THE CROWN'S DISCLOSURE OBLIGATIONS REGARDING LOST OR DAMAGED EVIDENCE[1]

A. Introduction

1. The remedies available to an accused when the Crown loses or damages relevant evidence can be seen to flow from three landmark cases with which all competent criminal lawyers are already quite familiar: *Stinchcombe (1991)*[2]*; O'Connor (1995)*[3]*; and Carosella (1997)*[4]. Each case touches upon broad themes in criminal justice: the notion of full answer and defence; the right to disclosure or to production; the duties of the Crown and the police to preserve and disseminate documentary evidence; and the sense of fair play that underlies or ought to underlie our system of Canadian justice.

B. Historical Analysis – *O'Connor & Carosella*

2. It is popular and proper to think of the *O'Connor* decision as one that sets out the common law regime for the production of third party records, but as Justice L'Heureux-Dube pointed out in the

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[2] *R. v. Stinchcombe* (No.1) (1991), 68 C.C.C. (3d) 1, [1991] 35C.R. 326, 8 C.R. (4th) 277.
[3] *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1, 130 D.L.R. (4th) 235, [1995] 4 S.C.R. 411, 44 C.R. (4th) 1, 33 C.R.R. (2d) 1.
[4] *R.v.Carosella* (1997), 112 C.C.C. (3d) 289, 142 D.L.R. (4th) 595, [1997] 1 S.C.R. 80, 207 N.R. 321, 41 C.R.R. (2d) 189, 4 C.R. (5th) 139.

majority judgment, "strictly speaking" leave had only been sought in the Supreme Court on the question of the appropriateness of a stay—a stay that was the product of non-disclosure of evidence from the Crown. The significance of *O'Connor* in this regard is critical in that it forms a cornerstone for *Charter* jurisprudence on the issue of *Charter* relief generally, and where and when a stay is appropriate.

3. It is important to bear in mind, as well, that *O'Connor* was not a case about "lost" evidence, but about suppressed evidence. The Crown there refused to disclose evidence to the defence on the basis that it considered the evidence irrelevant, despite the existence of a defence-obtained production order. Moreover, although defence counsel had obtained a production order, the order was given without notice to any third-party record holders, or, in fact, to the complainants themselves.

4. At trial, a stay was ordered when additional disclosure was made mid-way through the cross-examination of a defence witness. The trial judge found that the accused had suffered prejudice "although he conceded the extent of this prejudice could not be measured" (C.C.C., at 31). The trial judge also noted the constant intervention required by the court to ensure full compliance with the production order, and found that the Crown's questionable conduct,

"had created 'an aura' that had pervaded and ultimately destroyed the case" (C.C.C., at 31), thereby creating "one of the clearest of cases" to justify a stay. To allow the case to proceed, the trial judge held, would have tarnished the integrity of the court.

5. When the case came before the Supreme Court of Canada, on appeal from the BCCA, the court took the opportunity to analyze and clarify the relationship between the common law doctrine of abuse of process and the *Charter.* Ultimately, the court reaffirmed the principle it had earlier set out in *Jewitt*[5]: "there is a residual discretion in a trial judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive and vexatious proceedings" (C.C.C., at 33).

6. The BCCA had favoured maintaining a distinction between competing models of stay jurisprudence: the first arising out of the court's inherent jurisdiction (per *Jewitt*); the second arising out of s. 24(1) as a remedy for a Charter breach. But the Supreme Court noted that there was "a strong trend toward convergence between the Charter and traditional abuse of process doctrine", and concluded

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[5] *R. v. Jewitt* (1985), 21 C.C.C. (3d) 7, 20 D.L.R. (4th) 651, [1985] 2 S.C.R. 128.

that, as a general rule, "there is no utility in maintaining two distinct approaches to abusive conduct. The distinction is one that only lawyers could possibly find significant". In the end, the burden at common law—"the clearest of cases"—was (C.C.C., at 38) appropriated into a more elastic, more flexible *Charter* regime. Where there was a s. 7 breach, "the remedy of a judicial stay would be appropriate under s. 24(1) only in the clearest of cases" (C.C.C., at 37)

7. In examining the case on its merits, the Court in *O'Connor* said that the non-disclosure fell into a residual category of conduct addressing "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" (C.C.C., at 39-40). A challenge arising from this category of non-disclosure "will generally require a showing of actual prejudice to the accused's ability to make full answer and defence" (C.C.C., at 40). Moreover, this determination involved an inquiry into "materiality": immaterial non-disclosed information could not generate a *Charter* breach. Finally, a stay of proceedings could only be granted, "when all other acceptable avenues of protecting an accused's right to full answer and defence are exhausted" (C.C.C., at 41).

