THE CASE OF THE MISSING RECORDS: *R. V. CAROSELLA*

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On February 6, 1997, the Supreme Court of Canada handed down decisions in *R.* v. *Carosella*[1] and *R.* v. *Leipert*.[2] In the former case it was held that a gross indecency trial should be stayed because the accused could not have access to records shredded by a sexual assault crisis centre in Windsor, Ontario. In the latter, it was held that a trial on charges of cultivation of marijuana and possession for the purpose of trafficking could proceed without the accused being granted access to a Crime Stopper's tip in Vancouver, British Columbia. All trials must be fair, but must some be fairer than others?

In this essay I will outline the decisions of the various levels of court in *Carosella,* make some critical comments, and contrast the decision with *Leipert*. I conclude with an analogy which, I hope, captures the reasons why the current state of the law is inadequate and has led to calls for reform with respect to production of sexual assault records in criminal cases.[3]

Carosella arose in the context of on-going political and legal battles over the extent to which persons accused of sexual assault can have access to private records in the hands of third parties, such as rape crisis centres, therapists, doctors and complainants themselves.

The facts were that on March 16, 1992, a woman went to the Sexual Assault Crisis Centre in Windsor for advice on how to lay charges with respect to sexual abuse in 1964, when she was a student in a class taught by Carosella (the accused). For an hour and a half she talked to a social worker who took notes. She was advised that whatever she said could be subpoenaed and replied that it was quite all right. Following this interview, she contacted the police and a charge was laid.

After the preliminary inquiry and the jury selection, the accused applied for an order requiring the Centre to produce its file for the trial judge to determine what should be released to the defence. The file did not contain the notes of the interview, since they had been destroyed in accordance with the Centre's policy of shredding files where police were involved but before they were subpoenaed. The defence applied for a stay of proceedings. This was granted by the trial judge on the basis that it would be unfair to proceed given that the accused had been seriously prejudiced as a result of being deprived of the opportunity to cross-examine the complainant on her previous statements.

The Court of Appeal disagreed, holding that no realistic appraisal of the probable effects of the lost notes could support the conclusion that the accused's right to make full answer and defence was compromised.[4]

The Supreme Court of Canada restored the judgment staying the proceedings. The charges therefore will not be tried because material in the hands of third parties is no longer available. The majority was of the view that if the missing material meets the threshold test for disclosure, the accused's *Charter*

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1 (1997) 142 D.L.R. (4th) 595 (S.C.C.) [hereinafter *Carosella*]. The majority judgment was delivered by Sopinka J., with Lamer C.J., Cory, Iacobucci and Major JJ. L'Heureux-Dubé was in dissent with La Forest, Gonthier and McLachlin JJ.

2 (1997) 143 D.L.R. (4th) 38 (S.C.C.) [hereinafter *Leipert*]. The majority judgment was delivered by McLachlin J., with Lamer C.J., La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ. Justice L'Heureux-Dubé delivered a separate concurring judgment.

3 For a companion civil case to *Carosella*, see *M.(A.)* v. *Ryan*, [1997] S.C.J. No.13. Similar issues may also arise in the administrative context. See, e.g. *R.* v. *Russell*, [1996] B.C.J. No.1362 (W.C.B.).

4 (1995), 26 O.R.(3d) 209.

rights were breached without the requirement of showing additional prejudice. The majority reasoned that since the complainant consented, the file would have been disclosed to the Crown (and, implicitly, to the defence). "But even if the somewhat higher *O'Connor* standard [discussed below[5]] relating to production from third parties applied, *it was met in this case*."[6] Given the fact that the notes were the first detailed account of the event,[7] and in the absence of an alternative remedy, the extreme remedy of a stay was felt to be appropriate.

The dissenting judgment focused on the lack of any duty in third parties to preserve evidence for prosecutions or otherwise; the case law requiring accused persons to establish prejudice in situations of lost evidence; the broad implications of an inability to hold trials in such cases; the difference between constitutional rights such as the right to counsel where prejudice can be inferred and constitutional rights such as those contained in sections 7 and 11(d) of the *Charter* where a measure of prejudice is required;[8] the view that the *O'Connor* production threshold was not satisfied by a bare assertion; and the fact that the accused was in the same position as if the notes had never been taken.

