it pursuant to a court-ordered investigation to one of the subjects of the investigation who is facing serious allegations by the Ontario Securities Commission ("OSC").

[2] The moving party, Dr. Peter Sbaraglia ("Sbaraglia"), seeks an order compelling the court-appointed receiver, Duff & Phelps Canada Restructuring Inc. (formerly RSM Richter Inc.) (the "Receiver"), to provide him with requested documents and information obtained by the Receiver during a court-ordered investigation of Sbaraglia and others in order to assist him in responding to the OSC's allegations of securities fraud and misleading staff.

Background

[3] On March 17, 2010, the Receiver was appointed receiver over the assets, property and undertaking of E.M.B. Asset Group [page767] Inc. and Robert Mander (the "Mander debtors"). It was alleged that Mander and his company EMB were carrying on a Ponzi scheme and that Mander had misappropriated tens of millions of dollars. Mander committed suicide on the same day and the receivership was subsequently continued against his estate.

[4] Following its appointment and pursuant to orders issued by the court, the Receiver compelled production of documents from certain parties with knowledge of the affairs of Mander and his companies, including their lawyers and accountants. It also met with several individuals who had knowledge of or were involved with Mander and his companies.

[5] In its fourth report to the court dated July 4, 2010, the Receiver advised that, as part of its investigation of Mander and his companies, it identified numerous issues which suggested that an investigation should be undertaken of Sbaraglia, his wife, Mandy Sbaraglia, and their companies, CO Capital Growth Corp. ("CO Capital") and 91 Days Hygiene Inc. (collectively the "CO Group").

[6] Based on the evidence contained in the fourth report, the court issued an order on July 14, 2010, authorizing and directing the Receiver to commence an investigation into the business and affairs of the CO Group. The order granted broad powers to the Receiver to carry out the investigation, including meeting with the CO Group, their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on their instructions and behalf and to obtain books and records relating to the business or affairs of the CO Group. The order specifically provided that Peter Welsh, the former solicitor for Mander and his companies and Tonin & Co. LLP, the accountants for Mander and his companies and CO Capital, deliver up their books and records in respect of those companies.

[7] On September 9, 2010, the Receiver filed its seventh report to the court summarizing its findings of its investigation of the CO Group. The Receiver stated that in preparing the report, it relied upon, among other things, "documents, records and information provided by various parties, including several financial institutions, the CO Group, Tonin & Co. LLP, the former accountant to Mander and the CO Group, and Aylesworth LLP and Peter R. Welsh, former legal counsel to the CO Group". The Receiver disclaimed any opinion on the accuracy of the information obtained.

[8] The report indicated the investigation was ongoing and highlighted major issues identified by the Receiver to date, including that Sbaraglia's testimony before the OSC in July 2009 [page768] was misleading and incomplete; that the CO Group knew or ought to have known that they were not generating returns sufficient to repay their obligations to investors; that the CO Group were insolvent based on an admission by Sbaraglia in an affidavit filed; and that the CO Group had advised they may make payments to family members in preference to other creditors. The Receiver recommended that a receiver be appointed over the CO Group.

[9] The Receiver has continued to provide periodic reports to the court concerning both the Mander debtors' receivership and the CO Capital debtors' receivership.

The OSC Proceedings

[10] On September 8, 2010, following an investigation pursuant to s. 11(1) of the Securities Act, R.S.O. 1990, c. S.5, as amended (the "Securities Act"), which began in July 2008, the OSC commenced an application to the Superior Court (Commercial List) pursuant to s. 129(1) of the Securities Act, for the appointment of a receiver over the business, assets and undertakings of the CO Group.

[11] The CO Group strenuously opposed the OSC's application. They took the position they had done nothing wrong and were victims of Mander's fraud. Extensive materials were filed in opposition and numerous cross-examinations were conducted.

[12] The OSC's application was heard by Justice Morawetz in December 2010. In lengthy oral reasons on December 23, 2010, Justice Morawetz granted the OSC's application and appointed the Receiver as receiver over the CO Group.

[13] On February 24, 2011, the OSC issued a notice of hearing and statement of allegations naming Sbaraglia as the respondent and alleging that Sbaraglia had breached the Securities Act by committing fraud and misleading the OSC staff.

[14] As particularized in the statement of allegations, the OSC alleges that Sbaraglia committed fraud by

(a) failing to do any due diligence with respect to Mander and his investment scheme and obtaining any objective evidence from Mander about the alleged investment profits;
(b) misleading and deceiving investors by operating CO Capital's business in a way which deviated from its purported business model by keeping approximately $6-7 million of $21 million raised from investors in CO Capital and using the funds for (i) making payments to CO Capital investors with newly received funds from other CO Capital investors; [page769] (ii) making investments in securities, either directly in trading accounts of CO Capital or indirectly in trading accounts in the names of other companies, that resulted in significant losses; and (iii) making payments for personal expenses of the Sbaraglias; and
(c) using CO Capital investor moneys to fund his lifestyle.

[15] In respect of the allegation of materially misleading the OSC staff, the OSC alleges that during his July 9, 2009 examination by the OSC staff that was conducted under oath with counsel present, Sbaraglia failed to disclose liabilities of approximately $9.4 million owing to CO Capital investors and misled the staff about the assets that were allegedly available to satisfy CO Capital's obligations. It is also alleged that an undertaking given to the OSC by Sbaraglia on August 7, 2009 was materially misleading because it failed to identify material obligations of CO Capital in its schedule of outstanding loans.

[16] The hearing in respect of the OSC's allegations against Sbaraglia, which was originally scheduled to begin on June 4, 2012, has been adjourned at Sbaraglia's request and is currently scheduled to take place beginning October 22, 2012.

[17] The OSC has provided Sbaraglia with full disclosure (subject to its ongoing disclosure obligations) of all relevant documents in its possession and custody. Included in this disclosure are some of the Receiver's reports to the court and the entire record in the OSC's application for the appointment of a receiver over the CO Group.

[18] The Receiver is not a party to the OSC's proceedings against Sbaraglia.

Sbaraglia's Motion

[19] On this motion, Sbaraglia requests an order requiring the Receiver to

(i) produce transcripts, recordings and/or notes of interviews with 16 named individuals who met with the Receiver as part of its investigation;
(ii) produce documents provided to the Receiver by the individuals;
(iii) produce documents provided to the Receiver by the lawyer and accountant to both the Mander debtors and the CO Group pursuant to court order; [page770]
(iv) produce copies of e-mails to and from Sbaraglia which had been deleted but subsequently recovered by the Receiver from CO Capital's computers and servers and which are referred to in the Receiver's fourth report to the court;
(v) prepare an index of all the documents in the Receiver's power, possession and control; and
(vi) produce any additional documents that may be requested by Sbaraglia once he has had an opportunity to review the index.

The Position of the Parties

(a) Sbaraglia

[20] Sbaraglia submits, given the serious allegations alleged against him by the OSC and the potential sanctions that could be levied against him if the allegations are established, he is entitled to production of the requested documentation and information in order to make full answer and defence. The documents and information sought are relevant to the matters at issue before the OSC and will assist Sbaraglia in defending himself. It is submitted that the motion is analogous to an O'Connor application for third party production as dealt with by the Supreme Court of Canada in R. v. O'Connor, [1995] 4 S.C.R. 411, [1995] S.C.J. No. 98. Sbaraglia further submits that the Receiver has an obligation to provide relevant documents to "interested parties" such as himself.