8. The decision in *O'Connor* formed the backdrop for *Carosella*, a case primarily, if not exclusively, about destroyed rather than lost evidence. Although by now the facts in the case are commonly known, they are worth repeating. Charges of gross indecency covering the timeframe 1964 – 1966 were laid in 1992. The complainant initially attended a Sexual Assault Crisis Centre where she told them the story behind the charges. Before going to the police, the complainant agreed that whatever she told the Centre could be subpoenaed to court.

9. At trial, a production Order was issued compelling the Centre to disclose notes of the interview with the complainant. But the Centre had shredded the notes of the complainant's interview, as part its policy of combating production orders. At trial, a stay application was brought, and through evidence of the Centre's director the Court learned that approximately 300-400 other files had been shredded, each of which, of course, unless destroyed was potentially vulnerable to a production order.

10. The Supreme Court of Canada confirmed the trial judge's ruling that a stay was appropriate. The Court confirmed that "the entitlement of an accused person to production either from the Crown or third parties is a constitutional right" (C.C.C., at 301) and

noted (although this position would later be revisited in *R v La)* that "to require the accused to show that the conduct of his or her defence was prejudiced would foredoom any application for even the most modest remedy where the material has not been produced. It would require the accused to show how the defence would have been affected by the absence of material which the accused has not seen." (C.C.C., at 302)

11. The Supreme Court noted that the degree of prejudice suffered by the accused was a concern for the remedy stage, not for determining whether in fact there had been a *Charter* breach. The Court rejected the notion that it was incumbent on the accused to show that as a result of non-disclosure he was probably deprived of a fair trial; rather, the focus was on whether the accused could show a "reasonable possibility" of impairment of the right to make full answer and defence (See also, for example, the decision of the Court of Appeal for Alberta in *Antinello*[6]).

12. In *Carosella*, the Court held that if the material that was shredded met "the threshold test for disclosure or production, the appellant's *Charter* rights were breached *without the requirement of showing additional prejudice*" (C.C.C., at 307, emphasis added).

[6] *R. v. Antinello* (1995), 97 C.C.C. (3d) 126.

Because the notes related to the subject matter of the trial and were able to "shed light on the 'unfolding of events' or credibility" (C.C.C., at 308), and were likely "the first written record of the allegations," the trial judge was justified in determining that whatever was in the notes was relevant and material, and quite capable of forming the foundation for cross-examination (C.C.C., at 308).

13. In confirming the trial judge's decision to grant a stay, pursuant to 24(1) of the Charter, the Court agreed that although "a stay should only be exercised in the clearest of cases", having regard to the fact that credibility was "a major issue in the case", the destruction of documents was "very significant" (C.C.C., at 310). Either of two factors — the first that there was no alternative remedy available to the accused; the second that the conduct of the Centre was calculated to "deprive the court and the accused of relevant evidence"—would have justified the exercise of discretion in favour of a stay.

14. In dissent, Justice L'Heureux-Dube (not surprisingly) was critical of majority for "setting too low of a threshold for finding a breach of the right to full answer and defence" (C.C.C., at 322). She noted that an accused does not have an "automatic right to every piece of potentially relevant evidence in the world" (C.C.C., at 316), that it was "inaccurate to elevate this objective to a right, the non-

performance of which leads instantaneously to an unfair trial," and that an accused was only "entitled to a fair trial, where relevant, unprivileged material gathered by the Crown is disclosed, while evidence in the hands of third parties, after a balancing of considerations, is produced in appropriate cases" (C.C.C., at 316-17). Moreover, it would be incumbent on the accused to "demonstrate that there was actually some harm to his position."

