

**ACCESS TO THE PRIVATE THERAPEUTIC
RECORDS OF SEXUAL ASSAULT COMPLAINANTS**

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This article discusses the two-stage procedure developed by the Supreme Court to govern production of the private therapeutic records of complainants in sexual assault trials. The majority judgement is criticized as being entirely focussed on the rights of the accused, with no apparent appreciation of the nature or importance of the competing privacy and equality rights of the complainant. While preferring the minority judgement, the author concludes that legal rules alone will matter little. The debate will always turn on conflicting background notions of what material is "relevant" for a full answer and defence. Bill C-46, introduced in response to the majority decision in O'Connor, is remarkable for its exhaustive and detailed limits to what may be considered relevant for this purpose. This may make the Bill more vulnerable to Charter challenge before the very court that decided O'Connor in the first place.

Cet article discute de la procédure en deux étapes, développée par la Cour suprême, pour la production en cour, dans des procès pour agression sexuelle, des dossiers médicaux et privés des plaignantes. La décision de la majorité est critiquée comme étant entièrement centrée sur les droits de l'accusé et comme, apparemment, n'appréciant pas la nature ou l'importance des droits opposés de la plaignante à sa vie privée et à l'égalité. L'auteur préfère l'opinion dissidente, mais il conclut qu'à elle seules les règles de droit importeront peu. Le débat tournera toujours autour des notions sous-jacentes et conflictuelles de ce qui est 'pertinent' pour assurer une défense pleine et entière. Le projet de loi C-46, déposé en réaction à l'opinion de la majorité dans O'Connor, est remarquable pour les limites détaillées et exhaustives qu'il impose à ce qui peut être considéré pertinent pour cette fin. Mais ceci peut rendre cette loi encore plus vulnérable à une contestation au nom de la Charte devant cette même cour qui a déjà décidé de l'affaire O'Connor.

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Introduction	538
I. The Facts and Judicial History	541
II. What Are Private (Therapeutic) Records?	543
III. Private Records in the Hands of the Crown	544
IV. Getting Started	544
V. Step One: Production to the Judge Alone — Likely Relevance	546
VI. Step Two: Balancing the Competing Rights	551
VII. Privacy (at last)	554
VIII. Equality	555
IX. Relevance: the Bottom Line	556
X. <i>Bill C-46: The Legislative Repudiation of the O'Connor Decision</i> ...	559
Conclusion	562

Introduction

In *R. v. O'Connor*,¹ the Supreme Court dealt with two important issues. First, and beyond the scope of detailed analysis herein, it clarified the principles governing the granting of a judicial stay for abuse of process. Second, it clarified the law and procedure governing the production of private therapeutic records in the hands of third parties, and hence not part of the Crown's case against the accused. This was also considered in *A.(L.L.) v. B.(A.)*,² a companion judgement issued simultaneously. The production issue can and does arise in any type of criminal case.³ Typically however, as in *O'Connor* and *A.(L.L.)*, the issue is inextricably linked to sexual assault charges where the accused seeks access to private records concerning the complainant.

The initial difficulty involves the "privacy-admissibility conundrum". A privacy interest cannot be protected once violated. If private records are disclosed to anyone, privacy is violated regardless of whether the information later proves of no interest, irrelevant, or otherwise inadmissible at trial. At the same time, it is difficult for a court to determine whether the information ought to be disclosed without knowing what the information is. What *O'Connor* did was to modify a two-step procedure developed originally by the British Columbia Court of Appeal below. This procedure is intended to prevent or minimize the exposure of private information until a preliminary judicial assessment can be made.

At the first stage the accused is required to demonstrate a sufficient *likelihood of relevance* to justify production to the court alone. By relevant, the court means relevant to an issue in the proceedings, or to the competence of the

¹ [1995] 4 S.C.R. 411.

² [1995] 4 S.C.R. 536.

³ Indeed the minority in *O'Connor* refers to several cases that did not involve sexual assault, and notes that the requests for access to private records were peremptorily dismissed, *supra* footnote 1 at 489-490.

subject to testify in the case.⁴ If the accused satisfies this initial threshold of likely relevance, the records will be produced to the judge alone.

At the second stage the court employs the “balancing of Charter Rights” approach to determine which, if any, records may be produced to the defence. For the complainant, it is the right to privacy. This right enjoys some constitutional protection grounded in sections 7 and 8 of the *Charter*. For the accused, it is the right to make full answer and defence. This right is grounded in the very foundations of our legal system as well as in sections 7 and 11(d) of the *Charter*. This balancing seems to begin with the scales already heavily weighted in favor of disclosure.

Given that the overwhelming majority of those accused of sexual assault are male, and that complainants are disproportionally women, persons with disability, and members of racial minorities, s. 15 of the *Charter* is also relevant.⁵ I shall discuss later that neither the majority that ignored s. 15 altogether, nor the minority that dealt with it, seemed able to come to grips with it in their legal models.⁶

On the surface, all the justices in *O'Connor* appear to be in substantial agreement with the basic elements of the two-step approach.⁷ In fact, the divisions are sharp and significant. The majority judgement (on this issue) was delivered by Lamer C.J. and Sopinka J., with whom Cory, Iacobucci, and Major J.J. concurred.⁸ The criminal defence bar could not have hoped for much more. The minority judgement was given by L'Heureux-Dubé, with whom La Forest, Gonthier and McLachlin J.J. concurred. Although it too falls well short of what was sought by the intervenors, the minority judgement does offer greater protection for private therapeutic records. The main differences between the majority and minority are not over abstract statements of law, principle or approach. In part, the minority simply seems to attach a good deal more weight

⁴ A.(L.L.), *supra* footnote 2 at 574-575: “There are many avenues open to prevent production of such records if the need arises. Hearsay and irrelevance constitute one of these avenues; as discussed in *R. v. O'Connor*”.

⁵ See *infra* section IX, *Equality*. To emphasize this, I have deliberately used the male pronoun when referring to the accused and the female pronoun when referring to the complainant.

⁶ *Ibid.*

⁷ In fact, Lamer C.J. (Sopinka J. concurring) and Cory J. (Iacobucci J. concurring) expressly profess to be in general agreement with the judgement of L'Heureux-Dubé J. (La Forest, Gonthier, and McLachlin J.J. concurring). They suggest their judgement is intended only to offer “comments regarding the procedure to be followed,” *O'Connor*, *supra* footnote 1 at 427. The majority judgement does a great deal more than this.