(b) The Receiver

[21] The Receiver opposes Sbaraglia's motion on a number of grounds. It submits that the documents and information requested arose as a result of work done by it as an officer of the court pursuant to a court order. It cannot and should not be compelled to produce documents, including its working papers, either in the proceeding for which it was appointed or for purposes outside of it, which is what Sbaraglia's request amounts to. The Receiver further submits that it is prohibited from producing documents and other evidence obtained by it from third parties for any purpose other than for use in the proceeding in which the Receiver obtained the materials based on the common law implied undertaking rule. The Receiver further submits that the test in O'Connor has no application on this motion and, in any event, Sbaraglia has failed to adduce cogent evidence that the sought-after documents are likely relevant. Finally, the Receiver points to the estimated expense of complying with [page771] Sbaraglia's request and submits that the cost will result in a significant depletion of the estate's remaining cash which is otherwise available to distribute to creditors.

(c) The OSC

[22] The OSC appeared on the motion and filed a factum setting out some background information regarding its proceedings involving Sbaraglia and some of the OSC's rules of procedure. The OSC took no position on the motion.

(d) SA Capital Growth Corp.

[23] SA Capital Growth Corp., the applicant in the Mander debtor receivership, opposed the motion on the grounds that compliance with the request will result in the depletion of the estate's funds which should be distributed to the creditors.

(e) Tonin & Co. and Peter Tonin

[24] Tonin & Co. and Peter Tonin filed no material on the motion but adopted the positions of the Receiver and SA Capital against production.

Discussion

[25] The issues raised on this motion intersect principles from both insolvency law and criminal law.

[26] The Receiver submits that a court-appointed receiver cannot be compelled to produce documents obtained as part of its mandate in one proceeding for use in a separate proceeding.

[27] There is no question that receivers, as court-appointed officers, are afforded certain protections by the court in order to enable them to carry out their duties in an efficient and cost-effective manner. Court-appointed receivers file reports with the court for the purpose of providing information regarding the proceeding to the court and interested parties. Beyond the information contained in the reports, a receiver is not generally required to produce the details of its investigations, either within the receivership or for a purpose outside it. Receivers are not generally subject to cross-examination on their reports except in "exceptional or unusual" circumstances. See Bell Canada International Inc. (Re), [2003] O.J. No. 4738, 2003 CanLII 22640 (S.C.J. (Commercial List)); Impact Tool & Mould Inc. (Re), [2007] O.J. No. 5492, 41 C.B.R. (5th) 112 (S.C.J.); and Anvil Range Mining Corp. (Re), [2001] O.J. No. 1125, 21 C.B.R. (4th) 194 (S.C.J. (Commercial List)). A receiver is required only to respond to parties' reasonable requests for information [page772] regarding the receivership but is not required to produce all documents in its possession: Battery Plus Inc., [2002] O.J. No. 261, 31 C.B.R. (4th) 196 (S.C.J. (Commercial List)).

[28] The Receiver submits that, given the strict limits placed on the ability to compel the receiver to testify in respect of its own report in its own proceeding and the limit on the receiver to produce documents to parties relevant only to the receivership proceeding, the court ought not compel the Receiver to produce its preparatory notes and working papers in respect of a report for the purposes of a proceeding outside the receivership.

[29] Based on the above, therefore, and even though Sbaraglia is an interested party in both the Mander debtors and the CO Capital Group receiverships, he is not entitled to production of the information he seeks from the Receiver given the law relating to receiverships.

[30] That, however, does not end the issue. Sbaraglia submits that based on s. 7 of the Canadian Charter of Rights and Freedoms, he is entitled to production of the information requested in order to enable him to make full answer and defence in respect of the serious allegations that he is facing from the OSC.

[31] In R. v. Stinchcombe, [1991] 3 S.C.R. 326, [1991] S.C.J. No. 83, the Supreme Court of Canada held that in a criminal prosecution, the Crown has a duty to disclose to the accused all information in its possession or control unless it is clearly irrelevant or protected by a recognized form of privilege. The duty arises from the Crown's position and the accused's constitutional right as contained in s. 7 of the Charter to make full answer and defence.

[32] The duty of the Crown to disclose all information in its possession and control (and its corollary, the right of an accused to make full answer and defence) applies equally to the OSC and its prosecutors in respect of proceedings under s. 127 of the Act. See Deloitte & Touche LLP v. Ontario (Securities Commission), [2003] 2 S.C.R. 713, [2003] S.C.J. No. 62.

[33] Not long after Stinchcombe, the Supreme Court of Canada held in O'Connor, supra, that production of documents in the hands of third parties not involved in the prosecution may also be required to be produced to enable an accused to make full answer and defence. The court recognized, however, that because third parties have no duty to disclose to an accused, are not involved in the proceedings and have potential privacy issues in the information sought to be disclosed, that different rules for production of third party documents should apply. [page773]

[34] O'Connor dealt with the production of medical and therapeutic records of a complainant in a case involving numerous sexual offences. Subsequent to the decision, Parliament amended the Criminal Code, R.S.C. 1985, c. C-46 to provide a procedure for disclosure of third party records containing complainants' personal information in sexual assault cases. Nevertheless, the principals and procedure set out by L'Heureux-Dubé J., writing for the majority in O'Connor, have been recognized and adopted as applying to all requests by accused for production of documents in the hands of a third party who is not involved in the proceedings against the accused.

[35] The procedure established by O'Connor essentially involves an application to the court by the accused, supported by affidavit evidence, showing that the documents or information sought are likely to be relevant in the proceeding. Notice of the application is given to the prosecutor, the person who has control of the records, the person who is the subject of the records and anyone else who might have a privacy interest in the information sought. On the return of the application, the judge is required to engage in a two-step procedure. First, he or she must determine from the evidence whether the information sought is "likely relevant" to the proceedings the applicant is facing. If the judge is satisfied the information is "likely relevant", the next step is for the court to

review the documents. In that regard, the court may order production of the record for inspection by the court. Following review of the document or documents, the judge must then determine whether and to what extent, if any, production should be ordered to the applicant.

[36] In establishing the procedure to be followed in permitting production to an accused of third party records in criminal cases, L'Heureux-Dubé J. set out the considerations that must be borne in mind, at para. 132 of O'Connor:

> 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 fulfill 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 [page774] 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.

[37] The procedure set out in O'Connor was considered and confirmed by the Supreme Court of Canada in R. v. McNeil, [2009] 1 S.C.R. 66, [2009] S.C.J. No. 3. At para. 33, Charron J., on behalf of the court, set out the meaning of "likely relevant" as referred to in O'Connor:

> "Likely relevant" under the common law O'Connor regime means 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" (O'Connor, at para. 22 (emphasis deleted)). An "issue at trial" here includes not only material issues concerning the unfolding of the events which form the subject matter of the proceedings, but also "evidence relating to the credibility of witnesses and to the reliability of other evidence in the case" (O'Connor, at para. 22). At this stage of the proceedings, the court cannot insist on a demonstration of the precise manner in which the targeted documents could be used at trial. The imposition of such a stringent threshold burden would put the accused, who has not seen the documents, in an impossible Catch-22 position.