C. *R. v. La*[7] and the Prejudice Requirement

15. In *R. v. La*, the Alberta Court of Appeal was faced with the issue of the loss of an audiotape statement of a complainant, and the case later presented the Supreme Court of Canada an opportunity to reconsider its analysis in *Carosella*.

16. A 13-year-old Asian runaway girl was located by an Officer Hollinger as a passenger in a vehicle being driven by a person known to police as a pimp. The girl was taken to police headquarters where she was ultimately apprehended under child welfare legislation. In the interim, she provided Hollinger with a 45-minute audio taped interview that detailed her prostitution activities and her claim that she had been sexually assaulted at a local hotel. Hollinger reviewed

[7] *R. v. La* (1997), 116 C.C.C. (3d) 97, affirming 105 C.C.C. 417.

the tape and testified *in camera* at family court proceedings. Sometime later, the audiotape was lost, although further written materials and supplementary taped interviews were provided to the defence. Additionally, Hollinger had been involved in a shooting incident that was described as "extremely stressful" (at 421).

17. The trial judge ruled that the proceedings should be stayed on the grounds that the permanent loss of the tape recording of the initial interview with the complainant had made it impossible for the accused to have a fair trial.

18. On appeal, the central issue was the degree of duty upon the police to preserve statements taken by them, and the consequences for having failed to do so. The Court of Appeal determined that while they did not wish to find that the police did not have a duty to preserve evidence and statements taken by them, perfection was not required. The inadvertent loss of a statement should not lead to a stay of proceedings any more than the failure of a police officer to take complete notes or to record each conversation with a witness.

19. Quite properly, the Court of Appeal recognized that initial complaints are often made in circumstances in which recording is not possible or practical. The Court went on to say that if a police officer

within a reasonable period of time obtains a written statement from the witness, or an oral statement that is reduced to writing, *that is sufficient*, unless the evidence establishes on a balance of probabilities that the oral statement was materially different, in some particular other than lack of detail, from that later given in writing. (105 C.C.C., at 424-25, emphasis added).

20. On further appeal to the Supreme Court of Canada (released four months after *Carosella*), Sopinka J., for the majority, succinctly determined that "when the prosecution has lost evidence that should have been disclosed, the Crown has a duty to explain what happened to it. So long as the explanation is satisfactory, it discharges the Crown's constitutional obligation to disclose. There will, however, be a breach of the Canadian Charter of Rights and Freedoms if the explanation does not satisfy the trial judge. Moreover, I would not rule out a remedy in the extraordinary case in which a satisfactory explanation is given for the loss of evidence and no abuse of process is found, but the evidence is so important that its loss renders a fair trial problematic" (116 C.C.C., at 102-3).

21. Sopinka J. noted that the Crown's duty to disclose under *Stinchcombe* also "gives rise to an obligation to preserve relevant evidence", and that, in the case of lost evidence, "where the Crown's

explanation satisfies the trial judge that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached" (at 107).

22. The concerns the court ought to look at in making a assessment of lost evidence were summarized as follows:

- The court should analyze the circumstances surrounding the loss of the evidence; the main consideration is whether the Crown or the police took reasonable steps to preserve the evidence for disclosure; (at 107)

- As the relevance of the evidence increases, so too does the degree of care for its preservation that is expected of the police; (at 107)

- Conduct amounting to an abuse of process includes conduct on the part of governmental authorities that violates those fundamental principles that underlie the community's sense of decency and fair play; (at 107)

- The deliberate destruction of material by the police or other officers of the Crown for the purpose of defeating the Crown's obligation to disclose the material will, typically, fall into this category; (at 107)

- An abuse of process is not, however, limited to conduct of officers of the Crown which proceeds from an improper motive; (at 107)
- Other serious departures from the Crown's duty to preserve material that is subject to production may also amount to an

> abuse of process notwithstanding that a deliberate destruction for the purpose of evading disclosure is not established—in some cases, an unacceptable degree of negligent conduct may suffice (at 108).

