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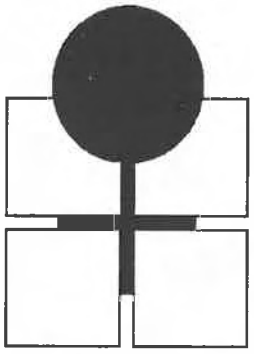

FREDA

# Legislating Unreasonable Doubt: Bill C-46, Personal Records Disclosure and Sexual Equality

*An analysis of the impact of Bill C-46 on judicial process and support service provision*


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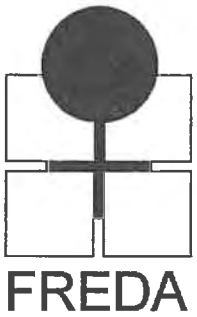


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# Executive Summary

Bill C-46, An *Act* to amend the *Criminal Code* on the production of records in sexual offence proceedings, became law on the 12th of May 1997. It was hailed by many feminist organizations as a victory for women's equality rights in sexual assault proceedings. The intention of Bill C-46 was to regulate, and restrict the access that a court, and in particular a defendant, might otherwise have to personal records kept by agencies and persons such as counselors, sexual assault centres, therapists, doctors and psychiatrists.

This study focuses on the ways in which concerns about the use of personal records in criminal sexual assault proceedings are borne out in the practices of the courts. The study also attends to how health professionals and other service providers have responded to the compelled production of client records in criminal trials and examines the ways in which record keeping procedures have evolved in the light of legislative reform.

The central questions informing this examination are as follows: Are record holders significantly changing the way they keep records because of the threat of having records subpoenaed? If so, what might be some of the effects of these changes on the quality of support services available to women who have been victims of sexual assault? Do the practices of the courts reflect the guiding principles of Bill C-46 which unequivocally acknowledge the seriousness of personal records disclosure for the victim? Has Bill C-46 provided substantial protection against re-victimization for women who choose to pursue legal redress through the criminal justice system?

Case law since the proclamation of Bill C-46 clearly shows that, like its predecessor Bill C-49 (1992), which attempted to limit the use of women's sexual histories in sexual assault trials, Bill C-46 is destined to be subject to constitutional challenges which focus largely on the rights of the accused. Case law research identified over fifty *Charter* challenges to the disclosure provisions in the three years following the *O'Connor* decision. The research indicates that the sections of the amended Code which provoke the most strident assertion that the accused's constitutionally enshrined right to make full answer and defence is violated by Bill C-46, are those sections which most strongly call for serious consideration of the equality rights of the complainant. Preliminary findings of this report confirm Parliament's concerns. Many women are discouraged from pursuing redress through the criminal justice system because they fear that the experience of court will itself be an experience of violation.

The study also draws upon interviews conducted with fifteen legal and health/social service professionals in British Columbia, who work with women and children who have been sexually assaulted. Four interviews were conducted with Crown counsel and one with an attorney in private practice. Ten interviews were conducted with front-line support workers (therapists and counselors), from various agencies including sexual assault centres, domestic violence units and transition houses. While few of the support service respondents interviewed for this study had had third-party records subpoenaed since the proclamation of Bill C-46, all indicated that many of their clients experience enough fear of the judicial process to deter them from pursuing legal redress. Interviews with Crown counsel indicated that in approximately fifty percent of sexual assault cases, third-party

records are requested. Moreover they anticipate that this percentage will increase as defence counsel become more familiar with the process by which Bill C-46 establishes the procedural requirements for third-party records to be made available to the court. All service providers indicated that they have changed their record keeping practices in some way in the last five years, as a direct consequence of the defence counsel strategy of subpoenaing third-party records. Few indicated that the legislative reforms of Bill C-46 had led to a decrease in the anxiety that they or their clients feel over the possibility of their records being subpoenaed.

Findings indicate that the general climate of hostility toward women complainants in sexual assault offences continues to threaten women's equality rights, and that Bill C-46 has thus far done little to allay these fears. Service providers indicated that women continue to feel that they have to choose between seeking support and assistance **or** pursuing legal redress. They further acknowledged that the possibility of engaging in both simultaneously will expose women to the unconscionable risk of being re-traumatized through the judicial process. This paper ends with recommendations for record keeping that may serve to alleviate the concerns of women survivors of violence, and service providers.

# I. Introduction

## Bill C-46 – Assessing the Impact

> The highest value in the criminal justice system is supposed to be the search for truth. All other values, such as ensuring the accused has the right to make full answer and defence, or the victim's right to not be revictimized are aimed at achieving the primary value. It is the search for truth which must determine how to interpret the other values in the system. Where the accused's right to make full answer and defence relies on stereotypes or myths, then the accused's right has too much weight.[1]
> (Bazili and Weir, 1995: 5)

This project examines the impact of the legislative reforms contained in Bill C-46 (1997, see Appendix A), which was introduced into the *Criminal Code* as sections 278.1-278.91 (see Appendix B). Bill C-46 derived from Parliament's recognition that the relatively recent defence counsel practices of compelling the production of personal records held by third parties such as doctors, psychiatrists, therapists, and sexual assault workers for use in criminal sexual assault proceedings, run the risk of severely compromising both women's equality **and** privacy rights. In the strongest of terms, the wording of Bill C-46 repeats and builds upon the guiding principles of the 1992 legislative

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[1] The recognition that the right to "full answer and defence" is a protection afforded by sections 7 and 11(d) of the *Charter* and established in *Dersch v. Canada* (Attorney General), [1990] 2 S.C.R. 1505, at 1514. However, it is a long-standing and fundamental premise of the criminal justice system that punishment of the innocent is intolerable in a fair and just society and that every step must be taken to ensure that this does not occur. The right to full answer and defence is understood as an expression in practice of this fundamental premise. Full answer and defence means that the defendant has the legal right to call *all* the evidence necessary to establish a defence and to challenge the evidence called by the prosecution, and anything that compromises this right effectively compromises the fundamental principles of the legal process as well as contravening society's interests in ensuring the innocent are not convicted. Section 11(d) of the *Charter* affirms that an accused has the right to be considered innocent until proven guilty.

reforms of Bill C-49[2] which governed the use of sexual history evidence, and which, like Bill C-46, raised significant concerns about equality rights for women (see Appendix C). In the guiding principles of both bills, Parliament emphasizes the significant interest society has in the eradication of all violence against women and children. Moreover the guiding principles of Bill C-46 reflect Parliament's support of the minority judgement of Supreme Court Madam Justice L'Heureux-Dubé, in the precedent setting sexual assault case of *R. v. O'Connor,*[3] which, unlike the majority judgement, took into serious consideration the equality interests of women survivors of sexual assault. More will be said later in this report about the *O'Connor* case and its significance in the evolution of sexual assault legislation in recent years.

In supporting Madam Justice L'Heureux-Dubé's minority judgement in *O'Connor*, Parliament recognized that the majority judgement effectively discriminated against women through the absence of a serious equality analysis. Parliament acknowledged that *O'Connor* did not strike the appropriate balance between the rights of an accused to make

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[2] Bill C-49 which governed the use of women's sexual histories in sexual assault trials, like Bill C-46, was largely a legislative response to the decision of the courts in one particular case. In *R. v. Seaboyer* [1991] 2 S.C.R. 577, the Supreme Court of Canada rendered a split decision which struck down one of the primary rape shield provisions of the *Criminal Code* while upholding the other. Section 276 of the *Criminal Code* was found to be unconstitutional on the grounds that it violated the accused's sections 7 and 11(d) *Charter* rights to a fair trial and to be presumed innocent until proven guilty. Section 277, the rape shield provision which excludes evidence of a victim's sexual reputation was not found to violate the accused's rights and was therefore upheld. As was also the case with *R. v. O'Connor* [1995] 4 S.C.R. 411, and prior to Bill C-46, significant concerns regarding women's equality rights were expressed by feminist legal advocates and members of the legal community about this decision by the majority of the Supreme Court of Canada. Parliament responded to the *Seaboyer* decision in much the same way as they have done with the *O'Connor* decision. They effectively rejected the majority decision, and along with substantial input from women's equality organizations, implemented legislation (Bill C-46), which effectively echoed the minority judgement of Madam Justice L'Heureux-Dubé in striking a more appropriate balance between the accused's right to make full answer and defence, and the equality and privacy rights of complainants.

[3] *R. v. O'Connor* [1995] 4 S.C.R. 411. In this case, the defendant, Catholic Bishop Hubert O'Connor was charged with multiple counts of sexual assault. As part of his defence, he requested access to the psychiatric and medical records of the four complainants, all of whom had been under his care in a residential school program. The case was appealed to the Supreme Court of Canada, where for the first time, an extensive consideration of the role of personal third-party records pertaining to complainants in sexual assault trials was considered. The Supreme Court of Canada was split in its decision with the majority adopting a set of guidelines considerably favouring the defendant's right to make full answer and defence, and the minority dissenting over the question of how the "relevance" of records was to be determined. Further details of the case are provided later in this report.

full answer and defence, and the rights of the complainant to equality, privacy, and security of the person. Bill C-46 attempts to correct this imbalance. Moreover, in drafting Bill C-46, Parliament reaffirmed that crimes of sexual violence are largely crimes perpetrated by men against women and children, and that as such they compromise society's interest in creating a society free from discrimination on the basis of sex.

This report examines the impact of Bill C-46 at two levels. First, it examines the effects of legislative reform on the judicial process, and second, it examines the effects that requests and orders to disclose third-party records have on the victim's ability to seek **both** justice **and** support and healing. In addition, the project involves an examination of the historical, social and legislative background leading to the passage of Bill C-46, taking into consideration both the intended and unintended consequences of the legislation.

The study also draws upon interviews conducted with fifteen legal and health service professionals in British Columbia who work with women and children who have been sexually assaulted. Four interviews were conducted with Crown counsel and one with an attorney in private practice. Ten interviews were conducted with front-line support workers from various agencies including sexual assault services, domestic violence units and transition houses. Direct quotes from interviewees are italicized for clarity and incorporated throughout the text.

This report is divided into three sections. The first addresses the legislative and social history of Bill C-46. The second, "The Legal Opinion," addresses the current issues from the perspective of the legal process through consideration of the literature, as well as a number of significant cases which informed the legislative reforms of Bill C-46. Throughout this second section, comments from the legal professionals interviewed for this project inform the analysis. The third and final section, "For the Record," deals almost exclusively with the findings of the interviews with support service staff. This section begins with a brief outline of the methodology used for both the legal, and support service interviews. Recommendations regarding record-keeping practices conclude the report.

It should be noted that issues concerning the differential privilege accorded by the courts to professional relationships are not discussed here in detail. A continuum of privilege exists, marked at one end by the utmost confidentiality accorded to an exchange between clients and legal counsel, to the lack of such privilege at the other extreme, as evident in the relationships between counselors, therapists and advocates, and the women survivors of abuse that they assist. The courts' criteria of what constitutes a legitimate, professional relationship underlies this continuum and by corollary, defines which parties are considered credible and hence protected from invasions of privacy.

## In/credible Histories: Women's Impugned Credibility in Historical Context

The questioning of women's ability to speak the truth about sexual experience is embroiled in the sexual politics of a long-standing, if ignoble, history.[4] It is a history replete with patriarchal presuppositions about the credibility and sexuality of women. Yet we can also identify a history of resistance to how women who speak of unwanted sexual advances have been treated in the criminal justice system, and particularly how they have been silenced, discredited and deterred by various subtle and explicit tactics.[5]

Feminist writers and advocates have long identified the pervasive tendency to discredit the testimonials of women who are victims of sexual assault. For example, in the 1960s and 1970s, activists mobilized against the practices of defence counsel who used women's sexual histories as evidence to impugn their credibility in rape trials. Women then recognized what appeared to be an innovative, aggressive strategy of defence counsel to intimidate and discredit female complainants. This tactic had the additional effect of deterring others from coming forward with sexual assault allegations. Although certain reforms such as the early "rape-shield" provisions (1983) and Bill C-49 (1992) were

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[4] For discussions on the historicity of discrediting women, see MacKinnon 1992, 1989, 1987; Masson 1986.

[5] Consider for example, the "defenders" or "apologists" for women accused of witchcraft in the European witch craze: Agrippa 1521; Weyer 1563. See also Clément, 1986.

introduced to curb such practices, they have done little to eradicate the myths and stereotypes that enable these tactics to thrive in their evolving forms.[6]

More recently, feminists have pointed out a comparable strategy that is unique to the court proceedings of the 1990s. Specifically, defence counsel, on behalf of the accused, have developed the practice of compelling the production and disclosure of private, personal records[7] of witnesses and victims of sexual assault. This practice, as Tellier and Oleskiw demonstrate through a comprehensive case-law study (1993 to 1995) "is restricted almost exclusively to sexual offence trials" (NAWL, 1997: 5). The request for disclosure of therapeutic, counseling and medical records of sexual assault complainants has been described by researchers, advocates and policy analysts as a practice completely unfamiliar to the courts until the 1990s.

While the specific form of subpoenaing personal records is a "new" defence counsel practice of intimidation, the underlying beliefs upon which they rest have a significant and pervasive history in judicial proceedings. Archival records of the court proceedings of 16th century witch trials are replete with judicial skepticism about the

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[6] Consider the very recent case of *R. v. Ewanchuk*, Supreme Court of Canada February 1998 (unreported), involving the sexual assault of a 17-year-old woman during a job interview, which was brought before the Supreme Court of Canada on appeal from the Appeal Court of Alberta. So clear was the miscarriage of justice in this case that the Supreme Court took the rare step of issuing a conviction rather than returning the case to trial. Justice L'Heureux-Dubé issued separate reasons from the unanimous decision of the Court outlining the very specific ways in which the findings of both the trial and appeal Courts were not only errors of law, but were significantly informed by myths and stereotypes concerning women and sexual assault. Justice L'Heureux-Dubé identified that the comments made particularly by Justice John McClung in his reasons, such as that the young woman was "not exactly wearing a bonnet and crinolines" or his seemingly irrelevant identification of the fact that she shared a house with another couple, her partner and their six month-old child, in no way spoke to the issues at trial but rather reflected the ongoing pervasiveness of stereotypes which discriminate against women. Concurring with these reasons, Justice McLachlin stated that such "stereotypical assumptions find their roots in many cultures, including our own. They no longer, however, find a place in Canadian law" (*Ewanchuk* at 104).

[7] For the purposes of this study, the definition of "personal records" accords with that of Bill C-46. It is as follows: "For the purposes of sections 278.2 to 278.9 [of the *Criminal Code*], 'record' means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counseling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence." See Appendix A.

possibility that women could be trusted to speak the truth about sex (Weyer, [1563] 1991; Bodin [1580] 1995). Moreover, like our contemporary trials, the witchcraft trials of the 16th century often involved the testimony of expert witnesses. The historical record shows that even sympathetic witnesses, the ostensible "defenders" of women accused of witchcraft such as the intervening physician Johan Weyer ([1563], 1991), relied upon an assumption that women could not be trusted to really *know,* much less to *speak,* the truth. As an "apologist" for witches, and particularly for those who voluntarily, or under coercion, confessed to engaging in sexual relations with the devil, Weyer argued that they were merely "tricked" by dreams or by the devil himself, into believing things about their sexual experiences that could not and did not take place (Weyer, [1563] 1991). Like Edward Jorden [1601] after him, Weyer also attributed women's testimonies of unwanted sexual encounters with "demon lovers" to melancholic delusions, dreams, false memories and hallucinations brought on by hysteria (see MacDonald, 1991). Such claims, made in the name of seeking *justice* for women and for curbing the judicial hostility against them, relied on engendered myths that are not unlike those at work in varying and innovative ways some four centuries later.