⁸ As explained below, the actual decision in *O'Connor* turned on the issue of stay, and on that issue L'Heureux-Dubé gave the judgement for the majority. Cory and Iacobucci J.J., who had joined L'Heureux-Dubé on the matter of stay, agreed instead with the judgement of Lamer C.J. and Sopinka J. on the production issues. Accordingly, the judgement of Lamer C.J. and Sopinka J. in *O'Connor* shall be referred to simply as the majority judgement, because it is the majority judgement on the production issue. The judgement of L'Heureux-Dubé shall be referred to as the minority judgement.

to privacy interests than does the majority. But the fundamental difference relates to relevance. Everything in this area turns on background judicial assumptions about just how likely private therapeutic records are to be relevant in sexual assault cases, and why. If nothing else, the decision in *O'Connor* is helpful for making this example of legal realism so strikingly clear.

A.(L.L.) also began with an order for production in an indecent assault case. The trial court had granted an order that two sexual assault crisis centers produce all documents, records and material in their possession relating to the complainant. The complainant and the two record holders appealed the order to the Ontario Court of Appeal. The Crown opposed their appeal. The Court of Appeal held that they had no right of appeal.⁹ For one thing, they were not parties to proceedings. For another, there is no provision in the Criminal Code which allows for interlocutory appeals from rulings at trial relating to the admissibility of evidence or documents. The frustrated appellants, noting that the order was a "final" decision in respect of their rights, then sought and obtained leave to appeal to the Supreme Court of Canada pursuant to s. 40 of the *Supreme Court Act*.¹⁰ The Supreme Court held unanimously that this was the appropriate method by which to pursue a third party appeal from a superior court, and that the Crown, record holder and complainant all had standing in any such appeal. While this is certainly preferable to there being no right of appeal, one wonders how many complainants will be able to pursue an appeal directly to the Supreme Court, and how readily the court will grant leave if they do.

On the matter of production of private records in the hands of third parties, the majority in *A.(L.L.)* (Lamer C.J., Sopinka, Cory and Major J.J.) simply adopted what it had held in *O'Connor*. The minority judgement on this point was delivered, as it was in *O'Connor*, by L'Heureux-Dubé J., La Forest and Gonthier J.J. concurring. She began with a detailed examination and eventual rejection of both class privilege and case-by-case privilege as appropriate approaches for private records. Instead, L'Heureux-Dubé J. held that the better approach is the *O'Connor* one that balances the complainant's Charter rights to privacy with the accused's Charter rights to a fair trial and full answer and defence. In the result, the appeal was allowed unanimously because the

⁹ (1995), 21 O.R. (3d) 621 (C.A.).

¹⁰ 40(1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court. *An Act to amend the Federal Court Act, the Crown Liability Act, the Supreme Court Act and other Acts in consequence thereof*, S.C. 1990, c. 8, s. 37, repealing *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40(1).

O'Connor procedures, whether as defined by the majority or minority, had not been followed.

As far as I can determine from the literature, there exists little or no middle ground on the question of production of private therapeutic records in sexual assault cases. Accordingly, I do not purport to have attempted to provide a neutral comment here. It will be clear that I prefer the minority's approach, specifically its assessment of relevance, its appreciation of privacy, and its sensitivity to the discriminatory aspects of the question. I have tried to refrain from developing the case for or against either side in any detail. This has been done elsewhere by those better qualified.¹¹ Instead, I have tried to point out the shortcomings of the judgement, as I see them, in the hope that anyone who has not yet formed a conclusive opinion might pursue these criticisms further.

The article concludes with a brief description of *Bill C-46*. The Bill rejects the majority decision in *O'Connor*, and accepts and develops with specificity the concerns expressed by the majority.

I. *The Facts and Judicial History*

In *R. v. O'Connor* the accused was committed to stand trial on two charges of rape and two of indecent assault, all allegedly committed between 1964 and 1967. At that time the accused was a priest serving as principal at an Indian residential school and the complainants were students. Prior to trial, the accused obtained an order for the production of certain therapeutic records of the complainants. It is worthwhile quoting from the order to put what follows in context:¹²

THIS COURT ORDERS that Crown Counsel produce names, addresses and telephone numbers of therapists, counsellors, psychologists or psychiatrists who have treated any of the complainants with respect to allegations of sexual assault or sexual abuse.

THIS COURT FURTHER ORDERS that the complainants authorize all therapists, counsellors, psychologists and psychiatrists who have treated any of them with respect to allegations of sexual assault or sexual abuse, to produce to the Crown copies of their complete file contents and any other related material including all documents, notes, records, reports, tape recordings and videotapes, and the Crown to provide copies of all this material to counsel for the accused forthwith.

THIS COURT FURTHER ORDERS that the complainants authorize the Crown to obtain all school and employment records while they were in attendance at St. Joseph's Mission School and that the Crown provide those records to counsel for the accused forthwith.

THIS COURT FURTHER ORDERS that the complainants authorize the production of all medical records from the period of time when they were resident at St. Joseph's Mission School as either students or employees.

The order was made without formal notice to the complainants, and in the absence of any representation on their behalf. There followed a somewhat

¹¹ The Supreme Court itself provided a comprehensive and balanced bibliography in both the judgements. I will refer to several articles specifically when relevant to the text that follows.

¹² *O'Connor*, *supra* footnote 1 at 445-446.

mysterious series of events to which this brief summary cannot do justice. Apparently, and understandably, a junior Crown counsel regarded the Order as too wide and insufficiently protective of the complainants' privacy. She advised records holders, contrary to the Order, to produce only those portions of the records relating to the accused, and she declined to comply with the first paragraph of the Order. Eventually this was discovered. Then a second Order for production was breached. The defendant moved for a stay, but this was rejected. The Order was fully complied with without further objection. Later, while the trial was underway, it became clear that the Crown had failed to disclose still other documents in its possession. At this point, the trial judge entered a judicial stay. In the words of the Court of Appeal:" it was the conduct of Crown counsel, not the late delivery of the therapy records, which lay at the heart of the trial judge's decision to enter a stay."¹³ According to the trial judge, "failure on the part of the Crown to comply with the earlier order — presumably meaning reluctance or tardiness on the part of the Crown in complying or securing compliance with it - had created 'an aura' which had in the end "destroyed" the prosecution."¹⁴

The Crown appealed the judicial stay. There followed three decisions of the same five member panel of the British Columbia Court of Appeal. The first dealt with three applications for intervenor status in the appeal: one by the complainants; one by a coalition of women's groups;¹⁵ and one by the Canadian Mental Health Association. The intervenors sought to address the court primarily on issues raised by the disclosure order quoted above rather than on the stay itself. The Court of Appeal denied the complainants' application, but allowed the applications of the two public interest groups. No appeal was taken from this decision.