23. In *La*, Sopinka J. harkened back to Justice L'Heureux Dube's dissent in *O'Connor,* and observed that "where the Crown has met its disclosure obligations, in order to make out a breach of s. 7 on the ground of lost evidence, the accused must establish actual prejudice to his or her right to make full answer and defence. This requirement is seen most clearly in lost evidence cases reviewed by my colleague Justice L'Heureux-Dube in her reasons in *Carosella* (at 109). But Sopinka J. quickly and clearly distinguished *Carosella* on the ground that it involved a "deliberate frustration of the court's jurisdiction over the admission of evidence" (at 109). In the particular circumstances of *Carosella,* the accused's constitutional rights had been seriously compromised and a stay was the only appropriate remedy.

24. A more topical concern is the procedural notation in *La* related to the timing of the Application. The court ruled that a ruling on the appropriateness of a stay was "often best assessed in the context of the trial as it unfolds" and that "the trial judge has a discretion as to whether to rule on the application for a stay immediately or after hearing some or all of the evidence" (at 109).

D. Recent Developments/Alternate Remedies

25. As noted above, the reason the court ordered a stay in *Carosella* was that there was no other appropriate alternate remedy. Since that decision, however, courts have tended to follow a flexible approach to fashioning a fit remedy in the face of lost or damaged evidence.

26. In *Bero*[8], a 2000 decision of the Ontario Court of Appeal, the accused was convicted of impaired driving causing bodily harm. The sole issue at trial was whether the accused or another individual was the driver of the vehicle. The vehicle was not subjected to a forensic examination, and was ultimately disposed of by the police and not available to the defence. Aside from the loss of evidence, the trial judge curtailed defence questioning of witnesses regarding the unavailability of the vehicle for forensic testing.

27. The significance of the lost evidence was clear to the defence: a forensic analysis of the vehicle could establish that Bero was not the driver. The defence moved for a stay at the start of trial, as it was entitled to do. However, the trial judge properly reserved on the motion until all the evidence had been heard. In doing so, she thus provided for herself and the Court of Appeal the benefit of a full

[8] *R. v. Bero* (2000), 151 C.C.C. (3d) 545.

record for assessing the degree of prejudice for which the motion for stay was being advanced.

28. Here, the destruction of the vehicle amounted to a breach of the Crown's disclosure obligations: "neither the police nor the Crown ever addressed the relevance of the vehicle in the context of the Crown's disclosure obligations" (para 35). Moreover, the failure to preserve the vehicle revealed "an ignorance of, or at least an indifference to, the duty on the Crown and the police to preserve the fruits of their investigation, an indifference or ignorance...difficult to comprehend so many years after...*Stinchcombe*" (para. 39).

29. However, the Court found that on this record there had been no "systemic disregard" for the obligation to preserve evidence, nor any "malevolent motive" (para. 45). Recognizing a stay as a "remedy of last resort" (para. 42), the Court concluded that a more appropriate remedy would have been to permit the defence to "demonstrate inadequacies or failures in an investigation and to link these failures to the Crown's obligation to prove its case beyond a reasonable doubt" (para 57). The Court noted that, pre-*Charter*, "many an acquittal could be attributed to police failure to preserve evidence or otherwise to conduct a proper investigation" (para 57). Additionally, aside from permitting a wide cross-examination on these issues, the

trial judge "*should also instruct the jury that the Crown was under an obligation to preserve the evidence and failed to do so, and that the defence cannot be faulted for not gaining access to the evidence before it was destroyed. These instructions would place the burden for the loss of the evidence on the Crown, where it belongs*" (para. 67, emphasis added).

30. Another approach to handling an issue of "lost evidence" is to be found in *Singh*[9], a 2005 decision in the Ontario Superior Court of Justice. In this homicide trial, a KGB statement from a critical Crown witness was not located until after the trial had begun. The statement, it was conceded, was admissible as "other suspect" evidence. The Crown located the other suspect and arranged to have him flown to Ontario from British Columbia, in the company of a detective who knew nothing about the case. Both the "other suspect" and the KGB declarant were obliged to testify at a *voir dire* in order to put the defence in the position they would have been in at the preliminary hearing.