[38] In discussing the second stage of the O'Connor procedure, the review and determination by

the court of whether or not to order production, Charron J. stated, at para. 35 of McNeil:

> In O'Connor, this Court provided the following list of factors for consideration in determining whether or not to order production to the accused (at para. 31):
>
> > "(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).
>
> The factors set out in O'Connor should not be applied mechanically. It should be kept in mind that O'Connor involved the production of the complainant's private records in proceedings for a sexual offence, an area of law subsequently overtaken by Parliament's enactment of the Mills regime. Some of the factors listed in O'Connor, in particular items 4 and 5 above, were obviously tailored to meet the exigencies in sexual assault proceedings and, consequently, are unlikely to be of assistance in other contexts. Ultimately, what is required at this second stage of the common law regime is a balancing of the competing interests at stake in the particular circumstances of the case. No exhaustive list can be crafted to suit every situation; however, I will elaborate somewhat on the balancing process. [page775]

[39] In my view, the principles set forth in O'Connor and McNeil concerning the production of third party records to enable an accused to make full answer and defence are of general application to records held by all third parties, regardless of whether they are private citizens, government agencies or court officers. The protections granted to a court-appointed receiver in a receivership to not have to generally provide information or documents regarding the receivership to others beyond what is contained in its reports cannot operate, in my view, to interfere with or defeat an accused's right to production in order to make full answer and defence. It follows that a court-appointed receiver is not prevented from having to produce its records to enable an accused to make full answer and defence where such documents are "likely relevant" and the balancing of the competing interests at stake favours the disclosing of the record.

[40] The procedure and safeguards set forth in O'Connor and elaborated on in McNeil are more than sufficient, in my view, to meet any concerns about production that the Receiver has raised in this case, including privacy and costs, while at the same time giving effect to Sbaraglia's right to make full answer and defence to the allegations he is facing before the OSC.

[41] Having said that, however, in order to obtain production, it is incumbent on Sbaraglia to

follow the procedure set out in O'Connor and establish the necessary requirements. The onus is on Sbaraglia.

Likely Relevant

[42] Sbaraglia seeks the records of the Receiver arising from interviews and documents obtained by it from 16 individuals during the Mander debtors' receivership which he submits will assist him in demonstrating that he did not know nor could he have known that Mander was engaged in fraudulent activities. Of the 16 individuals, 11 are former partners, associates, employees or clients of Mander; three are lawyers who acted for both Mander and CO Capital; one is an accountant; and one is the OSC staff investigator who conducted the investigation of Sbaraglia for the OSC.

[43] Sbaraglia also seeks production of certain deleted e-mails the Receiver has recovered as well as an index of all documents in the Receiver's possession and control from the Mander debtors' receivership and the right to request production of further documents once the index has been produced. [page776]

(a) Former partners, associates, employees or clients of Mander

[44] The Receiver, in the course of its mandate in the Mander debtors' receivership, interviewed, had discussions with and communicated periodically with nine of the 11 individuals. Two of the individuals, Grant Walton and Tascha Fluke, were never interviewed or corresponded with. None of the interviews or discussions were recorded or transcribed. What exists in the Receiver's files are notes and internal memoranda concerning the discussions.

[45] In addition, two of the individuals, David Amato and Thomas Obradovich, are former lenders to CO Capital and filed affidavits in the OSC's application for the CO Group receivership. They were cross-examined at length by the CO Groups' counsel during the application. They have also been examined by the OSC and the transcripts of those proceedings have been produced to Sbaraglia as part of the OSC's disclosure obligations.

[46] The Receiver further indicates that it did not keep any schedule of documents received from the individuals.

[47] In my view, Sbaraglia has not established, based on the allegations in the OSC's notice of hearing and the evidence or lack thereof before me, that the information or documents provided to the Receiver by the 11 individuals who were former partners, associates, employees or clients of Mander is likely relevant to his defence to the OSC allegations. Sbaraglia has not established that the information requested is either logically probative to an issue before the OSC or relates to the credibility of a witness or the reliability of other evidence in the case. I have reached this conclusion for a number of reasons.

[48] First, and given that the Receiver has had no communication with either of Walton and

Fluke, there is no evidence that there is any record in the hands of the Receiver concerning them that is likely relevant to Sbaraglia's due diligence defence.

[49] Of the nine individuals remaining, there is no evidence that any of them have refused to speak to Sbaraglia or his counsel about their dealings with the Receiver or to provide copies of the documents they provided to the Receiver, if any. In fact, [the] Sbaraglia affidavit indicates that in the case of three of the individuals, Zurini, Auriemma and Ward, either he or his wife spoke with them after they met with the Receiver. Sbaraglia has listed the nine individuals specifically and the Receiver has confirmed that it had discussions with them. Any information or documents given to the Receiver that Sbaraglia now seeks to obtain [page777] came from the individuals and one would have thought they would be the first persons to speak to about it. It is no answer, in my view, to say that the discussions with the Receiver took place a long time ago and the Receiver's record is therefore the best evidence when no attempt whatsoever has been made to speak with these individuals in the first instance.

[50] Further, some of the individuals have been cross-examined at length by Sbaraglia's counsel in the CO Group receivership application. No explanation has been provided by Sbaraglia as to why the information obtained from that proceeding about the individuals' relationship with Mander and Sbaraglia is not sufficient. In fact, it was not mentioned at all by Sbaraglia in his affidavit.

[51] I am mindful that in both O'Connor and McNeil, the court noted that the onus on the applicant in an application for third party production to establish likely relevant is not high given that the applicant has no information about what's in the documentation being sought. In my view, however, where an applicant seeks records of information given by specific individuals and has not first established that the information is unavailable from the individuals, the applicant has failed to meet his or her onus.

[52] The nine individuals who the Receiver spoke with and received documents from were associated with Mander, worked with him or dealt with him. To simply say, as Sbaraglia does many times in his affidavit, that information concerning what the person said or gave to the Receiver is necessary to assist him in his due diligence defence is, without more, speculative and without substance. The OSC's allegation of failure to exercise due diligence is that Sbaraglia failed to do any due diligence with respect to Mander and his investment scheme and obtain any objective evidence from Mander about the alleged investment profits. I am unable to conclude, in the absence of some specific information from Sbaraglia, that the relationships between the nine individuals and Mander and their dealings with him are in any way likely relevant to Sbaraglia's due diligence defence.

[53] Nor has Sbaraglia established that the information sought is necessary for the credibility of witnesses or the reliability of other evidence in the case. The OSC has indicated that it intends to call two staff investigators and a number of Sbaraglia's former clients as witnesses at the hearing. There is no indication any of the nine individuals will be witnesses at the hearing. Further, the OSC

staff has advised Sbaraglia on at [page778] least two occasions that it does not intend to call the Receiver as a witness at the hearing against Sbaraglia.

[54] As a result, I find that Sbaraglia has failed to establish that the Receiver's records relating to its discussions with the nine individuals as part of the Mander debtor receivership which he seeks production of are likely relevant to the OSC's allegations against him. In my view, his request for such records is nothing more than a fishing expedition, which is clearly not permissible.

(b) The lawyers

[55] Julia Dublin and Michael Miller from Alysworth LLP acted for Sbaraglia and Mander from approximately May 2009 to early 2010. The Receiver interviewed them with Sbaraglia's consent and recorded the interviews. No transcript of those interviews has been prepared.

[56] Peter Welsh acted for both Mander and his companies and CO Capital. As noted, the July 14, 2010 order required Mr. Welsh to produce documents relating to the Mander debtors and CO Capital to the Receiver. The Receiver met with Mr. Welsh.