The next decision in the Court of Appeal dealt directly with the judicial stay.¹⁶ The court held that the trial judge had been in error in granting the stay on either the basis of a common law doctrine of abuse of process or on the basis of an alleged violation of the s. 7 of the *Charter*. The matter was remitted to trial. In this decision, the Court of Appeal also expressed reservations about the original order for production, and its having been granted without formal notice to or representation by those affected. However, the court declined to rule directly on the validity of the order. To do so might have been taken as tacit approval of Crown counsel's decision to disobey the order. Instead, the court emphasized that the Crown had a duty to seek variation of the order if it objected. Since it had not done so, the Court of Appeal took the position that the validity of the initial order was immaterial to the issues before it.

¹³ *R. v. O'Connor* (1994), 89 C.C.C. (3d) 109 at 132 (B.C.C.A.).

¹⁴ *R. v. O'Connor* (1993), 82 C.C.C. (3d) 495 at 500 (B.C.C.A.).

¹⁵ The Aboriginal Women's Council ("AWC"), the Canadian Association of Sexual Assault Centres ("CASAC"), the Disabled Women's Network Canada ("DAWN Canada") and the Women's Legal Education and Action Fund ("LEAF").

¹⁶ *R. v. O'Connor*, *supra* footnote 13.

What the court did instead is release a third decision in the case, confusingly known as *O'Connor (No. 2)*,¹⁷ six weeks later. In this, the Court of Appeal responded to requests from the parties for guidance about the law and procedures to be applied on an application for the pre-trial production of medical records of potential witnesses which are not in the possession of the Crown.

Both the question of judicial stay the issues of record production were considered at length by the Supreme Court. The actual disposition of the appeal in the Supreme Court turned on the question of stay. The appeal was dismissed by a six-to-three margin, Major J., with whom Lamer C.J. and Sopinka J. concurred, dissenting. The majority agreed with the Court of Appeal that the facts did not support the granting of the exceptional remedy of a judicial stay. The full court agreed that there was no longer any need to maintain a distinction between the common law doctrine of abuse of process and similar objections grounded in Charter challenges in cases where the Charter applied. The majority emphasized prejudice to the accused's ability to make full answer and defence and prejudice to the integrity of the judicial system as the tests to determine whether a stay was warranted. Misconduct on the part of the Crown is neither a necessary, nor a sufficient ground for a stay. A stay is not a tool with which to discipline Crown counsel. The majority and dissent differed little in their formulation of the relevant legal principles. Perhaps the main message from *O'Connor* comes from how the tests for a judicial stay were applied on the facts. The minority found the requisite prejudice on the facts. The majority emphasizing that a judicial stay should be an exceptional remedy of last resort, held that the Crown's conduct had not caused irreparable prejudice. The comment that follows deals exclusively with law and procedure adopted to govern the production of private records in criminal trials.

II. What Are Private (Therapeutic) Records?

Strictly speaking, the scope of the decision in *O'Connor* extends to what L'Heureux-Dubé J. referred to as "private records held by third parties". Apparently all the justices accepted the definition of "private records" she used in both cases:¹⁸

The context in which the question of production of private records not in the possession of the Crown generally arises is not limited to medical and therapeutic records of complainants in sexual assault cases. It extends generally to any record, in the hands of a third party, in which a reasonable expectation of privacy lies. These records may include medical or therapeutic records, school records, private diaries, social worker activity logs and so on. For the sake of convenience, I refer to such documents as "private records held by third parties".

A few ambiguities remain. One assumes that the analysis applies to diaries made and kept by the complainant herself in the expectation of privacy, but this

¹⁷ *R. v. O'Connor* (1994), 90 C.C.C. (3d) 257 (B.C.C.A.).

¹⁸ *A.(L.L.)*, *supra* footnote 2 at 558; see also *O'Connor*, *supra* footnote 1 at 477.

is not discussed.¹⁹ Nor did the court consider whether the witness can be compelled to answer defence questions about her therapeutic history, including the basic question of whether any therapeutic history even exists. The defence may have no other way to obtain such information, a pre-condition for seeking production of records, except by asking the witness. On the other hand, the fact and particulars of therapeutic history may be as deeply personal as the records of treatment. Should the witness be compelled to answer at trial without the benefit of the same sort of protection that would be granted in respect of the records themselves? If so, should such enquiries be prohibited at a preliminary hearing, just as the full court agreed that record production could not be obtained at a preliminary hearing? Ought the police and Crown to be required to warn complainants at the outset that *any* information they provide about their therapeutic history may have to be provided to the defence?

III. *Private Records in the Hands of the Crown*

The minority confined its analysis to matter in issue, private records *in the hands of third parties*. The majority, however, dealt first with the matter of production of private records in the hands of the Crown. The majority concluded that the disclosure rules from *R. v. Stinchcombe*²⁰ and similar subsequent decisions should apply without modification to private records in the hands of the Crown. The rationale for this was waiver: by giving the records to the Crown, the witness will be taken to have waived privacy protection. The Crown must, therefore, inform the witness of the potential for disclosure should she provide records to the Crown. This is an important obligation, one that ought to be extended to the Crown and the police having to inform witnesses of all disclosure obligations, not just those related to private records. Unfortunately, the requirement to inform may prove purely symbolic. It seems doubtful that the majority would deny a defendant access to private records in the hands of the Crown because there had been no fully informed waiver. At best, the witness could hope for the same protection she would get if the records were in the hands of a third party. Even that is unlikely if the records form any part of the Crown's case. And what of records that come into the Crown's possession without the witnesses' knowledge or consent?

IV. *Getting Started*

When the production process begins, neither the Crown nor the defence will have actually seen the records. The accused must initiate the procedure as follows:²¹

¹⁹ See *R. v. Meyntz*, [1996] O.J. No. 39 (Gen. Div.) holding private diaries are included. As to expectation of privacy in diaries, see *Attorney-General for Ontario v. C.E.C. Edwards Construction* (1987), 60 O.R. (2d) 618 (S.C.). As to privilege in diaries see *V. (K.L.) v. R. (D.G.)* (1994), 118 D.L.R. (4th) 699 (B.C.C.A.). Query the impact of *A.(L.L.)*, *supra* footnote 2.

²⁰ [1991] 3 S.C.R. 326.

²¹ *O'Connor*, *supra* footnote 1 at 435.