Since the Renaissance, records show that women have been caught in adversarial judicial processes, both in practice and jurisprudence, that somehow presupposes their guilt if and when it comes to talking about unwanted sex. It is a process that has never been far removed from medico-scientific myths about women's feeble-mindedness, compulsions to fabricate sexual tales, propensity to mistake sexual fantasy for reality, and in effect, to be impugned, by nature, as credible witnesses at trial.

The arguments of both "defenders" and prosecutors of witches provide a glimpse at an entire genre of judicial literature documenting witchcraft trials that emerged in the wake of the invention of the printing press. While in its day, this was a "best-selling" literature that sensationalized the credibility debates about the sexual nature of the testimonies of accused witches, it is now recognized as an historical record attesting to the sustained duration of the beliefs and tactics that we see at work in contemporary criminal sexual assault trials. These tactics are aimed at casting aspersions on female victims and

challenging their testimonials to these crimes. What we still see at work in the criminal justice system, as Tellier says of contemporary defence tactics, is a "*defacto* assumption that women lie about rape" (NAWL, 1997: 5). Moreover this assumption, like the sex stereotypes that buttress it, has seen justice fail women in, and beyond, criminal procedure.

Recent legal reforms (rape-shield, Bill C-49 and Bill C-46) aimed at eradicating such assumptions, tell a story of the struggle of many equality advocates to keep pace with what Supreme Court Madam Justice L'Heureux-Dubé describes in her dissenting reasons in *O'Connor* as past discriminatory practices in new "guises" (*O'Connor* at 122). Comparing the "pernicious role" of evidentiary rules that have permitted "unwarranted inquiries into sexual histories" to those which in turn permitted the disclosure and use of personal counseling records, Justice L'Heureux-Dubé cautions against allowing the "defence to do indirectly what it cannot do directly under section 276 of the *Criminal Code*. This would close one discriminatory door only to open another" (*O'Connor* at 122).[8] Madam Justice L'Heureux-Dubé's comment in this case directly addresses the issue of what is truly at stake in the use of both sexual histories and personal records: the invocation of myths and stereotypes about women which impugn their credibility and hold the potential to significantly and unreasonably prejudice both juries and judges, but which do not pertain to the question before the courts – the facts of the specific assault upon the complainant.

The tenacity of such stereotypical assumptions within judicial reasoning, as well as the marked resistance in some judicial circles to engage in any meaningful consideration of the equality issues at stake is clearly documented in contemporary case law. The pre-trial hearing of the first *O'Connor* case contains a glaring example of such resistance from the bench and the pervasiveness of techniques for negating equality-minded reforms. In this case, when Crown raised the issue of sexual equality and submitted to the judge that the threat of having personal records disclosed would deter female complainants from ever

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[8] The reference to section 276 of the *Criminal Code* here relates to the amended rape shield provisions restricting the use of sexual history evidence in criminal sexual assault trials.

reporting sexual assaults, the judge responded by asserting that Crown's position reflected the "personal views" of a crusader, and that they compromised her "professional integrity." He then refused to hear "any more of this"[9] (McInnes and Boyle, 1995).

## Bill C-46 in Context

*Bill C-46, An Act to Amend the Criminal Code on the Production of Records in Sexual Offence Proceedings*, became law on the 12th of May 1997. It was hailed by many feminist organizations as a victory for women's equality rights in sexual assault proceedings. The intention of Bill C-46 was to regulate and restrict the access that a court, and in particular a defendant, might otherwise have to personal records kept by agencies and persons such as counselors, sexual assault centres, therapists, doctors and psychiatrists. These records are seen by equality-minded advocates and judges as "almost always irrelevant" to the material issues of a case and, when exposed in court, as being wholly

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[9] McInnes and Boyle cite the following transcript of the court proceedings in which this comment was made. It concerns the Crown's defence against the assertion in the first *O'Connor* trial, that it withheld documents which had been ordered disclosed to the court:

"[Crown]: The public's perception, in reading that order, in the Crown's respectful view, would be absolutely appalled.

The Court: At what?

[Crown]: At the fact that we have a justice system that is demanding that complainants in a trial involving a former principle bishop and principal of a residential school for aboriginal individuals, that those women who are coming forward with a complaint are compelled to provide full records, psychological, therapeutic, counseling [sic], medical, and all other records that are outlined in those orders [sic]. It's the Crown's respectful view that if the public knew that complainants were subjected to that that there would be strong reasons not to report any offences, particularly related to those of sexual assault. And the Crown says that in relation to that that this is – it's tantamount to a gender bias because the statistics say that the majority of victims of sexual assault are women, that this type of –

The Court: Excuse me. I do not know if you are now on a crusade or if you are acting as Crown counsel because it seems to me that your personal views are clouding your professional integrity.

[Crown]: With respect, My Lord, it used to be that things like that could be said – but we do have a report on gender equality in the justice system. It's been published by the Law –

The Court: I'm not hearing any more of this. Now, would you please get on with the issues in this case. And the question of gender bias is not one of them that I'm going to entertain and hear this morning on this application..." (1995: 344-345).

McInnes and Boyle further note that in this case Crown was represented by a woman, known at the time for her commitment to improving the experiences of sexual assault complainants in the court, and the trial judge and defence counsel were male.

removed from the context and purpose of their generation and thus of very limited evidentiary value to the case being tried. As Justice L'Heureux-Dubé said in dissent of the majority in *O'Connor*, and as reiterated by many of the support workers interviewed for this study, "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" (*O'Connor* at 144). Nevertheless, it is common for complainants of sexual assault to face the "psychological trauma" of contemplating "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..." (*O'Connor*, L'Heureux-Dubé at 112).

Dubé's comment were echoed by Crown counsel interviewed for this study. One stated: *Just imagine surviving a brutal assault only to turn around and have your records disclosed to the puke who did it. Although we counsel victims to proceed, in principle, in practice, I would never go through it myself.* Another Crown counsel reported,

> *One of my witnesses said that she will not come out and give evidence if she runs the risk of having her records revealed. When you think about it – that someone who has sexually assaulted you can have access to the most intimate details about you – I fully understand her position. I've watched too many brutal prosecutions and have watched women being mentally eviscerated on the stand. If that isn't re-victimization then I don't know what is.*

While the probative[10] value of such records is often the source of heated disagreement, the very threat of their exposure can and does have very real effects on women who have been the victims of sexual assault. The threat of having highly personal and private information exposed to the one person who assaulted them, let alone the threat of such information becoming a matter of public record, is sufficient to further entrench a general climate of discrimination against women in criminal procedures. Consider the effects on complainants of the advice offered by defence counsel Michael Adelson, to his colleagues at a legal conference in 1988, "Whack the complainant hard at the preliminary

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[10] Probative evidence is defined as evidence which has the quality or function of proving or demonstrating.

hearing.... Generally, if you destroy the complainant in a prosecution, you destroy the head. You cut off the head of the Crown's case and the case is dead" (cited in Feldthusen, 1996: 546). It is not surprising, in this context, that one Senior Crown counsel interviewed for this study would describe seeing complainants as being *mentally eviscerated* on the stand. Nor is it surprising to hear a support worker describe her own experience of this process as one of witnessing the re-traumatization of the victim. As she recollected: *I have seen so much pain and suffering from going through that system.*

In 1994, Brian Greenspan of the Criminal Lawyers Association, responded to a general query regarding what defence counsel are seeking to achieve in subpoenaing women's personal records. Agnew, citing Greenspan, offered the following spin on his responses which highlight the thriving myths and stereotypes surrounding women and sexual assault harboured within the bar, and which clearly underpin and motivate personal records requests.

> He's [defence counsel!] looking for three things: "she may have told a different story [in] different places" (read in women lie); "the allegation was prompted or fashioned or assisted or compelled by the therapist" (read in she's not very bright and rape crisis workers are vengeful man-haters); "it may raise questions about the emotional stability of the woman" (read in she's delusional, or men can rape women with mental or emotional disabilities and get away with it!). (Agnew, 1997: 1-2)

In dissent of the majority in *R. v. Seaboyer,* Justice L'Heureux-Dubé identified that "common law has always viewed victims of sexual assault with suspicion and distrust" (*Seaboyer* at 665). She confirms what many feminist legal advocates have long stated. Unlike any other offence, "common law has 'enshrined' prevailing mythology and stereotypes by formulating rules that made it extremely difficult for the complainant to establish her credibility and fend off inquiry and speculation regarding her 'morality' or 'character'"(*Seaboyer* at 665). What is more, the production and disclosure of therapeutic and counseling records in particular, similarly but more subtly, operates for the same end. The very nature of the records themselves compound the gender-based mythologies at work by invoking equally popular mythologies about the mental instability of those who

seek support and assistance from mental health professionals (Ministry of Justice, 1995, Appendix II, p.2).

When it comes to challenges of credibility, a number of the service providers interviewed for this project noted that it is as much their own credibility that is being tested as it is the complainants – and the fact that the vast majority of service providers are women, is not incidental. As one therapist noted, *defence counsel is looking for an Achilles heel, something they could use to threaten or intimidate and undermine credibility. They don't use an entire entry even when they do use material.*

The seriousness of the impact of the threat of disclosure was further reinforced by another respondent to this study who cited the example of a woman who said that if her records were to be disclosed *she would be on the first plane out of the country.* This woman clearly felt that her privacy rights would be violated and she would be publicly humiliated. Her sentiments are reflected in the statements by another therapist interviewed who identified the issues at stake as being less a matter of privacy than they are of psychic/mental survival. Bill C-46 was born within this general climate of fear and out of the recognition that its legislative forerunner, Bill C-49, had failed to broadly protect women's constitutionally enshrined privacy **and** equality interests in cases where they were the substantial witnesses, and victims, of sexual violence largely perpetrated by men.

Sexual violence is a gendered crime, and Bill C-49 and Bill C-46 cannot be truly understood outside of the recognition of this fact. Most crimes of sexual violence are perpetrated by men against women, and most continue to go unreported. The *Summary Statistics on Police Services and Crime Trends* show that only 2,100 (38 percent) of the 5,400 sexual offences reported to the police in British Columbia in 1995 resulted in criminal charges. Furthermore, of those 2,100 persons charged with sexual offences in B.C. in 1995, 97 percent were male (10 percent male youth) and over 80 percent of the victims were female (Statistics Canada, 1995: 38).

Studies dating back to the 1960s and 1970s which informed the need for the first "rape-shield" provisions, indicate a certain consistency to the gendered nature of this

phenomenon. A 1977 study by Clarke and Lewis (cited in Duffy, 1998: 141-142) made evident the judicial trivialization of rape as well as its reliance upon stereotypes about the "appropriate victim," a phrase which betrays the long-standing myth that only some kinds of women can be raped. Some twenty-years later, the *Ewanchuk* case attests to the fact that for some members of the judiciary, this myth continues to have significant purchase. Although the past ten years have seen reports of sexual crime increase by twenty-two percent, there has been little change in the ratio of reports to that of charges laid (Statistics Canada, 1995: 38).[11] Moreover, the courts have recognized that the reason women avoid the criminal justice system in cases of rape and sexual assault continues to be due to their fear of attitudes of the police and courts, and because of the likelihood of not being believed.[12]

In the spirit of Justice L'Heureux-Dubé's dissenting arguments, the guiding principles set out in Bill C-46 replicate those of the earlier Bill C-49 by again making explicit Parliament's grave concern about the prevalence of sexual violence against women and children. In apparent recognition of the equality interests of women and children, the guiding principles of Bill C-46 expressly acknowledge that compelling the production of personal records "deters" complainants from reporting offences while at the *same time* seeking the necessary treatment, counseling and advice. There can be little doubt that Parliament's intention was to alert the judiciary to its concerns about the effects of compelled personal records production on the equality interests of women and children who have been victims of sexual assault, and to provide the added caution that such practices can and will compromise the reporting of such crimes. In its contribution to drafting the legislative reforms which were later enacted through Bill C-46, the Attorney General had the following to say about the intentions of the legislation:

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[11] For a comprehensive analysis of the trends of violence against women in Canada, see Duffy, 1998: 132-159; Chambers, (1998).

[12] R. *v. Canadian Newspapers Co*, per Justice Lamer at 131-132. See also *Seaboyer*, per L'Heureux-Dubé at 649.

> The principles and procedures set out do not enlarge the jurisdiction of a justice or judge to permit access to or disclosure of confidential records or communications; they are intended to restrict applications made by any procedural means. (Ministry of Justice, 1995, Appendix 1: 8)

The overwhelming evidence suggests that crimes of sexual violence continue to reflect societal inequalities, beginning with, but not limited to, sexual inequality. Legislative reform remains a vital avenue through which to address the subtle and explicit practices that facilitate and perpetuate violence against women and children and which prevent women's constitutional rights from being fully and completely integrated in law and society. Both the Supreme Court of Canada and Parliament have acknowledged the significant societal interest in promoting and assuring the "full protection of the rights guaranteed by the *Canadian Charter of Rights and Freedoms* for all" and, to this end, encouraging "the reporting of incidents of sexual violence and abuse and provide for the prosecution of offences within a framework of laws that are consistent with the principles of fundamental justice" (Guiding Principles, Bill C-46). Bill C-46 can be understood, in principle at least, as a legislative expression of this commitment to ensuring that the equality rights guaranteed by section 15 and section 28 of the *Charter of Rights and Freedoms* (the *Charter*) are reflected in the practices of the courts and society at large.[13]

## II. The Legal Opinion

The following sections detail the significant case history leading up to Bill C-46 and include an analysis of the determination of relevance and the balancing of rights which characterized the debates. Throughout these sections, the reflections of Crown and

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[13] Section 15 of the *Charter* reads as follows:

"15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law, without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Section 28 states that: "Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

independent counsel inform the issues and contribute to an understanding of the contemporary climate within the courts. Direct quotes from interviews are italicized for clarity.

All of the respondents to the legal survey conducted for this project recognized that the defence counsel practice of requesting the personal records of complainants is a "new" feature of criminal sexual assault trials. They further confirmed that prior to the *O'Connor* decision, there had been no way for such evidence to be admitted to proceedings. Crown's comments are borne out in the recent case of *R. v. Stromner.*[14] In his reasons for this case, Judge Patterson noted that:

> Prior to the *O'Connor* decision there was no way for the accused person to compel disclosure of records in the hands of third parties. *O'Connor* provided a means to overcome this situation. This procedure provided a pathway through the common-law barrier ... the same situation prevails in respect of Bill C-46. Absent the procedure set forth, the accused cannot access private records. Section 278.2(1) does no more than legislate the common-law position. (*Stromner* at 53)

Since *O'Connor*, the B.C. Crown counsel interviewed for this study indicated that a minimum of 40 to 50 percent of all their sexual assault cases have involved requests for third-party records in some form. According to one Crown representative who deals with high profile sexual assault prosecutions, both the "O'Connor Guidelines" and those of Bill C-46 have acted as *a red flag* for defence counsel to whom it might previously have never occurred to request personal records. As he put it, *Bill C-46 simply formalized the procedure for the defence on how to get at these records.* Thus, even though feminist and equality advocates have applauded the focus on equality in the guiding principles of Bill C-46 as a measure of regulating and restricting the use of women's personal records in sexual assault trials, the very existence of the new guidelines for permitting these records to be used, ushered in through this legislation, has virtually resulted in the establishment of a

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[14] The accused in this Alberta case made an application for third-party records and mounted a constitutional challenge to Bill C-46, arguing that it was of no force and effect since it violated his rights under section 7 of the *Charter.* Section 278.2(1) is cited in full in Appendix B of this report.