[57] I view Sbaraglia's request for production of information received by the Receiver from the lawyers to be different from the records requested concerning the nine individuals. The record indicates that Sbaraglia is suing the lawyers from which I infer that speaking to them about what they said or gave in the way of documents to the Receiver or what they may say to support his due diligence defence is not realistic. Accordingly, I am not troubled by the fact that there is no evidence of any attempt by Sbaraglia or his lawyers to speak with the lawyers.

[58] Dublin and Miller were present when Sbaraglia was interviewed by the OSC. It is that interview and some of the answers provided by the lawyers (with Sbaraglia present) that is part of the OSC's allegation that Sbaraglia misled the OSC. What Dublin and Miller told the Receiver during their interviews could likely be relevant to the allegations Sbaraglia is facing. Similarly, any documents that they provided to the Receiver concerning their representation of CO Capital may also be likely relevant.

[59] I am of the same mind in respect of any documents provided by Welsh to the Receiver concerning his representation of CO Capital.

[60] With respect to any discussions with Welsh, there is no transcript. I do not regard the Receiver's notes of any discussions to be likely relevant. They are the note-taker's impression [page779] of the discussion and do not necessarily reflect what was said by the interviewee. Nor can they be used to impeach credibility.

(c) The accountant

[61] Also as noted, the July 14, 2010 order required Tonin & Co. LLP, who acted for Mander's

companies and CO Capital, to produce all related documents to the Receiver. In addition, the Receiver met with Peter Tonin, the partner who was in charge of the clients.

[62] There is no indication on the record why Sbaraglia or his counsel cannot speak with Tonin concerning his discussions with the Receiver. I infer, however, from the position taken by Tonin's counsel before me that any such request may not have had much success.

[63] For the same reason as noted concerning Welsh, it is my view that any documents which Tonin provided to the Receiver concerning CO Capital may be likely relevant to the OSC's allegations and Sbaraglia's defence. I do not, however, consider the Receiver's notes, if any, of any discussions with Tonin to be likely relevant for the reasons stated in respect of Welsh.

(d) The OSC staff investigator

[64] Pursuant to para. 30 of the fresh as amended receivership order in the Mander debtors' receivership dated March 31, 2010 which requested, among other things, that any regulatory or administrative body in Canada assist the Receiver in carrying out the order, the OSC staff investigator and other OSC staff members met with the Receiver and provided information concerning the OSC's investigation of, among others, Mander and Sbaraglia. All of the material provided to the Receiver by the OSC has been disclosed to Sbaraglia by the OSC as part of its disclosure obligations.

[65] Further, the investigator filed an affidavit in the OSC's receivership application against the CO Group and was cross-examined at some length by the CO Group's counsel.

[66] In my view, Sbaraglia has not established that any records the Receiver has with respect to its meeting with the OSC investigator are likely relevant to the issues raised by the OSC. The investigator was not interviewed by the Receiver. The OSC and the Receiver to some extent conducted parallel investigations. Sbaraglia has obtained full disclosure from the OSC concerning its investigation which is all of the information provided by the OSC to the Receiver. In addition, Sbaraglia has cross-examined the investigator at length in the OSC receivership application. [page780]

(e) Deleted e-mails

[67] As a result of the consent of CO Capital, the Receiver had access to CO Capital's computers and servers and identified e-mail correspondence from and to Sbaraglia that had been previously deleted, including e-mails sent to Sbaraglia on March 24, 2010, one day prior to the Receiver attending at CO Capital's office.

[68] Sbaraglia states in his affidavit that although he does not know what the deleted e-mails contain or whether he has copies, the Receiver's fourth report which refers to them gives the impression they contain relevant information and, accordingly, he believes that they will assist him

in defending the OSC's allegations.

[69] While I consider the reference to the deleted e-mails in the Receiver's report was simply to note a concern that e-mails had been deleted, particularly in and around the time when it was appointed receiver of the Mander debtors and is not a comment concerning their specific relevance, unlike the information requested from the nine individuals, because the deleted e-mails are to and from Sbaraglia, I am unable to conclude based on the information before me that they are not likely relevant to his defence of the OSC's allegations.

(f) Index of documents and information in the Receiver's possession and control

[70] As noted, Sbaraglia requests that the Receiver produce an index of all documents and information in its power, possession and control. Sbaraglia believes that it will assist him in defending the OSC's allegations. He further seeks the right to request production of any document which may appear in the index.

[71] There is no basis in the evidence for establishing that the Receiver should produce an index of all documents and information received by it during the two-year period of the Mander debtors' receivership. I am not prepared to find, in the absence of some specific information, that such an index is likely relevant to any of the issues raised in the OSC's allegations. The Receiver indicates that no such inventory has been prepared. The documents number in the hundreds. The request, in my view, is simply too bald and general to meet the test of likely relevant. In my view, it amounts to nothing more than a fishing expedition and not something the court can or will permit. [page781]

Conclusion

[72] Accordingly, for the above reasons and with the procedure set forth in O'Connor in mind, I direct that the Receiver have a transcript made of its interviews with Dublin and Miller for my review. The Receiver should also prepare and produce for my review the documents provided by Welsh and Tonin pursuant to court order concerning CO Capital only along with the deleted e-mails it recovered from CO Capital's computers and servers. I request that this be done as soon as possible and, in any event, by June 10, 2012 in order that I can review the transcript and documents to determine whether and to what extent production, if any, of the transcripts and documents should be ordered to Sbaraglia having regard to the factors set out in O'Connor and McNeil and the issues raised by the Receiver and Sbaraglia on the motion. If there is an issue concerning the timing I have set out, I may be spoken to.

[73] I am mindful of the costs to the Mander debtors' receivership of these additional requests placed upon the Receiver. I do not think, however, that the costs of producing the requested information should be significant. They must, however, be borne by the Receiver at this stage. The Receiver should keep track of its costs in preparing and providing the requested transcripts and documentation and I will deal with them along with the costs of the motion generally upon

completion of the motion.

Motion granted in part.

CITATION: R. v. Oleksiuk, 2013 ONSC 5258
COURT FILE NO.: CR-12-1078 and CR-12-891
DATE: 2013-10-09

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN and ONTARIO PROVINCIAL POLICE	)	Dallas Mack and Sam Humphrey, for the Crown
	)	Katie Clements, for the Ontario Provincial Police
Co-Applicants	)	
- and -	)	
KERSTI OLEKSIUK and ERIC THOMPSON	)	Darwin Yantha, for Mr. Aucoin
Respondents	)	
	)	**HEARD:** July 2, 2013

REASONS ON CERTIORARI APPLICATION

JAMES J.

Nature of the Application

[1] This matter involves applications by both the Crown and the Ontario Provincial Police (the "OPP") for a writ of c*ertiorari* quashing the decision of Radley-Walters, J dated January

23, 2013 wherein he ordered the Crown to disclose certain records and information in the possession of the OPP relating to an Intoxylizer 8000C breath testing device.

History of the Proceeding

[2] The respondents are both charged with the offence of operating a motor vehicle with a blood alcohol concentration in excess of the legal limit. They both made applications for disclosure of certain items and records (the "records") relating to the device that provided the breath test results, an Intoxylizer 8000C (sometimes referred to as the "approved instrument").

[3] The applications were heard together. The respondents (the applicants in the first instance) called no evidence. The Crown called one expert witness, Dr. Robert Langille, a forensic toxicologist at the Centre of Forensic Sciences and a member of the Alcohol Test Committee. The Alcohol Test Committee is a committee of the Canadian Society of Forensic Sciences. The committee provides advice to the Minister of Justice on breath testing and impaired driving issues and is the sole body that evaluates breath testing equipment. The committee also publishes recommended standards and procedures for alcohol breath testing and blood testing equipment.