... the accused must bring a formal written application supported by an affidavit setting out the specific grounds for production. However, the court should be able, in the interests of justice, to waive the need for a formal application in some cases. In either event, however, notice must be given to third parties in possession of the documents as well as to those persons who have a privacy interest in the records. The accused must also ensure that the custodian and the records are subpoenaed to ensure their attendance in the court. The initial application for disclosure should be made to the judge seized of the trial, but may be brought before the trial judge prior to the empaneling of the jury, at the same time that other motions are heard. In this way, disruption of the jury will be minimized and both the Crown and the defence will be provided with adequate time to prepare their cases based on any evidence that may be produced as a result of the application.

One might have thought it unnecessary to specify that all affected parties must be given notice. How else could they assert a privacy or other interest in the record?²² In fact, the explicit notice requirement in *O'Connor* may prove one of the more important aspects of the decision. Recall that the extraordinary production order in *O'Connor* itself was made without notice to anyone. Proper notice to the record holders in particular could prove crucial. They must be advised that they are only required to bring the records to court. They are not required to turn over these records to anyone until ordered to do so by the trial judge. Record holders may have a professional or institutional stake in preserving their clients' privacy, and may be better equipped and financed to argue the case before the court. Unless the record holders — shelters, crisis line operators, therapists, psychiatrists, and so on — come forth to argue the case, the *O'Connor* procedures, however defined, may be of limited use to complainants in sexual assault cases. Few witnesses contemplate requiring independent counsel when they make their initial complaint. Few will be willing or able to afford counsel to represent them on this issue, let alone on direct appeal to the Supreme Court. The Crown has no obligation to protect the witness' privacy, especially when disclosure is not expected to affect adversely the Crown's case.

The full court agreed that only the judge seized of the trial should entertain the motion for production. The full court also agreed that a preliminary inquiry judge is without jurisdiction to order production of private records in the hands of third parties.²³ However, unlike the majority, minority would not have allowed the request to be made by pre-trial motion, even by a motion directed to the judge seized of the trial. The minority felt that because this material was not part of the accused's case to meet, there was no entitlement to pre-trial discovery, and the request should therefore wait until trial.²⁴

The timing of the production motion is perhaps more important than may first appear. Unless the witness has been well-advised by the Crown, this notice may be her first warning that she should consider independent legal advice. This is a two-edged sword. It helps her prepare. It also put the complainant on notice of what she can expect at trial. It is a tremendous advantage for an accused to

²² *Ibid.* at 494-495.

²³ *Ibid.* at 510-512.

²⁴ *Ibid.* at 513-515.

intimidate a witness into dropping a complaint before it gets to trial. This is the purpose of much cross-examination at the preliminary inquiry. The request for production of private records should be seen in this context. It is one more way, and a significant way, of making the complainant regret that she has chosen to prosecute her complaint. Some members of the criminal defence bar refer to these requests for production as "whacking the complainant". They recommend it highly.²⁵ For that reason, the full court's holding that preliminary inquiry judges lack jurisdiction to order production is an important one. For the same reason, the minority's decision to require the production request to be brought at trial is to be preferred. Justice is best served by minimizing the harassment of complainants and by allowing sufficiently well-founded cases to proceed to trial. The accused is not properly prejudiced by having to wait. From the witness' point of view, however, the inevitable day of reckoning is merely postponed.²⁶

V. Step One: Production to the Judge Alone — Likely Relevance

To preserve as much of the complainant's privacy as possible, the full court endorsed a two step process in considering the application for production. At the first step, before the records are made available to anyone, the accused is required to make the case for production to a judge alone. The accused must demonstrate that the information is *likely to be relevant* either to an issue in the proceedings or to the competence of the subject to testify.²⁷ Only if the accused

²⁵ A lawyer named Mr. Edelson was apparently the first to use the expression "whacking the complainant" in 1988. See C. Schmitz, "'Whack' sex assault complainant at preliminary hearing" *The Lawyer's Weekly* (27 May 1988, vol. 8, no.5) 22. It led to him becoming something of a celebrity, even today. See M. Blanchfield, "Courtroom warrior goes to battle for accused. His tough courtroom tactics have inspired both respect and derision. Edelson says he's just doing his job" *The Lawyer's Weekly* (26 January 1996, vol. 15, no. 35) 1:

In 1988, Mr. Edelson laid out his philosophy for winning a sex assault case in a seminar for Ottawa-area lawyers at their Montebello retreat. But thanks to a detailed report in *The Lawyers Weekly*, he took some flak. Crown attorneys carried copies of the story. Women's groups started showing up in court to watch his cases. "Whack the complainant hard" at the preliminary hearing, he advised. "Generally, if you destroy the complainant in a prosecution," he said, "you destroy the head. You cut off the head of the Crown's case and the case is dead..." "You've got to attack the complainant hard with all you've got so that he or she will say: 'I'm not coming back in front of 12 good citizens to repeat this bullshit story that I've just told the judge.'" Four years later, Toronto Star columnist Michele Landsberg was still critical. "More and more defence lawyers are enthusiastically following Edelson's blueprint," she wrote.

²⁶ The warning may come too late to permit complainants to withdraw easily. L'Heureux-Dubé J. suggested that recognition of the privacy interest might justify allowing a complainant to withdraw from the prosecution during the trial, rather than have relevant, but highly sensitive information produced. *O'Connor*, *supra* footnote 1 at 506. But see *R. v. Ryan* (1991), 69 C.C.C. (3d) 226 (N.S.C.A.).

²⁷ *O'Connor*, *supra* footnote 1 at 494-495 and 434-435. This is the test adopted by the B.C.C.A. below.

is successful at this first stage will the information be turned over to the judge alone. At the second stage, discussed separately below, the judge balances the competing interests at stake, and then decides whether, and to what extent, further disclosure is warranted.

The first of many differences of opinion in the Supreme Court arises with respect to the burden of proof on the "likely relevance" standard. The minority refers to the accused's burden at this stage as a "significant one",²⁸ while the majority says that "... it should not be interpreted as an onerous burden ... the onus upon the accused should be a low one."²⁹ The majority was concerned that it would be difficult for the accused to meet a high threshold without having seen the records. But, as the minority points out, if relevance cannot be demonstrated, the accused is, by definition, merely "fishing". The real question is whether the right of full answer and defence entails an entitlement to a certain amount of fishing in the private records of the complainant. In effect, the majority says "yes". The only concession to the witness is that the majority designates the trial judge as the angler.