"procedure" for requiring their production, and has, practically and potentially, had the opposite of its intended effect. The following analysis of two significant cases, *R.* v. *Stinchcombe* (1991) and *R. v. O'Connor* (1995) sheds light on the irony of this unintended consequence of Bill C-46, and provides a more considered background to the issues which gave rise to the need for Bill C-46.

## Setting the Scene in Case-law: *Stinchcombe, Carosella, & O'Connor*

### *Stinchcombe*

The central issue in *Stinchcombe* concerned the duty for disclosure of records incumbent upon the Crown with respect to information in its possession.[15] Judge Patterson, in *Stromner,* indicated that the Supreme Court of Canada's unanimous decision in *Stinchcombe* was significantly influenced by its grave concern with a then recent wrongful conviction[16] in which the Crown had not disclosed to the defence, information in their possession attesting to prior inconsistent statements made by witnesses in the trial. The Crown's failure to disclose this information was directly implicated in the miscarriage of justice against the accused, and the "reactive" decision of the Supreme Court of Canada ruled that it is incumbent upon the Crown to disclose **all** information in its possession that is relevant to any criminal trial regardless of whether or not the Crown actually intends to use such evidence in its case. Consider Justice Sopinka's statement in *Stinchcombe*:

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[15] While this case (*Stinchcombe*) did not involve sexual abuse allegations, its concern with the question of the limits of the Crown's disclosure obligations had profound effects upon later cases dealing with sexual abuse records. The accused in this case was charged with fraud, theft, and breach of trust. A former secretary of the accused gave evidence as a Crown witness at a pre-trial inquiry, and later in a police statement which may have been favourable to the defence. The Crown found her "not worthy of credit" as a witness and chose not to call her in the trial, nor to disclose to the defence anything related to the contents of the evidence she gave. They did, however, inform the defence that the records of her statements existed. The case was appealed to the Supreme Court of Canada on the basis of the disclosure question.

[16] One wrongful conviction case cited by Judge Patterson in the *Stromner* decision was that of Donald Marshall Jr., in 1989. He noted however, that since then there "must now be added two more juridical horrors: the wrongful convictions of Guy Paul Morin and David Milgaard" (*Stromner* at 5).

> 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. Recent events have demonstrated that the erosion of this right was an important factor in the conviction and incarceration of an innocent person. (*Stinchcombe* at 336)

It was argued by the defence in *Stinchcombe* that the Crown is bound by duty to disclose all documents/information in its possession, including material which *might* assist the accused, and anything less than full disclosure would constitute a violation of an accused's right to full answer and defence pursuant to the section 7 *Charter* rights to life, liberty and security of the person. The Supreme Court of Canada unanimously agreed with the arguments of defence counsel on this matter.

For Crown counsel in particular, it is apparent that the *Stinchcombe* decision inaugurated a wholly new approach to the ways in which the testimonies of Crown witnesses could and would be sought. Where Crown had typically engaged in extensive processes of inquiry in developing their cases, including acquiring third-party documents which may or may not be deemed relevant by them at a later stage in the proceedings, they became considerably less willing to do so. One Crown counsel interviewed for this study said that:

> *Before* Stinchcombe, *counseling records were never asked about. After* Stinchcombe, *there was an appreciable jump in records requests. The position verified by* Stinchcombe *is that we indicate that we have various things and we wait for the application.*

While the Supreme Court of Canada in *Stinchcombe* did not address in detail the question of the content of records *per se,* nor the issues of privacy they may invoke, its ruling laid a foundation with respect to the procedures and obligations surrounding the disclosure of third-party records which was later built upon in the *O'Connor* decision. Unlike *Stinchcombe,* however, the issue of the content of such records and their inherent relationship to questions of privacy, both for complainants and third-party record holders, became a central concern and can be recognized as the judicial context for the legislative reforms proposed in Bill C-46.

*Carosella*

For many support services, a critical marker for serious concern was established in the 1994 case from Ontario, *R. v. Carosella* (1997). In this case, which involved allegations of sexual abuse going back to 1964, the complainant attended a sexual assault centre before laying the complaint. During the initial interview, notes were taken by a support worker and the complainant was informed that records could be subpoenaed if the case went to court. The complainant apparently understood and agreed to this. Charges were subsequently laid, a preliminary hearing took place, and the accused was ordered to stand trial on charges of gross indecency. In October 1994, prior to the trial, the defence brought an application for disclosure of the files of the sexual assault centre which the complainant had attended. The Crown, the complainant, and the defence had all consented to the disclosure order; however, when the file was produced to the courts, it did not contain the notes of the interview conducted with the complainant by the support worker.

In accordance with the Centre's policy of destroying the records of all clients potentially involved in criminal court proceedings, the complainant's records had been destroyed in April 1994. It should be noted that this was prior to a trial date being set. The support worker who had conducted the interview with the complainant had no recollection of the contents of the records. The defence requested a stay of proceedings which was granted by the initial trial judge who held that the destroyed notes were "relevant and material and they would more than likely, tend to assist the accused" (*Carosella* at 2). Their destruction was considered to have seriously compromised the accused's opportunity to cross-examine the complainant as to her previous statements and was, therefore, deemed to violate the accused's *Charter* right to make full answer and defence pursuant to section 7 of the *Charter*. The Crown appealed the stay of proceedings, and the superior court set aside the order and directed the matter to proceed to a new trial. The reasoning of the Appeal Court was based on the fact that "the evidence must disclose more than a "mere risk" to a *Charter* right and that in this case no realistic appraisal of the probable effect of the lost notes could support the conclusion that the accused's right to make full answer and defence was compromised" (Ibid.). Following the decision of the

Ontario Court of Appeal, leave was granted to the accused to bring the matter before the Supreme Court of Canada.

The basis of the appeal to the Supreme Court of Canada was that the accused's right to full answer and defence pursuant to section 7 of the *Charter* had been irreparably compromised by the destruction of the counseling records. The Supreme Court of Canada rendered a split decision (5:4) in favour of the defendant, and once again the dissent was led by Madam Justice L'Heureux-Dubé. While the majority held that the sexual assault centre's records would have been relevant and that the absence of them compromised the rights of the accused, the minority emphatically disagreed. Justice L'Heureux-Dubé's reasons began by stating that:

> This case is not about disclosure. Disclosure is a concept which is binding solely upon the Crown. This duty to disclose does not extend to third parties. Nor does it impose an obligation upon the Crown to comb the world for information which might be of possible relevance to the defence. *(Carosella,* L'Heureux-Dubé in dissent, 6)

In many ways, Justice L'Heureux-Dubé's comments here refer to the situation foreshadowed by the *Stinchcombe* decision. While *Stinchcombe* limited the duty of disclosure to the Crown for any relevant information in its possession, it nonetheless suggested the progressive extension of this duty to parties other than the Crown. In other words, *Stinchcombe* opened the door to the circumstances under consideration in *Carosella* where the Crown's case is materially affected by the actions of a third party. Clearly, the implications of this situation were of grave concern to the minority in *Carosella*. The remainder of Justice L'Heureux-Dubé's reasoning takes into consideration the conditions under which an accused can justifiably claim that the loss of evidence does indeed compromise his right to a fair trial. She makes the point that what is at issue here is a "fair trial" and not a "perfect" one, and that the accused must "establish a real likelihood of prejudice to his defence: it is not enough to speculate that there is potential to harm" (Ibid.: 6). According to the minority judgement, were the courts to establish a low threshold for finding a breach to the right to full answer and defence, the justice system would be brought to a halt (Ibid.: 7).

### *O'Connor*

In the *O'Connor* case, the accused, Catholic Bishop Hubert O'Connor, was charged with two counts of rape and two counts of indecent assault on four Aboriginal women. These assaults took place between 1964 and 1967 while he was principal of St. Joseph's Mission School in British Columbia. The complainants were former residents and employees under O'Connor's direct supervision. At a pre-trial hearing, the accused sought and was granted an order for the complainants to authorize the production of all records held by therapists, counselors, psychiatrists and psychologists. The issue of testing their relevance was never considered in the initial trial process. During the first trial, the defence argued that the Crown had not complied fully and completely with the disclosure order. In light of this, the trial judge agreed with defence arguments and ordered a judicial stay of proceedings on the basis of an abuse of process. The stay of proceedings was appealed by the Crown to the British Columbia Court of Appeal. The appeal resulted in a new trial date being set and the revocation of the records production order that was issued in the first trial. Following the decision of the B.C. Court of Appeal, Bishop O'Connor was granted leave to appeal to the Supreme Court of Canada on the grounds that his section 7 and 11(d) *Charter* rights had been compromised by the Crown's incomplete disclosure.

At the hearing of the B.C. Court of Appeal, a coalition of equality-seeking organizations was granted leave to intervene.[17] The Coalition argued that the contents of medical and therapy records are **never** relevant to matters at trial in sexual assault cases, and moreover, given that they are not relevant, the non-disclosure of them cannot be considered a violation of an accused's section 7 and 11(d) *Charter* rights. The court did not agree, at least with the assertion that counseling records are not relevant. The matter of the alleged violation of the accused's *Charter* rights was left for consideration by the Supreme Court of Canada.

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[17] The organizations granted intervenor status included the Women's Legal Education and Action Fund (LEAF), in coalition with the Aboriginal Women's Council, the Canadian Association of Sexual Assault Centres (CASAC), the DisAbled Women's Network of Canada (DAWN), the Attorney General of Canada, and the Canadian Mental Health Association.

In its consideration of the Crown's appeal against the initial stay in the first *O'Connor* trial, the B.C. Court of Appeal issued two sets of reasons. The first dealt with whether or not the initial stay of proceedings was the appropriate response on the part of the trial judge, and the second dealt with establishing some initial guidelines as to how the relevance of medical and therapeutic records could be determined by the courts. In its consideration of this second issue, the court was guided by the contributions of the intervenors, as well as the minority judgement of Justice L'Heureux-Dubé in *R. v. Osolin* (1993),[18] an earlier case which involved the disclosure of medical records. As a result of its considerations, the B.C. Court of Appeal established a two-stage threshold test to determine the relevance of such records on a case-by-case basis. This test was to take into account not only the accused's right to full answer and defence, but also the complainants' significant privacy interests in such records. Nonetheless, while the B.C. Court of Appeal recognized that a complainant's privacy interests were indeed worthy of consideration, it did not constitute its model of determining relevance as a competing rights model. The complainant's privacy issues were constituted as "interests" and not "rights."

Accordingly, at the first stage of the test, while respecting that the accused would not, at this stage of the proceedings, be able to address the question of the actual contents of records he most likely would not have seen, the court determined that the accused must only show that the information contained in the records is "likely" to be relevant either to an issue in the trial or to the competence of the witness to testify. If this test is met, the documents are then submitted to the court where they undergo the second stage of the test for relevance. At this second stage, the court reviews the documents to determine if they are "material" to the defence. The judge must determine whether the accused's right to make full answer and defence would be compromised if the records in question were not admitted. Documents that meet this second requirement could then be entered as evidence at the trial. The B.C. Court of Appeal, however, envisaged the possibility that disclosure itself could be subject to further conditions which would continue to address the privacy

[18] See *Osolin*, L'Heureux-Dubé at 613-614 for a discussion of the privacy interest in medical and therapeutic records.

interests of complainants and third-party record holders. For example, the court recognized the possibility of setting conditions on disclosure such as ordering parties not to reproduce or publish records, or requiring that records be disclosed only to the judge.

While the B.C. Court of Appeal concerned itself with the privacy interests of complainants, and acknowledged that stereotypical assumptions have no place in the determination of relevance, intervenors expressed regret and concern that they did not show equal regard for the equality **rights** of complainants. Moreover, similar criticisms were made of the majority decision of the Supreme Court of Canada in their subsequent judgement in *O'Connor*, which effectively accepted the integrity of the B.C. Court of Appeal's two-stage relevancy test. The Supreme Court did amend the relevance test at the second stage from "likely to be relevant" to "a reasonable possibility" that the information is logically probative to an issue at trial or the competence of a witness to testify. There remains, however, considerable debate as to whether or not this is, in practice, a "higher" threshold. In fact, none of the revisions made by the majority of the Supreme Court of Canada to the two-stage test of the B.C. Court of Appeal meaningfully addressed the equality rights of complainants.[19] The issue was understood as one invoking competing constitutional rights. These were largely understood as *his* equality rights versus *her* privacy rights. However, it was both the privacy and equality rights of complainants that remained the focus of the minority judgement led by Justice L'Heureux-Dubé and concurred by three of her colleagues.[20]

For many feminist equality activists, the *O'Connor* case represented an urgent opportunity to address the judiciary on the broader questions of how personal records were increasingly being sought in criminal sexual assault matters. It was not until *O'Connor* that the issue before the courts was so clearly focused on the question of "balancing" constitutional rights: the accused's right to full answer and defence with the rights of

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[19] For a review of the *O'Connor* case with respect to the development of the two-stage relevancy tests see F. Kelly 1997: 1-9.

[20] For a thorough analysis of the issues of equality and privacy at stake in both the *O'Connor* case and Bill C-46, see Feldthusen 1996: 537-563.

complainants to protection from the unnecessary and potentially harmful invasion of their privacy entailed by the production of personal records in sexual assault proceedings. However, neither the relevancy test proposed by the B.C. Court of Appeal nor the modified version accepted by the majority of the Supreme Court of Canada, subsequently known as the "O'Connor Guidelines," has resulted in significantly improved protections for complainants. Parliament attempted to address the imbalance it saw as inherent in the "O'Connor Guidelines" through its drafting of Bill C-46, in recognition of the equality concerns expressed both by the minority decision as well as women's equality advocates. However, the following comments from Crown indicate that equality issues for complainants continue to be subordinated to the rights of the accused to make full answer and defence. As one Crown counsel put it: *When Chief Justice Joseph Campbell issued that original order in O'Connor, we were doomed.* The moment that a procedure for disclosure was made a point of law, it *opened the floodgates* for defendants to access the records of those who accuse them.

This point was reiterated virtually verbatim by another Crown interviewee who, on the basis of many years of experience in criminal prosecution, spoke of recent trends. Noting that between 40 and 50 percent of all sexual assault cases continue to see requests for third-party records, he claimed that, contrary to the spirit and intent of the "O'Connor Guidelines," requests for records have been *far more prevalent* over the past five years. He further added that, *Both O'Connor and C-46 raise an issue that generally educates the bar* about **how** to make disclosure requests. It became clear that, under *O'Connor*, any "relevant" third-party records had to be disclosed. For Crown, one of the significant effects of the Supreme Court of Canada's *O'Connor* decision was to confirm the position already established by *Stinchcombe* with respect to third-party records. As one respondent put it, Crown's general response then was *to say that we did not want any documents. This way we would not be in a position to disclose them. The defence thinks that you're "hiding the weenie," so they request disclosure.* While Crown's reference here to "hiding the weenie" is expressed in a light-hearted fashion, it belies the far more troubling effects of an adversarial judicial system, still caught in patriarchal discourses of competitive secrecy.

