S E R V I N G C A N A D I A N S

RESEARCH REPORT

Bill C-46: Records Applications Post-*Mills*, A Caselaw Review

Department of Justice Canada
Ministère de la Justice Canada

Canada

Bill C-46: Records Applications Post-*Mills*, A Caselaw Review

Susan McDonald, A/Sr. Research Officer,
Research and Statistics Division
Andrea Wobick, Research Assistant,
Policy Centre for Victim Issues

Research and Statistics Division

June, 2004

rr06vic-2e

Table of Content

Executive Summary ..... **iii**

1. Introduction **1**

2. Background **3**

2.1 Bill C-46 ..... **3**

2.2 *R.* v. *Mills* **6**

2.3 Secondary Literature **7**

3. Statistics on Sexual Assault **11**

3.1 Data Sources and Research Studies **11**

3.2 Rates of Police-Reported Sexual Assault Offences **11**

3.3 Reasons for Changes in the rates of Police-Reported Sexual Offences in Canada **13**

3.4 Characteristics of Crimes of Sexual Assault and of its Victims **14**

3.4.1 The Majority of Sexual Assault Crimes are not Reported to Police. 14

3.4.2 Privacy and Confidentiality Issues for Victims 14

3.4.3 High Risk Groups 15

3.4.4 The Accused is Generally Known to the Victim 17

3.4.5 Gender Differentials in Spousal and Ex-Spousal Violence and in their emotional consequences 17

3.5 Multiple Factors Cause Women to be More Likely to have Therapeutic Records **18**

4. The Caselaw Review **21**

4.1 Research Objective **21**

4.2 Methodology **21**

4.3 Limitations of the Methodology **22**

4.4 Findings 23
4.4.1 Cases by Province/Territory 23
4.4.2 Offences Committed 23
4.4.3 Records 24
4.4.4 Location of Records 24
4.4.5 How Defendant Learned of the Records 24
4.4.6 Party Characteristics 25
4.4.7 Information about the Defendants 25
4.4.8 Information about the Complainants 25
4.4.9 Relationship between the Defendant and the Complainant 25

4.5 Reasons 26

4.6 Conclusion 31

4.7 The Preliminary Inquiry 31
4.7.1 *R.* v. *Kasook* 33
4.7.2 *R.* v. *B.(E.)* 33
4.7.3 Other Cases 35
4.7.4 Discussion 36

4.8 Independent Counsel 38

4.9 Costs 39

4.10 Caselaw 40

4.11 Myths and Stereotypes 40

5. Suggestions for Further Work 41

6. In Sum 43

Appendix A – 45

Appendix B – 52

Appendix C – 54

Executive Summary

In the 1990s, Canada witnessed significant changes in its sexual assault law, through legislative amendments and caselaw. There were a number of Supreme Court of Canada decisions that supported the rights of the accused (*Osolin, O'Connor, Carosella*)[*] within the context of access to complainants' confidential records, as well as significant discussion around the impact of these decisions. Bill C-46 was passed in May 1997 and amended the *Criminal Code* to include specific provisions regarding the production and disclosure of third party records to the accused in sexual assault proceedings (s.278.1). The provisions were challenged on constitutional grounds in *R* v. *Mills* and in November 1999, the Supreme Court upheld the legislation.

As part of an ongoing review of the impact of the legislative amendments, the authors undertook a caselaw review of all reported s.278.1 cases in the time period immediately following the *Mills* decision until June 2003. The purpose of the review was to obtain information on case characteristics (such as types of records sought, relationship between defendant and complainant), as well as the reasons for the decisions rendered.

There is significant literature dealing with sexual assault law and in particular, the changes that have been introduced into the Canadian context during the 1990s. Scholars from different disciplines and perspectives have provided commentaries on the several Supreme Court of Canada and appellate court decisions. While the critical commentaries were insightful, they do not provide the focus of the caselaw review.

Methodology

Judges are required to provide reasons for their decisions in s.278.1 applications.
This study is based only on the decisions found in QuickLaw. Decisions reported on QuickLaw were retrieved from December 1, 1999 until June 30, 2003. The time period covers 43 months after the decision of *Mills* in November 1999.

The search terms used were "s.278", in conjunction with other terms such as "records" or "sexual offences". Cases found were checked against lists compiled by Professor Lise Gotell and preliminary work by Professor Karen Busby to ensure that all relevant cases were retrieved. There was some duplication of cases and some inconsistencies. Cases were reviewed to determine whether they fit the criteria of being decisions on s.278 records applications. A total of 48 decisions were reviewed.

Limitations of the Methodology

The decisions reviewed from QuickLaw do not equal total decisions in Canada on s.278 applications within this time period. These decisions, however, are those that are reported and because they are available through the QuickLaw database, they become precedents for future

[*] Full citations are included in the full report and a list of cases can be found in Appendix B.

caselaw. Lawyers and judges would look to the decisions reported in QuickLaw for their precedents and would rarely have other information on cases available to them.

Decisions are usually provided orally. Unless a particular request is made, oral reasons are not usually transcribed and published. Judicial practices on the publication of reasons vary across Canada. For example, there were no cases on s.278 records applications found on QuickLaw from Quebec.

A caselaw review is limited in what it can ultimately tell us. It cannot reveal perceptions, beliefs or feelings of the key players; it does not answer the question of whether applications for records have become standard practice. A thorough caselaw review, however, may reveal trends in the jurisprudence and as such, it can perform a useful check on a trend that might not accurately reflect the jurisprudence.

Bill C-46

The procedure for third party records applications is set out in ss.278.1-278.9 of the *Criminal Code*, which are found in Appendix B of this document. It involves a two-stage process: 1) whether to order production to the court, and 2) whether to order production to the defence. The legislation provides factors to consider in making the production decision.

Findings

A total of 48 cases were reviewed covering the timeframe of December 1, 1999, through to June 30, 2003. One quarter of those cases (12 out of 48) were at the appellate level. Most cases were from Ontario (17) with Newfoundland having the second most cases (9). As noted, *supra,* there were no cases from Quebec, nor from Nunavut, nor Prince Edward Island. The absence of decisions in Nunavut and Prince Edward Island may be due to the small size of the jurisdictions; in Quebec, it may be due to reporting practices.

Characteristics about the defendants and the complainants presented below are consistent with trends noted in earlier caselaw reviews. Overall, the majority of complainants were female, the defendants were male and in a majority of cases, there was a prior relationship between them. A significant proportion of the complainants were young.

Information about Defendants

In all of the cases where the information was available (45 out of 48 cases), the defendant was male. At least 79% of the cases (38 out of 48) surveyed involved an adult defendant. Of the remaining 10 cases, 6 involved youths and in 4 cases, the age was not specified in the judgement.

Information about Complainants

In 60% of the cases (28 out of 47), there was only one complainant (in 4 cases the complainant was a male and in the remaining 24, a female). The sex of the complainant was not identified in 5 cases. In 30% of the cases (14), there was more than one complainant, ranging from 2 to 64 complainants.

The majority of cases examined involved young complainants. Of the 38 cases where the age of the complainant(s) was identified in the written judgement, just over three-quarters of the cases involved complainants that were younger than 18 years of age, and 6 cases involved adults. In 3 cases, there were both adult and young complainants.

Of the 6 cases studied involving adult complainants, 3 had developmental or cognitive delays. Another young child complainant was noted to have mental deficiencies, and in another case involving two teenaged girls, the facts suggest that the complainants had cognitive or developmental disabilities. In 4 cases, the complainant had a drug or alcohol dependency, although in one case the addiction developed subsequent to the alleged offence taking place.

Several of the complainants had some involvement with a child services agency. In 3 cases, complainants lived in group homes and in 5 cases, there was a history of Children's Aid Society (C.A.S.) involvement. Furthermore, social services, child welfare agencies, child and family services and like organizations had involvement with complainants in 11 cases.

Relationship between the Defendant and the Complainant

The majority of cases showed some form of prior relationship between the accused and the complainant(s). There were 28 cases where it was possible to determine the relationship between the parties with certainty. Most involved family members (father, step-father, uncle, etc.) and there were 7 cases where the defendants had some form of professional relationship with the complainant (e.g. doctor or psychologist/ patient).

Reasons

Given the list of factors that must be considered and the importance of the likely relevance of the reasons for the production of the records, the reasons in each of these cases were reviewed closely.

In *R.* v. *Mills*, the court stated that a court in deciding whether to order production must consider "the rights and interests of all those affected by disclosure" and that the three principles at stake in s.278 cases are full answer and defence, privacy, and equality.

In two thirds of the cases (26 out of 39) where the issue was whether or not to order production of the records, the judge made a general reference to s. 278.3(4), the subsection which lists the factors to be considered. This reference most often came in the form of mentioning that she or he must consider the provision, or that she or he had considered the provision in making a decision. The defendant's right to a full answer and defence (mentioned in 28 cases) and the potential prejudice to personal dignity and the right of privacy upon disclosure (29 cases) were the most commonly explored of the seven factors in the cases.

The probative value of the record was also a common theme, arising in almost half of cases (19), as was the reasonable expectation of privacy of the complainant, which was discussed by the judge in almost two thirds of the cases (24).

The least common listed factors to be utilized in the decision were society's interest in encouraging victims to seek treatment, mentioned in 5 cases, and the integrity of the trial process mentioned in 4 cases. Both the influence of discriminatory beliefs or biases (8 cases) and society's interest in reporting offences (9 cases) were mentioned in slightly less than one-quarter of the cases. In only one case did the judge go through an analysis of each factor listed in section 278.3(4), and in 9 of the 39 cases she or he examined five or more of the factors listed.

As a whole, judges in the cases reviewed have frequently cited the defendant's right to full answer and defence and the complainant's right to privacy as competing concerns in their reasons with respect to record production; the concept of equality, however, is rarely mentioned. In fact, a detailed consideration of equality only occurred in four judgements. This is not to say that more judges did not consider the notion of equality or that it did not factor into the judgement. Whereas other factors listed in s.278.3(4) and in *Mills* were explicitly stated, that was rarely the case for the principle of equality.

Privacy, however, is a *Charter* right that came up frequently in the reported judgements. In 4 cases, the judge focused almost exclusively on privacy interests while excluding any detailed analysis of other factors. A person's reasonable expectation of privacy may be found in s. 8 of the *Charter.* In *Mills*, privacy interests were defined as the right to be left alone by the state, which includes the ability to control the sharing of confidential information about oneself. The Court stated that, "privacy concerns are at their strongest where aspects of one's individual identity are at stake, such as in the context of information 'about one's lifestyle, intimate relations or political or religious opinions'". It went on to state that a key consideration when deciding whether to order production of therapeutic records in sexual assault cases is the relationship of trust and confidence between the complainant and the record-keeper.

In the 40 cases where disclosure/production was decided,[+] no production was ordered in 15 cases. In several of these cases, the judge rejected the defence's argument that the record(s) would demonstrate the complainant's lack of credibility or competency, or show a motive to fabricate the complaint. In one such case, which involved a complainant who was legally blind and had a mild cognitive delay, the judge stated that the application for disclosure may have been based on a discriminatory belief that individuals with an intellectual disability are potentially incapable of telling the truth.

Of the remaining 25 cases, partial or full disclosure was made to the defence in 14 cases, and in the remaining 11 cases, after partial or full disclosure to the judge, the case ended. In several of these cases, uncertainty as to the complainant's credibility or a motive to fabricate was mentioned as a reason for ordering production of the records. The defendant's right to a full answer and defence was also frequently cited often in the context that it should take precedence over the complainant's right to privacy in those circumstances.

In the 11 cases where full or partial production was ordered to the judge and further disclosure to the defence did not form part of the judgement, the reasons were similar to those offered in cases

[+] Out of the 48 cases reviewed, there were 8 cases where a decision on production was not relevant. See *infra* note 125. Bill C-46 set up a two-stage procedure: production to the court for review if necessary and only then production to the defence. For a description of the procedure under Bill C-46, see *infra.*

where production to the defence was ordered. Several such cases cited the credibility or potential for fabrication on the part of the complainant as a reason for production.

In conclusion, the way that judges have interpreted s. 278.5 in deciding whether to order production of relevant records has been inconsistent in the post-*Mills* caselaw. Different judges have placed varying emphasis (and sometimes none at all) on the factors listed in section 278.5(2) and in the guidelines offered by both the legislation and the Supreme Court's interpretation of the legislation in *Mills*. Privacy has been a key factor in decision-making whereas mention of equality has been quite sparse. However, it is very difficult to determine specific trends with respect to reasoning as the detail in judgements thus far has been so varied.

In Sum

This caselaw review revealed findings that are consistent with previous studies, such as Busby's and Gotell's. For example, in a majority of cases, there was a relationship between complainant and defendant (familial, professional); the majority of defendants were male while complainants were female; complainants were young; multiple records were sought; and records were ordered disclosed/produced to the defence in approximately 35% of cases.

No specific trends in terms of reasons could be discerned from the review with the exception of a greater emphasis on privacy of complainants. This caselaw review provides general and specific information on case characteristics and reasons in decisions in s.278.1 cases. It provides a specific tool with which to monitor trends in jurisprudence. Such monitoring is important to determine whether legislative provisions are working in the manner intended by Parliament. Given the many changes in sexual assault law in Canada over the past twenty years, such research plays an important role to inform policy at the Department of Justice. It will be important to continue research in this area as time passes.

1. Introduction

…sexual assault is not like any other crime.[1]

As criminal law has developed in Canada over the past decades, the criminal justice response to the offence of rape or more recently, sexual assault, has been fraught with tensions, both in the legal and in the political realm.[2] In the 1990s, a number of changes were implemented including a codified definition of consent, the removal of the defence of mistaken belief, and establishing parameters around evidence that can be introduced.[3] Bill C-49 was passed in August 1992 and introduced provisions that limit the admissibility of information in sexual assault trials on the sexual background or history of victims of sexual assault.[4] In October 2000, the Supreme Court of Canada upheld these provisions as constitutional in *R.* v. *Darrach.*[5]

In 1997, legislative amendments were introduced on the issue of access to complainants' personal records. These amendments were in response to widespread consultations, as well as a number of Supreme Court of Canada decisions that supported the rights of the accused, the first being *R.*v. *Seaboyer*, but also widely cited is *O'Connor,* and *Osolin* and *Carosella*.[6] With significant discussion on the impact of these decisions and consultations with equality-seeking groups, Bill C-46 was enacted in May 1997 and amended the *Criminal Code* to include specific provisions regarding the production and disclosure of third party records in sexual assault proceedings (s.278.1). [7] The provisions were challenged on constitutional grounds in *R.* v. *Mills* and in November 1999, the Supreme Court upheld the legislation.[8]

This caselaw review examines the reported decisions on production and disclosure of third party records applications, also referred to as "*O'Connor* applications," in the years following the *Mills* decision. At issue in these applications, is whether a complainant's personal records that are in the hands of a third party should be produced for the defence.