In support, the majority cited cases that extend great latitude in discovery of the Crown's case. Apparently, the majority saw no reason to treat differently private records that are not part of the Crown's case. This is because majority did not recognize any privacy issues arising from disclosure to a judge alone. It said: "A relevance threshold, at this stage, is simply a requirement to prevent the defence from engaging in "speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming" requests for production."³⁰ The majority held that the competing interests of the complainant were not to be considered until the second stage of the inquiry, when the judge considers the records.³¹

The minority showed a richer appreciation for the essence of the privacy interest. It believed that the court should engage in a preliminary consideration of privacy rights before ordering production to a judge alone.³² L'Heureux-Dubé J. said:

"What my colleagues fail to recognize is that even an order for production to the court is an invasion of privacy. The records here in question are profoundly intimate, and any violation of the intimacy of the records can have serious consequences for the dignity of the subject of the records and, in some cases, for the course of his or her therapy."

A stronger case can be made. The value of privacy exists quite apart from the content of the information, intimate or otherwise. The value of privacy exists independently of concern for any consequential damage entailed by its breach, such as injury to the witnesses' dignity or therapy. Production to a judge alone is surely *less* objectionable than production to the accused. Nevertheless, any unwanted invasion of privacy is objectionable *per se*. In effect, the majority

²⁸ *Ibid.* at 497.

²⁹ *Ibid.* at 437.

³⁰ *Ibid.* at 438.

³¹ *Ibid.* at 435-436.

³² *Ibid.* at 501-502.

judgement allows the state to violate a Charter right to privacy without even allowing the subject to assert that right at this stage.

As a practical matter, whether the onus of proof for production to a judge alone is high or low probably matters relatively little. Far more important is the *de facto* presumption for or against likely relevance that the individual judge, perhaps unknowingly, applies to the question of production. The different *de facto* assumptions for or against likely relevance are strikingly illustrated in the *O'Connor* judgements. The minority believes that such information is rarely relevant; the majority simply disagrees. Obviously this crucial background assumption, virtually unchallengeable in any particular trial, will have more impact on the question of production than any debate over the subtleties of legal onus. With the benefit of a *de facto* presumption of relevance, the accused will not have much difficulty meeting even a "significant" onus. Nor is it likely that a preliminary consideration of the complainant's privacy or equality interests would overcome this *de facto* presumption.³³ In the long run, perhaps the greatest contribution of the *O'Connor* decision will be its explicit exposure of the significance of judicial attitudes to legal decision making.

The minority said:³⁴

"the vast majority of information noted during therapy sessions bears no relevance whatsoever or, at its highest, only an attenuated sense of relevance to the issues at trial. . . . [M]uch of this information is inherently unreliable and, therefore, may frustrate rather than further the truth-seeking process."

In support, L'Heureux-Dubé J. quoted a passage from her own decision in *R. v. Osolin*,³⁵ that had also been quoted with approval by the Court of Appeal below:

...medical records concerning statements made in the course of therapy are both hearsay and inherently problematic as regards reliability. A witness's concerns expressed in the course of therapy after the fact, even assuming they are correctly understood and reliably noted, cannot be equated with evidence given in the course of a trial. Both the context in which the statements are made and the expectations of the parties are entirely different. In a trial, a witness is sworn to testify as to the particular events in issue. By contrast, in therapy an entire spectrum of factors such as personal history, thought, emotions as well as particular acts may inform the dialogue between therapist and patient. Thus, there is serious risk that such statements could be taken piecemeal out of the context in which they were made to provide a foundation for entirely unwarranted inferences by the trier of fact.

The majority assumed the opposite, that information in private records is often, even usually, relevant.³⁶ Its reasoning, however, is hardly compelling:³⁷

³³ Nor will the accused have much difficulty meeting the higher standard of relevance needed for a production order at step two: "reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify" as opposed to information that "may be useful."

³⁴ *O'Connor*, *supra* footnote 1 at 498.

³⁵ [1993] 4 S.C.R. 595 at 622-23.

³⁶ *O'Connor*, *supra* footnote 1 at 439-441.

³⁷ *Ibid.* at 440.

L'Heureux-Dubé J.'s observation as to the likelihood of relevance belies the reality that in many criminal cases, trial judges have ordered the production of third party records often applying the same principles we have enunciated in this case. The sheer number of decisions in which such evidence has been produced supports the potential relevance of therapeutic records.

Several intervenors had argued for strong restrictions or even outright prohibition on production of private records precisely because they believed that many trial judges routinely make unwarranted, discriminatory assumptions about the relevance of therapeutic records. The majority did not find it necessary to refer explicitly to these arguments. Surely the intervenors were entitled to expect more from the Supreme Court of Canada than this transparent circular reasoning.

The majority also pointed out correctly that the actual decision in *Osolin* supports admitting the very type of information that L'Heureux-Dubé J. finds suspect. The passage is worth quoting here, because it illustrates perfectly what is at issue in this key debate about likely relevance. The therapist's notes contained the following:³⁸

She is concerned that her attitude and behaviour may have influenced the man to some extent and is having second thoughts about the entire case.

Cory J., for the majority, held that:

...what the complainant said to her counsellor ...could well reflect a victim's unfortunate and unwarranted feelings of guilt and shame for actions and events that were in no way her fault. Feelings of guilt, shame and lowered self-esteem are often the result of the trauma of a sexual assault. If this is indeed the basis for her statement to the counsellor, then they could not in any way lend an air of reality to the accused's proposed defence of mistaken belief in the complainant's consent. However, in the absence of cross-examination it is impossible to know what the result might have been.

This passage reveals the true locus of decision in a case of this type. It lies in the background judicial attitudes about likely relevance. Everything depends on whether the judge believes the prejudicial value of such evidence exceeds its probative value.

The minority attempted to give concrete expression to its concerns about unwarranted assumptions of relevance. We know from *R v. Seaboyer*³⁹ that any attempt to be too rigid in establishing conditions for admitting evidence is doomed to failure. However, *O'Connor* itself illustrates that without some guidelines, relevance is to be determined by nothing more than the unstructured background opinions of trial judges. The guidelines provided by the minority included the following:⁴⁰

1. It would be insufficient for the accused to demand production simply on the basis of a bare, unsupported assertion that the records might impact on "recent complaint" or the "kind of person" the witness is.
2. The applicant cannot simply invoke credibility "at large", but must rather provide some basis to show that there is likely to be information in the impugned

³⁸ *Ibid.*

³⁹ [1991] 2 S.C.R. 577.

⁴⁰ *O'Connor*, *supra* footnote 1 at 497-499.

records which would relate to the complainant's credibility on a particular, material issue at trial.