## The Relevance of Equality

As noted earlier, the result of Bishop O'Connor's appeal to the Supreme Court of Canada was a narrow majority (5:4), with considerable disagreement between the majority and minority over the question of relevance and how it was to be determined. The modified test developed by the majority acknowledged that "fishing expeditions" on the part of the defence counsel bent on gaining access to personal records in the "mere hope" of finding something with which to impugn the complainant's credibility was not sufficient grounds to grant an application. Although the majority cautioned that judges considering disclosure applications need to be aware of the pernicious role of myths and stereotypes that are invoked in sexual assault trials in particular, it nevertheless emphasized that the burden on the accused at the initial stage of the relevancy test should not be an onerous one. It was considered by the majority that any higher burden of relevancy at this stage of the proceedings could compromise the accused's right to full answer and defence, given that the actual contents of the records being sought were largely unknown at this point. As explained by one Crown interviewee, *the onus we place on the accused should not be interpreted as an evidentiary burden requiring evidence and a voir dire in every case.*[21]

The majority decision of the Supreme Court of Canada to favour the rights of the accused in this instance effectively "glosses over any concerns about systemic bias and bluntly opposes any suggestion (such as that made by Justice L'Heureux-Dubé in dissent) that the records in question would rarely be relevant" (F. Kelly, 1997: 5). In other words, according to Frances Kelly, "The accused needs little or no foundation at this point to open up highly confidential files to the court" (Ibid.: 5). Moreover, as Busby suggests, "A literal application of the 'likely relevance' test (especially in the light of the examples the majority gives) will almost invariably result, at least, in an order requiring that counseling

[21] "A voire dire examination during a trial refers to a hearing out of the presence of the jury by the court upon some issue of fact or law that requires an initial determination by the court or upon which the court must rule as a matter of law alone" (Yogis, 1998).

records that may touch on the assault or any other abuse (that is, most counseling records) be disclosed to the judge" (Busby, 1997: 157).[22]

With its primary focus on the section 7 rights of the accused, the low standard for asserting the relevance of third-party records set out by the majority in *O'Connor* essentially ensured an increase in personal records applications by defence counsel. This consequence, unintended or otherwise, is directly attributable to the lack of any serious consideration of the equality rights of female complainants at stake in relevancy tests. As Frances Kelly notes, it is because the majority decision "is almost entirely devoid of an equality analysis as it relates to the complainant's section 15 *Charter* rights" that a complainant's records would "almost always be found relevant" (1997: 4). Van Dieen, is not alone in observing that the "majority did not even mention the word 'equality' in its reasons" (1997: 31).

Furthermore, the increase in applications cannot help but "have a serious impact on women and children who have been victims of sexual assault" (Sampson, 1998: 4), given that they make up over eighty percent of complainants in sexual assault proceedings. The *O'Connor* case represents what Sampson describes as a "watershed in the rape crisis backlash" particularly as this backlash relates to records disclosure in sexual assault proceedings (Ibid.: 5). Frances Kelly argues:

> Individuals who have been victims of assault will be reluctant to seek help as they will no longer be certain that their discussions will be confidential. The decisions will undoubtedly have an impact on the justice system, as victims will have to choose between pursuing either professional help, or criminal charges, but not both. (1997: 15)

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[22] Where, on this issue, the minority judgement concerned itself with the conditions which alone would be insufficient grounds for a determination of relevance, the majority gave the following examples of situations which may be sufficient grounds: (1) they may contain information concerning the unfolding of events underlying the criminal complaint; (2) they may reveal the use of a therapy which influences the complainant's memory of the alleged events; (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; and (4) 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 ... 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 (*O'Connor* at 440-441).

The procedures and tactics of compelling records in sexual assault trials can be understood as "part of the retrenchment movement against equality advances made by women in Canadian society" and an "assault on the progress made by women who have been working toward the goal of ending violence against women in Canada" (Sampson, 1998: 4). The equality compromises inherent in the judiciary's failure to truly take into consideration the impact of the gendered nature of sexual assault, undermines the subsequent incarnations of these guidelines (as set out in Bill C-46), however much the latter has been celebrated as a "victory" for women.

Within this context, Bill C-46 has been understood as a corrective measure, an "effort to compensate" for the lack of equality considerations in *O'Connor* (Ibid.: 5). It is also broadly acknowledged to be as much the legislative enactment of Justice L'Heureux-Dubé's dissent, as it is the accomplishment of equality-focused lobbying efforts and litigation.[23] Frances Kelly sees promise in the "additional protections" afforded by Bill C-46 against the "O'Connor Guidelines," because of their higher relevancy test and a recognition that both equality and privacy interests are implicated at all stages of the relevancy testing (1997: 15). However, there remains significant anecdotal evidence that the actual practice of determining relevance continues to differ from the intentions of the guiding principles. In other words, the additional legislative protections have yet to fully find their way into the courts. It is not surprising then, as recent conflicting case law has demonstrated and the interviews here have confirmed, that it is these "additional protections" that have remained the most contentious part of Bill C-46.

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[23] The following organizations are only some of those who had significant input into the drafting of Bill C-46 and who continue to be committed to lobbying for the equality rights of women. They include, the Women's Legal Education and Action Fund (LEAF), the National Association of Women and the Law (NAWL), The DisAbled Women's Network of Canada (DAWN), the Canadian Association of Sexual Assault Centres (CASAC), Metropolitan Action Committee on Violence Against Women and Children (METRAC), and the Feminist Research Education Development & Action (FREDA) Centre.

## The Balancing Act: Constitutional Challenges to Bill C-46

Perhaps one of the most promising aspects of the legislative reforms of Bill C-46 for the equality rights of women, lies in its acknowledgment that *Charter* rights are not to be treated hierarchically; every effort must be made to balance them when there is an apparent conflict.[24] The issue of balancing the rights of the accused and the complainant is to be undertaken at every stage of the test of determining the relevance of records, as opposed to the "O'Connor Guidelines" which had only invoked the balancing question at stage two of the relevancy tests.

A review of leading case law and judicial reasoning on the constitutionality of sections 278.1 to 278.91 of the *Criminal Code* demonstrates how the question of "balancing" the section 15 privacy rights of complainants with the section 7 full answer and defence rights of the accused has remained a central and contested issue in a post-Bill C-46 climate (see Appendix D for a brief review of the leading cases in B.C. since the enactment of Bill C-46). Generally speaking, reported cases in B.C. have illustrated what Crown counsel have confirmed in their interviews: section 278.5, the section which requires the judge to consider the balancing of the rights of complainants with the rights of the accused in the determination of relevance, is the most contentious and frequently challenged provision of this statute. Perhaps in part because of the educational efforts of both Crown and independent counsel on behalf of third-party record holders who have defended the intentions of this "balancing" provision, judges are becoming increasingly aware of the privacy and equality concerns at stake in disclosure procedures. More often, they are being exposed to the complexity and difficulty of protecting these rights under the current procedural guidelines.

Defence counsel's challenges to the constitutionality of Bill C-46, and particularly to section 278.5, have argued that the equality considerations and requirements specified here, at the outset, dictate too high a threshold for determining relevance and thus violate

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[24] See *Dagenais v. CBC*, where the Supreme Court of Canada determined that every effort must be made to balance *Charter* rights in the event of a conflict.

the accused's right to full answer and defence. The provision specifies the terms of the relevancy tests, and precisely what the judge must balance in determining whether records shall be produced firstly for his/her review, and secondly, for trial. Section 278.5(2) requires judges, in their determination of relevance, to consider *in addition to* the accused's right to make full answer and defence, the discriminatory beliefs, biases and prejudices against the "personal dignity" of complainants, together with society's interest in encouraging the reporting of sexual offences and enabling complainants to obtain treatment.

> **278.5 (1)** The judge may order the person who has possession or control of the record to produce the record or part of the record to the court for review by the judge if, after the hearing referred to in subsection 278.4(1), the judge is satisfied that
>
> a) the application was made in accordance with subsections 278.3 (2) to (6);
>
> b) the accused has established that the record is likely relevant to an issue at trial or to the said competence of a witness to testify; and
>
> c) the production of the record is necessary in the interests of justice.
>
> **(2)** In determining whether to order the production of the record or part of the record for review pursuant to subsection (1), the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy and equality of the complainant or witness, as the case may be, and any other person to whom the record relates. In particular, the judge shall take the following factors into account:
>
> a) the extent to which the record is necessary for the accused to make a full answer and defence;
>
> b) the probative value of the record;
>
> c) the nature and extent of the reasonable expectation of privacy with respect to the record;
>
> d) whether production of the record is based on a discriminatory belief or bias;
>
> e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
>
> f) society's interest in encouraging the reporting of sexual offences;

g) society's interest in encouraging the obtaining of treatment by complaints of sexual offences; and

h) the effect of the determination on the integrity of the trial process.

There has been a colourful array of judicial responses to the requirements of this provision, noted particularly by their reception of both Crown and defence arguments on the question of balancing competing rights. In a recent sexual assault case in Victoria, B.C., *R.* v. *Stewart* (February 1999), Judge Stewart ordered a stay of proceedings in 76 of 79 charges against the accused. This order was explicitly made in reaction to the Crown's suggestion that the disclosure of the complainant's records to the accused could render the complainant suicidal. A Crown counsel explained that they were quite *surprised* at what was clearly a judicially *inappropriate* response in staying the proceedings. It was an answer that is perhaps indicative of the very deep-seated prejudices that have thrived in traditional, misogynist "justice." By issuing stays of proceedings rather than making a determination of relevance at the point in the proceedings where the complainant's section 15 and section 7 *Charter* rights should have been most powerfully invoked, Judge Stewart refused any consideration of the balancing required by section 278.5, much less any tolerance for the mere suggestion that the disclosure may be a violation for women.

Although Judge Stewart's decision did not formally concern a constitutional challenge, it is, however, similar to that of Judge Belzil's in *R. v. Mills* (1997), especially insofar as it indicates a hostile refusal to comprehend, much less to "balance" the competing "rights" in sexual assault hearings. Close attention is being paid to the *Mills* case, both by the legal community and equality advocates, as it is the first case to appear before the Supreme Court of Canada to test the constitutionality of the legislative reforms of Bill C-46. In striking down the entirety of Bill C-46 as unconstitutional, Judge Belzil took as his specific target the equality-minded objectives of the new legislation and the dissenting arguments of Justice L'Heureux-Dubé that informed them. Issuing a decision that enables the lower courts of Alberta to return to the *very low* threshold test endorsed by the majority in *O'Connor,* Judge Belzil simply railroaded the equality analysis added to the disclosure/relevancy test of Bill C-46. In his reasons, Judge Belzil held that:

> The Supreme Court of Canada has, as recently as December 1995 in the *O'Connor* decision, determined what the proper balance [between competing constitutional rights] is.
>
> In my view, Bill C-46 is not a proportional response and does not constitute a minimal impairment of rights but rather constitutes a substantial impairment of the fundamental right to a fair trial. (at 71-72)

The Supreme Court of Canada heard this appeal in January 1999, and is expected to issue its decision this spring.

In striking down sections 278.1 to 278.91 of the *Criminal Code*, the judgements of *Mills* (Alberta), and shortly in turn, *Lee* (Ontario) (1997), have provided a rationale for an onslaught of subsequent challenges, particularly in these two jurisdictions. Case law research identified over fifty *Charter* challenges to the disclosure provisions in the three years following the *O'Connor* decision (Sampson, 1998: 4). There may be some comfort, however, in knowing that most have been unsuccessful. *Quick Law* searches (March 1999) failed to capture any **successful** constitutional challenges in British Columbia since *O'Connor*. In other words, despite the growing frequency of defence requests for third-party records, and despite the provisions that now *open the floodgates* by formalizing the procedures for these requests, Appeal Court judges have indicated a reluctance to throw the legislative baby out with the bathwater. Consider Justice Patterson's comments in *Stromner,* which recognize the pivotal role the courts have in interpreting the legislative intentions of Parliament.

> However, I would respectfully suggest that the more frequently judicial gladiators enter the arena to strike down laws enacted by elected assemblies, the more likely it is that the cries of the spectators will turn from cheering to derision. (*Stromner* at 36)

Following Justice Taylor in *R. v. Hurrie* (1997), the Appeal Court judges in B.C. have considered the broad assertion by defence counsel that the relevancy tests of sections 278.1-278.91 (and particularly, section 278.5) (see Appendix B) create a "presumption against disclosure" and therefore contravene the accused's section 7 rights to full answer and defence. They have ruled that this is not an accurate reading of the statute, and have affirmed that the procedural requirements of Bill C-46 for gaining access to third-party

records, establish a "low evidentiary threshold" and thus do not infringe on the rights of the accused.

While the decisions of the Appeal Court of B.C. upholding the constitutional validity of sections 278.1-278.91, are promising with respect to the possibility of Bill C-46 withstanding the constitutional challenge of the *Mills* case to be heard in the Supreme Court of Canada, it is worth remembering that they rest on an assertion that the relevancy tests are in fact based upon a low evidentiary threshold. From the point of view of equality advocates, one can only conclude that from the perspective of complainants, the likelihood of records being released firstly to the judge (which is itself a violation of privacy and confidentiality, although this point seems largely lost on the judiciary) for further consideration, and secondly to the courts, is in fact high. While the relevancy threshold of Bill C-46 is slightly higher than that in *O'Connor* and therefore is **more** protective of women's equality and privacy rights, the broad context of the position created by Bill C-46 indicates that personal records can and will be made available to the courts on a regular basis.

A case law review nonetheless captures a certain ambivalence toward Bill C-46 on the part of the judiciary. The spirit of judgements issued from the B.C. Court of Appeal tends to resemble the cautious considerations articulated by Judge Patterson in *Stromner* (1997). While striking down most of the constitutional challenges to Bill C-46 which were brought before him, Judge Patterson nevertheless held that section 278.5(1) did represent a threat to the accused's section 7 *Charter* rights in light of section 278.5(2) which requires taking into account eight factors (see page 27 of this report) in determining relevance, before the contents of the records have been made available to the court. Although Judge Patterson held that section 278.5(1) could not withstand a constitutional challenge, he nevertheless argued that:

> ... serious effort should be made to interpret the impugned legislation in such a fashion that it will be in constitutional harmony with the rulings of the Supreme Court of Canada and the legislative intentions of Parliament. In other words, a serious effort should be made to try and make it work

> before sections of the enactment are relegated to section 52 oblivion. (*Stromner* at 37)[25]

More importantly, we might add, a serious effort should be made to keep in view the **equality** focused protections that, as was the case in *Stromner*, are treated as the single most contestable sections of the provisions. Acknowledging the *modest effort* of the courts to balance the rights of an accused to a fair trial with the rights of victims/witnesses to a fair trial, a sexual assault worker interviewed here further captures one of the obstacles of such judicial reasoning:

> *I don't see these [rights] as contradictory, and any balancing effort compromises both. That is, there can be no fair trial if women's equality rights are not respected, nor if accused's rights are undermined. It takes both. It is* ***both/and****, and the metaphor of balancing is a wrong-headed notion.* ***You don't get both by balancing, you get both by attending to both.***

The point made by this interviewee goes to the heart of the debates concerning Bill C-46. Without serious judicial consideration of women's equality interests, the scales of justice will inevitably be tipped in favour of the accused.