---

[1] *R.* v. *Seaboyer* (1991) 2 S.C.R. 577, per L'Heureux-Dubé J. at 648-49.
[2] The tensions have stimulated a significant amount of writing on the issue. See for example, J. Roberts and R. Mohr (eds.), *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994).
[3] *Criminal Code*, ss. 273.1(1), s.276 (sexual history evidence), s. 278.1 (production and disclosure of personal records).
[4] Bill C-49, An Act to amend the Criminal Code (prohibiting the admission of sexual history evidence), c.38, Ss.276, 276.1, 276.2
[5] (2000) 2 S.C.R. 443.
[6] *R. v. Seaboyer, supra* note 1, which struck down the *Criminal Code's* "rape-shield" provision; *R.* v. *Osolin* (1993) 4 S.C.R. 595 which held the trial judge erred in failing to allow cross-examination of the complainant on her medical records; *L.L.A.* v. *Beharriell* (1995) 4 S.C.R. 536; *R.* v. *O'Connor* (1995) 4 S.C.R. 411 (hereinafter *O'Connor)*; *R.* v. *Carosella* (1997) 1 S.C.R. 80 which held that a sexual assault centre's destruction of evidence violated the accused's right of full answer and defence;
[7] Bill C-46, An Act to amend the Criminal Code (production of records in sexual offence proceedings), 2d Sess., 35th Parl. 1997 (assented to 25 April 1997), S.C. 1997, c.30 (Bill C-46).
[8] (1999) 3 S.C.R. 668 (hereinafter *Mills).*

This report is divided into three sections: the first provides a brief background on Bill C-46, on the case of *R.* v. *Mills,* and on research and writing that has flourished over the years on the issue; the second section provides statistical data to provide a context for the number of sexual assaults that occur and are reported in Canada each year; and finally, the third section is the caselaw review itself with a description of the methodology, its limitations, the findings and some suggestions for further work.

2. Background

"Disclosure" refers to the responsibility of the Crown to share information with the accused. "Production" refers to any responsibility of a third party to fulfill the accused's right of full answer and defence and will be the term generally used in this review. In the 1991 Supreme Court case of *R.* v. *Stinchcome,* the court established that "information ought not to be withheld if there is a reasonable possibility (of impairing) the right of the accused to make full answer and defence."[9] This rule was quickly challenged in subsequent caselaw on two points: whether certain *kinds of information* may be exempt from disclosure or production; and whether the right of full answer and defence can be enforced against *third parties*.

As L'Heureux-Dubé J. noted in *O'Connor*, ". . . when an accused is unable to make full answer and defence. . . as a result of his inability to obtain information that is material to his defence, it is of little concern whether that information is in the hands of the state or in the hands of a third party."[10]

2.1 Bill C-46

The issue of disclosure and production of third party records had attracted considerable attention in the mid-nineties. Gordon Kirkby, Parliamentary Secretary to the Minister of Justice, spoke to the House of Commons during discussion on a motion that Bill C-46 be read a second time. He noted that some two years earlier, the Minister of Justice had been informed of cases where access to personal records was being sought.

> Some critics of Bill C-46 contend that this legislation is simply a knee-jerk reaction to the Supreme Court's decision last December in *O'Connor*. This is not the case. The trend to seek out personal records emerged several years ago and was brought to the attention of the Minister in June 1994 when he met with national women's groups.
>
> The Minister launched an extensive consultation two years ago to fully explore the extent of the problem, its impact on sexual offence victims and possible solutions. The consultation process has included equality seeking women's groups, victim advocates, service providers, the defence bar, crown attorneys and the provincial attorneys general. The consultation process began before and continued after the Supreme Court's hearing and decision in *O'Connor*.[11]

Bill C-46 was the result of much consultation that had begun prior to the *O'Connor* hearing at the Supreme Court and after the decision was released as well. The Commons Standing Committee on Justice and Legal Affairs held several sessions in March 1997 and heard from numerous witnesses. Representatives from women's groups supported the bill, but suggested amendments to extend protections to complainants. The Canadian Mental Health Association

[9] (1991)3 S.C.R. 326 at 333.
[10] *Supra* note 6, *O'Connor*, at 479.
[11] House of Commons Debates, February 4, 1997 as cited in, *R.* v. *Mills Factum,* Attorney General of Alberta, Appellant's Record, Vol. 5, at 939.

also supported the legislation, with an amendment. The Criminal Lawyers' Association of Ontario and the Canadian Council of Criminal Defence Lawyers were not in support.

Those against the legislation argued that complainants are not reluctant to report cases of sexual assault because there are so many cases before the courts, and also, citing anecdotal evidence, that a significant proportion of sexual assault allegations are untrue and thus, testing credibility through access to records are critical.[12] Empirical evidence from Statistics Canada, however, highlighted the low reporting rates.[13] Further evidence presented to the Committee indicated a situation in the aftermath of *O'Connor* described by women's groups as "increasingly more confusing" as lower courts seemed to be applying the *O'Connor* test of "likely relevance" to result in an "as of right" production and disclosure of records to the defence.[14]

Those witnesses for the Committee who supported Bill C-46 spoke about the myths and stereotypes surrounding sexual assault when the complainant's credibility appears to be on trial and their privacy invaded at all levels. Bill C-46 was designed to balance the rights of the accused with those of the complainant. Balancing ultimately involves compromise between competing rights, and this exact balance may differ depending upon the particular circumstances of each case.

The Preamble to Bill C-46 sets out the principles underpinning the provisions. The Preamble frames the amendments within the context of violence against women and children in Canadian society and the grave social ill that such violence causes. It states in part that, "… the Parliament of Canada recognizes that violence has a disadvantageous impact on the equal participation of women and children in society and on the rights on women and children to the security of the person, privacy and equal benefit under the law. . .".[15] It is interesting to note that the first example of the explicit reference to equality as constitutional support for criminal legislation was in the Preamble of Bill C-49, a piece of legislation that also enacted changes to sexual assault law. The Preamble of Bill C-46 was cited in the *Mills* decision,[16] and must be "read as a part of the enactment intended to assist in explaining its purport and object."[17] In a recent key informant study, however, counsel for complainants on records applications have noted that referring to the Preamble does not appear to carry much weight in applications arguments where relevancy is key.[18]

---

[12] *Ibid,* Vol. 6, pp. 1114-15, 117, 1120.
[13] See for example, the Statistics on Sexual Assault section *infra* at 20.
[14] Supra note 11, Vol. 7, at 1360.
[15] *Supra* note 7, Preamble.
[16] *Supra* note 8 at para. 48.
[17] *Interpretation Act*, R.S.C. 1985, c.I-21, s.13
[18] The key informant study by R. Mohr, "Words are not Enough: Sexual Assault - Legislation, Education and Information" (Department of Justice Canada: Ottawa, 2002) at 20, notes that only the independent counsel interviewed were familiar with the Preamble. Judges, Crown, and defence were similarly ignorant of its existence. For a discussion on the uses of preambles, see K. Roach. "The Uses and Audiences of Preambles in Legislation" (2001) *McGill L.J.* 47:129 (-160) who suggests that there has been a dramatic increase in the use of preambles for federal legislation over the past fifteen years. While Bill C-46 was not included in his detailed review, the author notes that preambles are used for (among other situations) ideologically charged amendments to criminal laws and legislation enacted in response to court decisions. By providing a context and legislative history, the preambles seek to establish legitimacy and should continue to be included as they do outline the purposes of the legislation.

The Preamble and the relevant provisions, sections 278.1 to 278.91 of the *Criminal Code,* are found in Appendix A.

The records included in such applications are defined in s.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.

In determining whether a record should be produced, section 278 lays out a two-stage process. At the first stage, the accused must prove that the record is "likely relevant to an issue at trial or to the competence of a witness to testify" and that "the production of the record is necessary in the interests of justice". [19] In making this determination, a judge is to consider the salutary and deleterious effects of her or his decision 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.[20]

The provision then states that the judge shall take into account eight factors, which include the following:

a. the accused's right to make full answer and defence; the probative value of the record;
b. the reasonable expectation of privacy with respect to the record;
c. whether production of the record is based on a discriminatory belief or bias;
d. the potential prejudice to the record holder's privacy or personal dignity;
e. society's interest in encouraging reporting sexual offences;
f. society's interest in encouraging complainants of sexual offences to seek treatment; and
g. the effect of production on the integrity of the trial process. [21]

In *Mills*, the Court stated that each of the above-mentioned factors does not require an in-depth and conclusive evaluation; rather, they serve as a check-list of factors that may come into play in the judge's decision about whether to allow production of the record.[22]

Applications are made to the trial judge, to avoid disclosure requests at the preliminary inquiry and to establish a more robust test for disclosure. A written application is required to indicate how the record is "likely relevant to an issue at trial or the competence of the witness to testify"

[19] *Criminal Code*, s. 278.5(1)(b) and (c)
[20] *Criminal Code*, s. 278.5(2).
[21] *Criminal Code*, s.278.5(2)
[22] *Supra* note 8 at para. 134.

and also how the production of said record is "necessary in the interests of justice." A number of reasons are included, which will not meet the criteria of "likely relevance":

a. the existence of a record; that the record may contain prior inconsistent statements;
b. that the record may relate to the reliability of the witness because she has received therapy;
c. that the record may reveal other allegations of sexual abuse; and,
d. that the record relates to sexual reputation.[23]

Given the tensions around the issue and the balancing between the accused's and the complainant's rights, it seemed inevitable that the legislation would be tested in the courts.[24] Given the lack of certainty over the constitutionality of the provisions, an appeal from the Alberta Court of Queen's Bench in *R.* v. *Mills* was quickly heard at the Supreme Court of Canada.

2.2 *R.* v. *Mills*

In the case of *R.* v. *Mills*, the Supreme Court revisited its decision in *O'Connor* and affirmed the view of the minority that the principles of fundamental justice that inform the accused's rights to full answer and defence do not include the right to evidence that would distort the search for truth inherent in the trial process. The defendant, Brian Mills, had been charged with one count of sexual touching and one count of sexual assault. The offences allegedly took place in 1995 when the complainant was 13 years old. At the trial level, Mr. Mills sought full disclosure of all therapeutic records and notes relating to the complainant. The trial judge held that the provisions of Bill C-46 violated the defendant's rights under s. 7 and s.11(d) and declared the entire scheme unconstitutional.

The decision recognized that privacy rights are most at stake where a record concerns aspects of one's individual identity or where confidentiality is crucial to a therapeutic or trust relationship. It upheld the test set out in s.278.1 that was drafted with the intent to prevent myths, stereotypes and assumptions regarding complainants and classes of records from forming the entire basis of an otherwise unsubstantiated order. *Mills* incorporates an equality analysis in its consideration of the truth-seeking objectives of the process.[25]

[23] *Criminal Code*, s.278.3(4) (a-j)
[24] Ss.278.1-278.9(1) of the *Criminal Code* were struck down in *R.* v. *B. J. M.*, (1997) A. J. No. 891 (Alta. Q.B.); *R.* v. *Mills*, (1997) A.J. No. 1036 (Alta. Q.B.); and *R.* v. Boudreau, (1998) O.J. No. 3526 (Ct. J. (Gen. Div.)). The sections were upheld in *R.*v. *Hurrie*, (1997) B.C.J. No. 2634 (B.C.S.C.) and *R.* v. *Regan*, (1998) N.S.J. No. 356 (N.S.S.C.).
[25] See for example, M. Denike, "Myths of Woman and the Rights of Man: The Politics of Credibility in Canadian Rape Law" in J. Hodgson and D. Kelly (eds.) *Sexual Violence: Policies, Practices and Challenges in the United States and Canada* (Connecticut: Praeger Publications, 2002) at 101-118. See also Jamie Cameron's excellent discussion of the evolving thinking on victim privacy in sexual assault cases at the Supreme Court. She analyzes the judgements in *Seaboyer, O'Connor* and *Mills* in Chapter 3 of her report entitled, "Victim Privacy and the Open Court Principle" (Department of Justice: Ottawa, 2004).

2.3 Secondary Literature

There is significant literature dealing with sexual assault law and in particular, the changes that have been introduced into the Canadian context during the 1990s. Scholars from different disciplines and perspectives have provided commentaries and analyses on the legislative amendments and the several Supreme Court of Canada decisions. While an exhaustive review of the literature was not part of the scope of this study, a few pieces have been selected to illustrate the range of perspectives.

For example, prior to the *Mills* case, law professor Bruce Feldthusen criticized the *O'Connor* judgement noting that, "the court might as well have approved production to a judge alone as of right."[26] Submissions to the Committee during hearings on Bill C-46 certainly supported this prediction with evidence that production to the judge was common.[27]

Law professor Karen Busby undertook a review of records cases for the Department of Justice in the aftermath of the *O'Connor* decision and before *Mills*.[28] Busby's findings carry the same limitations as this current review, in that one cannot determine: whether applications are standard practice for defence, what the actual frequency of production to the judge or disclosure to the defence is, nor what overall trends on reasons for production/disclosure.[29] Overall, she found that, "the defendant obtained (or was denied) disclosure of records in about 50 per cent of the cases reviewed both before and after Bill C-46."[30]

Women's Studies professor Lise Gotell has written on both C-46 and C-49 caselaw through feminist discursive analysis.[31] She argues that while the *Mills* decision has been highly lauded, it is a contradictory decision and it interprets s.278 in such a way as to erode its meaning and intent. Gotell suggests that "Charter rights discourse invades the test for likely relevance"[32] in that fair trial rights override consideration of the needs, harms and interests of the complainant. She is critical of the court's discussion of privacy and suggests that underlying the discussion is "a highly individualistic and atomistic understanding of complainants' concerns."[33] The decision individualizes the complainant who is not seen as someone who is part of different relationships

[26] B. Feldthusen, "Access to the Private Therapeutic Records of Sexual Assault Complainants" (1996), 75 Can. Bar Rev. 537 (-563), at 551.
[27] Attorney General of Canada, Mills Factum, Parts III-IV, para. 19-20.
[28] K. Busby, "Third Party Records Cases since R. v. O'Connor: A Preliminary Analysis" (Department of Justice: Ottawa, 1998). Published as K. Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases" (1997) 9 C.J.W.L. 148 (-177); K. Busby, "Third Party Records Cases Since O'Connor" (2000), 27 Man. L. J. 355 (-390). Her work is cited in the *Mills* decision at para.92.
[29] DOJ report, *ibid.* at 43.
[30] *Ibid*. at 44.
[31] L. Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 Osgoode Hall L.J. 251 (-295). Professor Gotell has been completing a Social Sciences and Humanities Research Council funded study entitled "Canadian Sexual Assault Law and the Contested Boundaries of Consent" which includes reviews of caselaw on Bill C-46 and C-49, as well as qualitative research with key informants.
[32] *Ibid.* at para. 22 (QuickLaw version).
[33] *Ibid*. at para. 27.

that are based on power and control and it limits one's ability to construct an "authoritative version of events".[34]

Other writers include law professor Jamie Cameron[35] who is critical of the decision in *R.* v. *Mills* in light of a seeming reversal of the Court's reasoning in *O'Connor.* She argues that the Court's deference to the weight given by Parliament to consultations in the legislative process suggests that the consultation process leading up to Bill C-46 was limited and favoured women's equality-seeking groups. Steve Coughlan comments on the relationship between the courts and the legislature noting that "the Court did its best to interpret the legislation to conform to its earlier judgement in *O'Connor".*[36]

Prior to the *Mills* decision, there was significant writing on Bill C-46, such as that by law professor David Paciocco, who critiqued Bill C-46 arguing that it should not survive a constitutional challenge as it denied the accused the right to full answer and defence.[37] From the defence bar, there was also significant discussion after *Mills*, in general calling into question the Court's deference to Parliament.[38]

Professor Cameron completed a report for the Department of Justice entitled, "Victim Privacy and the Open Court Principle."[39] She provides an excellent review of caselaw on the issues and finds that almost exclusively in the context of sexual assault proceedings, the status of crime victims changed radically under the *Charter*. It is within the context of conflict between the rights of the accused and the complainant that the Supreme Court of Canada recognized a right of victim privacy under s.7 of the *Charter*, and placed it on an equal plane with the defendant's right of full answer and defence. The author views this as a critical development because of the importance of linking the privacy concerns which arise at different times and for different reasons in sexual assault proceedings.