3. Equally inadequate is a bare, unsupported assertion that a prior inconsistent statement might be revealed.

4. [Equally inadequate is] that the defence wishes to explore the records for "allegations of sexual abuse by other people".

4. The mere fact that a witness has a medical or psychiatric record cannot be taken as indicative of the potential unreliability of his or her testimony.

5. Any suggestion that a particular treatment, therapy, illness, or disability implies unreliability must be informed by cogent evidence, rather than stereotype, myth or prejudice.

6. It must not be presumed that the mere fact that a witness received treatment or counselling after a sexual assault indicates that the records will contain information that is relevant to the defence . . . although the fact that an individual has sought counselling after an alleged assault may certainly raise the applicant's hopes for a fruitful fishing expedition, it does not follow, absent other evidence, that information found in those records is likely to be relevant to the accused's defence.

The majority did not believe that trial judges require any specific guidance about relevance of private records in sexual assault cases. That trial judges frequently find these records relevant was neither of surprise nor concern. "By way of illustration only", the majority provided the following examples of likely relevance:

(1) they may contain information concerning the unfolding of events underlying the criminal complaint.

(2) they may reveal the use of a therapy which influenced the complainant's memory of the alleged events.

(3) they may contain information that bears on the complainant's "credibility, including testimonial factors such as the quality of their perception of events at the time of the offence, and their memory since."⁴¹

[and]

(4) there is a possibility of materiality where there is a "reasonably close temporal connection between" the creation of the records and the date of the alleged commission of the offence . . . or in cases of historical events, as in this case, a close temporal connection between the creation of the records and the decision to bring charges against the accused.⁴²

It would have been more satisfactory if the majority had added approval of the minority's restriction that "any suggestion that a particular treatment, therapy, illness, or disability implies unreliability must be informed by cogent evidence, rather than stereotype, myth or prejudice" to its comment that "they

⁴¹ *Ibid.* at 440-441.

⁴² *Ibid.* at 439.

may reveal the use of a therapy which influenced the complainant's memory". Many victims of sexual assault have found traditional therapeutic treatment quite unsatisfactory. Those who choose to turn to alternative therapies ought now to be warned, not of the therapeutic risks, but of the legal risks. One suspects that it will now be open season on private records made in relation to any non-traditional therapeutic or support setting.

Similarly, if one makes the reasonable assumption that victims will seek therapy, most defendants will have little difficulty establishing a close temporal connection between "the creation of the records and the date of the alleged commission of the offence". The majority pointedly failed to endorse the minority's comment that although the fact that an individual has sought counselling after an alleged assault may certainly raise the applicant's hopes for a fruitful fishing expedition, it does not follow, absent other evidence, that information found in those records is likely to be relevant to the accused's defence".

Obviously, private therapeutic records *may* reveal one or more of these matters in virtually any case. If these, without qualification, were intended as guidelines of likely relevance, the court might as well have approved production to a judge alone as of right. While the accused may not be allowed to do his own fishing through the records, he can routinely expect the judge to do it for him.

As a doctrinal matter, the majority's failure to qualify its remarks is ambiguous. One could argue that silence on point suggests that the matter falls within the majority's professed general agreement with the minority. I would argue that the general tenor of the majority judgement is more consistent with a rejection of the minority's specific guidelines. I believe that the combination of a low burden on the likely relevance issue, a *de facto* presumption of relevance, and the failure to allow consideration of any competing privacy interest, all make it relatively easy for the accused to succeed in having the private therapeutic records disclosed to the judge alone. This is objectionable because it allows for an invasion of the constitutional right of privacy without representation on that issue. As a practical matter, a low threshold at step one virtually insures that the defence gets at least one good "whack" at the complainant. What was once private must now be turned over to the court. It can hardly be encouraging for a witness to have had her privacy violated through a process in which her interests are deemed irrelevant. Intimidating the witness merely increases the chances of improperly derailing the trial.

VI. Step Two: Balancing the Competing Rights

Once the records pass the likely relevance standard, they are produced to the judge alone. It is now, for the first and only time in the opinion of the majority, that the competing claim of privacy is to be taken into account. The trial judge's job of determining relevance is not necessarily an easy one, even though the records are now before the court. For one thing, the records can be voluminous.⁴³

⁴³ *Ibid.* at 502.

For another, the judge may be understandably reluctant to suppress what is not clearly irrelevant to the defence. After all, the judge may be quite unaware of the theory of the defence.

On the surface, there appears to be more agreement among the justices with respect to step two than step one. Again, the consensus is more apparent than real. The majority and minority agreed that the test of relevance should be higher than at step one: "the presiding judge must be satisfied that there is a *reasonable possibility* [as opposed to likely] that the information is logically probative to an issue at trial or the competence of a witness to testify."⁴⁴ However, the justices' strikingly different background assumptions about relevance of records in sexual assault cases are likely to be far more important than their agreement about precisely how the test is framed.

The majority also purported to agree with the minority about the basic test for production:⁴⁵

We also agree that in making that determination, the judge must examine and weigh the salutary and deleterious effects of a production order and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence.

This passage accurately captures how the majority viewed the issue. It does not, however, describe the minority's competing rights model. The majority is starting the balancing with the scales already weighted in favour of production based on the *right* to make full answer and defence. It resembles somewhat the *Seaboyer* majority approach to privacy as a s.1 issue. In contrast, the minority purports to adopt a neutral starting point from which weight is to be given to the competing claims of right as they arise on the facts.

For much of the majority judgement, the only right in issue is the accused's right to make full answer and defence. This is all that counts at step one. Even at step two, privacy interests are not analysed as competing claims of right, but merely as a possible reasonable limit to the accused's rights. The majority seems quite deliberate in its failure to endorse a model of competing Charter rights. The majority says it is in "general agreement with (L'Heureux-Dubé J.'s) reasons on the *issues* of privacy and privilege."⁴⁶ Elsewhere the majority refers to a "privacy *interest*."⁴⁷ Only rarely, and then when referring to or quoting from the minority, does the majority even refer to a competing *right* of privacy.⁴⁸ (emphases added)

In contrast, the minority's model is explicitly described as one intended to balance competing Charter Rights..⁴⁹

⁴⁴ *Ibid.* at 436.

⁴⁵ *Ibid.* at 441-442.

⁴⁶ *Ibid.* at 427.

⁴⁷ E.g. *ibid.* at 429 and 430.

⁴⁸ *Ibid.* at 485-486 (para. 117); contrast to *ibid.* at 486 (para. 118).