# III. For the Record (Interviews)

## Methodology

Central to the purpose of this study was the need to begin to assess the ways in which the use of third-party records in sexual assault trials has affected the provision of support services to women and children who have been sexually assaulted. Focusing on B.C., this project is preliminary in nature, and the scope of the interview component was

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[25] In *Stromner* the accused claimed that sections 278.1–278.9 violated his section 7 rights because they did not allow him to make full answer and defence. Judge Patterson held that "with the exception of section 278.5(2), the measures contained in the Act are not arbitrary, unfair or based on irrational considerations ... in balancing the interests of both parties" (at 61). He added that section 278.5(2), however, "mandates judicial consideration of matters likely unknown to the judge," and thus could not be saved under section 1 of the *Charter* (at 62). Section 52(1) of the Constitution Act, 1982 states that: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

limited to a total of fifteen interviews. Respondents were selected with a view to obtaining information which would address both the judicial experience as well as the experience of support services, and therefore provide a range of informed accounts of the impact of Bill C-46 on the experiences of women, both as complainants and clients/victims. Legal respondents were selected at random from the court registries of two regions in B.C. Service provider respondents were selected from a range of services whose primary mandate is the provision of health care, counseling, and support to women who have been victims of violence. These included representatives from both the government and non-government sectors. Two of the support service respondents were therapists in private practice, both of whom had had the experience of having their records subpoenaed in the last five years. One respondent was a psychiatrist in private practice. Health care respondents were drawn from several regions of B.C.

Two separate but overlapping questionnaires containing over twenty-five questions were drafted for the purpose of these interviews. Questions were both closed and open-ended, and were used primarily as orientation points for further discussion. For service providers, the questionnaire had five domains of inquiry: (a) a general section seeking background information regarding the nature of the services provided and the interviewee's role in them; (b) a section on their experience and perceptions in/of court proceedings; (c) a section about the type of records kept on clients before and after the enactment of Bill C-46; (d) a section about how they inform, and how their clients respond to, the question of confidentiality; and (e) a section about their knowledge and evaluation of the effectiveness of Bill C-46.

For Crown and independent counsel, the questionnaire also had five domains of inquiry. These included: (a) a general section seeking background information regarding their involvement in sexual assault proceedings and the specific courts and investigative units in which they have acted; (b) a section about the number of cases in which they have been involved which included third-party records requests; (c) a section about the nature of the records and the rationale for producing them; (d) a section about the responses of complainants to the seeking of personal records and the judicial ordering of their

production; and (e) a section about their knowledge and evaluation of the effectiveness of Bill C-46.

Each of the interviews was conducted by telephone and varied considerably in length. Respondent's answers were recorded by the researchers. A sample of both the legal and service provider questionnaires can be found in Appendix E. For many of the respondents, confidentiality both for themselves and on behalf of their clients was an issue in this study. In respect of this, every effort has been made to ensure that the opinions expressed in no way compromise the identities of their sources unless the matter under consideration is itself already one of public record. Accordingly, quotations appear with reference only to the context of the nature of the services the respondent provides.

## Responding to Disclosure Requests

Over the past decade, service providers have identified significant concerns with the ways in which personal records are being used in sexual assault trials. While a number of the respondents here suggested that the proclamation of Bill C-46 had introduced a sense of hope for equality advocates and complainants alike, the decisions of *Carosella*, in combination with the constitutional challenges to Bill C-46 in both the *Mills* and *Lee* cases, have re-introduced a sense of trepidation. Since *Carosella*, one interviewee noted that she keeps records for ten years, although she is now very concerned about what this would mean if they were ever subpoenaed. She raised the important point that even though she keeps thorough notes, she doubts that after ten years she *would remember well enough to interpret them sufficiently to rebut an assertion which has been taken out of context* by defence counsel. Moreover, she had no sense that her role in court in such circumstances would be anything other than defending credibility, both her own as a health professional and the complainant's. The circumstances of historical sexual assault trials make this concern all the more pressing, and the potential jeopardy to justice for the complainant more likely. Another counselor added that:

> *There was a time in the mid to late 80s and early 90s when the courts were far more sympathetic. I think it's gone back in the last 5 years to the 70s really – to before the gains women had made – where victims of sexual*

*assault are considered fair game. Counselors are also fair game. It's like they're still saying we don't believe women whether they're counselors or clients when it comes to sexual assault. It feels like this is part of a backlash against progress that was made.*

One women's centre interviewed for this project reported that in the year following the introduction of Bill C-46, they had significantly fewer requests for records; however, *after the recent cases in Alberta (Mills) and Ontario (Lee) ... we've had a run of production requests. In the last year there are a lot more than in the last two years.* When asked about the nature of the requests they were receiving, this centre noted that of the twenty requests in the past two years, five of them were by clients themselves. None was done according to the new subpoena process which accompanies Bill C-46.[26] They had either received letters of request from the defence or subpoenas which were not in accordance with the guidelines. This respondent said she had been subpoenaed three times over the course of three consecutive months, and each time the agency engaged their lawyer to defend their position of refusing to disclose. On each occasion it was brought to the attention of the defence that their subpoena requests did not comply with the Bill C-46 guidelines, and on each occasion their request was withdrawn. The interviewee noted that the goal of the defence in this instance was *harassment and intimidation*, not disclosure. When asked if she thought Bill C-46 had improved the situation for counselors as well as complainants, this worker remarked that:

*Bill C-46 has allowed our lawyer to argue request by request that in each instance they are not using the C-46 guidelines so no records will be disclosed. And he's been successful because when they are faced with discussing the legislation they back down, even in the case of a subpoena.*

While this agency clearly feels that some aspects of the legislative reforms of Bill C-46 have been empowering, the worker noted that without funding for legal services, their agency would be unable to defend themselves or their clients against the ongoing and

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[26] Bill C-46 significantly amended the subpoena process for personal third-party records in sexual assault cases. Subpoenas can only be issued by the trial judge after an affidavit has been submitted by the accused. A notice of issue is then provided to all stakeholders, and a hearing is conducted at which the two-stage relevancy tests are applied. Bill C-46 expressly addresses the question of the process by which records can be obtained and letters of request from defence counsel are no longer an applicable option.

increasing requests they receive for disclosure of their records. For agencies who are either unaware of the legislative reforms of Bill C-46, or are unable to secure legal assistance, the question of protecting the equality and privacy interests of their clients becomes critical. While some provinces such as British Columbia have enacted legislation which permits third-party record holders to have access to legal aid *(The Victims of Crime Act)*, this is by no means a uniform response. The question of informing stakeholders of the resources available to them is one which requires the urgent attention of the Justice Department. Bill C-46 did, however, forestall the option for which some courts had previously availed themselves in stipulating that costs cannot be awarded against third-party record holders.

Regardless of the lack of success of disclosure requests in the above circumstance, the general awareness of support staff in some agencies to the climate of hostility toward complainants in the courts, has led them to keep only the most minimal of notes. One worker mentioned that they had been advised to *keep few notes and have poor memories.* However, the implications of such an approach for service delivery is significantly less than ideal. For agencies that employ more than one counselor, it creates a situation in which there is an inordinate reliance upon the memories of individual staff members, and the continuity of service is significantly compromised. One health care provider related a comment made to her by the police: *"You women are so stupid because you keep diaries and notes and that information is there forever to be used against you." The situation is such that the only safe guarantee that your personal life won't be exposed is not to record it or have it recorded.*

What is at issue here is not only the impact of accessing personal records, but the intent which underpins such access and the uses to which such information is put. Crown suggests the kind of information sought by defence is *anything that would demonstrate unreliability or questionable character of the witness/complainant. They are fishing expeditions and intimidation tactics. Whether intentional or not the whole proceeding tends to intimidate the complainant.* This same Crown counsel also pointed out that:

> *One of the interesting things about the legislation is that if someone broke into my house and beat up my husband, and the accused was caught red*

*handed so to speak, he could not apply to disclose any records. But if he broke into my house and sexually assaulted me he could get them. Section 278 applies only to sexual offences and witnesses to it. The court feels that women will lie about sexual assault yet men don't lie about assault.*

## Modifying Record-Keeping Practices

All respondents to our survey identified that they have changed their record-keeping practices in the last five years as a direct consequence of the defence strategy of requesting their disclosure to the courts. The degree to which each of the interviewees had changed their practices varied considerably, with only two of the agencies surveyed acknowledging that they now keep virtually no notes on the content of counseling sessions with clients. Hospital-based agencies have record-keeping practices which are largely determined by institutional policy.[27] Moreover, the context in which such records are made, shapes both the information recorded as well as the potential it has to be used as a weapon by the defence against the credibility of the complainant.

Given the focus that medical records (as opposed to counseling records) have on documenting the physiological effects of an assault, such records are invariably less attractive to defence counsel and more likely to make up a component of the Crown's case. They carry substantially less potential to invoke the sorts of myths and stereotypes which would undermine credibility.

Nonetheless, it is worth considering the observation provided by one interviewee from a hospital-based service. While she commented about the more positive use of personal/medical records in criminal sexual assault trials, she noted that examiners are still cautioned about recording anything about a woman's account of an assault unless it is relevant to the provision of medical treatment. Staff are made aware that such information is considerably more vulnerable to being used against a client if the matter proceeds to court. Clearly, while we can identify important differences in how information generated

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[27] An attempt was made to examine the record-keeping and releasing policy of a major hospital. However, the staff member contacted for the purposes of this research did not wish to continue the interview or share any information on the hospital's record-keeping practices.

in different contexts carries a different value with respect to its potential for being used against a complainant, the overall focus on the credibility of the complainant nevertheless remains. As one worker put it, *in sexual assault its always about credibility – whether it's officially stated or not. Most sexual assault cases ... are trying to prove she's lying.* Another interviewee noted: *I do think that part of what they are trying to do is to shame her with her life story; scare her about the possibility of shame; and isolate her* [from support] – *if she wants to use the courts.*

For agencies whose roles are more closely involved in providing emotional and psychological support, the question of how their record-keeping practices have been affected by the defence counsel tactic of disclosure is far more complicated. While most respondents to this study were clear that it is in the best interests of their clients for them to keep records, and that the purpose of keeping records is to provide a better quality of service to their clients, none felt confident that without significant intervention, the integrity of their records would be respected by the courts if and when they were disclosed. As a consequence, a number of note-taking strategies were described. These included such things as placing particular emphasis on adding contextualizing phrases after any note which could be read in an ambiguous way. One worker gave the example of a client who might disclose significant drug and alcohol use. In these circumstances she would add a note to her records describing the behaviour as a *coping mechanism.* Without such contextualizing comments or glosses, her notation could easily be misread to imply that the woman's drug or alcohol use fundamentally compromises her credibility. Another strategy frequently employed by support workers is to use shorthand notations, for which they might add an interpretive legend if their records were subpoenaed. It was felt by one worker that if her notes were "coded" she would be required to interpret them. Given the opportunity to interpret them to the courts, she felt she might be better able to rebut misleading and inaccurate readings of her client's actions.

On the question of directly quoting their clients in their notes, most respondents felt this was an inadvisable practice. For one worker, the only circumstance in which the use of direct quotations is considered appropriate is when a client repeatedly uses a particularly

emotive phrase or description. In this circumstance, the worker feels that documenting a direct quotation would at least deter defence counsel from alleging that she herself had framed the client's responses. The anxiety which underpins this comment relates to the increasingly popular myth that therapists put words in their clients' mouths, and effectively "invent" false memories for them.

Given the highly sensitive nature of the information which is revealed in counseling and therapy, the issue of confidentiality is a very real one. Moreover, much of the force of the claim that disclosure of counseling records is a violation of both the privacy and equality interests of women, derives in law from the very high expectation of privacy contained in therapy and counseling records. Many of the respondents to this survey no longer feel that they can assure their clients that what is discussed in therapy will remain confidential. A number of respondents have generated client contracts which now specify the circumstances under which their client's confidentiality cannot be guaranteed, and they present this statement to the client at the first session. Typically, these circumstances include three situations: a) when a client indicates that she intends to seriously harm someone else or herself; b) the client reveals that a child is being subjected to abuse; and c) the worker is ordered by the courts to disclose their records or is subpoenaed as a witness herself. As a consequence, clients must live with the anxiety that the discussions they are about to have may be disclosed to the courts should their records ever be subpoenaed. While it is virtually impossible to measure the effects of this kind of declaration on the client/therapist relationship, it seems reasonable to suggest that it must erode the client's feelings of safety and trust, both of which are essential components to a successful therapeutic relationship.

In summation then, while all respondents had changed their record-keeping practices in some way, none felt that to do so was in the best interests of their clients. The range of changes to record-keeping practices varied considerably between the respondents to this survey, with some indicating only minimal changes, and others indicating a reluctance to do anything more than record the client's name and the time of the appointment. In any case, the counseling relationship is potentially jeopardized should the

client pursue legal redress. As one counselor noted, anything that brings the therapeutic relationship into the courtroom inevitably changes the therapeutic relationship, and the change is invariably a deleterious one. Additionally, it might be best if a client does not have access to her own therapeutic records. Beyond the disclosure practices of court proceedings, these records would remain confidential. This cannot help but be experienced by many women as a violation of the trust upon which the therapeutic relationship is based.

## The Threat of Disclosure

When asked about their experiences of client's thoughts on seeking legal redress, support workers consistently identified one of two things: either women remain somewhat naive about what to expect from the justice system and continue to believe that justice will be done or, as one worker put it, *they know exactly what they are doing and how they will be publicly shamed, and they do it anyway*. The third position that was frequently reported by those interviewed is that women simply feel that they must avoid the criminal justice system if they are to receive the support and healing they need. Marginalized women, in particular, avoid the system. As one counselor advised, *Native clients don't go to court – it's that simple, they don't trust the justice system so they have a much higher rate of not reporting anything*. Crown pointed to a similar situation in three cases which *involved cultural issues, i.e., the complainants would be exposed to their* [ethnocultural] *communities. For some there is a tremendous fear of being exposed.* [For one of these women] ... *her life would have been over when her community heard what was said in the courtroom.* And a sexual assault counselor related that:

> *First Nations people are significantly over-represented. The highest percentage would be First Nations people. They are particularly vulnerable because so many of them have had records generated from all sorts of places which are scattered all over the country.*

Another counselor advised that *the poorer you are, the more records* [are requested]; *disabled – it's the same, Native women the same.*

One counselor gave the example of a client who actually terminated counseling at the point when sexual abuse issues were raised. The sole reason for this choice related to

the possibility of the client pursuing criminal charges, and her fear that her credibility would be impugned on the basis of allegedly being influenced by her therapist. The client in this case did return to therapy, but not until a complaint was filed with the police several months after the client had first terminated counseling. During the period between leaving therapy and deciding to pursue criminal charges, this client was effectively prevented from having the support that she would otherwise have chosen and that might have assisted her in making her decision. The counselor in this situation explained that this scenario is by no means a rare occurrence.

Most of the respondents to this survey unequivocally felt that over the past five years there had been an increase in the number of women who show a reluctance to pursue a sexual assault complaint through the courts. None reported that the proclamation of Bill C-46 had worked to encourage the reporting of incidents of sexual assault. This suggests one of two things: either a) Bill C-46 affords no greater comfort to women who are the using the criminal justice system to seek redress (and extensive publicity on constitutional challenges to this legislation such as the *Mills* and *Lee* cases would further inscribe this concern), or b) there is little public awareness of the protections that Bill C-46 affords in principle, and there is an urgent need for this information to be disseminated more widely, in and beyond the judicial system.