There have also been several socio-legal studies. For example, Gotell cites a study undertaken by doctors working at the Sexual Assault Service at Vancouver General Hospital where the rate of police reporting declined steadily between 1993-1997. The authors do not link this decrease in reporting and the rise of dislosure/production applications.[40] Researchers Margaret Denike and Sal Renshaw looked at caselaw prior to the *Mills* decision and interviewed health and social service professionals in British Columbia to find that overall there remains a climate of hostility

[34] *Ibid.*
[35] J. Cameron, "Dialogue and Hierarchy in Charter Interpretation: A Comment on R. v. Mills" (2001) 38 Alta. L. Rev. 1051.
[36] S. Coughlan, "Complainants' records After Mills: Same as it Ever Was" (2000) 33 Const. Rev. (5th) 300 at 301.
[37] D. Paciocco, "Bill C-46 Should not Survive Constitutional Challenge" (1997), 18:2 Ontario Criminal Lawyers Association Newsletter 25 (-38)
[38] See for example, D. Paciocco, "Criminal Jurisprudence in the Supreme Court of Canada: IV. Recent Developments in Criminal Procedure; A. Access to Third Party Records" (National Judicial Institute Appellate Courts Seminar, Ottawa, April 2000) (unpublished); R. Pomerance, "Shifting Ground: New Approaches to *Charter* Analysis in Criminal Contest" 8 Canada Watch 31; P. Sankoff, "Crown Disclosure After *Mills:* Have the Ground Rules Suddenly Changed?" (2000) 28 C.R. (5th) 285; D. Stuart, "*Mills*: Dialogue with Parliament and Equality by Assertion at What Cost?" (2000) 28 C.R. (5th) 275.
[39] *Supra,* Cameron, note 25.
[40] See M. MacGregor et al., "Why Don't More Women Report Sexual Assault to the Police?" (2000) 162 Can. Med. Assoc. J. 659 as cited in Gotell, *supra* note 31 at Note 49.

toward women complainants in sexual assault proceedings and that Bill C-46 has helped very little.[41] Research on record keeping practices at sexual assault centres has also been undertaken.[42]

The Department of Justice has undertaken significant social science research, focusing mainly on assessing the impacts of the numerous legislative changes in the past two decades.[43] A survey of sexual assault survivors was completed in collaboration with the Canadian Association of Sexual Assault Centres (CASAC). One finding of the study was that, "women said that they were unwilling to risk being re-victimized by 'being put under a microscope during the trial,' by having their personal life exposed in front of their abuser and others, or by having their personal information used against them."[44] The women indicated that this violation did impact their counselling relationship.[45]

A recent study involved in-depth interviews with criminal justice professionals (judges, Crown, defence, police, third party record keepers and independent counsel) in Ottawa and Toronto about their perceptions regarding the impact of both Bills C-46 and C-49.[46] The results, while not generalizable, complement this caselaw review and will be referred to throughout the report. The following section provides recent statistical information on sexual assault in Canada to provide a context for the prevalence of reported and unreported incidents.

[41] "Legislating Unreasonable Doubt: Bill C-46, Personal Records Disclosure and Sexual Equality" (FREDA Centre: British Columbia, 1999).
[42] P. Downe, "Record Keeping Practices of Sexual Assault Centres in Canada" (Sexual Assault Services of Saskatchewan: Regina, 2000).
[43] For a full list and summary of this research see "Research on Victims of Crime Before the Victims of Crime Initiative" (Research and Statistics Division, internal document, forthcoming 2004).
[44] T. Hattem, "Survey of Sexual Assault Survivors" (Department of Justice: Ottawa, 2000) at 41.
[45] *Ibid.* at 13.
[46] *Supra* note 18.

3. Statistics on Sexual Assault

3.1 Data Sources and Research Studies

Data on crime in Canada are gathered and reported on by the Canadian Centre for Justice Statistics (CCJS), which is part of Statistics Canada. The CCJS collects data from different sources such as, court data, police reported data (measuring what is reported to the police), and victimization surveys that poll the general public.[47] Data regarding sexual offences are available in various CCJS publications.[48] The report, *Women in Canada,* also profiles the experiences of women as victims and offenders in the criminal justice system.[49] Roberts' study for the Department of Justice entitled, *Prevalence of Sexual Assault and Therapeutic Records*, also provided data.[50]

3.2 Rates of police-reported sexual assault offences

The General Social Survey (GSS) found no significant change in the rates of self-reported sexual assault between 1993 and 1999. After having decreased for seven previous years, in 2000 and 2001 there were consecutive increases of 1% in police-recorded violent crimes.[51,52] Violent offences[53] increased by 5% between 1977 and 2002,[54] accounting for 13% of all *Criminal Code* offences in 2001[55] and in 2002.[56] The crime rate declined slightly by 0.6% in 2002,[57] with

[47] Data has been gathered through the Aggregate Uniform Crime Reporting Survey (UCR1) since 1962 and the Incident-Based Uniform Crime Reporting Survey (UCR2) since 1994. The incident-based Uniform Crime Reporting (UCR2) survey captures detailed information on individual criminal incidents reported to police, including characteristics of victims, accused persons and incidents. In 2002, 154 police services in 9 provinces participated in this survey representing 59% of the national volume of reported crime. Other than Ontario and Quebec, the data are primarily from urban police departments. The reader is cautioned that this data are not nationally representative." *Juristat,* "Sexual Offences in Canada", (23:6), p.6.The General Social Survey (GSS) on Victimization is based on a sample and occurs every 5 years. The last year completed was 1999 and it is currently in the field. According to the CCJS study of sexual offences in Canada, Victimization studies "include a large number of incidents not reported to the police, [as a result] victimization surveys produce estimates that are higher than rates derived from police statistics. This is the case even though sexual assaults recorded in victimization surveys exclude those committed against children under 15 years old, and the population residing in institutions or in Canada's three territories." CCJS, *Juristat,* "Sexual offences in Canada" (23:6), at 6.

[48] Publications include: R. Kong et al., "Sexual Offences in Canada" *Juristat* (23:6) and M. Wallace, "Crime Statistics in Canada, 2002*" Juristat* (23:5). Additional data on sexual offences are published by the Centre for Justice Statistics (CCJS) in their *Youth Court Statistics* and *Adult Criminal Court Statistics* reports.

[49] CCJS Profile Series, "Women in Canada" (June 2001. Ministry of Industry: Ottawa)

[50] J.V. Roberts with C. Benjamin, "Prevalence of Sexual Assault and Therapeutic Records: Research Findings" (internal report for the Department of Justice: Ottawa, 1998).

[51] Police-reported crime statistics for 2001 reveal an increase of 1% in the rates of crime in Canada, after nine years of decline. "Over the previous nine years, the crime rate had decreased by an average of 3% per year, resulting in the 2000 rate being the lowest since 1978… However, the 2001 crime rate was 46% higher than the rate 30 years ago." CCJS, *Juristat,* "Crime Statistics in Canada, 2001", (22:6), p.4.

[52] Within the category of violent offences, assaults and sexual assaults both increased by 1% in 2001. CCJS, *Juristat,* "Crime Statistics in Canada, 2001", (22:6), p.1.

[53]"Violent crime includes homicide, attempted murder, assault, sexual assault, other assaults, other sexual offences, abduction and robbery." CCJS, *Juristat,* "Crime Statistics in Canada, 2002", (23:5), p.5.

[54] Ibid at 3.

[55] CCJS, *Juristat,* "Crime Statistics in Canada, 2001", (22:6), p.4.

violent crimes decreasing by 2%,[58] and all levels of sexual offences comprising 9% of violent crimes reported to the police in Canada.[59]

Amendments to the *Criminal Code* in 1983 replaced the crimes of rape and indecent assault with a three-tiered categorization of sexual assault offences: level one sexual assault (with minimal physical injury to the victim); level two sexual assault (with a weapon, threats to use a weapon, or causing bodily harm); and, level three aggravated sexual assault (wounds, maims, disfigures, or endangers the life of the victim).[60,61] The CCJS report on *Sexual Offences in Canada* explains that "The goals of these amendments were to emphasize the violent rather than the sexual nature of such crimes, and to increase victims' confidence in the criminal justice system and willingness to report these crimes to the police."[62] After adoption of these reforms the rates of reported sexual assaults began to rise, reflecting increases in level one sexual offences.[63]

As in previous years, in 2002 the vast majority (88%) of police-reported sexual assaults were classified as level one offences.[64] Other sexual offences accounted for 10%, and the more serious levels 2 and 3 composed 2% of all sexual offences.[65] In 2002 there were 27,100 reported cases of sexual assaults.[66] This was 36% lower than in 1993, mainly due to decreases in level one sexual offences. Level 2 and level 3 sexual assaults also declined by 60% between 1993 and 2002. Other sexual offences (which are primarily offences against children) fluctuated, but overall fell by 40% during this period.[67] The fairly low rates of levels 2 and 3 and other sexual assaults account for these large changes in terms of percentages.[68] In terms of the numbers of offences, however, all levels of sexual assault have remained relatively stable since 1999, when the rate was 89 reported incidents per 100,000 population in Canada. By 2002 the national average had declined only slightly, to 86 reported sexual offences per 100,000 population.[69]

---

[56] "Twenty-five years ago property crimes made up 64% of all *Criminal Code* incidents, but that proportion has declined steadily since then. In contrast, the proportion of incidents that are classified as 'other' *Criminal Code* offences has been increasing since 1977 when it was only 28%. Violent offences have increased slightly from 8% to 13% of all Criminal Code incidents in the past twenty-five years." CCJS, *Juristat,* "Crime Statistics in Canada, 2002", (23:5), p.3.

[57] "The decline in the rate of sexual offences since 1993 parallels the overall downward trend among other violent offences." *The Daily,* "Sexual Offences, 2002", July 25, 2003, p.2.

[58] CCJS, *Juristat,* "Crime Statistics in Canada, 2002", (23:5), p.1.

[59] Sexual assaults level 1, 2 and 3 accounted for 8% and other sexual offences made up 1% of the 303,294 violent incidents reported by the police in 2002. CCJS *Juristat,,* "Sexual Offences in Canada", (23:6), p.2.

[60] Ibid at 3.

[61] The three levels of sexual assaults are applicable to youth and to adults accuseds. See CCJS, *Juristat,* "Sex Offenders", (19:3), p.3. for further information regarding the three levels of sexual offences.

[62] "Amendments also eliminated immunity for those accused of sexually assaulting a spouse, removed reference to the gender of victims and perpetrators, and restricted the admissibility of evidence about the complainant's prior sexual history." CCJS, *Juristat,,* "Sexual Offences in Canada", (23:6), p.2.

[63] Ibid at3.

[64] In 2001 there had been 24,000 reported incidents of sexual assault, and level one sexual offences had comprised 98% of these offences. CCJS, *Juristat,* "Crime Statistics in Canada, 2001", (22:6), p.6.

[65] *The Daily,* "Sexual Offences, 2002", July 25, 2003, p.2.

[66] This is "virtually unchanged since 1999 when the rate was 89" incidents for every 100,000 population in Canada.

[67] CCJS, *Juristat,* "Sexual Offences in Canada (23:6), p.3.

[68] Ibid.

[69] *The Daily,* "Sexual Offences, 2002", July 25, 2003, p.1.

Significant variations in the rates of police-reported sexual offences were evidenced across Canada in 2002. Nunavut reported the highest rates of violent crime and sexual offences (1,017 sexual offences per 100,000 population). The Northwest Territories (473) and Yukon (261) followed in rates of sexual offences. Saskatchewan (160) and Manitoba (139) reported the highest rates among all of the provinces. Ontario (74) and Quebec (71) had the lowest rates of sexual offences, below the national average of 86 per 100,000 population. Between 2001 and 2002 increased rates were reported in Prince Edward Island, Nova Scotia, Quebec, Manitoba, Saskatchewan and the territories. Rates in other provinces decreased during this period.

Reported cases of sexual offences in Canadian cities also varied widely. In 2002, the highest rates of sexual offences were in Saskatoon (155 incidents per 100,000 population), Sudbury (119 incidents per 100,000 population) and Regina (109 incidents per 100,000 population). The lowest rates were reported in Ottawa (46), Windsor (54) and Quebec City (59).[70,71]

3.3 Reasons for changes in the rates of police-reported sexual offences in Canada

After a decade of increases, in 1993 police-reported sexual assaults reached a peak of 136 per 100,000 population in Canada. In addition to legislative reforms and demographic changes,[72] researchers have attributed this steady rise to several factors. They point out that victims were encouraged to come forward by significant changes in Canadian society such as reduced stigma attached to victims of sexual assault, as well as,

> improvements to the social economic and political status of women; a heightened focus on victims of crime and the growth in services and initiatives to support the victim, including sexual assault centres [and shelters]; special training of police to deal with victims, and; the growth of treatment teams in hospitals trained to respond to victims of sexual assault and gather evidence that could be used at trial.[73]

Thus, increasing numbers of sexual assault centres and the services they provided were among the changes which caused greater reporting of sexual offences to police to be achieved. It is

[70] CCJS, *Juristat,,* "Sexual Offences in Canada", (23:6), p.4.

[71] According to *The Daily* report, "In the absence of extensive evaluation it is difficult to identify specific factors in the disparity in rates of reported sexual offences among provinces, territories and metropolitan areas. Possible factors include variations in public attitudes towards sexual assault that may influence reporting rates among victims, as well as differences in police practices with regard to diverting accused persons, especially youth, to programs such as community work and counselling instead of laying formal charges." *The Daily,* "Sexual Offences, 2002", July 25, 2003, p.3.

[72] Demographic factors include "recent shifts in the age structures of the population and changing social values. Declines in rates of sexual offences coincided with a decrease in the proportion of the population aged 15-34. Since young adults have higher rates of criminal victimization and offending than other age groups, crime rates can be expected to decline as their share of the population declines. Changing social values related to sexual assault have also coincided with an aging population, and the combined effect may be more important than demographic shifts alone." CCJS, *Juristat,* "Sexual Offences in Canada (23:6), p.3.