⁴⁹ *Ibid.* at 491-492 and 492-493.

As important as the right to full answer and defence may be, it must co-exist with other constitutional rights, rather than trample them: Dagenais Privacy and equality must not be sacrificed willy-nilly on the altar of trial fairness.

The use of State power to compel production of private records will be justified in a free and democratic society when the following criteria are applied. First, production should only be granted when it is shown that the accused cannot obtain the information sought by any other reasonably available and effective alternative means. Second, production which infringes upon a right to privacy must be as limited as reasonably possible to fulfil the right to make full answer and defence. Third, arguments urging production must rest upon permissible chains of reasoning, rather than upon discriminatory assumptions and stereotypes. Finally, there must be a proportionality between the salutary effects of production on the accused's right to make full answer and defence as compared with the deleterious effects on the party whose private records are being produced. The measure of proportionality must reflect the extent to which a reasonable expectation of privacy vests in the particular records, on the one hand, and the importance of the issue to which the evidence relates, on the other. Moreover, courts must remain alive to the fact that, in certain cases, the deleterious effects of production may demonstrably include negative effects on the complainant's course of therapy, threatening psychological harm to the individual concerned and thereby resulting in a concomitant deprivation of the individual's security of the person

The disagreement extends beyond the fundamentally different conceptualization of how the issues are to be weighed. When the court turns to the relevant factors to be taken into account, once again we encounter agreement that is more apparent than real. The majority said:⁵⁰

We also agree that, in balancing the competing rights in question, the following factors should be considered: (1) "the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record in question; (3) the nature and extent of the reasonable expectation of privacy vested in that record; (4) whether production of the record would be premised upon any discriminatory belief or bias" and (5) "the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question".

The weight that the court will place on the factors is as important as the list of considerations itself. The first two factors return us to the previous discussion of "likely relevance". The third factor, the question of the reasonable expectation of privacy in the particular record, does not seem to have been controversial in these cases. There is nothing to suggest that the majority agrees with the minority about the nature or prevalence of discriminatory stereotypical beliefs about sexual assault complainants. There is nothing that endorses the need to give guidance to lower courts on this crucial issue. Depending on whether the judge begins with the *de facto* presumptions of the majority or the minority, the scales are going to be tilted, perhaps irrevocably tilted, long before any privacy interests of the record holder are taken onto account.

⁵⁰ *Ibid.* at 442.

VII. Privacy (*at last*)

The case for privacy in therapeutic records rich and complex. Neither judicial opinions, nor academic commentary are well-suited to do it justice. L'Heureux-Dubé J. does a thorough job of listing the arguments, although some of the more important points are developed only in her less well-known *A.(L.L.)* reasons.

First is the matter of potential psychological trauma to the witness if forced to reveal the confidential records. Quoting Lamer J. in *Mills v. The Queen*, the minority refers to:⁵¹

...stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to outcome and sanction.

The minority judgement continues:

These people must contemplate the threat of disclosing to the very person accused of assaulting them in the first place, and quite possibly in open court, records containing intensely private aspects of their lives, possibly containing thoughts and statements which have never even been shared with the closest of friends or family. (Emphasis added)

Second is the argument that an expectation of privacy is essential to the therapeutic relationship.⁵² Without such an expectation of privacy, fewer victims will seek therapy, or take full advantage of its potential. The majority appears to dismiss this concern peremptorily.⁵³

Third, is a social interest derived from this, rather than a privacy interest *per se*. Faced with the potential breach of privacy, fewer sexual assault victims will report and prosecute what is already a seriously under-reported crime.⁵⁴ The majority says that this is irrelevant to the question of production. It suggests that the disincentive to report can be dealt with by the trial judge's discretion to ban publication and spectators when "extremely sensitive" material is at issue.⁵⁵ Even if the complainant were confident that this discretion would be exercised, a big "if", this would not address many concerns, especially concern over disclosure to the perpetrator. Moreover, privacy is a considerably richer issue than the majority acknowledges, not fully captured by controlling the circulation of "extremely sensitive" material.

Finally, but fundamentally, privacy, especially privacy in our own thoughts and emotions, is a thing *sui generis*. Perhaps this is what Wilson J. meant when she related privacy to human dignity and psychological integrity.⁵⁶ Typically, especially in a therapeutic context, it would extend to "intimate details of the

⁵¹ *Ibid.* at 483, referring to *Mills v. The Queen*, [1986] 1 S.C.R. 863 at 920. See also *A.(L.L.)*, *supra* footnote 2 at 560-561.

⁵² *A.(L.L.)*, *supra* footnote 2 at 570-571 and 559-560.

⁵³ *O'Connor*, *supra* footnote 1 at 442.

⁵⁴ *Ibid.* at 571-572.

⁵⁵ *Ibid.*

⁵⁶ *O'Connor*, *supra* footnote 1 at 482-483, referring to *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 171 per Wilson J.

lifestyle and personal choices of the individual".⁵⁷ However, a true conception of privacy depends neither on the precise type of information, nor on the objectively perceived consequences of releasing it. Rather, liberty and human dignity include the individual's right to privacy in all personal thoughts and feelings because, and only because, they are her own.

In the end, I suspect the privacy analysis will matter little. At best, we are left with the de-contextualized listing of four considerations that illuminate one of five factors to be taken into account by the judge. The majority only grudgingly acknowledged privacy as a competing *right*, if at all. When one considers the specific points of disagreement, there is little to suggest that the majority truly understands or shares minority's conception of privacy.⁵⁸ However, the strongest critique of the privacy analysis applies equally to the minority and majority judgements. As I shall conclude shortly, this case is about relevance, not privacy. If the judge finds that there is a reasonable possibility the information in the records is relevant to the accused's right to make full answer and defence, no abstract privacy concerns will ever tip the scales against production.

VIII. Equality

Some readers will be surprised to encounter this as a separate section. Others will be appalled that it took so long to get to it. I deliberately left the subject of equality rights until near the end to reflect the ultimate irony in this comment: equality is probably the fundamental issue in *O'Connor*, yet there does not seem to exist a place in the conventional analysis with which to allow it the central and determining position it deserves. The majority seems also to have had difficulty dealing with the equality implications of the case; it said not one word about the issue. The minority did deal explicitly with the equality aspects of the production issue, yet it seemed unable to follow this through to any significant specific conclusion. The minority said in part (references omitted):⁵⁹

Unlike virtually every other offence in the Criminal Code, sexual assault is a crime which overwhelmingly affects women, children and the disabled. Ninety percent of all victims of sexual assault are female: . . . Moreover, studies suggest that between 50 percent and 80 percent of women institutionalized for psychiatric disorders have prior histories of sexual abuse. . . . Children are most highly vulnerable. . . . It is a common phenomenon in this day and age for one who has been sexually victimized to seek counselling or therapy in relation to this occurrence. It therefore stands to reason that disclosure rules or practices which make mental health or medical records routinely accessible in sexual offence proceedings will have disproportionately invasive consequences for women, particularly those with disabilities, and children.