I find a number of aspects of the decision very disturbing. First, there is the off-hand ease with which the majority concluded that the *O'Connor* threshold of likely relevance would have been met in this case. A majority of the Supreme Court of Canada in *O'Connor* set out a process by which accused persons could gain pre-trial access to records in the hands of third parties. Before a judge will look at the records, the accused must show that the information is likely to be relevant, that is that there is a reasonable possibility that it is logically probative to an issue at trial or the competence of a witness to testify. While not onerous, this is supposed to be a significant burden, preventing the accused from engaging in speculative, disruptive and unmeritorious requests for records.[9] After examining the records and weighing the salutory and deleterious effects and considering a number of factors such as the reasonable expectation of privacy in the records, the judge may order production to the accused.

Since there will be an invasion of privacy once the judge looks at the records, the "likely relevance" test is crucial as it is the concept which is the primary shield against production. It would appear from *Carosella* that this test can be met by the mere assertion that there is material relating to the charge, thus reducing its ability to act as any sort of filter.[10]

Second, I find disturbing the majority characterization of what the Centre did. It is a characterization that can, at best, be described as a rude and deplorable departure from any sense of courteous discourse about a sensitive topic. The judgment, written by Sopinka J., accuses the Centre of deliberate destruction of "relevant" evidence.[11] It referred to "conduct designed to defeat the processes of the court. The agency made a decision to obstruct the course of justice . . ."[12] Another perspective, shared by people whose commitment to the rule of law cannot be doubted, is that the Centre engaged in the prudent destruction of irrelevant material which could only be used to discourage complainants in general (a point ignored in the majority's focus on the consent of this individual complainant) and distort the trial process. Discourteous and inflammatory characterization of people with whom one disagrees, especially given the very close vote on the Court, can only add to the perception that people who are prepared to be witnesses in sexual assault trials, and the people who advocate for them, are accorded a very low status in our current legal culture.

Third, the dissent, understandably, tends to focus on the problems with the majority view if given a broad reading. What I wish to do, in contrast, is suggest the narrowest possible reading of the *Carosella* decision

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

6 *Supra* note 1 at 613 (par.41) [emphasis added].

7 This fact seems to have been assumed. The report does not reveal any inquiry into whether the complainant or her husband had made notes.

8 The majority seems to miss the fact that in order to determine if there is a breach of the right to make full answer and defence one has to determine the scope of the right, which cannot sensibly be done by the bald assertion that there is a right to be breached by some action of a third party irrespective of prejudice.

9 For a rare example of inability to meet the test, however, see *R.* v. *Bane*, [1996] O.J. No.2750 (Ct. of Just. Gen. Div.).

10 "[T]he notes related to the very subject of the trial, the alleged sexual incidents. *On that basis*, it was open to the trial judge to conclude that the notes were likely relevant, in that they might have been able to shed light on the "unfolding of events," or might have contained information bearing on the complainant's credibility" [emphasis added]. *Supra* note 1 at 614 (par. 44).

11 *Supra* note 1 at 614 (par. 43).

12 *Ibid.* at 618 (par. 56).

which leaves scope for Parliament to reform the law in this area. The majority stressed that the Crown and the complainant consented to disclosure.[13]

> Given the circumstances, it is clear that the file would have been disclosed to the Crown. As material in the possession of the Crown, only the *Stinchcombe* standard would have applied.

R. v. *Stinchcombe*[14] is the leading case on the duty of Crown disclosure to the defence. The Crown has an ethical and constitutional obligation to disclose all relevant, non-privileged information in its possession to the defence. While it is still unfortunate that the majority took the view that the notes would have been relevant even in the hands of the Crown, the decision can be read as a Crown disclosure case, with its higher, and more clearly constitutionalized, obligation. The majority did go on to say that the *O'Connor* standard was met, but this was not necessary for the decision, and the reasoning also was influenced by the assumption that the presence of consent removed any need for balancing of interests. There is nothing in *Carosella* which *compels* the conclusion that the majority is constitutionalizing the "likely relevance" test in *O'Connor*, or applying it in a way they see as compelled constitutionally. Even though there is *some* constitutional core to the right to disclosure, it can be argued that *O'Connor* articulates a common law rather than a constitutional threshold for production of material in the hands of third parties. This is implicit in the set of factors, adopted by the Court in *O'Connor*, as relevant to the question of whether the judge should disclose the records to the defence.

> We also agree [with the dissent] that . . . 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 on 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." [15]

Thus this list contemplates the disclosure of information which is *not* necessary for full answer and defence, suggesting a broader right at common law than under the *Charter*.

The *Leipert* case provides the strongest argument that the Court could not conceivably have been applying the *O'Connor* approach as a constitutional rather than a common law standard.