[73] Roberts and Gebotys, 1992; Roberts and Grossman, 1994; Department of Justice, 1985, Clark and Hepworth, 1994 cited in CCJS, *Juristat*, "Sexual Offences in Canada", (23:6), p.3.

possible that cutbacks in such services represent one of the factors that have contributed to the declines in reported cases of sexual offences since 1993.[74]

3.4 Characteristics of Crimes of Sexual Assault and of its Victims

3.4.1 The majority of sexual assault crimes are not reported to police

Sexual assault is among the crimes which are least likely to be reported to the police.[75] The 1999 General Social Survey (GSS) on Victimization found 78% of sexual assaults were not reported to the police.[76] In addition, incidents of sexual assault are not always reported immediately after the offence has taken place. In some cases, sexual offences are reported long after the incident has occurred.[77]

Victims do not report incidents of sexual assault to the police for many reasons.[78] Explanations provided by victims include: the incident was dealt with another way (61%), it was not deemed to be important enough (50%), it was considered to be a personal matter (50%), or they did not want the police involved (47%). One third (33%) of victims who did not report felt that the police could not do anything about it, and approximately one fifth (18%) believed that the police would not help them. Another fifth (19%) of the victims of sexual assault did not report the incident to police because they feared revenge by the offender and 14% sought to avoid publicity regarding the incident.[79]

3.4.2 Privacy and confidentiality issues for victims

Privacy and confidentiality issues are critical for victims of sexual assault and they are related to reasons for victims failing to report these crimes to the police. According to the CCJS *Sexual Offences in Canada* report,

> Reasons for not reporting to police that stand out for sexual assault victims, as compared to the other violent crimes measured by the GSS, relate to the sensitive nature of these events: higher proportions avoided calling the police because they considered it a personal mater that did not concern the police, or because they feared publicity.[80]

[74] Women have been more vulnerable to downturns in the economy and to government cutbacks which have occurred during the past decade. Poverty has been also identified as an indicator for higher vulnerability of women to sexual assault, to increased health problems, to substance abuse, to the need for physical and/or emotional health services and to having therapeutic records.

[75] CCJS, *Juristat,* "Sexual offences in Canada" (23:6), p.1.

[76] The GSS includes victims of 15 years of age and older in its survey. Roberts' analysis of Statistics Canada's Violence Against Women Survey (VAWS) of 1993, found ranges of approximately one incident in 17 reported to the police. *Supra* note 35 at ii.

[77] CCJS, *Juristat,* "Sex Offenders", (19:3), p.12.

[78] Researchers have attempted to overcome these obstacles to reporting, but have not been able to capture all unreported incidents of sexual assault. The VAWS, for example, used a telephone survey and as result excluded several groups of women. Women who do not have a telephone, women who do not have a fixed address, institutionalized women such as those with disabilities, and women such as new Canadians who do not speak English or French are not included in this study. Roberts, *supra* note 35 at 4.

[79] CCJS, *Juristat,* "Sexual Offences in Canada", (23:6), p.6.

[80] Ibid.

Victims of sexual offences are also less likely to seek assistance. The CCJS *Sexual Offences in Canada* report explains that,

> Just as sexual assault victims were less likely than victims of other violent crimes to report to the police, they were less likely to seek help from formal or informal supports. Smaller percentages [measured by the GSS], as compared to robbery or assault victims, said they spoke about the incident with family, friends or neighbours, or co-workers.[81]

3.4.3 High risk groups

Certain groups in the population can be identified as being more vulnerable to becoming victims of sexual assault. Gender is the most important factor.[82] Females are far more likely to be victims of sexual offences than any other type of violent offence. For example, in 2002, women represented approximately half of all victims of violent offences; however, women accounted for 85% of victims of sexual offences reported to a sample of police services.[83,84] Sexual aggression against women is widespread in Canadian society and women may experience multiple incidents of this crime in their lifetimes. Statistics Canada's 1993 *Violence Against Women Survey* (which did not include incidents prior to 16 years of age) found that over half of all women who had reported incidents of sexual assault, reported more than one case of victimization. *The Women's Safety Project* survey, of the same year, found that 69% of women who reported having been sexually assaulted in childhood also reported having been sexually assaulted after the age of 16.[85]

Moreover, women are more likely to be victims of the more serious levels of sexual assault. According to the CCJS report on *Sex Offenders,* "Relative to males, females were more apt to be victims of sexual assault levels 2 and 3 and less apt to be victims of "other" sexual assaults."[86] Adult victims were also more likely to be victims of levels 2 and 3 sexual offences, compared to level 1 assaults which were most often perpetrated against children. Although consistently fewer victims were males, they make up a relatively high percentage of cases of young children who are victims of sexual offences.

Disadvantaged groups of females in Canadian society are particularly vulnerable to being victimized by sexual assault. Women with disabilities and those who are institutionalized, Aboriginal women, particularly in the North and Territories, single, separated or divorced women, and women who are unemployed or have low-incomes are at heightened risk of being sexually assaulted.

---

[81] Ibid.

[82] While the vast majority of females are victims of sexual assaults, an even higher percentage of males are the accused in these crimes. The 2002 Uniform Crime Reporting Survey showed that a larger proportion of 97% of accuseds in sexual assault cases were male, than males accused in all other types of violent offences (82%). Ibid. at 7.

[83] 123 police departments reported to the UCR2 in 2002

[84] In 2001, sexual offences represented 19% of all reported assaults against youth, of which 89% of the victims were female. *Family Violence in Canada: A Statistical Profile, 2003*, p.34; The 1999 GSS found similarly high proportions of 82% of sexual assaults being perpetrated against women. *Juristat,* "Sexual Offences in Canada", (23:6), p.6.

[85] This figure has been weighted to the Canadian adult female population. See Roberts, 1994, p.3 as cited in Roberts, supra note 35 at 3.

[86] CCJS, *Juristat,* "Sex Offenders", (19:3), p.3.

For example, Sobsey found that, "Children and adults with disabilities are particularly at risk for becoming victims of sexual abuse or assault."[87] The research of Stimpson and Best shows that, "…40% of women with disabilities have been assaulted, sexually assaulted, or abused in some way." These researchers estimate that 83% of women with disabilities will be assaulted, sexually assaulted or abused in their lifetimes.[88] Research based on the VAWS found that ". . . 39% of ever-married women with a disability or a disabling health problem reported physical or sexual assault by a partner over the course of their married lives, compared to 29% of the female population."[89]

In addition, people with disabilities are at greater risk of suffering the most serious kinds of sexual aggression.[90] In 1993, the Canadian Panel on Violence Against Women found that 18% of women in Canada have a disability. Sorenson summarizes findings in the literature:

> In study after study, rates of violent crime are found to be 4 to 10 or more times higher [for persons with disabilities] than the rate against the general population. The rate of sexual assault is particularly chilling. One study found that 83% of women and 32% of men with developmental disabilities in their sample had been sexually assaulted. Other studies have found from 86% to 91% of women in their samples had been sexually assaulted.[91,92]

A review of the research literature by Roberts shows that not only are women with disabilities who are institutionalized at higher risk of being victimized by sexual assault, more than half of their victimizers are those in the health care system. He cites a 1990 study of women in psychiatric institutions, which revealed that:

> . . . 37% of those interviewed had been sexually assaulted in adulthood;[93] in another 1986 study on women with disabilities, 63% indicated that while they were in an institution, they had been assaulted by someone in the health care system. According to the Canadian Panel on Violence Against Women, the 'complete powerlessness in institutional settings [also] leaves [elderly women] highly vulnerable to sexual and physical abuse'.[94]

Age also affects vulnerability to sexual offences. Young females and children are at the highest risk of becoming victims of sexual assault. These are also the groups which make up the largest proportion of residents of shelters in Canada. Although children and youth under the age of 18

---

[87] D. Sobsey cited in Roberts, supra note 35 at 7.
[88] L. Stimpson and M.C. Best, *Courage Above All: Sexual Assault Against Women with Disabilities, (*Toronto: DisAbled Women's Network, 1991) cited in Robert ibid at 8.
[89] K. Rodgers (1994), p.6 in ibid.
[90] "In Canada, a significant (18%) of all women have a disability (Canadian Panel on Violence Against Women, 1993). This statistic includes those women with mobility impairment, who have hearing impairments, who are blind or visually impaired, those with developmental disabilities, intellectual impairments, psychiatric disorders and learning disabilities. These individuals are more likely to acquire and official health-related record." Cited in ibid at 13.
[91] D. Sorenson, "The Invisible Victims", (1997) *Impact* Vol. 10, at 1 in Roberts, supra note 35 at 7.
[92] D. Sobsey and C. Varnhagen, *Sexual Abuse and Exploitation of People with Disabilities: A Study of the Victims* (National Clearinghouse on Family Violence, Family Violence Prevention Division, Health Canada: Ottawa, 1990) cited in ibid at 8.
[93] K. Capen, *Legal, ethical, and legislative issues and women's health in Canada.* Paper presented at the Canada-United States Health Symposium, June 1996. http://www.hc-sc.gc.ca/canusa/papers/canada/english/ethical/htm in ibid.
[94] Ibid at 7.

made up only one-fifth of the population (21%) in 2002, for example, they were the victims of 61% of sexual offences reported to the police.[95] The highest number of police-reported sexual offences were against girls between the ages of 11 to 19, peaking at age 13 (781 per 100,000 population). Similarly, the 1999 GSS interviewed adults (15 years and older) and found that the highest rates of sexual assault were among specific categories of young women: "15 to 24 years of age, those who were single, separated or divorced,[96] as well as students, those who participated in at least 30 evening activities outside the home per month and those who had a household income of less than $15,000 or who lived in urban areas."[97]

3.4.4 The accused is generally known to the victim

In the vast majority of crimes of sexual assault, the accused is known to the victim (in 80% of sexual offences in 2002). Two fifths of all victims (41%) were assaulted by an acquaintance, 10% by a friend, 28% by a family member, and the remaining 20% were victimized by a stranger. More than half of the sexual assaults against adults (52%) and youth between 12 and 17 years of age (58%) were committed by friends and acquaintances.[98] Victims' reticence to report incidents to police or to seek assistance may be caused by their relationship with the accused.

Victim surveys also show that young teenage girls had the highest rates of victimization in cases of family-related and dating-related sexual assaults. Rates of sexual assault for male victims were highest for boys between 3 to 14 years of age and usually committed against females of their own age group.[99] The vast majority of children residing in shelters are within these ages of highest risk of victimization by sexual assault, particularly by perpetrators who are a relative, family member, or someone known to the victim.

3.4.5 Gender differentials in spousal and ex-spousal violence and in their physical and emotional consequences

Spousal violence is a critical and increasingly recognized problem in Canadian society. According to the *Family Violence in Canada* report, "One-quarter of all violent crimes reported to a sample of police services in 2001 involved cases of family violence… two-thirds of these cases of violence were committed by a spouse or an ex-spouse, and 85% of the victims were female."[100] There have been increases in the number of both female and male victims of spousal violence between 1995 and 2001. However, the rates of spousal violence against females have been consistently higher (344 incidents for every 100,000 women aged 15 and older in the

---

[95] CCJS, *Juristat,* "Sexual Offences in Canada", (23:6), p.7.

[96] [T]he 1993 GSS found that rates of victimization for single and separated/divorced women were about six times as high as the rate for women who were married/living common law. Rates of victimization were also higher for women who were working or attending school or those who had an active lifestyle outside the more in the evenings. These are consistent indicators of 'exposure' to risk across a variety of violent crime categories." CCJS, *Juristat,,* "Sex Offences", (19:3), p.12.

[97] CCJS, *Juristat,,* "Sexual Offences in Canada", (23:6, p.7). Many of these factors also mirror those which lead to greater likelihood of acquiring a therapeutic record.

[98] *The Daily,* "Family Violence", June 23, 2003, p.1 .

[99] CCJS, *Juristat,* "Sexual Offences in Canada", (23:6), p.7.

[100] *The Daily*, "Family Violence", June 23, 2003, p.1.

population in 2001, up from 302 in 1995) than those against males (62 incidents for every 100,000 men in the population in 2001, up from only 37 six years earlier).[101]

Similar rates of spousal violence are reported by both sexes.[102] However, much higher rates of women were sexually assaulted by their spouses (20%), as compared to men (3%).

> Spousal violence often includes multiple types of offences committed by a perpetrator against a victim. Spousal violence includes sexual and physical assault, threats, criminal harassment, murder, attempted murder, and other violent offences. Police statistics under-record sexual assaults, as in cases of multiple offences only the most serious offence is recorded by police.[103]

3.5 Multiple factors cause women to be more likely to have therapeutic records

Roberts' research reveals high rates of sexual assault against women, with psychological and physical consequences of these crimes, which cause women to seek therapeutic treatment and thus generate therapeutic records. The author explains that,

> Research has clearly demonstrated the adverse health effects resulting from criminal victimization, particularly sexual assault. In a representative sample of 2,004 adult women who were interviewed about their experience with victimisation and mental health problems, Kilpatrick *et al* (1985: 866) found that the rates for 'nervous breakdown', suicide ideation and attempts, were significantly higher for crime victims than for non-victims with the highest incidences for women who had experienced rape, attempted rape, sexual molestation. Nearly one-fifth of rape victims had attempted suicide – 8.7 times higher than non-victims (2.2%) (p. 873). It is also critical to understand that the sequelae of sexual assaults last longer than for other crimes. The longer the post-victimization trauma exits, the more likely an individual is to turn to professional medical or psychiatric help, and thereby generate a therapeutic record.[104]

Roberts further found that therapeutic records are more common among women than men, and that there are multiple, co-occurring risk factors which cause specific groups of women to be at greater risk of having therapeutic records. The author explains,

> Gender differences emerge with respect to criminal victimization, self-reported medical and psychiatric symptoms and the acquisition of a therapeutic record. The gender difference is stronger with respect to the first issue. Nevertheless, a higher percentage of women [as compared to men] report medical and psychological symptoms, and women are disproportionately likely to be clients of medical, therapeutic and counselling services. These populations included: women with disabilities, women in lower-income groups, younger women and aboriginal women.

[101] Ibid. at 3.
[102] "An in-depth module in the 1999 GSS addressed the issue of spousal violence separately and found that, overall 8% of women and 7% of men reported some type of violence by a common-law or marital partner in the 5 years preceding the survey." Among those who reported experiencing spousal violence, 20% of women and 3% of men reported being victims of at least one incident of sexual assault. "This amounts to an estimated 138,000 women and 14,000 men who were sexually assaulted by a spousal partner over the 5 year period preceding the study." It is important to note that in this study spousal violence sexual assault was defined as a sexual attack. Thus it measures more serious incidents of sexual violence and these percentages would be much higher if they included lower level sexual offences. CCJS, *Juristat,* "Sexual Offences in Canada", (23:6), p.6.
[103] *The Daily*, "Family Violence", June 23, 2003, p.3.
[104] Supra note 35 at 15.