31. However, to further complicate matters, the KGB declarant had, according to police notes, given a further contemporaneous statement. The KGB declarant denied that she had ever given such a statement, and no statement could be located. The importance to the

[9] *R. v. Singh* [2005] O.J. No. 1319 (S.C.J.).

defence was that the missing statement could have provided additional corroboration to the KGB declarant's evidence that the other suspect was guilty of the offence. Here, the court handily dismissed the stay application as it related to the KGB statement.

32. The misplaced KGB statement was found. And, the court permitted the holding of a *voir dire* that provided the defence with a full opportunity to cross-examine the witnesses to put the defence in the position that they should have been in and would have been in at the preliminary hearing. As for the issue of the lost ½ page statement referred to in one of the detective's notes, the trial judge held that this was not one of the "clearest of cases" in which a stay of proceedings was necessary, particularly in light of the fact the other suspect as well as the KGB declarant and the investigating officer were subject to cross-examination. The detective testified that the statement was destroyed in the usual and ordinary course of police practice in accordance with the policy of the Peel Regional Police. In these circumstances the court could not conclude that the officer acted in an unacceptable and negligent manner.

E. The Application: When Should it Be Brought?

33. *Henderson*[10], a recent decision of the Court of Appeal for Ontario, is significant in this area, because it highlights the importance of the timeliness of an application for stay of proceedings. In *Henderson*, the respondent had been convicted by a jury of multiple counts of fraudulently obtaining GST returns. In brief, the accused was an auditor at Revenue Canada who, along with his father, participated in a scheme in which he "audited" and refunded GST claims from dummy GST claimants.

34. The respondent brought a pre-trial motion for a stay based on the Crown's failure to produce certain of the respondent's travel expense reports which arguably could have provided alibi-type evidence. However, this application was abandoned before trial and the appellant's counsel indicated the Crown had fulfilled its disclosure obligation.

35. The trial judge concluded that because *Bero* had not been cited to him before his charge to the jury, he did not instruct the jury that the Crown was responsible for the loss of that evidence. However, because this was not one of the rarest of cases where the proper

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[10] *R. v. Henderson* [2004] O.J. No. 4157, (Ont. C.A.), application for leave to appeal dismissed (without reasons) June 30, 2005.

remedy was a stay, he instead declared a mistrial so that the whole issue of the lost evidence could be explored again at another trial.

36. Although it was clear to the Court of Appeal that the trial judge could not declare a mistrial following the jury's verdict, the court took the opportunity to confirm the procedure set out in *La* and *Bero*: the accused should move, normally at the opening of the trial, for a stay based on the Crown's failure to preserve, disclose or produce evidence. Unless the need for a stay is clear, the trial judge is not to rule on the motion at the opening of trial, but rather reserve the decision until all the evidence has been heard. Then the court will be in the best position to assess the degree of prejudice caused to the accused. The court specifically ruled that defence counsel cannot hold such motions in abeyance and bring them only if the accused is convicted. The Court said: Once the jury has delivered its verdict, matters that involve the conduct of the trial and that could have affected the jury's verdict can only be raised on appeal" (para. 46).

37. In *R. v. Scott & Eyre*[11], the Court of Appeal for Ontario was critical of the trial judge who ordered a stay where a videotaped statement of an eyewitness had been lost owing to the negligence of the police. The court ruled that "the lost evidence at its highest

[11] *R. v. Scott and Eyre* [2002] O.J. No. 1937, [2002] O.J. No. 2180, [2005] C.C.S. No. 2690. (Ont.C.A)

would have provided but one more weapon in what was already a well armed attack on identification evidence" (para. 5).

Here, the appellate court said, the trial judge should have considered alternatives to a stay; he "could have considered the lost evidence in weighing the identification evidence" or he "could have excluded the identification evidence entirely". Had the trial judge opted for the second course, the benefit to the accused would have been obvious. The case would have had to be decided solely on the evidence of a co-perpetrator (para. 6).