[4] The respondents sought disclosure of the following five items:

i. A sample of the alcohol standard solution used in the test in question;

ii. Subject test records for the approved instrument in question and for the previous twenty-four subject tests;

iii. Calibration records for the approved instrument in question for a period of 3 months prior to the subject tests;

iv. Maintenance logs and records for the approved instrument in question for a period of one year prior to the subject tests; and

v. Usage logs regarding the alcohol standard solution since the last calibration prior to the tests in question.

[5] An alcohol standard solution is used to perform calibration checks prior to taking a breath sample that may lead to a charge being laid (sometimes referred to as "subject test"). The solution is formulated to produce a reading of 100 mg of alcohol in 100 ml of blood within a range of plus or minus 10 mg. This calibration test mimics a breath test and if the approved instrument detects a problem, it registers a diagnostic fail reading which is printed on a paper record and provided to the accused. If the calibration test indicates a reading of 100 mg of alcohol in 100 ml of blood, the results of the successful calibration test are also printed on a paper record and provided to the accused.

[6] Since the decision in *R. v. Boudens*, 2009, (OCJ), unreported, it has been policy for the Pembroke Police Service to routinely provide the following information:

i. The actual test results for the approved instrument in question for the last 25 times it was used with any personal identifiers blacked out;

ii. Production of any and all printouts respecting calibration checks, diagnostic checks and internal standard checks performed on that particular instrument during the last 12 month period.

[7] In the case of the present respondents, however, Crown counsel notified defence counsel that this information was "clearly irrelevant" and would not be disclosed. The phrase "clearly irrelevant" is the standard applicable to the Crown's disclosure obligations established by the decision in *R v. Stinchcombe* (1991), 68 C.C.C., 3d 1 (S.C.C.).

[8] The decision of the Crown not to disclose the above information prompted the defence to make the disclosure application that led to the order now under review.

[9] The presiding application judge articulated the issues raised by the application as follows:

i. Whether or not the accused is entitled to disclosure which might assist the individual accused person in proving that the approved instrument either

malfunctioned or was operated improperly as is required by Section 258 of the *Criminal Code of Canada*, and if so what specific disclosure is the accused entitled to?

ii. Whether the applicants are required to bring an *O'Connor* application to obtain records relating to any tests performed by the specific Intoxylizer 8000C with respect to previous accused persons;

iii. Whether or not the disclosure sought by the applicants in this case falls within the test for disclosure set out in *Stinchcombe*.

[10] The disclosure order required the Crown to provide the following items:

a. Certificates of Analyst for the alcohol standard solutions involved;

b. Samples of the alcohol standard solution, if they still exist;

c. The applicants' test records generated by the approved instrument and the 24 immediately prior subject test records with personal information redacted;

d. Calibration records for the 3 months prior to the subject tests;

e. Maintenance logs and records for the year prior to the subject tests; and

f. Usage logs for the alcohol standard solution since the last calibration prior to the subject tests.

[11] The application judge concluded that a sample of the alcohol standard solution used in the test in question and the usage logs regarding the alcohol standard solution since the last calibration prior to the tests in question ought to be disclosed because they could be relevant if either the specific alcohol standard solution was passed its expiry date or if it had been tampered with or stored improperly. Disclosure of the previous 24 subject tests and 3 months' of calibration records could be relevant to show that the approved instrument malfunctioned in the past, required service or was not operated properly. Disclosure of

maintenance records could be relevant to determine if the approved instrument had been repaired and if any parts had been replaced or modified.

[12] The application judge quoted with approval from the decision in *R. v. Gubins* [2009] O.J. No. 848 (O.C.J.) as follows:

> The test for disclosure as set out in R. v. Stinchcombe.... is that the Crown is required to disclose all relevant information, whether it is inculpatory or exculpatory, and whether or not the Crown intends to introduce it as evidence. This broad duty of disclosure is subject only to a limited discretion to withhold what is "clearly irrelevant", privileged or beyond the Crown's control....
>
> The trial judge on a review should be guided by the general principle that the information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence unless the non-disclosure is justified by the law of privilege. (para. 13,14)

[13] The application judge held that since the requested disclosure was in the hands of the police, it was therefore within the control of the Crown. The requested disclosure fell within the ambit of *Stinchcombe*. (para. 14, 16).

[14] On the issue of whether or not the disclosure required an *O'Connor* application, the application judge concluded that it was not necessary for two reasons. Firstly, the removal of personal identifiers eliminated any privacy concerns. Secondly, the applicants were not seeking disclosure from sources outside the control of the police such as documents from the manufacturer of the approved instrument.

Position of the Parties

[15] The applicants contend that there are two grounds which independently support the request to quash the disclosure order.

[16] Firstly, they say that the application judge committed a jurisdictional error in concluding that the records were subject to the first party disclosure rules contained in *Stinchcombe*.

They contend that the OPP should have been treated as a third party, thereby entitling the police to make submissions whether, and to what extent, a disclosure order was appropriate. The failure to give notice of the application to the OPP and an opportunity to be heard constituted a denial of natural justice.

[17] Secondly, they state that the application judge made an order that was contrary to the evidence of the only witness, Dr. Langille, who said the requested disclosure did not provide assistance in determining whether the device was an approved instrument and whether it was working properly when it measured the quantity of alcohol in the respondents' blood. They say a finding that is contrary to the evidence constitutes an error of law on the face of the record.

[18] The respondents contend that the OPP does not have standing to contest the impugned order because the requested records constitute first party disclosure; the *Stinchcombe* disclosure regime ought to govern this situation. Consequently, there has been no denial of natural justice principles because for disclosure purposes, the OPP is not a third party.

[19] Secondly, the respondents argue that there are aspects of the expert evidence of Dr. Langille that suggest the requested records are sufficiently relevant to support the order that was made.

[20] Thirdly, the respondents emphasize the narrow basis upon which an extraordinary remedy ought to be permitted.

Availability of Certiorari

[21] The present application seeks to quash the order requiring disclosure of information relating to the particular device in question.

[22] There are two applicants, the Crown and the OPP. The presence of the OPP as a co-applicant is significant. It is the owner and operator of the device in question. Although it is

affected by the disclosure order, as a stranger to the prosecution it has limited ability to have its position placed before the court.

[23] The remedy available through a writ of *certiorari* is limited to quashing certain types of decisions made by an inferior statutory tribunal. It is a discretionary remedy and not available to an applicant as of right. In *R v. Russell* [2001] 2 S.C.R. 804 McLachlin, C.J. said as follows:

> The scope of review on certiorari is very limited. While at certain times in its history the writ of certiorari afforded more extensive review, today certiorari "runs largely to jurisdictional review or surveillance by a superior court of statutory tribunals, the term 'jurisdiction' being given its narrow or technical sense": Skogman v. The Queen, [1984] 2 S.C.R. 93, at p. 99. Thus, review on certiorari does not permit a reviewing court to overturn a decision of the statutory tribunal merely because that tribunal committed an error of law or reached a conclusion different from that which the reviewing court would have reached. Rather certiorari permits review "only where it is alleged that the tribunal has acted in excess of its assigned statutory jurisdiction or has acted in breach of the principles of natural justice which, by the authorities, is taken to be an excess of jurisdiction."