> Finally, it is important to point out that many of these risk factors co-occur. This means that some women are multiply disadvantaged, being disabled and poor, for example.[105]

Roberts points out that by the time women "reach middle age, significant proportions of the female population have …acquired a therapeutic record of some kind. Since most of these records involve personal information, it is reasonable to assume that there will be a privacy interest for the subject of the record."[106]

In summary, violence against women including sexual assault crimes are most often perpetrated by someone who is known to the victim. Women are subjected more often to spousal and ex-spousal violence, to a multiplicity of more severe, more frequent and more long-term forms of both physical and psychological spousal violence than men. As a result women generally suffer more severe medical and psychological effects. Women are more likely to seek medical, psychological services and to take refuge from their ex-spouses in shelters, and thus women are more vulnerable to having therapeutic records than men.

[105] Ibid at v.
[106] *Ibid* at 17.

4. The Caselaw Review

4.1 Research Objective

The objective of this research project was to thoroughly review the QuickLaw database to obtain decisions in all s.278.1 application cases since the Supreme Court of Canada's decision in *Mills*. The cases are reviewed to obtain the following information**:** relationship between defendant and complainant; types of records sought; nature of the offence; rationales offered for production; and identification of judicial commentary on the provisions.

4.2 Methodology

For s. 278.1 applications, judges are required to provide reasons for their decisions.[107] Decisions reported on the QuickLaw database were retrieved from December 1, 1999 until June 30, 2003. The time period covers 43 months from the decision of *Mills* in November 1999.

Cases were reviewed for information on the complainant(s), the defendant(s), kinds of records, whether records were ordered to be produced/disclosed to the judge and to the defendant, and the reasons given in the decision for production and/or disclosure. As well, information on the preliminary inquiry, particularly concerning the cross-examination of the complainant on her records, was reviewed.

This review looked specifically at the use of s.278 records applications. As such, the search terms used were "s.278" ", in conjunction with other possible terms such as "records" or "sexual offences". The process was verified to have been thorough with QuickLaw Customer Service.

Section 278.2 lists the offences for which records applications can be made, so the offences found in these cases accordingly were sexual offences, or those listed in the legislation. Analysis based on kinds of offences is not included.

The researchers began with lists compiled by Karen Busby and Lise Gotell. [108] There were some inconsistencies and duplication of cases. Cases were reviewed to determine whether they fit the criteria of being decisions on s.278.1 records applications. After reviewing the cases on these preliminary lists, a QuickLaw search was completed to update the list and ensure there were no gaps.

A total of 48 decisions were reviewed in this study. The list of cases can be found in Appendix B.

This review is based only on the decisions found in the QuickLaw database.

[107] *Criminal Code,* s.278.8(1) and (2)

[108] Initial work completed by Karen Busby on contract for the Department of Justice, December 2001. As well, see Gotell, *supra* note 31 at Appendix.

4.3 Limitations of the Methodology

These decisions are not representative of the total decisions on s.278 and records applications. They do not represent all the situations in which records applications can be made. These decisions, however, are those that are reported and as such, become precedents for future caselaw. Lawyers and judges would look to the decisions reported in QuickLaw for their precedents and would rarely have other information on cases available to them.

Decisions are usually provided orally. Unless a particular request is made, oral reasons are not usually transcribed and published. Judicial practices on the publication of reasons vary across Canada; for example, there were no cases on s.278 records applications found on QuickLaw from Quebec although that database holds 65,000 cases from that province.

Caselaw review is limited in what in can ultimately tell us. In this study, as only decisions on records applications were reviewed, at times certain information is incomplete. A caselaw review cannot reveal perceptions, beliefs or feelings of the key players. It cannot provide representative data on what is occurring for all s.278 records applications. Basically, the decision tells us whether the records applications pass the threshold test for production to the judge and/or disclosure to the defendant and the reasons for the decision.

Further, in reviewing those decisions for information on the preliminary inquiry, one was limited to what was reported by the judge in the decision. In most cases, this was quite limited in contrast to a full account of what occurred at the preliminary inquiry which could have been obtained through transcripts.

A thorough caselaw review will reveal trends in the jurisprudence. In an advocacy context, jurists are prone to the assertion of a proposition and the citation of a case to support that proposition, ignoring cases which might refute that proposition or suggest otherwise. As such, it can perform a useful check on trends that might not accurately reflect the jurisprudence.

A caselaw review will not be able to answer the question of whether applications for records have become standard practice, as only decisions on applications already made are reviewed. The key informant study asked this specific question and the responses of those interviewed will be presented herein to further inform this study. Finally, one cannot state with any authority how likely it is that records will be ordered produced or disclosed.

4.4 Findings

The findings that are presented in this review are consistent with previous studies.[109] For example, in a majority of cases, there was a relationship between complainant and defendant (familial or professional), the majority of defendants were male while the complainants were female; a large number of complainants were younger than 18; multiple records were often sought; and partial or full records were ordered disclosed/produced to the defence in approximately 35% of cases.

4.4.1 Cases by province/territory

A total of 48 cases (n=48) were reviewed from the time period of December 1, 1999, through June 30, 2003. Cases from Ontario represented 35% (17 out of 48) of these cases. There were no cases from Quebec, nor from Nunavut, nor Prince Edward Island. The absence of decisions in Nunavut and Prince Edward Island may be due to the small size of the jurisdictions; in Quebec, it may be due to reporting practices.[110]

Three out of the four cases reported in B.C. were at the appellate level, one to the Supreme Court of Canada. In Ontario, just less than one third of cases (5 out of 17 or 29%) were at the appellate level. Out of the total number of cases reviewed, 25% (12 out of 48) were at the appellate level.

Table 1: Cases by Jurisdiction and Court Level

Province/territory	No. of Cases	No. of appellate level cases
Alberta	3	1
British Columbia	4	3
Manitoba	5	1
Newfoundland	9	0
New-Brunswick	1	0
Northwest Territories	2	0
Nova Scotia	4	1
Ontario	17	5
Saskatchewan	2	1
Yukon	1	0
Total	**48**	**12**

4.4.2 Offences Committed

Many of the decisions, because they were decisions specifically about the s.278 application, did not include the specific *Criminal Code* sections involved. In the majority of cases where the offences were noted in the decision, the accused had been charged with more than one offence. All were offences that fell under those listed in s.278.2.[111] Offences that were listed included: sexual assault (s.265(1)); assault (s.265); sexual interference (s.151); administering a noxious

[109] Busby and Gotell, *supra* notes 28 and 31.
[110] It is interesting to note that Nunavut reported the highest rates of violent crime and sexual offences (1,017 sexual offences per 100,000 population). See *infra* at 19.
[111] See Appendix A.

thing (s.245); threats (s.264.1); mischief (s.430); forceable confinement (s.279(2)); sexual exploitation of a person with a disability (s.153.1); anal intercourse (s.159); incest (s.155).

4.4.3 Records

Table 2: Type of Record and Number of Cases	
Type of records	Number of cases
Counselling records/ Therapeutic records	23
Medical records	14
Psychiatric records	10
Psychological records	4
Social services records	5
Child welfare records	8
Group home records	3
Personal records (eg.diary, notes)	6
Child and Family Services records	4
School records (incl. Letters to principal)	6
Other (VIS, testimony, work/personnel, discipline, custodial reports, Criminal Injuries, investigation records)	9
Total*	**102**

* Total adds up to more than 48, as many cases had multiple reords.

Of interest is that in the top three categories of types of records (counselling/therapeutic, medical and psychiatric), one could argue that there is a high expectation of privacy. Records were sought from multiple sources in almost half of the cases (22 of the 48).

4.4.4 Location of Records

At the time of the actual records applications, records were in various locations: Crown (4), third party (32), and with others such as the defence, court, complainant, and police (11). The records had been destroyed in one case, and unknown in one case. Totals do not add up to 48 as in cases where there were multiple records, the records may have been in different locations.

4.4.5 How Defendant learned of the records

In more than half of the cases (56%), the decision was silent as to how the Defendant learned about the records being sought. In the other cases, in general the Defendant learned about the records in one of two ways. The first was through the criminal justice system itself: the preliminary inquiry (3 cases), disclosure by the Crown or another complainant, earlier testimony, statements by the Complainant or witnesses. The second situation was where the Defendant had personal knowledge of the records because he had worked at the site where the records were made (4 cases), or where he had been present for some of the counselling sessions (1 case).

What is apparent is that there are a number of ways in which the defendant learns of the presence of records.

4.4.6 Party Characteristics

The characteristics of the defendants and the complainants are consistent with trends noted in earlier caselaw reviews.[112]

4.4.7 Information about the Defendants

In all of the cases where the information was available (45 out of 48 cases), the defendant was male. At least four out of five of the cases (79%) surveyed, involved an adult defendant. Of the remaining 10 cases, 6 involved youths and in 4 cases, the age was not specified in the judgement. The ethnic background of the defendant was only mentioned in two of the forty-eight cases. Both cases involved Aboriginal defendants.

The defendant was a professional in 4 cases: a doctor, a lawyer, a graduate student in psychology and a psychologist. In all but the lawyer's case, the defendant's profession led to his relationship with the complainant(s). With respect to the lawyer, the complainants were his two children.

4.4.8 Information about the Complainants[113]

In 60% of the cases (28 out of 47), there was only one complainant (in 4 cases the complainant was a male and in the remaining 24, a female). The sex of the complainant was not identified in 5 cases. In almost a third of the cases (30% or 14), there was more than one complainant, ranging from 2 to 64 complainants.

The majority of cases examined involved young complainants. Three quarters of cases where the age was identified (29 out of 38, or 76%) complainants were younger than 18 years of age at the time of the alleged offence(s). Six cases involved adults. In 3 cases, there were both adult and young complainants.

Of the six cases studied involving adult complainants, 3 had developmental or cognitive delays. In one of these cases, the complainant was also blind. Another young child complainant was noted to have mental deficiencies, and in another case involving two teenaged girls, the facts proffered in the case suggest that the complainants had cognitive or developmental disabilities. In 4 cases, the complainant had a drug or alcohol dependency, although in one case the addiction developed subsequent to the alleged offence taking place.

Many of the complainants had some involvement with a child services agency. In 3 cases, complainants lived in group homes and in 5 cases, there was a history of Children's Aid Society (C.A.S.) involvement. Furthermore, social services, child welfare agencies, child and family services and like organizations had involvement with complainants in 11 cases.

4.4.9 Relationship between the Defendant and the Complainant

As previously noted, the majority of cases showed some form of prior relationship between the accused and the complainant(s).[114] There were 28 cases where it was possible to determine the

[112] See Busby and Gotell, *supra* notes 28 and 31.
[113] One case concerned the personnel records of a constable involved in the case rather than records of the complainant.

relationship between the parties with certainty. In 5 cases the defendant was either the father or step-father of the complainant.[115] In 7 cases, there was an uncle-niece/nephew relationship. One case involved a brother and sister, another case involved a brother-in-law, and 3 cases involved a neighbour or family friend. Two cases involved spouses and another involved 2 youths that had a sexual relationship and, according to the complainant, had a boyfriend-girlfriend relationship. Seven other defendants had some form of professional relationship with the client.

4.5 Reasons

Given the importance of the likely relevance of the reasons for the production of the records and the list of factors that must be considered by the trial judge hearing the application,[116] the reasons provided for the decision were reviewed.

In *R.* v. *Mills*, the court stated that, a court in deciding whether to order production must consider "the rights and interests of all those affected by disclosure" [117] and that the three principles at stake in s.278 cases are full answer and defence, privacy and equality.

In two-thirds of the cases (26/39) where the issue was whether or not to order production of the records, [118] the judge made a general reference to s. 278.5(2), the subsection which lists the factors to be considered. This reference most often came in the form of mentioning that she or he must consider the provision, or that she or he had considered the provision in making a decision. The defendant's right to a full answer and defence (mentioned in 28 cases) and the potential prejudice to personal dignity and the right of privacy upon disclosure (29 cases) were the most commonly explored of the seven factors in the cases.

The probative value of the record was also a common theme, arising in almost half (19) of cases, as was the reasonable expectation of privacy of the complainant, which was discussed by the judge in almost two-thirds (24) of the cases.

Both the influence of discriminatory beliefs or biases (8 cases) and society's interest in reporting offences (9 cases) were mentioned in slightly less than one-quarter of the cases. The least commonly listed factors to be utilized in the decision were society's interest in encouraging victims to seek treatment, mentioned in 5 cases, and the integrity of the trial process mentioned in 4 cases. In only one case did the judge go through an analysis of each factor listed in section 278.5(2); in almost a quarter of the cases (9/39), she or he examined five or more of the factors listed.

---

[114] These numbers cannot be formulated as percentages as some of the cases involve more than one complainant. For example, *R.* v. *C.L.* involved both a spouse and a child as complainants.
[115] In two other cases, it is likely that the defendant was a father or *in loco parentis* to the complainant.
[116] *Criminal Code,* s.278.3(4) a-j and s.278.5(2) a-h
[117] *Supra* note 8 at para. 126.
[118] "Applicable cases" refers to cases in which the issue at hand is whether or not to order production of the records. Some of the 39 cases are appellate cases; thus it is important to keep in mind that although the reasons mentioned may be scant, the trial judge may have conducted and outlined a more complete examination.
[118] The necessity for a full answer and defence was explored in 28 cases, whereas the effect of production on the right to privacy and personal dignity was examined in 29 cases.
[118] Mentioned in 5 and 4 cases respectively.

As a whole, the judges in the cases reviewed have frequently cited the defendant's right to full answer and defence and the complainant's right to privacy as competing concerns in their reasons with respect to record production; the concept of equality, however, is rarely mentioned. In fact, a detailed consideration of equality only occurred in four judgements.[119] This is not to say that more judges did not consider the notion of equality or that it did not factor into the judgement. Whereas other factors outlined in the legislation and in *Mills* were explicitly stated, that was rarely the case for the principle of equality.

This is part of Gotell's critique of decisions on records applications in the post-*Mills* era. As noted earlier, she suggests that the *Mills* decision is ambiguous in terms of the emphasis on equality rights. As such, lower courts have not included any equality analysis in their decisions, to the detriment of complainants and to the benefit of defendants.[120] She states,

> And while most trial judges in sexual assault cases will be very familiar with how fair trial rights can be used to express the interests and needs of the accused, few judges have any experience in pouring the concerns of complainants into the containers of constitutional privacy and equality rights.[121]

Equality rights are relatively new to criminal cases and law professor Christine Boyle has noted the more frequent inclusion of equality rights.[122] Parliament has certainly taken a leadership role in applying section 15 of the *Charter* to criminal law. Professor Boyle also notes that "the judiciary and legal profession are beginning to take equality into account."[123] In practice, however, it is perhaps unsurprising that an equality analysis is less prevalent in these decisions. Professor Jamie Cameron agrees with Gotell and has suggested that lack of experience in equality analysis in the criminal context on the part of the trial judge may be at play. Given the number of factors to consider, judges might not feel compelled to undertake such analysis if it were not seemingly necessary in order to reach a decision on production.[124]

Privacy, however, came up frequently in the reported judgements, more than any other factor. In 4 cases the judge focused almost exclusively on privacy interests while excluding any detailed analysis of other factors.[125] A person's reasonable expectation of privacy may be found in s. 8 of the *Charter.* In *Mills*, privacy interests were defined as the right to be left alone by the state, which includes the ability to control the sharing of confidential information about oneself.[126] The Court stated that, "…privacy concerns are at their strongest where aspects of one's individual identity are at stake, such as in the context of information 'about one's lifestyle, intimate relations or political or religious opinions'".[127] It went on to state that a key consideration when deciding whether to order production of therapeutic records in sexual assault cases is the

[119] *D.H.*, *E.A.N.*, *G.P.J.* ,and *R.B.*. See Appendix B for full citations.
[120] *Supra* note 31 at para. 23
[121] *Ibid.*
[122] See for example, C. Boyle, "The Role of Equality in Criminal Law" (1998), Diversity and Gender Equality Bulletin 5: 3-5 (Department of Justice publication).
[123] *Ibid.* at 5.
[124] J. Cameron, Research and Statistics Division, Department of Justice Seminar Series, February 2004.
[125] *R.* v. *Clifford*, *R.* v. *Thompson*, *R.* v. *R.C.* and *R.* v. *W.P.N.*. See Appendix B for full citations.
[126] *Supra* note 8 at paras. 79-80.
[127] *Ibid* at para. 80 (quoting *Thomson Newspapers* at 517).

relationship of trust and confidence between the complainant and the record-keeper.[128] This would also apply to medical and psychiatric records, which as noted earlier, comprise the majority of records sought in the cases reviewed.