As well, many of the women seeking help, and their health care service providers, express distrust of the judicial system. One counselor described the court system as *misogynist and racist. The legal system is just not for women and children and in particular for representing diversity and special needs people.* Another advised that *the Attorney General must do something about renegade judges who are making decisions anyway. There needs to be more checks and balances.* And yet another commented:

> *It's not true that this law has discouraged a lot more women. Most women were already discouraged, and this law did not get them to change their minds. The system is clearly biased against women and they have no doubt about this. They absolutely expect that. But it should be noted that women are taking on more highly positioned men through the courts than ever before. The women who took on O'Connor knew this, and proceeded anyway. They know exactly what they are doing and how they will be*

*publicly shamed, and they do it anyway. The only change is that more and more the system is being brought into disrepute.*

One health care service provider advised,

> *I think that there are judges who have openly thwarted the law. There is a slightly better practice among prosecutors. The defence bar has been viciously thwarting the law. And particularly men within the system have been conducting a debate using the lives of women, about the* Charter *or legislation, in spite of the fact that C-46 is backed up by both the* Charter *and legislative initiative.*

Preliminary inquires into the record-keeping facilities of a number of hospitals suggest that there is little awareness on the part of hospital administrators regarding the new subpoena procedures in criminal sexual assault trials. As reported by our interviewees, defence counsel routinely circumvent formal subpoena procedures. Instead, defence count on the lack of familiarity with the law by health care providers. For example, a personal physician expressed some concern over the practice of patients requesting their own records or authorizing insurance companies, through a standardized release form which does not specify which records are to be released. This doctor felt that patients thought they were signing a form authorizing their physician to write a report on a condition relevant to a particular claim, whereas the entire medical record is released. According to him, he's *realized I don't have a lot of power. If my patient is OK with something then I have to go along with that.* This results in the exposure of personal records in courts with little consideration for the privacy interests, let alone equality interests, of the complainants. The holders of personal therapeutic health records must become more familiar with the law and correct procedures regarding the subpoena process, and have access to legal counsel in order to safeguard the interests of their clients.

Despite the tenacity of myths and stereotypes about women's sexuality and credibility that inform defence counsel practices, and the judicial reasoning that tolerates and reproduces them, perhaps we may place some faith in the recent, unanimous recognition of the Supreme Court of Canada in *Ewanchuk* of the "inappropriateness" of such equality-compromising assumptions. As Supreme Court Madam Justice McLachlin

held, in support of Madam Justice L'Heureux-Dubé, while myths and stereotypes regarding women's ability to speak the truth of sex lie at the root of the inequality that women continue to experience both in the judicial system and society at large, they in fact "no longer have a place in Canadian Law" (*Ewanchuk* at 103). If the legislative reforms of Bill C-46 are applied with respect to their guiding principles, the equality rights of women who have been victims of sexual assault, can and will be appreciably improved.

## IV. Conclusion

The purpose of this study was to undertake a preliminary assessment of the legislative reforms of Bill C-46 on the use of personal, third-party records in criminal sexual assault trials. At issue is whether and to what extent, do the practices of the courts impede women's access to both the criminal justice system **and** to support and healing.

Interviews with Crown and independent counsel indicate that:

- There has been a significant increase in personal records requests in the last five years. Records are requested in an average of 50 percent of sexual assault cases.
- The practices of requesting third-party records is recognized as a tactic of intimidation and/or a "fishing expedition" in the hope of being able to impugn the credibility of the complainant or witnesses.
- Bill C-46 notwithstanding, the greater protections afforded by the higher relevance threshold or the 11 insufficiencies for requesting records, nevertheless establishes in law the means by which third-party records **can** be obtained.
- Bill C-46 has been subject to numerous constitutional challenges based on the assertion that the relevance tests set a threshold which compromises the accused's ability to make full answer and defence, and thus violates section 7 of the *Charter* which guarantees, life, liberty and security of the person.
- The most frequently challenged section of the amended legislation is section 278.5. It is the section which **requires** that the complainant's rights to privacy **and** equality be balanced against the accused's right to full answer and defence.

- Despite the success of challenges in Alberta (*R. v. Mills*) and Ontario (*R. v. Lee*), there have been **no** reported successful constitutional challenges to Bill C-46 in British Columbia. However, the recent case of *R. v. Stewart* highlights a considerable resistance to the Bill's principles on the part of some members of the judiciary.

Crown anticipates that Bill C-46 will lead to an increase in records requests. It is yet to be determined, however, whether the appropriate application of the procedures will impact on the number of these requests which actually lead to disclosure. The successful administration of Bill C-46 is likely to be affected by the decision of the Supreme Court of Canada in the *Mills* case.

Interviews with service providers indicate that:

- In the last five years, clients have increasingly acknowledged a reluctance to pursue legal redress through the criminal justice system in cases of sexual assault because they do not trust the court system in general. They fear that highly personal information about them will be exposed to the court and used against them.
- There has been no appreciable reduction of this fear since the proclamation of Bill C-46.
- Awareness of legislative reforms such as Bill C-46 varies considerably among service providers, ranging from little knowledge of its substance or import to significant participation in lobbying for reform.
- Women continue to feel that they have to choose between counseling and support on the one hand, and legal redress on the other. While Bill C-46 was reported as providing an initial sense of optimism for both clients and service providers, the ongoing and highly publicized constitutional challenges have undermined this optimism.
- The defence counsel tactic of requesting records has had varying effects on the record-keeping practices of service providers. These effects range from the destruction of existing records to the keeping of only minimal information such as

names and dates of appointments, through to consciously maintaining detailed information which has been carefully recorded with a view to the possibility of its disclosure to a court at some time.

- The use of personal records as a weapon against complainants is a phenomenon which is peculiar to sexual assault. In the case of other forms of violence against women such as domestic assault, the use of personal records in criminal proceedings invariably supports the credibility of the complainant. Such records are far less vulnerable to being exploited for their potential to invoke prejudicial myths and stereotypes about women and sexuality. Not surprisingly, they have proven to be of little interest to defence counsel in other types of cases.
- The provision of free legal support to agencies whose records have been subpoenaed is vital to ensuring that women's equality and privacy rights are protected. Without free legal assistance, few agencies are in a position to resist a disclosure request.

## Recommendations on Record-keeping Practices

The practices of record-keeping vary considerably, depending upon the nature of the services provided. As such, it is virtually impossible to recommend a uniform practice which would ensure that records would not be vulnerable to vexatious requests by defence counsel or to disclosure. If the purpose of defence counsel subpoenaing records is to intimidate or discourage complainants from pursuing legal redress, then the contents of the records, as such, are irrelevant. As was noted in this study, it is not uncommon for records to be requested informally and indeed handed over, although they may never find their way into case evidence. Support services have few resources available to them in these circumstances to resist this process. It falls to the courts and the legal community to ensure that the vexatious pursuit of personal records in these circumstances is not permitted.

In view of the fact that the defence counsel practice of seeking records is to impugn the credibility of complainants of sexual assault, there are a number of strategies available to support services to minimize the potential harm this can cause. These include:

- Adopting a uniform approach to note-taking so that there is consistency both within the records as well as between staff members. This is particularly important for services which have more than one staff member involved with a client.
- Ensuring that the only information which is recorded is information which assists the provision of services to clients. The focus here should be on providing as high a quality of service to clients as possible.
- Limiting the use of direct quotations from clients, and where it is necessary or important to do so, ensuring that they are appropriately contextualized, and that it is clear that they are the client's own words and do not reflect the views or input of the health care worker.
- Developing and implementing a uniform policy with respect to the storage of records, which may include establishing a time-limit beyond which records will be destroyed.
- Ensuring that if therapy contracts are part of the practice of the agency, it is clear that the client is signing only for the release of material covered by that contract and is not authorizing release of the notes taken by the therapist as part of the overall service provision. However, this does not wholly protect the client from having all records subpoenaed by the courts.
- Establishing a policy with respect to informing clients about the expectations they can have of confidentiality. If possible, this includes providing a written statement to clients about the limits of confidentiality and the possibility of having records subpoenaed. Clients should be made aware of these constraints at the commencement of the therapeutic relationship.
- Developing a clear policy with respect to the management of disclosure requests. Some agencies are reluctant to disclose records even when the client herself initiates the request. Clients should be made aware of such a policy at the outset of service provision.
- For agencies who consider themselves particularly vulnerable to records disclosure requests, access to legal assistance is vital. While funding for legal representation

to assist in responding to disclosure requests may not be available in some circumstances, the benefits of a consistent relationship with informed counsel cannot be underestimated.

- Clients, agencies and health and social service providers require further education on issues concerning confidentiality, its implications, and the particular protections they may be afforded by the law.

## Postscript: Further Research

The findings of this preliminary survey indicate that there is an urgent need for a more comprehensive, broad-based, national study of the effects of Bill C-46. From the perspective of the practices of the courts, a detailed inquiry into the rationale used by defence counsel in the subpoenaing of personal records would provide equality advocates with vital information as to future legislative reforms. Moreover, a considered analysis of the varying ways in which individual judges determine relevance would provide important information regarding the concerns expressed by both sides of this debate. Do judges largely determine relevance as a point of law? To what extent are myths and stereotypes still profoundly affecting the decision-making of the judiciary?

From the perspective of the effects of Bill C-46 on women's access to counseling and support services, a much broader survey of service providers is required. In such a study, the experiences of clients themselves would add considerably to the quality of the information provided. Additionally, physicians in private practice should be surveyed to examine their record-keeping procedures and the ways in which personal medical records are released to various parties, including the courts. As well, educational initiatives need to be developed to respond to clients' rights to confidentiality, privacy and equality.

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# APPENDIX A:

# Bill C-46

2nd Session, 35th Parliament,
45-46 Elizabeth II, 1996-97

The House of Commons of Canada

# BILL C-46

An Act to amend the Criminal Code (production of records in sexual offence proceedings)

Preamble

WHEREAS the Parliament of Canada continues to be gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual violence against women and children;

WHEREAS the Parliament of Canada recognizes that violence has a particularly disadvantageous impact on the equal participation of women and children in society and on the rights of women and children to security of the person, privacy and equal benefit of the law as guaranteed by sections 7, 8, 15 and 28 of the *Canadian Charter of Rights and Freedoms*;

WHEREAS the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed by the *Canadian Charter of Rights and Freedoms* for all, including those who are accused of, and those who are or may be victims of, sexual violence or abuse;

WHEREAS the rights guaranteed by the *Canadian Charter of Rights and Freedoms* are guaranteed equally to all and, in the event of a conflict, those rights are to be accommodated and reconciled to the greatest extent possible;

WHEREAS the Parliament of Canada wishes to encourage the reporting of incidents of sexual violence and abuse and to provide for the prosecution of offences within a framework of laws that are consistent with the principles of fundamental justice and that are fair to complainants as well as to accused persons;

WHEREAS the Parliament of Canada recognizes that the compelled production of personal information may deter complainants of sexual offences from reporting the offence to the police and may deter complainants from seeking necessary treatment, counselling or advice;

WHEREAS the Parliament of Canada recognizes that the work of those who provide services and assistance to complainants of sexual offences is detrimentally affected

by the compelled production of records and by the process to compel that production;

AND WHEREAS the Parliament of Canada recognizes that, while production to the court and to the accused of personal information regarding any person may be necessary in order for an accused to make a full answer and defence, that production may breach the person's right to privacy and equality and therefore the determination as to whether to order production should be subject to careful scrutiny;

R.S., c. C-46; R.S., cc. 2, 11, 27, 31, 47, 51, 52 (1st Supp.), cc. 1, 24, 27, 35 (2nd Supp.), cc. 10, 19, 30, 34 (3rd Supp.), cc. 1, 23, 29, 30, 31, 32, 40, 42, 50 (4th Supp.); 1989, c. 2; 1990, cc. 15, 16, 17, 44; 1991, cc. 1, 4, 28, 40, 43; 1992, cc. 1, 11, 20, 21, 22, 27, 38, 41, 47, 51; 1993, cc. 7, 25, 28, 34, 37, 40, 45, 46; 1994, cc. 12, 13, 38, 44; 1995, cc. 5, 19, 22, 27, 29, 32, 39, 42

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

**1. The *Criminal Code* is amended by adding the following after section 278:**

Definition of ``record''

**278.1** For the purposes of sections 278.2 to 278.9, ``record'' means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

Production of record to accused

**278.2** (1) No record relating to a complainant or a witness shall be produced to an accused in any proceedings in respect of

(*a*) an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272 or 273,

(*b*) an offence under section 144, 145, 149, 156, 245 or 246 of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(*c*) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,

or in any proceedings in respect of two or more offences that include an offence referred to in any of paragraphs (*a*) to (*c*), except in accordance with sections 278.3 to 278.91.

Application of provisions

(2) Section 278.1, this section and sections 278.3 to 278.91 apply where a record is in the possession or control of any person, including the prosecutor in the proceedings, unless, in the case of a record in the possession or control of the prosecutor, the complainant or witness to whom the record relates has expressly waived the application of those sections.

Duty of prosecutor to give notice

(3) In the case of a record in respect of which this section applies that is in the possession or control of the prosecutor, the prosecutor shall notify the accused that the record is in the prosecutor's possession but, in doing so, the prosecutor shall not disclose the record's contents.

Application for production

**278.3** (1) An accused who seeks production of a record referred to in subsection 278.2(1) must make an application to the judge before whom the accused is to be, or is being, tried.

No application in other proceedings

(2) For greater certainty, an application under subsection (1) may not be made to a judge or justice presiding at any other proceedings, including a preliminary inquiry.

Form and content of application

(3) An application must be made in writing and set out

(*a*) particulars identifying the record that the accused seeks to have produced and the name of the person who has possession or control of the record; and

(*b*) the grounds on which the accused relies to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify.

Insufficient grounds

(4) Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify:

(*a*) that the record exists;

(*b*) that the record relates to medical or psychiatric treatment, therapy or counsel ling that the complainant or witness has received or is receiving;

(*c*) that the record relates to the incident that is the subject-matter of the proceedings;

(*d*) that the record may disclose a prior inconsistent statement of the complainant or witness;

(*e*) that the record may relate to the credibility of the complainant or witness;

(*f*) that the record may relate to the reliabil ity of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psy chiatric treatment, therapy or counselling;

(*g*) that the record may reveal allegations of sexual abuse of the complainant by a person other than the

accused;

(*h*) that the record relates to the sexual activity of the complainant with any person, including the accused;

(*i*) that the record relates to the presence or absence of a recent complaint;

(*j*) that the record relates to the complain ant's sexual reputation; or

(*k*) that the record was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused.

Service of application and subpoena

(5) The accused shall serve the application on the prosecutor, on the person who has possession or control of the record, on the complainant or witness, as the case may be, and on any other person to whom, to the knowledge of the accused, the record relates, at least seven days before the hearing referred to in subsection 278.4(1) or any shorter interval that the judge may allow in the interests of justice. The accused shall also serve a subpoena issued under Part XXII in Form 16.1 on the person who has possession or control of the record at the same time as the application is served.

Service on other persons

(6) The judge may at any time order that the application be served on any person to whom the judge considers the record may relate.

Hearing *in camera*

**278.4** (1) The judge shall hold a hearing *in camera* to determine whether to order the person who has possession or control of the record to produce it to the court for review by the judge.

Persons who may appear at hearing

(2) The person who has possession or control of the record, the complainant or witness, as the case may be, and any other person to whom the record relates may appear and make submissions at the hearing, but they are not compellable as witnesses at the hearing.

Costs

(3) No order for costs may be made against a person referred to in subsection (2) in respect of their participation in the hearing.

Judge may order production of record for review

**278.5** (1) The judge may order the person who has possession or control of the record to produce the record or part of the record to the court for review by the judge if, after the hearing referred to in subsection 278.4(1), the judge is satisfied that

(*a*) the application was made in accordance with subsections 278.3(2) to (6);

(*b*) the accused has established that the record is likely relevant to an issue at trial or to the competence of a witness to testify; and

(*c*) the production of the record is necessary in the interests of justice.