[24] In *Dagenais v. Canadian Broadcasting Corp.*,[1994] 3 S.C.R. 835, Lamer. J. acknowledged that provincial superior courts have jurisdiction to hear *certiorari* applications against provincial court judges for excesses of jurisdiction and for errors of law on the face of the record. In *Dagenais*, the Canadian Broadcasting Corporation applied for an order quashing a publication ban. Since the order in that case was held to be inconsistent with the principles of the *Charter*, the publication ban constituted an error on the face of the record (para. 38).

The Jurisdictional Error (What is the Applicable Disclosure Regime?)

[25] The OPP says that the application judge made a jurisdiction error in ordering that the records be disclosed by the Crown. Central to this submission is the need to determine whether the requested records constitute first party disclosure or third party disclosure. This requires a consideration of whether it is proper to regard the police and the Crown as a single disclosing entity (the *Stinchcombe* disclosure regime) or whether the police should

be viewed as a third party distinct from the Crown for disclosure purposes (the *O'Connor* disclosure regime).

[26] In *R v. McNeil* [2009] 1 S.C.R. 6, the Supreme Court of Canada dealt with a defence request for production of police disciplinary records and the criminal investigation files relating to a police officer who was the Crown's main witness against the accused. The issue was whether the Crown (and the police) had an obligation under *Stinchcombe* to disclose all material pertaining to its investigation of the accused including the requested records, unless they were clearly irrelevant. The competing view was that the disclosure obligation was limited to production of all relevant records *in the possession of the Crown* and such additional records as may be in the hands of the police *pertaining to its investigation of the accused* (the so-called "fruits of the investigation"). *McNeil* stands for the following propositions:

a. The *O'Connor* regime provides a general mechanism at common law for ordering production of any record beyond the possession or control of the prosecuting Crown. The *O'Connor* regime is not limited to cases where the third party has an expectation of privacy in the targeted documents;

b. Whether the targeted document is subject to a reasonable expectation of privacy is one of the questions to be determined. It is a factor, not a pre-condition. Privacy is not an all or nothing right. It is a contextual, fact-based inquiry;

c. Records in the possession of one Crown entity are not to be deemed to be in the possession of another. While the police and the Crown may be viewed as one entity for disclosure purposes, the two are separate and independent entities in fact and law. The prosecuting Crown has an obligation to make reasonable inquiries of other Crown entities and other third parties respecting records and information that may be relevant to the case being prosecuted; and,

d. Police disciplinary records and third party criminal investigation files may in appropriate circumstances be sufficiently relevant to the case of the accused that they should form part of the "first party" disclosure package from the police to the Crown, subject to further vetting by the prosecuting Crown. Notice to the subject of the records may be required.

[27] In *R. v. Black*, [2011] A.J. No. 129, 286 C.C.C. (3d) 432 (C.A.) the Alberta Court of Appeal granted an appeal from a decision of a reviewing judge requiring disclosure of the calibration logs for an approved screening device (ASD). An ASD roadside test assists in determining whether a police officer has reasonable and probable grounds to require a breath test. In the first instance the trial judge ordered the production of the calibration logs as first party disclosure, relying in part on three decisions from Ontario.[1] The Crown and the Chief of Police for the Edmonton Police Service brought a *certiorari* application. After finding that *certiorari* was an available remedy, the reviewing judge concluded the trial judge's decision was correct and dismissed the application. On appeal, K.G. Ritter J.A. considered the role played by the ASD in impaired driving investigations and the relevance of the calibration tests. He concluded that the calibration standards were reasonable and observed that a fail reading does not result in a charge against the accused. He considered the process by which an officer can formulate reasonable and probable grounds and held that logs were irrelevant to any issue respecting charges of impaired driving or driving over .08.

[28] In a dissenting judgment M.B. Bielby J.A. said that in his view the logs ought to be produced as first party disclosure as "fruits of the investigation". He was unmoved by police claims of increased administrative burdens and additional costs.

[29] Subsequently, in *R.v. Kilpatrick*, [2013] A.J. No. 41 (A.C.Q.B.) R.A.Graesser J., sitting on appeal of the accused's summary conviction in provincial court, held that it was appropriate to differentiate between ASD records and maintenance logs for approved instruments and found the latter to be subject to first party disclosure rules. Failure to disclose in the first instance resulted in an order for a new trial. Leave to appeal was refused. The judge hearing the application for leave noted that there was a lack of expert evidence relative to the operation of the device and said this interfered with the Crown's ability to meet the required criteria.

[1] *R. v. Gubins*, 2009 ONCJ 80; *R. v. Pfaller*, 2009 ONCJ 216; *R. v. Robertson*, 2009 ONCJ 388.

[30] In Ontario, judges of the provincial court have been grappling with the issue of disclosure of Intoxylizer records for several years. Two lines of authorities have emerged. One branch holds that the Crown has the onus of establishing that the records are clearly irrelevant in order to avoid the necessity of producing them.[2] Within this group, the determination of which categories of records are and are not "clearly irrelevant" is unevenly applied. The cases are often inconsistent with respect to the type of information that is ordered to be disclosed.

[31] A second line of authorities[3] holds that the defence has the onus of establishing that the records are "likely relevant" in order to compel their production. When this more restrictive approach is employed, accused persons have had difficulty making the case that the requested records can have probative value and that they are likely to contain material and relevant information respecting the reliability of a particular set of readings. An example of this is the rejection of the double error concept by A. Tuck-Jackson J. in *R. v. Ahmed,* [2010] O.J. No. 1500 (C.J.).

[32] In my view the OPP ought to be given an opportunity to be heard on the various aspects of the disclosure issue. Clearly the law in this area is not settled. The interests of the OPP may not be synonymous with the prosecuting Crown. The OPP is an outsider to the defence disclosure request and has limited opportunities to advance its position. Despite the obvious fact that the prosecuting Crown works closely with the police in marshaling evidence, *McNeil* tells us they are separate entities in fact and law. The OPP possesses the records in question and therefore has direct interest in addressing disclosure issues. Natural justice principles are engaged when a party with a discernible interest in the outcome seeks an opportunity to be heard. (See *L.L.A. v. A.B.*, [1995] 4 S.C.R. 536 at para.27, 28)

Error of Law on the Face of the Record

[2] In addition to *Gubins, Pfaller* and *Robertson*, see also *R. v. Jemmett*, 2009 ONCJ 741, *R. v. George*, 2009 ONCJ 470 and *R. v. Dionne*, 2009 ONCJ 609.

[3] See *R. v. Bensette*, [2011] O.J. No. 403 (C.J.); *R. v. Ahmed*, [2010] O.J. No. 1500 (C.J.); *R. v. Batenchuk,* [2010] O.J. No. 2302 (C.J.); *R. v. Lenti*, [2010] O.J. No. 5081 (C.J.); *R. v. Carriveau* [2011] O.J. No. 4318 (C.J.) and *R. v. Da Costa* [2011] O.J. No. 3942 (C.J.)

[33] *Certiorari* is available to quash an order that constitutes an error on the face of the record and this jurisdiction is available to a provincial superior court in relation to provincial court judges (See *Dagenais*, para. 38).

[34] More difficult, however, is a definition of what actually constitutes an error of law on the face of the record. Counsel for the OPP says it is an error that is "apparent from the record" and that any order that is "inconsistent with the governing law" is an error of law on the face of the record. In particular, "the failure to consider a relevant factor or alternative measure may also be characterized as an error of law on the face of the record". (OPP factum, para. 44).