In many of the post-*Mills* judgments, the judge displayed an understanding and consideration of the complainant's right to privacy, although this did not necessarily result in a decision not to order production. For example, in *R.* v. *D.M.*, the court stated the following with respect to the complainant's diary, psychiatric records and counselling records:

> To grant the order sought on the material presented would in effect condone routine production for review orders without a reasonable possibility of advancing full answer and defence while creating prejudicial consequences and possible revictimization for a sexual assault complainant.[129]

With respect to the diary of the complainant, the judge stated:

> A diary generally contains significantly intimate thoughts, ideas, and emotional recordings. As such, there exists a high expectation of privacy in a personal diary and, with disclosure, even to the court, prejudice is occasioned to the personal dignity and right to privacy of the complainant.[130]

The above judgment would appear to reflect the Supreme Court's analysis of the privacy interests of a complainant offered in *Mills.* In other post-*Mills* judgments however, although the court considered the issue, the complainant's privacy interest in her or his records were not accorded nearly the same level of deference. For example, in *R.* v. *R.B.*, the judge used the privacy interests of the complainant to justify production to the court:

> There is…no doubt but that the expectation of privacy is very high as it relates to these records. There are no doubt intimate and private records which may well reflect on past history are of a very personal nature. It is for that reason that the record should be produced to the court to make a further determination as to whether it should be disclosed. Some of the record may relate to events which are in no way connected to the allegations before the court. As such, it should be reviewed by the court to make a determination as to whether it should be released to the defence.[131]

Similarly, in *R.* v. *L.P.M*, the judge remarked that with Children's Aid Society records there is a reduced expectation of privacy when the contact is initiated to spark an investigation.[132]

For Gotell, the emphasis on privacy is troubling in that "… it encourages a kind of legal analysis that is both degendered and decontextualized."[133] The author of this review, however, suggests that an opposite conclusion is equally valid.[134] The emphasis on privacy, which was the most

[128] *Ibid* at para. 82.
[129] *R.* v. *D.M.* (2000) O.J. No. 3114 at para. 61
[130] *Ibid* at para. 43.
[131] *R.* v. *R.B.* (2002) N.J. No. 176 at para. 30.
[132] *R.* v. *L.P.M.,* [2000] OJ No. 4076 (Ont. C.J.) at para. 9.
[133] *Supra* note 31 at para. 48.
[134] S. McDonald

commonly cited factor in the cases reviewed (29), demonstrates a contextualizing of the entire criminal justice process for a complainant. Cameron makes this point very clear:

> The discussion begins by acknowledging the significance of privacy in sexual assault proceedings. . . Privacy concerns do not stop there, however, but continue through the investigative and trial processes. At every stage, the complainant's credibility is open to question. In addition to the unavoidably private nature of a sexual offence, which can only be revealed by the complainant, the victim has in the past been subject to inquiries into the history of other activities. More recently, complainants' privacy has been threatened by defence claims for access to counselling and therapeutic records which are in the possession either of the Crown or private third parties.[135]

The importance of the development of a *Charter* right to privacy through sexual assault proceedings should not be quickly dismissed. The decisions reviewed herein demonstrate that during applications hearings, judges understand and accept its role in the balancing between accuseds' and complainants' rights.

In the 40 cases where an order re production was decided, [136] no production was ordered in 15 cases.[137] In several of these cases, the judge rejected the defence's argument that the record(s) would demonstrate the complainant's lack of credibility or competency, or show a motive to fabricate the complaint. In one such case, which involved a complainant who was legally blind and had a mild cognitive delay, the judge stated that the application for disclosure may have been based on a discriminatory belief that individuals with an intellectual disability are potentially incapable of telling the truth.[138]

Of the remaining 25 cases, partial or full disclosure was ordered to the defence in 14 cases. In several of these cases, uncertainty as to the complainant's credibility or a motive to fabricate was mentioned as a reason for ordering production of the records. The defendant's right to a full answer and defence was also frequently cited often in the context that it should take precedence over the complainant's right to privacy in those circumstances.

In the remaining 11 cases, after partial or full production to the judge, the case ended. While there were no further reasons for not ordering production to the defence, the initial reasons for production to the judge were similar to those offered in cases where production to the defence was ordered. Several cases cited the credibility or potential for fabrication on the part of the complainant as a reason for production.

---

[135] *Supra* note 25 at 24.

[136] Out of the 48 cases reviewed, there were 8 cases where a decision on production was not relevant for a variety of reasons. In *Stewart, Bowen, Shearing*, the defence already had the records; in *D.P.F.3*, the decision was about testifying at s. 278 hearing, not the records themselves; in *Kasook* and *D.W.L.*, the case was ordered back to trial because the trial judge did not properly weigh factors; and the cases of *B.(E.)* and *W.A.O.* dealt with viewing videotapes. The 15 cases where no production was ordered were: *E.A.N., M.A.S., M.G., J.J.P. Tatchell, D.P.F.*(4), *P.E., D.M., S.P., Thompson, N.P., Sutherland, Clifford* and *P.J.S.*. See Appendix B for full citations.

[137] The 15 cases where no production was ordered were: E.A.N., M.A.S., M.G., J.J.P. Tatchell, D.P.F.(4), *P.E., D.M., S.P., Thompson, N.P., Sutherland, Clifford* and *P.J.S.*. See Appendix B for full citations.

[138] *R.* v. *Tatchell*, [2001] N.J. No. 314 at para. 20.

The perceptions of the key informants interviewed in Mohr's study certainly support the findings of the caselaw review.[139] For example, the judges interviewed listed the rationales for disclosure: history of lying, veracity, ability to recall, a psychiatric record suggesting the complainant is delusional or has a history of blackouts, credibility (inconsistent statements), and the use of medications that affect memory.

Of note, the judges were generally very uncomfortable with the task of reading records. One judge expressed the concern that since there are no guidelines for judges on how to read the records, "the judge is reading them in the dark, the Crown and defence don't know what the judge has read and if something comes out later in the trial, the judge cannot ask for time-out to check what he or she has read".[140]

Judges also believed that it was likely that records would be produced to the judge, although not necessarily the defence, in cases where applications are made.[141] The caselaw review certainly demonstrated that where records were ordered produced to the judge, they were not necessarily handed over to the defence, or if they were, the records may have been edited, such that only partial production would have been ordered.

All of the Crowns mentioned inconsistent statements and credibility issues as the most common rationale used by defence counsel in applications for production. They further noted that the decision of the Ontario Court of Appeal in *Batte* was extremely helpful in blocking these kinds of applications. The decision is unequivocal with clear statements from Doherty J. that the mere fact that a complainant spoke to a therapist does not "get you the records". Some Crowns felt that the likelihood of production of records to the judge depends on both the individual judge and the individual complainant.

All of the defence counsel said that testing credibility through inconsistent statements was the primary rationale for record production. The independent counsel for complainants agreed that defence counsel were primarily looking for inconsistent statements. One independent counsel felt that judges, as a rule, do not look at records unless a "really good connection" is made. The other independent counsel felt that judges will view the records in about 50% of the cases. The caselaw review supports this perception in that records were produced to the judge in more than half the cases (25 out of 40). Again, counsel commented that *Batte* is an extremely important case to make judges aware that there is in fact a significant threshold before production can be ordered.

The experiences and perceptions of key informants from that study add a more in-depth understanding to the process and thinking behind records applications. It appears that the case of *Batte* has provided clarity on threshold for many players, at least in Ontario.

[139] *Supra* note 18 at 16-17.
[140] *Ibid.* at 16
[141] *Ibid.*

4.6 Conclusion

In conclusion, the way that judges have interpreted s. 278.5 in deciding whether to order production of relevant records has been inconsistent in the post-*Mills* caselaw. Different judges have placed varying emphasis (and sometimes none at all) on the factors listed in section 278.5(2) and in the guidelines offered by both the legislation and the Supreme Court's interpretation of the legislation in *Mills*.

As was noted earlier, the provisions in Bill C-46 permit a balancing of the rights of the accused and those of the complainant. Gotell has suggested that the "post-Mills terrain is highly unstable"[142] and certainly, the decisions reviewed herein indicate that there are few, if any, definitive trends to be discerned from the caselaw. Trial judges have been given the tools to assess each situation on its own facts and balance the competing rights. If anything, it is suggested that it is appropriate that there be variation in terms of decisions in such applications. If there were significant trends, such as consistent orders to produce and disclose to the defence, or no orders at all to do so, then one would have cause to wonder whether a careful assessment of the facts of each case and the balancing of rights according to the guidelines provided by Bill C-46 were actually taking place.

Privacy, and the accused's right to full answer and defence, have been key factors in decision-making, whereas mention of equality has been quite sparse. However, it is very difficult to determine specific trends with respect to reasoning as the detail in judgements thus far has been so varied.

4.7 The Preliminary Inquiry

The preliminary inquiry plays an important role in the criminal justice system. Its role, in terms of access to a complainant's personal records, has been a matter of discussion both by commentators and in the caselaw. The specific issue under debate is the scope of defence questioning complainants and other witnesses about personal records.

There is a statutory right of cross-examination at the preliminary inquiry.[143] There are several references to the preliminary inquiry as being one source for establishing the specific case for the likely relevance of records in *R.* v. *O'Connor* made by Lamer C.J.C and Sopinka J.[144] and in the dissenting judgment of L'Heureux-Dubé J.[145]

The majority decision in *Mills* notes that the examination of Crown witnesses at the preliminary inquiry is one manner by which an evidentiary foundation might be developed.[146]

---

[142] *Supra* note 31 at para.66

[143] See Slhany, *Canadian Criminal Procedure* (6th ed) at para. 5.500; *R.* v. *George* (1991), 69 C.C.C. (3d) 148 (Ont. C.A.) and *Criminal Code,* s.540(1)(a) which provides that a justice holding a preliminary inquiry shall take the evidence under oath of the witnesses who are called on the part of the prosecution and allow the accused or his counsel to cross-examine them.

[144] *Supra* note 6 at para. 26.

[145] *Ibid* at para. 146.

[146] *Supra* note 8 at para.135, specifically citing L'Heureux-Dubé as in *ibid.*

> Furthermore, contrary to the respondent's submissions, there is a sufficient evidentiary basis to support such an analysis at this early stage. This basis can be established through Crown disclosure, defence witnesses, the cross-examination of Crown witnesses at both the preliminary inquiry and the trial, and expert evidence, see: *O'Connor, supra,* at para. 146, per L'Heureux-Dubé J. As noted by Taylor J. for the British Columbia Supreme Court, "the criminal process provides a reasonable process for the acquisition of the evidentiary basis", *Hurrie, supra,* at para. 39. To this end, as the Attorney of British Columbia submitted: "Laying the groundwork prior to trial, comprehensive examination of witnesses at trial, will go a long way to establishing a meritorious application under this legislation." [147]

The Criminal Lawyers Association published an article in its newsletter shortly after the *Mills* decision was released.[148] The authors, Steven Skurka and Elsa Renzella, interpreted this aspect of the majority decision as providing a legal basis for a rigorous examination at the preliminary inquiry.

Professor Lise Gotell suggests that, "… defence counsel, always adept at finding ways around legislative protections for complainants, have initiated a reinvented strategy. This strategy rests on grilling complainants on their records at the preliminary inquiry and it has become a crucial new battleground in the quest for disclosure."[149] Gotell is accurate in her description of defence counsel adeptness in finding new strategies on behalf of their clients. Her comments inspired an in-depth examination of the role of the preliminary inquiry in this review.

The 48 cases included in this review were further examined on the basis of some information in the decisions about the preliminary inquiry. A list of the cases that provided some information, 20 in total, can be found in Appendix C. They came from Manitoba (2), Newfoundland (3), the Northwest Territories (2), Ontario (11), Saskatchewan (1) and the Yukon (1). Of the remaining cases, there was no preliminary inquiry (6, often in cases of young offenders) or no information on the preliminary inquiry.

Reliance upon these records applications decisions to provide an accurate portrayal of what occurred produced only limited results. Less than half of cases could be reviewed and of these, few had sufficient information to understand what had arisen at the preliminary inquiry in terms of the complainants' records. Given that it is the published decisions that are available to counsel in preparing for a case where a s.278.1 application may be appropriate, a review of these decisions is not without merit. Further, in terms of establishing precedent, cases that have reached higher level courts did provide adequate information as to facts and issues. As noted, *infra,* in order to fully understand what occurred at the preliminary inquiry, it is suggested that for a future study, transcripts of the inquiries should be reviewed in their entirety.

Two cases provided in-depth discussion on the issue of cross-examination of the complainant on her/his personal records and are reviewed below in detail, with other, but not all cases, along with one dated before *Mills*, in lesser detail. There were only two cases where the records

[147] *Ibid.* at para. 135, 744
[148] S. Skurka and E. Renzella, "Defending a Sexual Assault Case: Third Party Record Production" (2002), 21 *For the Defence* 32
[149] *Supra* note 31 at para.67.

application decision itself provided information on subsequent cross-examination by defence counsel.[150] This did not necessarily result in production/disclosure to the judge, or defence.

4.7.1 *R.* v. *Kasook*[151]

In the case of *R.* v. *Kasook,* the applicant applied for judicial review of the preliminary inquiry. He argued that the preliminary inquiry judge erred by precluding cross-examination of the complainant as desired by the applicant in order to establish an evidentiary basis for a s.278.1 application.