Crime Stoppers is a controversial programme. Some see it as an essential protection for citizens prepared to help the police. Others see it as a seedy encouragement of snitching.[16] Anyone can call Crime Stoppers and leave an anonymous tip. Mr. Leipert was the subject of just such a tip. His lawyer wanted to see the tip just as Mr. Carosella's lawyer wanted to see the file. The Crown was concerned that the identity of the informer might be revealed to the accused. The case went to the Supreme Court of Canada on the issue of whether the accused should have access to the tip.

The Court reached the unanimous conclusion that the defence can only see the tip when innocence is at stake, when there is a basis in the evidence for concluding that disclosure is necessary or essential to demonstrate the innocence of the accused. No balancing is permitted.[17] The accused has to justify disclosure without seeing the tip, so apparently this "Catch 22" is constitutionally tolerable. Furthermore, the high standard of necessity to demonstrate innocence suggests considerable constitutional toleration of trials where the accused does not have access to information. If *Leipert* sets the constitutional minimum, then this suggests that the much broader test of likely relevance, especially as used in *Carosella*, cannot possibly be a constitutional one. I will argue below that this means there is a good deal of constitutional room for Parliament to substitute its view of relevance, so long as it is prepared to attach similar importance to the interests of sexual assault complainants as the courts attach to informers. After all, in some sense sexual

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[13] *Ibid.* at 613 (par. 41).

[14] [1991] 3 S.C.R. 326.

[15] *Supra* note 5 at 442.

[16] For a critical analysis, see K.D. Carriere and R.V. Ericson, *Crime Stoppers: A Study in the Organization of Community Policing* (Toronto: Centre of Criminology, University of Toronto, 1989).

[17] "Informer privilege is of such importance that once found, courts are not entitled to balance the benefit enuring from the privilege against countervailing considerations..." (*supra* note 2 at 45 [par. 12]).

assault complainants are simply informers who are prepared to come forward and give evidence.

Fourth, in my view *Carosella* made the need for reform of this area of law even more urgent. Parliament has now passed Bill C-46 as a legislative response to these problems.[18] Before turning to the Bill itself, I want to try to explain at least some of the concerns behind it. Why do the recent developments which give accused persons the right of pre-trial access to complainants' records arouse enough concern to generate the political impetus to change the law?

The following is an imaginary scenario, but one which is not far from reality. Several years ago lawyers defending people charged with sexual assault started to search through the garbage of complainants. Some hoped that the long shot would pay off and that they might just chance across something useful. Maybe a complainant had written to her mother saying she had made the whole thing up and then torn up the letter. Maybe a discarded diary would say that the assault occurred on the evening of May 8th instead of the morning. Perhaps a complainant had discarded a book which had given her the false impression that she had been sexually assaulted. Others thought that the sheer unpleasantness of someone going through her garbage would make the complainant refuse to proceed.

There was a good deal of concern about this. First, this practice was mostly confined to sexual assault cases, so women and children were the primary targets. Some people took the view that toleration of such practices indicated the low status of women and children in our culture. Second, there were concerns about privacy. It was easy for people to imagine how unpleasant it would be to have others scrutinizing the things they had discarded. Third, there were concerns about social utility. Law enforcement would be undermined if the practice discouraged prosecutions. As well, it was not a good idea for people to be forced to keep their garbage in their homes.

So there were disputes in court about these garbage expeditions. Judges on the whole did not pay attention to the concerns about low status.[19] They were willing to order complainants and others to produce garbage for inspection. However, because of concerns about privacy and social utility, judges offered to go through the garbage themselves first. They made it clear that in order for the defence to be allowed to see the garbage, the standard of "likely relevance" would be very easy to meet. For example, it might be enough to suggest that the garbage could contain material that would make the complainant mistakenly believe that she had been sexually assaulted.[20]

The *Carosella* decision suggests that the stage has now been reached where, if the garbage has been taken away (perhaps in the usual course, or to protect the complainant), a sexual assault trial cannot be held.

Of course there is no simple parallel between what people say to their doctors, therapists and counsellors and what they put in their garbage. Of course the whole network of support for victims is far more important than garbage collection. Of course, being forced to chose between keeping your garbage and assisting with a prosecution is not nearly as bad as being forced to chose between keeping the pain and fear of sexual assault to yourself or assisting with a prosecution. Nevertheless, I think this story gives some flavour of the phenonomen we have seen develop in the nineties. While we have not yet seen a case where a sexual assault trial could not be held because a charge was laid after garbage collection day, *Carosella* is the equivalent with respect to missing records. It is only a short step away from the requirement that a complainant actually create records so that they can be examined by the accused.