[35] Spies, J. in *R. v. J.M.*, [2012] O.J. No. 2199 (S.C.J.) observed at para. 28 that:

> Despite the able assistance of my law clerk, I have found no principled explanation or comprehensive definition of what constitutes such errors in the criminal law context. Instead, courts seem to have taken a case-by-case approach in determining whether an error is an error of law on the face of the record.

[36] In *Skogman v. The Queen*, [1984] 2 S.C.R. 93, Estey, J. discussed the remedy in these terms:

> In the result, certiorari, or the newer term of judicial review, runs largely to jurisdictional review or surveillance by a superior court of statutory tribunals, the term 'jurisdiction' being given its narrow or technical sense. In the absence of a privative clause, the Court may also review for error of law on the face of the record. However, even then, under the most recent authorities, the error must assume a jurisdictional dimension. These authorities and the development and Darwin-like elimination of sub-doctrines are reviewed in Douglas Aircraft Company of Canada Ltd. v. McConnell, [1980] 1 S.C.R. 245, particularly at pp. 265-78. It is clear, however, that certiorari remains available to the courts for the review of the functioning of the preliminary hearing tribunal only where it is alleged that the tribunal has acted in excess of its assigned statutory jurisdiction or has acted in breach of the principles of natural justice which, by the authorities, is taken to be an excess of jurisdiction (see Forsythe v. The Queen, [1980] 2 S.C.R. 268). It need only be added by way of emphasis that such certiorari review does not authorize a superior court to reach inside the functioning of the statutory tribunal for the purpose of challenging a decision reached by that tribunal within its assigned jurisdiction on the ground that the tribunal committed an error of law in reaching that decision, or

reached a conclusion different from that which the reviewing tribunal might have reached.

[37] I am not prepared to quash the order on the basis of an error of law on the face of the record for the following reasons:

i. *Certiorari* is an extraordinary remedy and should be used sparingly;

ii. A decision respecting whether an order ought to be quashed is discretionary;

iii. The impugned order is consistent with a line of authorities emanating from the same court;

iv. The OPP has been granted redress that will result in a rehearing. A remedy such as *certiorari* should not be more intrusive than necessary; and,

v. I am not convinced that the impugned order amounts to an error on the face of the record.

Disposition

[38] An order shall issue quashing the order of Radley-Walters J. dated January 23 2013 and remitting the matter to the Ontario Court of Justice for reconsideration of the issue of whether or not the records sought by the respondents are third party records.

[39] It is further ordered that the OPP shall be provided the opportunity to call evidence and make submissions on the issue of whether the records sought by the respondents are third party records.

Honourable Justice Martin James

Released: October 9, 2013

CITATION: R. v. Oleksiuk, 2013 ONSC 5258
COURT FILE NO.: CR-12-1078 and CR-12-891
DATE: 2013-10-09

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN and ONTARIO PROVINCIAL POLICE

Co-Applicants

- and –

KERSTI OLEKSIUK and ERIC THOMPSON

Respondents

REASONS FOR CERTIORARI APPLICATION

JAMES J.

Released: October 9, 2013

Ontario Energy Board

Commission de l'Énergie de l'Ontario

EB-2011-0316

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Schedule B);

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance and an Administrative Penalty against Summitt Energy Management Inc., Licence Numbers ER-2010-0368 and GM-2010-0369

BEFORE: Ken Quesnelle
Presiding Member

Cathy Spoel
Member

DECISION AND ORDER AND PROCEDURAL ORDER NO. 3

The Ontario Energy Board (the "Board"), on its own motion under section 112.2 of the *Ontario Energy Board Act, 1998* (the "Act"), issued a Notice of Intention (Notice) stating that it intends to make an Order under sections 112.3 and 112.5 of the Act requiring Summitt Energy Management Inc. ("Summitt") to comply with a number of enforceable provisions as defined in section 112.1 of the Act and to pay an administrative penalty in the amount of $15,000 for breaches of enforceable provisions. By way of letter dated September 7, 2011, Summitt, in accordance with the opportunity provided in the Notice, requested that the Board hold a hearing on this matter. The Board is therefore holding a hearing into this matter. The parties to this proceeding are Summitt and the staff members of the Board (assisted by external counsel) assigned to bring forward this matter ("Compliance").

The Board issued Procedural Order No. 1 on November 22, 2011, which established December 22nd as a provisional date for the hearing of any motions pertaining to the hearing, as well as the schedule for filings pertaining to potential motions.

Summitt filed a Notice of Motion on December 15th, 2011. The Motion seeks various orders of the Board with respect to, among other things, the confidential treatment of certain information, requirements of the compliance staff to disclose certain information, a requirement for certain witness statements or summaries of anticipated oral evidence, contact information of intended witnesses, information pertaining to intended expert witnesses, the establishment of an interrogatory process, and the fixing of a hearing schedule according to a proposed timetable.

In response, Compliance filed its submission on December 19, 2011 addressing the matters raised in the motion and the relief sought by Summitt.

The motion was argued before the Board on December 22, 2011. Compliance agreed at the hearing to provide much of the information Summitt was requesting. The Board established January 13, 2012 as the date for the production of the "agreed to" information. Several issues, however, remained contested.

Decision on Motion

A. Additional Disclosure

Summitt's original request for additional disclosure was itemized in Schedule "A" to its Notice of Motion. Since the Notice of Motion was filed the list of requested documents has become shorter, either because Compliance has agreed to provide the documents, or because Compliance has confirmed that the documents do not exist.

Compliance's written submissions (para. 33) describe five categories of documents that it will not agree to provide absent an order from the Board:

(a) The audit working papers, investigator notes and memoranda;

(b) The names, addresses and telephone numbers of the individuals at the Board who instructed Ernst & Young ("E&Y"), to whom E&Y reported and with whom

E&Y discussed the auditor's process and findings, and from whom the auditors sought guidance and instruction (beyond Mr. Mustillo);

(c) The names, addresses and telephone numbers of the individuals at E&Y who conducted the audit of Summitt, who reviewed and commented upon the audit findings, who prepared and submitted the audit report to the Board and who discussed the audit and its findings with the Board (beyond Stephen Hack, the E&Y partner who signed the E&Y Report);

(d) Particulars of the audits of other energy retailers and marketers, including the identity of such retailers and marketers, the scope of the audit, copies of the audit reports and other materials put before decision-makers in those instances;

(e) Particulars and supporting reasons for the calculation of the administrative monetary and other penalties sought in each of the other Notices of Intention issued at or about the same time in respect of the concurrent audits of other energy retailers and marketers, as well as for the calculation of the administrative penalty sought in this proceeding.

The test

Although there was disagreement between the parties regarding what documents Compliance should be required to disclose, there was general agreement regarding the test the Board should apply in considering requests for disclosure. Both parties agreed that Summitt is entitled to disclosure that will allow it know the case against it, and thereby be provided with the opportunity to make full answer and defence.[1]

The case law is clear, however, that in an administrative process such as the current proceeding, Compliance is not necessarily required to disclose all potentially relevant material. As the Federal Court of Appeal held in *Ciba-Geigy Canada Ltd. v. Canada (Patented Medicine Price Review Board)*:

[1] See, for example, *Howe v. Institute of Chartered Accountants of Ontario* (1994), 19 O.R. (3d) 483 (C.A.) and *Ontario (Human Rights Commission) v. Dofasco Inc.* (2001), 57 O.R. (3d) 693 (C.A.) (both cited in Summitt's factum); and the Board's decision on motion in EB-2010-0221 (Re Summitt Energy Management Inc.), dated August 23, 2010 (cited in Compliance's factum).