The issue for the court was the extent to which the complainant can be questioned on the topic of counselling. Vertes J. refers to a pre-*Mills* decision[152] wherein Jennis P.C.J. allowed questions in the following areas:

- whether the complainant received counselling in regard to the particular allegations before the court following the alleged incident;
- whether the counsellors appeared to take notes or maintain records;
- what was the general nature of the counselling (i.e. one on one or group therapy, hypnosis, memory regression, imaging);
- whether the alleged offence was part of the counselling topics or issues;
- whether the counselling assisted the complainant in recalling that the alleged offence occurred or in recovering forgotten details of its occurrence;
- if there was counselling prior to the complaint, whether that counselling affected the decision to contact the police;
- if there was counselling following the alleged offence whether a narrative of the events comprising the alleged offence was given to the counsellor;
- the names of counsellors involved, the names and locations of the agency they work for, and the duration of the counselling.[153]

Vertes J. concludes that the preliminary inquiry should be re-opened to permit further cross-examination, based on the parameters above. The decision does affirm that privacy should limit the line of questioning given that one cannot question about contents. Questioning about the existence of information and what type of information exists (e.g. summary, narrative, references only, etc.) is permissible.

4.7.2 *R.* v. *B.(E.)*[154]

In the Ontario Court of Appeal case of *R.* v. *B.(E.),* the issue was the nature and extent of permissible cross-examination of a complainant, at a preliminary inquiry involving sexual assault, where the stated purpose of the questioning is to lay the foundation for a s.278.1 application. An application for leave to appeal to the Supreme Court of Canada was dismissed on January 9, 2003.

---

[150] *R. v. D.M.(*2000), 37 C.R. 5th (80 at 94 (Ont. Sup. Ct.) also as *R.* v.*D.M.* (2000) O.J. No.3114 (Ont. C.J.) and *R.* v. *P.J.S.* (2000) Y.J. No. 119 (Y.T.S.C.)
[151] (2000) N.W.T.J. No.33 2000 NWTSC 33
[152] *R.*v.*J.F.S.* (1997) O.J. No. 5328
[153] *Ibid.* at para. 18.
[154] [2002] 57 O.R. (3d) 741 (Ont. C.A.)

The complainant described one of the assaults on a piece of loose paper and at the preliminary inquiry said he did so because he could not find his diary. Under cross-examination, he asked whether he wrote in his diary and he replied no. Counsel for the defendant wished to question the complainant on his diary at the preliminary inquiry to lay the foundation for a s.278.1 application and the judge declined to permit the questioning. A successful application for *certioriari* resulted and the preliminary inquiry continued.

The judge subsequently allowed questioning in four areas:

a) the location of the diary;
b) whether the diary contains descriptions of several encounters with the respondent on occasions other than the alleged offence dates;
c) whether the diary contains references to the presence of another person on those occasions; and
d) whether the diary includes a chronological record of the complainant's activities over a period of time when the complainant had some involvement with the respondent.

Counsel for the respondent argued that an "accused's statutory right to cross-examine witnesses called during a preliminary inquiry should not be limited absent a clear expression of Parliament's intention to do so".[155]

Crown counsel argued that the principles enshrined in these sections (ss.278.1-278.9) should inform the assessment of the questions being proposed. This approach was not adopted on the grounds that it would "effect an improper inferential expansion of the reach of these sections."[156]

Defence and Crown counsel agreed that questions concerning the actual contents of the diary are impermissible. Neither ss.278.1 to 278.9, nor the caselaw prohibit defence counsel from using the preliminary inquiry as an opportunity to attempt to lay an evidentiary foundation for a subsequent application. Subsections 278.1-278.9 do not directly relate to issues on appeal, but s. 278.3(3) obliges an accused to establish an evidentiary foundation of "likely relevance" to support an application. Defence counsel in these two cases raise the question that if one is limited to general questions, how could one ever achieve the threshold of "likely relevance"?

As noted earlier, the majority decision in *Mills* certainly supports the need to cross-examine the complainant. Caselaw suggests a trend to distinguish between cross-examination concerning a private record which intrudes on the private or personal domain of the author of the record and that which does not.

The appeal by the Crown was dismissed and the court held that defence is entitled to ask questions that establish the legal relevance of a record. This may include whether a topic is covered in the record.

[155] *Ibid* at para 17.
[156] *Ibid*. at para.28

4.7.3 Other Cases

In *R.* v. *D.M.*,[157] the Complainant had counsel[158] and production was not ordered. The decision noted,

> Although the defence was unable at the PI to examine on the exact contents of the diary, no attempt was made to discover the timing of relevant entries, the degree of the writing, ie. pages of narrative or summary reference only, or the nature of the entries ie. detailed history of the abuse or recordings of feelings and emotions.[159]
>
> There exists a high expectation of privacy in a personal diary, and with disclosure, even to the court, prejudice is occasioned to the personal dignity and right to privacy of the complainant.[160]

At the preliminary inquiry, the defence asked no questions of the complainant on the identity of her counsellor and made no inquiries as to the time or place of intervention. Nothing is known about the entries in the records.

The judge denied production of a diary on the basis of a lack of evidence and remarked, "… no attempt was made (during preliminary cross-examination) to discover the timing of relevant entries, the degree of writing i.e. pages of narrative or summary reference only, or the nature of entries i.e. detailed history of abuse or recordings of feelings or emotions."[161]

In the case of *R.* v. *P. J. S.*,[162] the complainant testified at the preliminary inquiry that she had been sexually assaulted by others. The complainant was questioned as to her ability to identify the Defendant in this case and what the hospital records would show as to the timing of events. The records were not disclosed to the judge, nor to the defence in this case. The reasons indicated that there was no evidence to suggest that there were problems with the complainant's memory and the hospital records pertained to a suicide attempt and thus were not necessary for full answer and defence.

There were some cases where this issue was discussed at length that were decided before the *Mills* decision. In *R.* v. *J.F.S.*[163], when defence counsel sought to cross-examine a complainant on her possible involvement in therapy, Crown counsel objected. Jennis Prov. J. held that cross-examination relating to the source and existence of third-party records that "may likely be

[157] (2000) O.J. No. 3114 (Ont. C.J.)
[158] Traditionally, complainants/witnesses in criminal proceedings have not had their own counsel. Since Crown counsel does not represent the complainant, there are increasingly more cases where complainants retain their own counsel. See findings and discussion, *infra,* at 42, on Independent Counsel.
[159] *Supra* note 157 at para. 40.
[160] *Ibid.* at para. 43.
[161] *R.v. D.M.*(2000), 37 C.R. 5th (80 at 94 (Ont. Sup. Ct.) also as *R.* v. *D.M.* (2000) O.J. No.3114 (Ont. C.J.)
[162] (2000) Y.J. No. 119 (Y.T.S.C.)
[163] (1997) O.J. No. 5328 (Prov. Div)

relevant to the allegations before the court" was proper.

He stated:

> Where that line of questioning crosses over the boundary into the substance or contents of those records then those questions will have to be scrutinized to determine whether they potentially elicit information that would be considered part of the private or personal domain referred to by L'Heureux-Dubé in the *Regina* v. *O'Connor* case. If so, then those questions will not be permissible . . .[164]

Jennis Prov. J. also noted that:

> Where the defence seeks to question the Complainant directly or indirectly on the very private parts of the Complainant's life as recorded . . . is precluded from doing so even though that type of evidence could assist in the discovery process and in laying the foundation for production of these records for trial. However, in my view, the defence is entitled to ask questions of the witness which will relate to the existence and source of such potential records provided that those questions do not call for answers which relate to those, "intensely private aspects" of the life of the witness or complainant as envisaged by L'Heureux-Dubé in the *Regina v. O'Connor* decision. . . .[165]

In the case of *R.* v. *Hurrie,* which is cited in the Mills decision:

> … while a preliminary hearing judge does not have the power to order production, there is nothing in the legislation or in either of the judgements in R. v. O'Connor or the law generally that prohibits the exercise of the right of cross-examination at the preliminary inquiry to provide an evidentiary basis for such an application, which must be made to the trial judge. Whether that application is made prior to the trial or during it is a matter of timing and choice by counsel. Indeed, it would be hard to imagine any basis for objection to such a cross-examination, given that the issue of credibility, including aspects of recollection, is always a live issue even at a preliminary inquiry.[166]

4.7.4 Discussion

As noted earlier, Gotell argues that cross-examination of the complainant at the preliminary inquiry not only subverts the protections of s.278, but is also a "crucial new battleground in the quest for disclosure."[167] Gotell seems to base her assertion on cases such as *Kasook* and *B.(E.)* suggesting that, "These cases are crucial because, in establishing the right to preliminary cross-examination on records, they potentially increase the evidentiary basis for these applications."[168] There has always been, however, a statutory right to cross-examination at the preliminary inquiry and this right has also been supported more recently in caselaw.[169]

---

[164] *Ibid.* at para.16.
[165] *Ibid.* at para. 10.
[166] (No.2) (1997), 12 C.R. (5th) 180 (B.C.S.C.) at 186.
[167] *See supra* note 149.
[168] *Supra* note 31 at para.69.
[169] See *supra* notes 143-147.

Heather Holmes argued in an article after the introduction of Bill C-46 that the legislation did not address the fundamental issue of the scope for the defence to "lay the groundwork" for an application for production.[170] She suggests that ". . . presumably, therefore, defence counsel will continue to cross-examine the complainant at the preliminary inquiry as to the history and details of her medical or counselling therapy."[171] Caselaw it seems has addressed the issue of laying the groundwork, in terms of nature and extent of questioning at the preliminary inquiry. This review of those cases suggests that they set parameters for questioning on records at the preliminary inquiry that clearly uphold the importance of the preliminary inquiry, while respecting the regime provided for by Bill C-46. Further, these parameters appear to respect the principles of Bill C-46 at the preliminary inquiry stage.[172] Such guidance can be very important for judges. Indeed, judges in Mohr's study commented that guidelines for reviewing records would be beneficial.[173]

It is acknowledged, however, that there are a number of disadvantages when cross-examination of complainants on their records is permitted latitude at the preliminary inquiry. As argued by the Crown in *Kasook*, the procedure established in s.278.1 is not available at a preliminary inquiry.[174] For example, a preliminary inquiry is a public hearing, whereas a s.278.1 hearing is held in private. As well, complainants are not compellable at a s.278.1 hearing, whereas they are compellable at a preliminary inquiry as the Crown's main witness. Further, both the complainant and the third party record keepers have standing at a s.278.1 hearing to make representations on whether they should be produced and receive notice. Neither has standing at a preliminary inquiry, nor do they receive notice of the intention to be questioned.

Finally, as one sexual assault counsellor during her interview for Mohr's study, "once the evidence is stated in court, the damage is done."[175] This comment summarizes the strongly held beliefs of equality-seeking women's groups that the criminal justice system does not offer sufficient protection for complainants in sexual assault cases. In submissions to the Standing Committee on Bill C-46, women's groups overall were supportive of the Bill. They sought an amendment that complainants' personal records should never be produced through the creation of a statutory privilege.[176] Third party record keepers noted in interviews that complainants are afraid that their personal records will be revealed and that there are no guarantees of privacy once the case is at trial. Given the competing rights at play and the importance of fairness as a fundamental principle of justice, such guarantees are unlikely.

In sum, the review of cases herein on the issues of cross-examination at the preliminary inquiry does not support Gotell's assertion that this is the "crucial new battleground". There are

[170] H. Holmes, "An Analysis of Bill C-46, Production of Records in Sexual Offence Proceedings" (199X), 2 Can. Crim L.R. 71 (-110) at 102-103.
[171] *Ibid.* at 103.
[172] *Ibid.* As Holmes notes, any cross-examination is subject to the usual rules of evidence, particularly relevance. Since s.278.3(4) sets out the illegitimate bases of relevance, it should apply to evidentiary issues at any stage of the proceedings.
[173] *Supra* note 18 at 16.
[174] *Supra* note 151 para. 21, Crown's brief.
[175] Supra note 18 at 16. This comment was made in the context of admissibility of sexual history evidence (Bill C-49).
[176] *Supra* note 11, Vol. 6, pp. 1032, 1051, and 1163.

procedural concerns that need to be closely examined and certainly, this area should be monitored in the future.

It is important to bear in mind, however, that the criminal trial is a process which involves the telling of events of an intimate, sexual nature, and not just telling. One is questioned, rigorously on these events, in such a way that one cannot help feeling personally attacked, even if it the testimony that is being attacked. As the quotation which begins this report states, " . . . sexual assault is not like any other crime."[177] Law professor Jamie Cameron acknowledges the unique nature of sexual assault and raises a number of difficult questions in her report on privacy and victims of crime.[178]

The legislative protections that will always be subject to the delicate balancing of rights may not be able to address the ongoing concerns of complainants of sexual assault and their advocates. There may be other safeguards that could work towards reducing the anxiety and tensions that seem to be unfortunately, part of a sexual assault trial. The role of independent counsel is one and is examined in the section below.

4.8 Independent Counsel

In criminal proceedings, Crown counsel represent the state and the public, not the complainant. Whereas defendants have their own counsel to advocate on their behalf, this is not the case for complainants. There are times when the interests of the state and those of the complainant are not the same. Furthermore, the complainant may incorrectly believe that Crown counsel is her lawyer. For records applications, both complainants and third party record keepers have standing and the right to counsel, though not necessarily state-funded counsel. The term "independent counsel" is used here to denote an advocate for the complainant only.

The caselaw review indicated that independent counsel for the complainant was present in almost half of the cases (23/48 or 48%). There was not a strong relationship between the presence of independent counsel for the complainant and whether records were ultimately produced/disclosed to the court and/or defence. There were some jurisdictional trends. For example, there were no cases in which there was independent counsel in Saskatchewan, Northwest Territories, New-Brunswick, Nova Scotia. In contrast, independent counsel was present in all cases but one in Newfoundland (8/9), and in almost half of the cases (8/18) in Ontario.

This issue was raised directly in Mohr's key informant study and interviews were conducted with independent counsel. Crowns who were interviewed stated that, ". . . everyone takes it more seriously"[179] when there is independent counsel for the complainant. All those interviewed agreed in the importance of having independent counsel for the complainant on applications for disclosure of third party records, particularly Crown counsel and the third party record keepers themselves (ie. counsellors).

[177] *Infra* note 1.
[178] *Supra* note 25.
[179] *Supra* note 18 at 16-17.

Ontario is the only jurisdiction where legal aid is provided for complainants in applications for third party records. In fiscal year 2003-04, 40 certificates were granted for independent counsel for complainants in applications. Legal Aid Ontario believes that all those who apply and are financially eligible are receiving a certificate.[180] Training on "O'Connor applications" has also been offered as Continuing Legal Education seminars in Toronto. Mohr's study revealed that the availability of legal aid was not always known to Crown or to judges. As well, the study revealed geographic differences: in Ottawa, it was very rare for counsel to represent complainants, whereas in Toronto it seemed to be more common. Toronto Crown counsel raised concerns about the difficulties inherent in the procedures to get legal aid certificates or a court order for independent counsel.[181]

Independent counsel in Mohr's study believed that independent representation should be automatically provided for all complainants.[182] The idea of some form of readily accessible and permanent (ie. a non-profit organization such as a legal clinic with staff lawyers and other services for victims) has been raised by advocates such as Fiona Sampson.[183] Further research that explored the impact for complainants of having independent counsel in terms of decreasing anxiety and safety fears around applications hearings and other aspects of the trial would be insightful.