Will Bill C-46 make any difference in future cases similar to *Carosella*?[21] In general, the Bill can be said to be designed to limit judicial and defence access to a broad, non-exhaustive, range of personal records, including medical, counselling, and education, but not explicitly rape crisis centre, records. In a future case,

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18 An Act to amend the *Criminal Code* (production of records in sexual offence proceedings), S.C. 1997, c.C-30.

19 In *O'Connor*, *supra* note 5, only the dissenting justices, L'Heureux-Dubé, La Forest, McLachlin and Gonthier JJ., included equality in their analysis of such disclosure (*ibid.* at 487-88).

20 In *O'Connor*, the majority consisting of Lamer C.J., Sopinka, Cory, Iacobucci and Major JJ., included in their illustrations of when records may be relevant the following: "they may reveal the use of a therapy which influenced the complainant's memory of the alleged events" (*supra* note 5 at 441).

21 For much fuller discussions of the Bill, see D. Oleskiw and N.Tellier, *Submissions to the Standing Committee on Bill C-46 An Act to Amend the Criminal Code in Respect of Production of Records in Sexual Offence Proceedings* (The National Association of Women and the Law, 1997), and J. Scott and S. McIntyre, *Submissions to Standing Committee on Justice and Legal Affairs* (Women's Legal Education and Action Fund, 1997).

therefore, a Centre would need to start by arguing that its records contained "personal information for which there is a reasonable expectation of privacy" (section 278.1). The process for seeking production set out in the Bill applies to records "in the possession or control of any person, including the prosecutor . . . unless . . . the complainant or witness . . . has expressly waived the application" of the provisions (section 278.2 (2)). While this is very positive, in that there is no automatic disclosure of material in the hands of the Crown, it also means that a person in the position of the complainant in *Carosella* can consent to disclosure, even if a particular rape crisis centre feels that is not in the interests of sexual assault victims generally.

A person seeking production of records under Bill C-46 must make an application to the trial judge who is to apply the tests of likely relevance and necessity in the interests of justice. There are three crucial differences between the Bill and *O'Connor*, however. The first two are significant here. First the Bill adds the test of necessity to *O'Connor's* likely relevance, thus bringing the required approach into line with *Leipert*. Second, the Bill sets out the assertions which are not sufficient on their own to meet that tests [section 278.3(4)].[22] Four of these assertions appear in *Carosella*: that the records exist [(4)(a)]; that they relate to the incident which is the subject-matter of the charge [(4)(c)]; that they might contain inconsistencies [(4)(d)]; and that they might relate to credibility [(4)(e)].[23] The Bill requires that courts treat all of these as insufficient grounds to establish "likely relevance." Since a judge would not be entitled to look at the records in a future case, then the fact that they are missing will not be grounds for a stay of proceedings. Consequently, a *Carosella* application should fail at this stage.[24]

It is obvious, therefore, that it matters a great deal whether the majority in *Carosella*, in its opinion that the *O'Connor* "likely relevance" test was met in that case, saw itself as doing something constitutionally required. Of course, even if it did, Parliament can still change the content of what is likely relevant if it grounds the Bill in a careful consideration of all co-existing constitutional rights, as it does in the Preamble to the Bill.[25] I would prefer to argue, however, that the decision that a trial could not be held without the missing records did not track the applicable constitutional doctrine as embodied in *Leipert* and can simply be changed by Parliament. The idea, rejected in *Leipert*, that an accused person has a constitutional right, absent a showing of prejudice, of access to all records which ever existed and which may relate to the charge, is one which could only be taken seriously in a legal culture tolerant of distinctive suspicion and scrutiny of people who report sexual assaults.❑

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22 The section numbers are to the *Criminal Code*, as it has been amended by Bill C-46.

23 *Supra* note 1 at 614-15 (paras. 44-46).

24 The second difference between the Bill and *O'Connor* is that the judge must balance the salutory and deleterious effects of production before deciding to look at the records (s. 278.5(2)). If (s)he does examine the records then these factors must be considered again in deciding whether to order production to the defence, the test again being likely relevance (s. 278.7). The Women's Legal Education and Action Fund has taken the position that the higher standard of necessity should be required (*supra* note 20).

25 The Preamble explicitly grounds the Bill in the constitutional rights to equality and states that Parliament intends to promote protection of the rights of those accused of, and those who are or may be the victims of, sexual violence. It is clear therefore that Parliament is attentive to a broader range of constitutional rights than the majority in *Carosella*.