Factors to be considered

(2) In determining whether to order the production of the record or part of the record for review pursuant to subsection (1), the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy and equality of the complainant or witness, as the case may be, and any other person to whom the record relates. In particular, the judge shall take the following factors into account:

(*a*) the extent to which the record is necessary for the accused to make a full answer and defence;

(*b*) the probative value of the record;

(*c*) the nature and extent of the reasonable expectation of privacy with respect to the record;

(*d*) whether production of the record is based on a discriminatory belief or bias;

(*e*) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;

(*f*) society's interest in encouraging the reporting of sexual offences;

(*g*) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and

(*h*) the effect of the determination on the integrity of the trial process.

Review of record by judge

**278.6** (1) Where the judge has ordered the production of the record or part of the record for review, the judge shall review it in the absence of the parties in order to determine whether the record or part of the record should be produced to the accused.

Hearing *in camera*

(2) The judge may hold a hearing *in camera* if the judge considers that it will assist in making the determination.

Provisions re hearing

(3) Subsections 278.4(2) and (3) apply in the case of a hearing under subsection (2).

Judge may order production of record to accused

**278.7** (1) Where the judge is satisfied that the record or part of the record is likely relevant to an issue at trial or to the competence of a witness to testify and its production is necessary in the interests of justice, the judge may order that the record or part of the record that is likely relevant be produced to the accused, subject to any conditions that may be imposed pursuant to subsection (3).

Factors to be considered

(2) In determining whether to order the production of the record or part of the record to the accused, the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy and equality of the complainant or witness, as the case may be, and any other person to whom the record relates and, in particular, shall

take the factors specified in paragraphs 278.5(2)(*a*) to (*h*) into account.

Conditions on production

(3) Where the judge orders the production of the record or part of the record to the accused, the judge may impose conditions on the production to protect the interests of justice and, to the greatest extent possible, the privacy and equality interests of the complainant or witness, as the case may be, and any other person to whom the record relates, including, for example, the following conditions:

(*a*) that the record be edited as directed by the judge;

(*b*) that a copy of the record, rather than the original, be produced;

(*c*) that the accused and counsel for the accused not disclose the contents of the record to any other person, except with the approval of the court;

(*d*) that the record be viewed only at the offices of the court;

(*e*) that no copies of the record be made or that restrictions be imposed on the number of copies of the record that may be made; and

(*f*) that information regarding any person named in the record, such as their address, telephone number and place of employ ment, be severed from the record.

Copy to prosecutor

(4) Where the judge orders the production of the record or part of the record to the accused, the judge shall direct that a copy of the record or part of the record be provided to the prosecutor, unless the judge determines that it is not in the interests of justice to do so.

Record not to be used in other proceedings

(5) The record or part of the record that is produced to the accused pursuant to an order under subsection (1) shall not be used in any other proceedings.

Retention of record by court

(6) Where the judge refuses to order the production of the record or part of the record to the accused, the record or part of the record shall, unless a court orders otherwise, be kept in a sealed package by the court until the later of the expiration of the time for any appeal and the completion of any appeal in the proceedings against the accused, whereupon the record or part of the record shall be returned to the person lawfully entitled to possession or control of it.

Reasons for decision

**278.8** (1) The judge shall provide reasons for ordering or refusing to order the production of the record or part of the record pursuant to subsection 278.5(1) or 278.7(1).

Record of reasons

(2) The reasons referred to in subsection (1) shall be entered in the record of the proceedings or, where the proceedings are not recorded, shall be provided in writing.

Publication prohibited

**278.9** (1) No person shall publish in a newspaper, as

defined in section 297, or in a broadcast, any of the following:

(*a*) the contents of an application made under section 278.3;

(*b*) any evidence taken, information given or submissions made at a hearing under subsection 278.4(1) or 278.6(2); or

(*c*) the determination of the judge pursuant to subsection 278.5(1) or 278.7(1) and the reasons provided pursuant to section 278.8, unless the judge, after taking into account the interests of justice and the right to privacy of the person to whom the record relates, orders that the determination may be published.

Offence

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

Appeal

**278.91** For the purposes of sections 675 and 676, a determination to make or refuse to make an order pursuant to subsection 278.5(1) or 278.7(1) is deemed to be a question of law.

**2. Subsection 699(6) of the Act is replaced by the following:**

Sexual offences

(5.1) Notwithstanding anything in subsections (1) to (5), in the case of an offence referred to in subsection 278.2(1), a subpoena requiring a witness to bring to the court a record, the production of which is governed by sections 278.1 to 278.91, must be issued and signed by a judge.

Form of subpoena

(6) Subject to subsection (7), a subpoena issued under this Part may be in Form 16.

# APPENDIX B:

# Criminal Code Sections 278.1-278.91 (1998)

CROSS-REFERENCES
Sections 675 and 676 govern rights of appeal by the accused and the Attorney General respectively. The main importance of this section lies in the fact that the decision to admit sexual activity evidence being a question of law is appealable by the Crown should the accused be acquitted.

REPUTATION EVIDENCE.

**277. In proceedings in respect of an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.** 1980-81-82-83, c. 125, s. 19; R.S.C. 1985, c. 19 (3rd Supp.), s. 13.

CROSS-REFERENCES
The term "complainant" is defined in s. 2. As to other evidentiary and procedural provisions respecting the offences listed in this section, see the cross-references in relation to those provisions and the notes under s. 150.1. However, note in particular the companion provisions in s. 276 respecting evidence of sexual conduct with persons other than the accused.

SYNOPSIS
This section states that evidence of sexual reputation is not admissible to challenge or support the credibility of the complainant in proceedings under ss. 151, 152, 153, 155, 159, 170, 171, 172, 173, 271, 272, 273, or s. 160(2) or (3). It, in effect, reverses the common law rule that evidence of a reputation for sexual promiscuity was relevant to the complainant's credibility.

ANNOTATIONS
This section is not unconstitutional by reason of ss. 7 and 11(*d*) of the Charter: *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321, 7 C.R. (4th) 117 (7:2).

SPOUSE MAY BE CHARGED.

**278. A husband or wife may be charged with an offence under section 271, 272 or 273 in respect of his or her spouse, whether or not the spouses were living together at the time the activity that forms the subject-matter of the charge occurred.** 1980-81-82-83, c. 125, s. 19.

CROSS-REFERENCES
As to other evidentiary and procedural provisions respecting the offences listed in this section, see the cross-references in relation to those provisions and the notes under s. 150.1.

SYNOPSIS
This section specifies that a person may be charged with the offences of sexual assault, sexual assault with a weapon or causing bodily harm, or aggravated sexual assault against his or her spouse, whether or not they were living together at the time of the alleged offence. This reverses the common law rule that a husband could not be guilty of rape committed, by himself, upon his lawful wife, on the basis that, by virtue of the marriage contract, she was deemed to have irrevocably consented to intercourse.

DEFINITION OF "RECORD".

**278.1 For the purposes of sections 278.2 to 278.9, "record" means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.** 1997, c. 18, s. 1.





PRODUCTION OF RECORD TO ACCUSED / Application of provisions / Duty of prosecutor to give notice.

**278.2 (1) No record relating to a complainant or a witness shall be produced to an accused in any proceedings in respect of**
**(*a*) an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272 or 273,**
**(*b*) an offence under section 144, 145, 149, 156, 245 or 246 of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or**
**(*c*) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,**
**or in any proceedings in respect of two or more offences that include an offence referred to in any of paragraphs (*a*) to (*c*), except in accordance with sections 278.3 to 278.91.**

**(2) Section 278.1, this section and sections 278.3 to 278.91 apply where a record is in the possession or control of any person, including the prosecutor in the proceedings, unless, in the case of a record in the possession or control of the prosecutor, the complainant or witness to whom the record relates has expressly waived the application of those sections.**

**(3) In the case of a record in respect of which this section applies that is in the possession or control of the prosecutor, the prosecutor shall notify the accused that the record is in the prosecutor's possession but, in doing so, the prosecutor shall not disclose the record's contents.** 1997, c. 18, s. 1.

APPLICATION FOR PRODUCTION / No application in other proceedings / Form and content of application / Insufficient grounds / Service of application and subpoena / Service on other persons.

**278.3 (1) An accused who seeks production of a record referred to in subsection 278.2(1) must make an application to the judge before whom the accused is to be, or is being, tried.**

**(2) For greater certainty, an application under subsection (1) may not be made to a judge or justice presiding at any other proceedings, including a preliminary inquiry.**

**(3) An application must be made in writing and set out**
**(*a*) particulars identifying the record that the accused seeks to have produced and the name of the person who has possession or control of the record; and**
**(*b*) the grounds on which the accused relies to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify.**

**(4) Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify:**
**(*a*) that the record exists;**
**(*b*) that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;**
**(*c*) that the record relates to the incident that is the subject-matter of the proceedings;**

(*d*) that the record may disclose a prior inconsistent statement of the complainant or witness;
(*e*) that the record may relate to the credibility of the complainant or witness;
(*f*) that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psy chiatric treatment, therapy or counselling;
(*g*) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;
(*h*) that the record relates to the sexual activity of the complainant with any person, including the accused;
(*i*) that the record relates to the presence or absence of a recent complaint;
(*j*) that the record relates to the complain ant's sexual reputation; or
(*k*) that the record was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused.

(5) The accused shall serve the application on the prosecutor, on the person who has possession or control of the record, on the complainant or witness, as the case may be, and on any other person to whom, to the knowledge of the accused, the record relates, at least seven days before the hearing referred to in subsection 278.4(1) or any shorter interval that the judge may allow in the interests of justice. The accused shall also serve a subpoena issued under Part XXII in Form 16.1 on the person who has possession or control of the record at the same time as the application is served.

(6) The judge may at any time order that the application be served on any person to whom the judge considers the record may relate. 1997, c. 18, s. 1.

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HEARING *IN CAMERA* / Persons who may appear at hearing / Costs.

278.4 (1) The judge shall hold a hearing *in camera* to determine whether to order the person who has possession or control of the record to produce it to the court for review by the judge.

(2) The person who has possession or control of the record, the complainant or witness, as the case may be, and any other person to whom the record relates may appear and make submissions at the hearing, but they are not compellable as witnesses at the hearing.

(3) No order for costs may be made against a person referred to in subsection (2) in respect of their participation in the hearing. 1997, c. 18, s. 1.

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JUDGE MAY ORDER PRODUCTION OF RECORD FOR REVIEW / Factors to be considered.

278.5 (1) The judge may order the person who has possession or control of the record to produce the record or part of the record to the court for review by the judge if, after the hearing referred to in subsection 278.4(1), the judge is satisfied that
(*a*) the application was made in accordance with subsections 278.3(2) to (6);
(*b*) the accused has established that the record is likely relevant to an issue at trial or to the competence of a witness to testify; and
(*c*) the production of the record is necessary in the interests of justice.

(2) In determining whether to order the production of the record or part of the record for review pursuant to subsection (1), the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy and equality of the complainant or witness, as the case may be, and any other person to whom the record relates. In particular, the judge shall take the following factors into account:



(*a*) the extent to which the record is necessary for the accused to make a full answer and defence;
(*b*) the probative value of the record;
(*c*) the nature and extent of the reasonable expectation of privacy with respect to the record;
(*d*) whether production of the record is based on a discriminatory belief or bias;
(*e*) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
(*f*) society's interest in encouraging the reporting of sexual offences;
(*g*) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
(*h*) the effect of the determination on the integrity of the trial process. 1997, c. 18, s. 1.

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REVIEW OF RECORD BY JUDGE / Hearing *in camera* / Provision re hearing.

278.6 (1) Where the judge has ordered the production of the record or part of the record for review, the judge shall review it in the absence of the parties in order to determine whether the record or part of the record should be produced to the accused.

(2) The judge may hold a hearing *in camera* if the judge considers that it will assist in making the determination.

(3) Subsections 278.4(2) and (3) apply in the case of a hearing under subsection (2). 1997, c. 18, s. 1.

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JUDGE MAY ORDER PRODUCTION OF RECORD TO ACCUSED / Factors to be considered / Conditions on production / Copy to prosecutor / Record not to be used in other proceedings / Retention of record by court.

278.7 (1) Where the judge is satisfied that the record or part of the record is likely relevant to an issue at trial or to the competence of a witness to testify and its production is necessary in the interests of justice, the judge may order that the record or part of the record that is likely relevant be produced to the accused, subject to any conditions that may be imposed pursuant to subsection (3).

(2) In determining whether to order the production of the record or part of the record to the accused, the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy and equality of the complainant or witness, as the case may be, and any other person to whom the record relates and, in particular, shall take the factors specified in paragraphs 278.5(2)(*a*) to (*h*) into account.

(3) Where the judge orders the production of the record or part of the record to the accused, the judge may impose conditions on the production to protect the interests of justice and, to the greatest extent possible, the privacy and equality interests of the complainant or witness, as the case may be, and any other person to whom the record relates, including, for example, the following conditions:
(*a*) that the record be edited as directed by the judge;
(*b*) that a copy of the record, rather than the original, be produced;
(*c*) that the accused and counsel for the accused not disclose the contents of the record to any other person, except with the approval of the court;
(*d*) that the record be viewed only at the offices of the court;
(*e*) that no copies of the record be made or that restrictions be imposed on the number of copies of the record that may be made; and

(f) that information regarding any person named in the record, such as their address, telephone number and place of employ ment, be severed from the record.

(4) Where the judge orders the production of the record or part of the record to the accused, the judge shall direct that a copy of the record or part of the record be provided to the prosecutor, unless the judge determines that it is not in the interests of justice to do so.

(5) The record or part of the record that is produced to the accused pursuant to an order under subsection (1) shall not be used in any other proceedings.

(6) Where the judge refuses to order the production of the record or part of the record to the accused, the record or part of the record shall, unless a court orders otherwise, be kept in a sealed package by the court until the later of the expiration of the time for any appeal and the completion of any appeal in the proceedings against the accused, whereupon the record or part of the record shall be returned to the person lawfully entitled to possession or control of it. 1997, c. 18, s. 1.

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REASONS FOR DECISION / Record of reasons.

278.8 (1) The judge shall provide reasons for ordering or refusing to order the production of the record or part of the record pursuant to subsection 278.5(1) or 278.7(1).

(2) The reasons referred to in subsection (1) shall be entered in the record of the proceedings or, where the proceedings are not recorded, shall be provided in writing. 1997, c. 18, s. 1.

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PUBLICATION PROHIBITED / Offence.

278.9 (1) No person shall publish in a newspaper, as defined in section 297, or in a broadcast, any of the following:

(a) the contents of an application made under section 278.3;
(b) any evidence taken, information given or submissions made at a hearing under subsection 278.4(1) or 278.6(2); or
(c) the determination of the judge pursuant to subsection 278.5(1) or 278.7(1) and the reasons provided pursuant to section 278.8, unless the judge, after taking into account the interests of justice and the right to privacy of the person to whom the record relates, orders that the determination may be published.

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction. 1997, c. 18, s. 1.

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APPEAL.

278.91 For the purposes of sections 675 and 676, a determination to make or refuse to make an order pursuant to subsection 278.5(1) or 278.7(1) is deemed to be a question of law. 1997, c. 18, s. 1.

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## Kidnapping, Hostage Taking and Abduction

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KIDNAPPING / Punishment / Forcible confinement / Non-resistance.

279. (1) Every person commits an offence who kidnaps a person with intent

(a) to cause the person to be confined or imprisoned against the person's will;
(b) to cause the person to be unlawfully sent or transported out of Canada against the person's will; or
(c) to hold the person for ransom or to service against the person's will.