4.9 Costs

A recent case out of Ontario, *R.* v. *J.G.C.*,[184] dealt with costs incurred by the third party to respond to the defendant's s.278 application. McIsaac J. awarded the third party, the Children's Aid Society, $1500 in costs after examining whether the court had jurisdiction to grant the relief requested, and if so, whether it should be granted.

The judge found that superior courts have long had the power to award costs. Section 278.4(3) states that no order for costs can be made against a third party as a result of their participation in the hearing, but is silent as to awarding of costs. The judge dismissed arguments on the basis of fault or misconduct on the part of the defendant and found that he did have jurisdiction.

In his reasons, McIsaac J. found that normally defence counsel further the accused's entitlement to full answer and defence. The Crown cannot be expected to fund counsel for complainants and third parties, although there have been "court appointed counsel" in several instances. He also found that self-representation is not an ideal manner in which to advance the interests of third parties, nor does it advance the quality or administration of justice. McIsaac J. rejected the argument of a chilling effect on the launching of meritorious records applications because the litigation costs of any decision are always subject to a cost/benefit analysis which legal aid plan administrators must also undergo.

[180] Conversation with George Biggar, Legal Aid Ontario, June 7, 2004.
[181] *Supra* note 18 at 18.
[182] *Ibid.* at 19.
[183] See for example, F. Sampson, "The Coroner's Inquest as an Equality Rights Mechanism" (2003), 18 J.L. & Soc. Pol'y 75 (-97). The focus of this article is the inquest into the homicide of Arlene May and subsequent suicide of Randy Iles, her abusive partner. The author argues for independent legal counsel for women in domestic violence courts and in cases of sexual assault, particularly where power dynamics are strongly imbalanced.
[184] (2003) 0.J. No. 2274, June 3, 2003 Ontario Superior Court of Justice

In support of such a remedy, the judge found that the Children's Aid Society was being forced to divert its scarce resources from its mandated work (child protection) in order to respond adequately to the application. The judge found that a fair balance between competing interests had been reached, if not a perfect balance.

The Criminal Lawyers' Association was invited to intervene and declined while reserving the right to participate at a higher level. This case is the first of its kind, but signals an important development in third party records applications.

In Mohr's study, defence counsel commented that applications are "expensive, cumbersome, and time-consuming," and represent a "series of burning rings through which you incinerate your client's retainer." They also indicated, however, that such applications would be filed as a matter of course where money was not at issue.[185] Third party record keepers who were interviewed believed that applications for records will be made "depending on how much money the accused has."[186]

Clearly, the costs involved for such applications are considerations for the defence, and indeed, for whether third parties and complainants are able to retain independent counsel. The decision in *R.* v. *J.G.C.* may lead to a more rigorous cost/benefit analysis on the part of defence counsel and the accused prior to launching such applications. Third parties and complainants may ultimately benefit.

4.10 Caselaw

It is difficult to distinguish the importance of the caselaw and the legislation itself. In general, those interviewed felt that *Mills* significantly strengthened the importance of the legislation. Since those interviewed were from Ontario, the Ontario Court of Appeal case of *Batte* was cited even more widely than *Mills* as having had a significant impact in setting the standard of likely relevance. *Batte* represents a very strong statement from the Court. Neither the court decisions, nor the legislation have trickled down to the average person. This is hardly surprising.

4.11 Myths and Stereotypes

The caselaw review also revealed that the myths and stereotypes that have historically pervaded sexual assault proceedings are still prevalent. All the grounds for seeking production of the records were founded on such myths and stereotypes. One such stereotype is that a psychiatric record suggests that the complainant is not stable, or has been on medication that would impair memory.

While the legislation itself has not changed the stereotypes, it has provided a procedure for challenging them. Changing stereotypes can best be achieved through public education and awareness-raising, as the case of drunk driving has demonstrated.

[185] *Supra* note 18 at 15.
[186] *Ibid.* at 18.

5. Suggestions for Further Work

The Department of Justice Canada has in the past twenty years undertaken extensive research in the area of sexual assault law.[187] Much of this research has been based upon the very significant changes in the *Criminal Code* and resulting caselaw. The perspectives of all players, including complainants themselves, have been sought during various studies. Some issues arose during the course of this review that would bear further examination if resources were available.

First of all, it would be ideal to update this caselaw review so that it is relatively current (i.e., within two years). As well, the issue of cross-examination of the complainant on records at the preliminary inquiry could be monitored to determine whether or not it is becoming a "battleground" as suggested by one author. The issue of costs, which was not prevalent, but very important, could also be monitored. Finally, it could be beneficial to gain insight into the potential role for independent counsel, or indeed, of advocates in general, who assist complainants through the sexual assault trial. Questions to be explored would be the impact on anxiety levels and safety fears if a complainant had an independent counsel/advocate there on her or his behalf.

While the legislation provides a procedure for challenging myths and stereotypes around sexual assault along with some protections for the privacy of the complainant, it is only one tool. Education and awareness-raising are equally important tools that need to be employed. Whether it is training for criminal justice personnel, awareness campaigns for the general public, or targeted education for complainants around expectations of the criminal justice system, all serve an important role to challenge myths and change attitudes.

The title of Mohr's study highlights the importance of education – "Words Are Not Enough: Sexual Assault – Legislation, Education and Information." Most of the key informants noted that they had received little or no training after the passing of both Bill C-49 and C-46, but some judges commented that more training had been available on Bill C-49. There was a general agreement that there should be refresher courses for on all aspects of sexual assault law every couple years. Defence counsel reported many workshops and on-going training. Overall, more training for criminal justice personnel was recommended by a number of key informants.[188]

[187] See *supra* note 43.
[188] *Supra* note 18 at 28-29 and 33-34.

Given the breadth of changes in sexual assault law in Canada over the past twenty years, a recommendation for on-going training and education appears reasonable. The general public also could benefit from awareness campaigns, such as those regarding domestic family violence and most recently, trafficking of persons. It is the general public who will sit on juries to judge the accused. As well, complainants or potential complainants could surely benefit from targeted education strategies that focus on not only information about the criminal justice system, but their own expectations and what is realistic. Format and delivery of this education must be sensitive to the individual needs of the complainants at different points after the assault. Trauma does have an impact on learning.[189]

[189] See for example, J. Hill, "Cognitive Changes in Victims of Crime: A Review of the Literature" (Research and Statistics Division and Policy Centre for Victim Issues, Department of Justice Canada, 2003) who examines recent social science research on the cognitive changes in victims of crime; S. McDonald, "Learning about the Law: Immigrant Women, Violence and Rights" (2002), *The Canadian Journal for the Study of Adult Education,* 16,2:73-94, who looks closely at the impact of trauma on learning in the context of legal proceedings for immigrant women who had experienced domestic abuse; J. Horsman, *Too Scared to Learn: Women, Violence and Education* (Toronto: McGilligan Books, 1999) who documents a pan-Canadian study looking at women and the impact violence had on their abilities to learn to read.

6. In Sum

This caselaw review examined decisions from records applications during the time period of December 1, 1999, to June 30, 2003, obtained from the QuickLaw database. It provides general and specific information on case characteristics and reasons in decisions in s.278.1 cases, including**:** relationship between defendant and complainant; types of records sought; nature of the offence; rationales offered for disclosure; and identification of judicial commentary on the provisions. A total of 48 cases were reviewed from all jurisdictions except Quebec, Nunavut and Prince Edward Island where no cases were reported. The decisions reviewed are those readily available as precedent to counsel, and as such, the research does provide some insight on trends in this area.

This report began with background on the development of Bill C-46 and the case of *R*. v. *Mills* wherein Bill C-46 was upheld as constitutional. A brief discussion of the significant literature generated on the issue of third party records was included to highlight some of the debates, and indeed, the conflicting and multidisciplinary perspectives.

The findings of the review are consistent with those of previous studies. In a majority of cases, there was a relationship between complainant and defendant (familial, professional); the majority of defendants were male while complainants were female; complainants were young; multiple records were sought; and records were ordered disclosed/produced to the defence in approximately 35% of the cases reviewed. No definitive trends in terms of reasons could be discerned from the review, with the exception of a greater emphasis on privacy of complainants.

This review provides a specific tool with which to monitor trends in jurisprudence. Such monitoring is important to determine whether legislative provisions are working in the manner intended by Parliament. Given the many changes in sexual assault law in Canada over the past twenty years, such research plays an important role to inform policy at the Department of Justice. It will be important to continue research in this area as time passes.

Appendix A –

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;

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

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

Definition of "record"

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

(1) No record relating to a complainant or a witness shall be produced to an accused in any proceedings in respect ofan offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272 or 273, 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 an offence under section 146, 151, 153, 155, 157, 166, 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.

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
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
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 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 psychiatric 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; or
j) that the record relates to the complainant's sexual reputation.

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

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.

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.1997, c. 30, s. 1.

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.1997, c. 30, s. 1.

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.1997, c. 30, s. 1.

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).1997, c. 30, s. 1.

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 employment, 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.1997, c. 30, s. 1.

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.1997, c. 30, s. 1.

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.1997, c. 30, s. 1.

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. 30, s. 1.

Appendix B –

List of Cases by Province and Territory

Alberta

R. v. *D.H.* [2002] A.J. No. 142 (Prov. Ct, Youth Division)
R. v. *Howorko* [2002] A.J. No. 665 (A.B.C.A.)
R. v. *Hundle* [2002] A.J. No. 1549 (ACQB)

British Columbia

R. v. *E.A.N.* [2000] B.C.J. No. 298 (B.C.C.A.)
R. v. *Stewart* [2000] B.C.J. No. 1815 (B.C.C.A.)
R. v. *Shearing* (2002) 214 D.L.R. (4th) 215 (S.C.C.)

Manitoba

R. v. *W.C.* [1999] M.J. No. 542 (M.C.Q.B.)
R. v. *M.A.S.* [2000] M.J. No. 516 (M.C.Q.B.)
R. v. *M.G.* [2001] M.J. No. 61 (Man Prov. Ct)
R. v. *P.P.* [2001] M.J. No. 438 (Man Prov Ct)

Newfoundland

R. v. *W.G.* [2000] N.J. No. 86 (Nfld. SC Trial Div)
R. v. *J.J.P.* [2000] NJ No. 156
R. v. *C.S.* [2000] N.J. No.302 (N. S.C.T.D.)
R. v. *Tatchell* [2001] N.J. No. 314 (N.S.C.T.D.)
R. v. *R.B.* [2002] N.J. Nos. 176 & 341 (N.S. C.T.D.)
R. v. *D.P.F.* [2000] N.J. No. 272 (N.S.C.T.D.)
R. v. *D.P.F.* [2001] N.J. No.114 (N. S.C.T.D.)
R. v. *D.P.F.* [2001] N.J. No. 233 (N.S.C. T. D.)
R. v. *D.P.F.* [2001] N.J. No. 234 (N.S.C.T. D.)

New-Brunswick

R. v. *D.S.H.* [2000] N.B.J No. 499(N.B.C.Q.B.T.D.)
R. v. *W.P.N* [2000] N. W.T.J. No. 15 (N.W.T. S.C.)

Northwest Territories

R. v. *Kasook* [2000] N.W.T.J. No. 33 (N. W.T.S.C.)

Nova Scotia

*R.*v. *K.A.G.* [2001] N.S.J No. 71 (N.S.F.C.)
R. v. *D.W.L.* [2001] NSJ No. 269 (N.S.C.A.)
R. v. *Lalo* [2002] NSJ No. 311 (N.S.S.C.)
R. v. *J.M.S.* [2003] N.S.J. No. 117 (NSYC)

Ontario

R. v. *P.E.* [2000] O.J. No. 574 (Ont. C.A.)
R. v. *Batte* [2000] 49 O.R. (3d) 321 (Ont C.A.
R. v. *R.W.K.* [2000] O.J. No. 2847 (OS.C.J.)
R. v. *D.M.* [2000] O.J. No. 3114 (Ont. C.J.)
R. v. *L.S.* [2000] O.J. No. 3991 (O.S.C.J.)
R. v. *L.P.M.* [2000] OJ No. 4076 (Ont C.J.)
R. v. *L.G.* [2000] O.J. No. 5090 (O.S.C.J.)
R. v. *S.P.* [2001] O.J. No 2898 (O.S.C.J.)
R. v. *N.P.* [2001] O.J. No. 1828 (O.S.C.J.)
R. v. *Sutherland* (2001) 156 CCC (3d) 264 (Ont CA)
R. v. *Hudson* [2001] O.J. No. 5456 (O.S.C.J.)
R. v. *B.(E.)* [2002] 57 O.R. (3d) 741 (Ont. C.A.)
R. v. *Clifford* [2002] 58 O.R. (3d) No. 865 (Ont.CA)
R. v. *B.P.* [2002] O.J. No. 1195 (O.S.C.J.)
R. v. *Hammond* [2002] O.J. No. 1596 (O.C.J.)
R. v. *C.L.* [2002] O.J. No. 4228 (O.S.C.J.)

Saskatchewan

R. v. *W.A.O.* [2001] S.J. No. 316 (Sask C.A.)
R. v. *R.D.* [2002] S.J. No. 427 (S.Q.B.)

Yukon

R. v. *P.J.S.* [2000] Y.J. No. 119 (Y.T.S.C.)

Appendix C –

Cases reviewed for information on the preliminary inquiry

Manitoba

R. v. *M.A.S.* (2000) M.J. No. 516 (M.C.Q.B)
R. v. *G.P.J.* (2001) M.J. No.53 (Man. C.A.)

Newfoundland

R. v. *J.J.P.* (2000)N.J. No. 156
R. v. *C.S.* (2000) N.J. No. 302 (NSCTD)
R. v. *R.B. (2002)* NJ Nos. 176 & 341 (NSCTD)
No.176, No. 341

Northwest Territories

R. v. *W.P.N.* (2000) NWTJ No.15 (NWTSC)
R. v. *Kasook* (2000) NWTJ No. 33 (NWTSC)

Ontario

R. v. *Batte* (2000) 49 O.R. (3d) 321 (Ont. C.A.)
R. v. *R.W.K.* [2000] O.J. No. 2847 (OS.C.J.)
R. v. *D.M.* [2000] O.J. No. 3114 (Ont. C.J.)
R. v. *L.S.* [2000] O.J. No. 3991 (O.S.C.J.)
R. v. *L.P.M.* [2000] OJ No. 4076 (Ont. C.J.)
R. v. *L.G.* [2000] O.J. No. 5090 (O.S.C.J.)
R. v. *S.P.* [2001] O.J. No 2898 (O.S.C.J.)
R. v. *N.P.* [2001] O.J. No. 1828 (O.S.C.J.)
R. v. *Sutherland* (2001) 156 CCC (3d) 264 (Ont. C.A.)
R. v. *B.(E.)* [2002] 57 O.R. (3d) 741 (Ont. C.A.)
R. v. C.L. [2002] O.J. No. 4228 (O.S.C.J.)

Saskatchewan

R. v. *R.D. [2002] S.J. No. 427 (SQB)*

Yukon

R. v. *P.J.S. [2000] Y.J. No. 119 (Y.T.S.C.)*

Pre-Mills

R. v. *J.F.S.* (1997) O.J. No. 5328 (Prov. Div)