> Certainly, the subject of an excess price hearing is entitled to know the case against it, but it should not be permitted to obtain all the evidence which has come into the possession of the Board in carrying out its regulatory functions in the public interest on the sole ground that it may be relevant to the matter at hand. […]
>
> To require the Board to disclose all possibly relevant information gathered while fulfilling its regulatory obligations would unduly impede its work from an administrative standpoint.[2]

The test, therefore, is not whether a document is possibly relevant; the test is whether disclosure is required for Summitt to know the case to be met and to make full answer and defence.

Decision with respect to specific requests for disclosure

Names and contact information of individuals at the Board who dealt with Ernst &Young ("E&Y") with respect to this matter

Names and contact information of individuals at E&Y who worked on the audit

The Board will not require Compliance to provide any additional information regarding individuals at the Board who dealt with E&Y with respect to this matter.

As a practical matter, it appears that few if any people at the Board had substantive dealings with E&Y respecting this matter other than Mr. Lou Mustillo, who is known to Summitt and will be Compliance's first witness. Regardless, in the Board's view there is no compelling reason why Compliance should be required to provide the names of any individuals other than proposed witnesses.

Compliance is required to provide Summitt with materials sufficient to "allow it to know the case it is expected to meet with sufficient detail to enable it to mount an effective defence to the allegations contained in the notice of intention to make an order." It is not clear how the identity of persons at the Board who were involved in this case (other than the proposed witnesses) will assist Summitt in understanding the case it has to

[2] [1994] 3 F.C.J. No 884, paras. 5-8.

meet. The onus will lie with Compliance to present evidence to the Board which satisfies the Board that Summitt has breached an enforceable provision of the Act.

For the same reasons (though subject to the additional ruling below) the Board will not require Compliance to provide Summitt with any additional names and contact information of individuals at E&Y who were involved in the preparation or review of the audit. The Board finds that additional contact information is not necessary to allow Summitt to know the case it has to defend.

Particulars of audits of other energy retailers

The Board will not require Compliance to provide any additional information with respect to audits conducted of other energy retailers.

Additional information regarding audit of energy retailers would be of little to no value in the current proceeding. Information relating to many recent Board compliance activities respecting other retailers is already a matter of public record, as are several Board decisions where notices of intention to make an order were contested. Summitt submitted that this information could be relevant to any potential due diligence defence it might choose to present. The Board is not convinced by this argument. Even to the extent that other energy retailers were thought to have or found to have breached similar enforceable provisions, any information relating to their due diligence practices would be of little to no benefit in the current proceeding. In any event, Summitt would have had to be aware of the practices of other retailers to rely on them as part of the basis of a due diligence defence. Disclosure by Compliance of this information after the fact will not be relevant if Summitt was not already aware of it, and if Summitt was aware of it, disclosure is not required.

Particulars relating to the calculation of administrative penalties sought against other energy retailers

The Board will not require Compliance to provide any additional information with respect to the calculation of the administrative penalties sought against any other party in other proceedings.

Compliance has already provided Summitt with the details on how Compliance determined what it regarded as an appropriate administrative penalty against Summitt

for the alleged breaches of enforceable provisions in this case. The administrative penalties that Compliance sought against other parties is also a matter of public record. In the event that the Board determines that one or more breaches of enforceable provisions have occurred in this case, the Board will determine the quantum of any administrative penalty. Compliance will present its view of an appropriate penalty, and Summitt will present its view. Presumably Compliance's argument in any penalty submissions will include details regarding how it determined what it views to be the appropriate penalty. This will of course not be binding on the Board, although it will be considered like any other submission before the Board. Details regarding how Compliance determined what it viewed as appropriate penalties in *other* proceedings, however, has no relevance to the current proceeding.

The audit working papers, investigator notes and memoranda

Compliance has already provided Summitt with all documents in its possession relating to the audit conducted by E&Y. What remains in dispute is the status of working papers, audit notes, etc., that may have been produced by employees of E&Y, but were never provided to Compliance (and which therefore have not been provided to Summitt).

Although employees of E&Y are not, of course, employees of the Board, they were retained by Compliance and appointed as inspectors pursuant to section 106 of the Act for the purpose of conducting the audit of Summitt. They were acting on behalf of Compliance. To the extent that any materials produced by E&Y meet the tests for disclosure as described above, they should be provided to Summitt. The Board does not consider the fact that the documents (to the extent they exist) were produced by people who do not work directly for Compliance to protect them from disclosure. The Board will consider Summitt's request for disclosure of documents in the possession of E&Y no differently than it would consider a request for similar documents produced by Compliance itself.

The Board has determined that the audit working papers, investigator notes and memoranda produced by E&Y but not given to Compliance may be relevant and therefore will order that they be provided to Summitt by Compliance.

The Board will rely on Compliance to obtain the documents and provide them to Summitt.

B. Interrogatories

While the Board indicated at the end of the motions day that it would make provisions for a limited interrogatory process, now that (in a decision being released concurrently) the Notice of Intention has been amended to clarify that the alleged contravention relates to physical placement, the Board expects that such interrogatories, if any, will be very limited in scope, as they must relate specifically to the allegations of non-compliance. The Board also expects that any interrogatories posed by Summitt will generally fall within the scope of the Board's findings relating to discovery: in other words the Board will not expect interrogatories in areas where the Board has declined Summitt's request for further information from Compliance.

The Board considers it necessary to make provision for the following procedural matters. The Board may issue further Procedural Orders from time to time.

THE BOARD THERFORE ORDERS THAT:

1. Compliance shall file any outstanding materials Ernst & Young prepared in regards to the Summitt audit with the Board, and copied to Summitt, on or before **April 16, 2012**.

2. If Summitt wishes information and material from Compliance that is in addition to the evidence filed with the Board shall request it by written interrogatories filed with the Board, and delivered to Compliance on or before **April 30, 2012**.

3. Compliance shall file with the Board complete responses to the interrogatories and deliver them to Summitt no later than **May 14, 2012.**

All filings to the Board must quote file number EB-2011-0316, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format filed through the Board's web portal at https://www.errr.ontarioenergyboard.ca/. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may e-mail your document to boardsec@ontarioenergyboard.ca.

Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies. All communications should be directed to the attention of the Board Secretary, and be received no later than **4:45 p.m.** on the required date.

ISSUED at Toronto, April 2, 2012
ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

File No. EB-2017-0007

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance and Payment of an Administrative Penalty against Planet Energy (Ontario) Corp. (ER-2011-0409) (GM-2013-0269)

ONTARIO ENERGY BOARD

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF BOARD ENFORCEMENT STAFF
(Planet Energy Motion for Third Party Records)

Stockwoods LLP Barristers
TD North Tower
77 King Street West
Suite 4130, P.O. Box 140
Toronto-Dominion Centre
Toronto, ON M5K 1H1

Andrea Gonsalves LSUC #52532E
Email: *AndreaG@stockwoods.ca*
Justin Safayeni LSUC #58427U
Email: *JustinS@stockwoods.ca*

Tel: 416-593-7200
Fax: 416-593-9345

Lawyers for the Ontario Energy Board
Enforcement Staff