38. However, on the issue of procedure, the Court of Appeal noted that although the trial judge properly waited until the end of the trial to decide the application, "he should have dealt with the merits first and then proceeded to the question of whether the proceedings should be stayed" (para. 7). This procedure was apt for two reasons: first, if the Crown had not proven the case against the accused, they were entitled to an acquittal; second, in the event they were convicted, the appeal court could hear all the appeals together, and in this particular case, "could have brought an end to the matter". With obvious reluctance, the Court felt obliged to order a new trial.

F. A Duty also to Gather Evidence?

39. While the case-law is settled on the duty to preserve evidence, what can be said of the Crown's duty—if there is one—to gather forensic evidence? This was the issue decided in *R. v. Norman*[12], where the accused, charged with sexual assault, argued for a stay because of the failure of a hospital Sexual Assault Care Centre to obtain a vaginal swab or otherwise take biological samples. Although a consent form was available permitting nursing staff to obtain such forensic samples, it was not provided to the complainant—and consequently samples were not taken from her—because the complainant informed the nurse on duty that she had had prior sexual relations with the accused. Accordingly, the nurse "assessed the issue, not as identification, but consent, and concluded that the biological sample 'wouldn't go to that issue'".

40. Following the lead of the Ontario Court of Appeal in *Scott & Eyre,* the court dealt with the stay application after considering the merits of the case—here, after having found the accused guilty. Of significance in the ruling on criminal liability was that the defence offered alternate theories: that no sexual intercourse occurred, or, alternatively, that if it had occurred, the complainant was enraged

[12] *R. v. Norman* [2005] O.J. No. 3153 (O.C.J.).

when the accused mentioned the name of another woman during intercourse. The court was of the view that this tactic "potentially undermines the defendant's Charter motion."

41. In any event, the Court was critical of the nurse for having taken it upon herself not to ask for specific consent for bodily samples. At the same time, the Court was not prepared to visit this error upon the Crown: "There is a difference between the collection of evidence and the duty to preserve and disclose evidence. In the normal course of events, the Crown has no control over the collection of evidence and will not be held responsible for errors that can, and will, occur." Although there might be cases in which the failure to gather evidence could result in the denial to make full answer and defence, it would require either "unacceptable negligence" or "systemic negligence".

42. On the facts of the case, in *Norman* the Court held that the investigating officer had delegated the taking of biological samples to the nurse, and, while this was characterized as a "mistake", it was not fleshed out in cross-examination. Similarly, because there was no policy in place between the police and the hospital that would "clarify the authority and duty of each", it was not possible to find systemic negligence.

G. Conclusion

43. In the slow evolution of the case-law flowing out of the Supreme Court's 1991 decision in *Stinchcombe* (No.1), it now seems abundantly clear that important consequences attach to the Crown's failure to disclose all relevant information in its possession, whether inculpatory or exculpatory. It is likewise clear that if the Crown fails in its duty of disclosure because it or the police loses or damages relevant evidence the fairness of the trial may well be so completely compromised as to justify a staying of the proceedings.

44. But a stay of the proceedings will be granted only rarely and exceptionally. The policy underlying the myriad cases after *Stinchcombe* (No.1) is that cases should proceed to trial, except in extraordinary circumstances. This being so, defence counsel contemplating an application for a stay of proceedings based on lost or damaged evidence might think of adopting the following trial approach:

(i) Bring the stay application at the beginning of the trial, or as soon as practicable after the lost or damaged evidence comes to the accused's or counsel's attention;

(ii) In the application and in cross-examination at trial, tie specifically the relevance of the impugned evidence to one or more of the issues in the trial;

(iii) Show that the evidence in question is not only relevant but also essential to the accused's ability to make full answer and defence, so that without it the accused and, indeed, the entire judicial system suffers irreparable prejudice;

(iv) Be alive to the difference between mere error or inadvertence and negligence. Negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do under the circumstances similar to those shown by the evidence;

(v) Understand that a showing of mere negligence may not create the extreme prejudice the accused is required to show. Relate the negligent act or omission to injury or damage by the accused, showing how the negligent act or omission is a direct contributing cause of the accused's inability to receive a fair trial;

(vi) Understand, further, that the stay application can never be prepared and advanced at the expense of full trial preparation, because the Court is likely to reserve on the application until all the evidence is heard.