(1.1) Every person who commits an offence under subsection (1) is guilty of indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment life and to a minimum punishment of imprisonment for a term of four yea and
(b) in any other case, to imprisonment for life.

(2) Every one who, without lawful authority, confines, imprisons or forcibly sei another person is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding t years; or
(b) an offence punishable on summary conviction and liable to imprisonment f a term not exceeding eighteen months.

(3) In proceedings under this section, the fact that the person in relation to who the offence is alleged to have been committed did not resist is not a defence unles the accused proves that the failure to resist was not caused by threats, duress, forc or exhibition of force. R.S., c. C-34, s. 247; R.S.C. 1985, c. 27 (1st Supp.), s. 39; 199 c. 39, s. 147.

CROSS-REFERENCES

Section 17 limits the availability of the statutory defence of compulsion by threats to the offence o "forcible abduction". However, forcible abduction has been held not to include kidnapping: *R. v Robins* (1982), 66 C.C.C. (2d) 550 (Que. C.A.).

This offence may be the basis for an application for an authorization to intercept private commu- nications by reason of s. 183 and for a warrant to conduct video surveillance pursuant to s. 487.01(5). These offences may be the basis for a conviction for constructive murder under s. 230 and first degree murder under s. 231(5). Section 7(3) enacts special jurisdictional rules for commission of this offence outside Canada when the offence is in relation to an internationally protected person or property referred to in s. 431 (official premises, etc.). A threat to commit an offence under this section against an internationally protected person (defined in s. 2) is an offence under s. 424.

The accused may elect the mode of trial pursuant to s. 536(2) for either of the offences under this section unless the Crown elects to proceed by way of summary conviction for the offence under subsec. (2). Release pending trial is determined by s. 515. A person found guilty of the offence in this section will be liable to the mandatory prohibition order in s. 100(1) for possession of firearms, ammunition and explosives. A person found guilty of this offence may be subject to a dangerous offender application under Part XXIV.

SYNOPSIS

This section describes the offences of kidnapping and forcible confinement, the punish- ment for these offences, and the defence of non-resistance. Any person who kidnaps another person *against his will*, with intent to confine him, to cause him to be sent out of Canada, or to hold him for ransom or to service, is guilty of an indictable offence and liable to life imprisonment. Where a firearm is used in the commission of this offence, the offender is subject to a minimum punishment of four years' imprisonment. Anyone who confines, imprisons or forcibly seizes another person *without lawful authority* is guilty of an indictable offence punishable by a maximum term of imprisonment of 10 years where the Crown proceeds by indictment and 18 months where the Crown proceeds by summary conviction. Evidence of the fact that the victim did not resist does not consti- tute a defence unless the accused proves that such failure to resist was not caused by threats, duress or force.

ANNOTATIONS

Kidnapping [subsec. (1)] – To constitute kidnapping there must be a movement or taking of the person from one place to another and not simply the placing of the person

# APPENDIX C:

# Bill C-49

# Bill C-49

Third Session, Thirty-fourth Parliament,

40–41 Elizabeth II, 1991–92

THE HOUSE OF COMMONS OF CANADA

BILL-C-49

An Act to amend the Criminal Code (sexual assault)

AS PASSED BY THE HOUSE OF COMMONS
JUNE 15, 1992

An Act to amend the Criminal Code (sexual assault)

WHEREAS the Parliament of Canada is gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual assault against women and children;

WHEREAS the Parliament of Canada recognizes the unique character of the offence of sexual assault of how sexual assault and, more particularly, the fear of sexual assault affects the lives of the people of Canada;

WHEREAS the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*;

WHEREAS the Parliament of Canada wishes to encourage the reporting of incidents of sexual violence or abuse, and to provide for the prosecution of offenses within a

framework of laws that are consistent with the principles of fundamental justice and that are fair to complainants as well as to accused persons;

WHEREAS the Supreme Court of Canada has declared the existing section 276 of the 25 Criminal Code to be of no force and effect;

AND WHEREAS the Parliament of Canada believes that at trials of sexual offenses, evidence of the complainant's sexual history is rarely relevant and that its admission should be subject to particular scrutiny, bearing in mind the inherently prejudicial character of such evidence;

NOW THEREFORE, Her majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

**1. The Criminal Code is amended by adding thereto, immediately after section 273 thereof, the following sections:**

273.1 (1) Subject to subsection (2) and subsection 265(3), 'consent' means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
(a) the agreement is expressed by the words or conduct of a person other than the complainant;
(b) the complainant is incapable of consenting to the activity;
(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity;
or
(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(a) the accused's belief from the accused's
  (i) self-induced intoxication, or
  (ii) recklessness or wilful blindness; or

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

**2. Section 276 of the said Act is repealed and the following substituted therefor:**

276. (1) In proceedings in respect of an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
(b) is less worthy of belief.

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with the any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

(a) is of specific instances of sexual activity;
(b) is relevant to an issue at trial; and
(c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account.
(a) the interest of justice, including the right of the accused to make a full answer and defence;
(b) society's interest in encouraging the reporting of sexual assault offenses;
(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
(d) the need to remove from the fact-finding process any discriminatory belief or bias;
(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the injury;
(f) the potential prejudice to the complainant`s personal dignity and right of privacy;
(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(h) any other factor that the judge, provincial court judge considers relevant.

**276.1** (1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 276.2 to determine whether evidence is admissible under subsection 276(2).

(2) An application referred to in subsection (1) must be made in writing and set out
(a) detailed particulars of the evidence that the accused seeks to adduce, and
(b) the relevance of that evidence to an issue at trial,
and a copy of the application must be given to the prosecutor and to the clerk of the court.

(3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.

(4) Where the judge, provincial court judge or justice is satisfied
(a) that the application was made in accordance with subsection(2).
(b) that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or such shorter interval as the judge, provincial court judge or justice may allow where the interests of justice so require, and
(c) that the evidence sought to be adduced is capable of being admissible under subsection 276(2),

the judge, provincial court judge or justice shall grant the application and hold a hearing under section 276.2 to determine whether the evidence is admissible under subsection 276(2).

**276.2** (1) At a hearing to determine whether evidence is admissible under subsection 276(2), the jury and the public shall be excluded.

(2) The complainant is not a compellable witness at the hearing.

(3) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part thereof, is admissible under subsection 276(2) and shall provide reasons for that determination, and
(a) where not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;
(b) the reasons must state the factors referred to in subsection 276(3) that affected the determination; and
(c) where all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.

(4) The reasons provided under subsection (3) shall be entered in the record of the

proceedings or, where the proceedings are not recorded, shall be provided in writing.

276.4 (1) No person shall publish in a newspaper, as defined in section 297, or in a broadcast, any of the following:

(a) the contents of an application made under section 276.1;
(b) any evidence taken, the information given and the representations made at an application under section 276.1 or at a hearing under section 276.2;
(c) the decision of a judge, provincial court judge or justice under subsection 276.1(4), unless the judge, provincial court judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the decision may be published; and
(d) the determination made and the reasons provided under section 276.2, unless
(i) that determination is that evidence is admissible, or
(ii) the judge, provincial court judge or justice, after taking into account the complainant's right of privacy and the interest of justice, orders that the determination and reasons may be published.

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

276.4 Where evidence is admitted at trial pursuant to a determination made under section 276.2, the judge shall instruct the jury as to the uses that the jury may or may not make of that evidence.

276.5 For the purposes of sections 675 and 676, a determination made under section 276.2 shall be deemed to be a question of law.

**3. This Act or any provision thereof, or any provision of the Criminal Code as enacted by this Act, shall come into force on a day or days to be fixed by order of the Governor in Council.**

# APPENDIX D:

# Unsuccessful Constitutional Challenges

# Recent B.C. Cases

## Unsuccessful Constitutional Challenges to ss. 278.1-278.91

### *R. v. Hurrie* (1997), 12 C.R. (5TH) 180 (B.C.S.C.) Port Alberni Registry 20136 (October 10, 1997)

Dangerous Offender hearing following conviction for sexual assault. During the hearing a witness revealed for the first time that she had spoken about the alleged incident to her counsellor in 1977.

Challenge to s. 278.1 to 278.9. Defence argued that the presumption against disclosure and the procedural requirement infringe the accused's right to make full answer and defence.

Taylor, J. Held that the provisions in ss. 278.1 to 278.91 did not infringe the right of an accused person to make full answer and defence. They established a low evidentiary threshold which an accused must meet in order to invade the privacy of a complainant or witness. The procedure provided a reasonable process for the acquisition of the evidentiary basis and did not infringe the right of an accused.

### *R. v. Curti* [1997] B.C.J. No. 2367 (QL) (B.C.S.C.)

Counsel for Mr. Curti argued that Bill C-46, 278.1-278.91 were unconstitutional. They violate section 7 and 11(d) of the *Charter.*

Hutchison, J. Held that since Justice Taylor in *Hurrie* had already held that the legislation did not violate the Charter "it seems inappropriate to hear any furtherargument". He follows Justice Taylor's finding that the threshold test of 'likely relevance' does not infringe on the accused's right to fundamental justice as guaranteed by Section 7 of the *Charter*. He notes that neither Justice Belzil (*Mills*) and Justice Chapnick (*Lee*) are "in sync" with the British Columbia Supreme Court.

### *R. v. Hnyda* (1997) B.C.S.C. Vancouver Registry, CC950478, (November 11, 1997)

The accused was charged with indecent assault and committing acts of gross indecency. The defence sought disclosure of child welfare records to determine what it was that the complainant's mother had told social workers about allegations of the complainant's abuse by the accused when the complainant was 4-6 years old (from 1983-1989) pursuant to sections 278.2 and 278.3 of the *Criminal Code*.

Justice Collvert, having expressed some misgivings about the decisions in both *Hurrie* and *Curti,* noting that this relatively uncharted area of law "would be further unsettled by conflicting decisions, nevertheless held that pursuant to s. 278.3(4) the test ' likely relevance' had not been met. It was not enough, without more, to simply say that the records related to credibility, therapy, counselling or inconsistent statements. Before the

intrusion into [personal] records can be justified, clear and cogent grounds must be established, even to meet the threshold test of likely relevance.

***R. v. A.D.J.A.* (1998) B.C.S.C. Victoria Registry, 95516-T (March 9, 1998)**

The accused was charged with three counts of sexual assault. The defence brought a pre-trial application arguing that ss. 278.1 - 278.91 contravene the accused's right pursuant to s. 7 of the *Charter*. Counsel was directed to present arguments as to why this application should be heard in the light of the decisions of *Hurrie* and *Curti,* both of which had provided lengthy reasons upholding ss. 278.1 - 278.9 on the same questions.

Madam Justice Dorgan dismissed the pre-trial application in the light of the decisions of both *Hurrie* and *Curti*. She further noted that the issue will be heard by the Supreme Court (*Mills*) where "this issue will finally be determined and that is the appropriate forum, given the development of law across the country."

# APPENDIX E:

# Sample Questionnaires

## Bill C-46 Research/Interview Questionnaire

## Legal Representatives Questionnaire

### Records

**For the purposes of this questionnaire, the definition of records accords with that in Bill C-46. It is as follows:**

**"For the purposes of sections 278.2 to 278.9 (of the Criminal Code), "record" means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence. "**

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### General:

1. **Name of Agency/Firm**
2. **Contact Details:**
3. **Name of Interviewee:**
4. **Position Held:**
5. **Type of Practice -ie., Family Law, Criminal Law etc.**
6. **Approximately how many cases does your firm manage at any given time?**
7. **What percentage of cases for which you provide counsel would be sexual assault cases?**

**Court**

1(a) How many times have you been involved in a criminal sexual assault case in which there was a request for third party records in the last 5 years?

(b) Have you noticed an appreciable difference in the number of times third party records have been requested in the last 2 years?

(c) Have you ever represented a third party record holder/complainant in an endeavor to have a personal records subpoena/order quashed? Were you successful/partially successful?

**Records**

2(a) How would you describe the kinds of information sought in third party record requests?

(b) How would you describe the reasons why such information is sought?

(c) Have you been involved in cases other than sexual assault where 3rd party records were sought?

(e) What percentage of sexual assault cases have involved the seeking of 3rd party records?

**Clients**

**3(a)** **Have you ever been involved in a case where a complainant refused to pursue a case because personal records were to be exposed in court?**

**(b)** **In cases where the production of personal records have been ordered, how would you describe the effects of this on the complainant?.**

**(c)** **Have you noticed any differences in the ways in which courts are treating personal information records requests in the last five years?**

**(d)** **Do any of your clients whose records have been subpoenaed, fall into any particular minority group?**

**<u>Bill C-46</u>**

**4(a)** **Would you regard Bill C-46 as a successful piece of legislation with respect to protecting the confidentiality of the personal records of women and children who have been sexually assaulted?**

**(b)** **In your experience in the courts, would you say that the judiciary largely complies with the spirit captured in the preamble of the legislation in Bill C-46?**

**(c)** **How would you describe the ways in which 'relevance' is determined in the courts?**

**(d)** **Have you been involved in any cases in which there was a constitutional challenge to Bill C-46? What was the basis of the challenge?**

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## Bill C-46 Research/Interview Questionnaire

## Sexual Assault and Rape Crisis Centres.

### Records

**For the purposes of this questionnaire, the definition of records accords with that in Bill C-46. It is as follows:**

**"For the purposes of sections 278.2 to 278.9 (of the Criminal Code), "record" means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence. "**

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### General:

1. **Name(Agency/Individual)**
2. **Contact Details**
3. **Name of Interviewee**
4. **Position Held**
5. **Number of staff who work directly with women/children who have been victims of sexual assault in a capacity which would require them to generate records which would be deemed 'personal'.**
6. **Nature of Service/s Provided**
7. **Designated Client Group**
8. **Funding Authority**

## Court

1(a) Have you, or your colleagues, ever been required to give evidence, through the disclosure of your professional client records, in a criminal sexual assault matter?

(b) To what extent did such evidence go to the question of the credibility of the witness/victim (your client)?

(c) How many times was the subject of the records a client at the time?

(d) How were you notified? Were you subpoenaed? Did you receive a production order, solicitors letter?

(e) What impact did this experience(s) have on the practices of your service, including record-keeping?

(f). How do you view your role in appearing in court as a third party?

(g) How would you describe the practices of the courts with respect to criminal sexual assault matters in the last five years? Are you aware of legislative reforms such as Bill C-46 and if so, how would you describe their effects upon your work?

## Records

2 (a) Do you keep written records of interviews or sessions with clients?

(b) What sort of information do you record?

(c) Have you changed your record keeping practices for any reason - why?

## Clients

3(a) How do you inform your clients about confidentiality?

(b) Have you changed your explanation of confidentiality in the past five years for any reasons. Why?

(c) **Have you ever had clients suggest that the question of confidentiality is the reason they won't pursue legal redress in a criminal sexual assault matter?**

(d) **Have you ever had to terminate counselling/support for any clients or modify counselling/support sessions because a client was involved in court action (or because her records were subpoenaed)?**

(e) **Do any of your clients whose records have been subpoenaed, fall into any particular minority group?**

**Bill C-46**

4(a) **Are you aware of the legislation in Bill C-46?**

(b) **Has it appreciably effected the way you engage in your work?**

(c) **Do you believe the changes effected by Bill C-46 have provided stronger protections for the confidentiality of personal records of women and children who are victims of sexual assault?**

(d) **In your experience in the last two years, have the practices of the courts with respect to personal records been in accordance with your understanding of the requirements of Bill C-46?**

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