⁵⁷ A.(L.L.), *supra* footnote 2 at 583, referring to *O'Connor*, *supra* footnote 1 at 486, referring to *R. v. Plant*, [1993] 3 S.C.R. 281 at 293.

⁵⁸ *Supra* footnote 1. E.g., the majority does not see disclosure to a judge alone as a privacy question; the majority is dismissive of the impact of disclosure on treatment for victims; and the majority seems to limit its conception of privacy to protection from public disclosure of sensitive information.

⁵⁹ *O'Connor*, *supra* footnote 1 at 487-488.

Although a distinct improvement over the majority's silence, there are some significant omissions here. For one thing, it would have been worth noting that the overwhelming majority of those accused of sexual assault are men.⁶⁰ For another, what about race? *O'Connor* deals with records kept about aboriginal children by white professionals at one of the most inherently racist institutions in Canadian history, the residential school. It is impossible to consider relevance (and prejudice) divorced from racism in this case.⁶¹

Unfortunately, identifying the equality concerns, does not take us very far. Equality does not seem to fit in the balancing of competing rights model. It is difficult to deal with the equality implications of production orders as a standard s. 15 challenge. L'Heureux-Dubé alludes to the difficulty this way:⁶²

... if there were an explicit requirement in the Criminal Code requiring corroboration before women or children could bring sexual assault charges, such a provision would raise serious concerns under s. 15 of the Charter. In my view, a legal system which devalues the evidence of complainants to sexual assault by de facto presuming their uncreditworthiness would raise similar concerns.

Perhaps she was saying such a direct challenge is premature. One might materialize if experience under the *O'Connor* rules raises evidence of unlawful discrimination.

The minority did the best it could with conventional legal analysis by relating the equality concerns to stereotypical attitudes towards sexual assault victims. The minority pointed out how difficult it was to obtain access to private records in cases other than sexual assault. It related these observations to the question of truth finding and relevance. As I shall explain next, that advances the cause little, if at all. The majority agreed that assessments of relevance ought not to be based on stereotypical attitudes. However, it refused to endorse any of the minority's specific guidelines for relevance. Rather, it left the way open for precisely the discriminatory rulings that concerned the minority.

IX. Relevance: the Bottom Line

The importance of relevance to the production of private therapeutic records has been noted throughout this comment. According to the majority, relevance alone determines whether production must be made to a judge alone. The accused's burden at this stage is a low one, perhaps low enough to effectively

⁶⁰ "Men are the offenders in 99% of reported sexual assaults against women. See 'Response To Allegations made About The Violence Against Women Survey', Statistics Canada (February, 1995) at 3; and M. Torrey, "When Will We Be Believed?" (1991) 24 U.C. Davis L. Rev. 1013 at 1061. See also M. Randall and L. Haskell, "Sexual Violence In Women's Lives: Findings From the Women's Safety project, a Community-Based Survey" (1995), 1 *Violence Against Women* 6 at 21, reporting that "96% of the cases of child sexual abuse were perpetrated by men."

⁶¹ The failure to discuss either the general issue of race and sexual assault, or the specific racism inherent in residential schools is all the more striking when one considers that it was covered in some detail in the factum of the coalition intervenors.

⁶² *O'Connor*, supra footnote 1 at 488.

authorize routine judicial fishing expeditions in the private records of sexual assault complainants. Then the degree to which the private information is deemed relevant to the right to make full answer and defence is given extra weight by the majority when balanced against the competing privacy interest.

What needs to be noted explicitly is that even the minority would not refuse production of private information it considered relevant to the right to make full answer and defence, whatever the "negative effects on the complainant's course of therapy" or possible "psychological harm to the individual." The minority would certainly assess relevance differently, value privacy more, and invade privacy only as a last resort. There does exist a hierarchy of rights in Canada with the right of full answer and defence ranking at or near the top. The full Supreme Court agrees. The majority, quoting from *R. v. Seaboyer*,⁶³ said:

Canadian courts, ... have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be convicted. Indeed, so important is the societal interest in preventing a miscarriage of justice that our law requires the state to disclose the identity of an informer in certain circumstances, despite the fact that the revelation may jeopardize the informer's safety.

The minority does not quarrel with this proposition.⁶⁴ The case of the informer is distinguishable because it deals with information in the hands of the Crown. But how the right of full answer and defence is balanced against the safety of the informer is surely indicative of the weight to be given to the abstract possibility of psychological trauma. The supremacy of relevance over privacy is real message from the *A.(L.L.)* decision written by L'Heureux-Dubé J. herself. The full court rejected an approach that would deem certain records as privileged communications precisely because the effect of such a privilege would be to exclude relevant information in certain cases.⁶⁵

The minority's competing rights framework is objectionable because it obscures what is really at stake. The majority model may be insensitive to privacy concerns, but it is an accurate appraisal of how "balancing" really works. Experienced criminal lawyers and academics can and will successfully assert by fiat that neither privacy interests, nor the state's interests in enforcing the criminal law, can ever justify a risk of convicting an innocent person.⁶⁶ The presumption of innocence and what it entails in criminal procedure is fundamental to our legal culture. No emerging and uncertain constitutional zone of privacy is going to prevail in direct conflict over the right to make full answer and defence. Nor should it. Innocent persons have been convicted of crimes in Canada.⁶⁷ The chance of an innocent person being convicted of sexual assault

⁶³ *Ibid.* at 434, referring to *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 611.

⁶⁴ *A.(L.L.)*, *supra* footnote 2 at 561 and 577.

⁶⁵ *Ibid.* at 576-577.

⁶⁶ See e.g. D.H. Doherty, "'Sparing' The Complainant 'Spoils' The Trial" (1984) 40 C.R. (3d) 55 at 66 and *Paciocco*, *infra* footnote 67 at 142.

⁶⁷ D.M. Paciocco, "The Charter And The Rape Shield Provisions Of The Criminal Code: More About relevance And The Constitutional Exemptions Doctrine" (1989) 21 Ottawa L. Rev. 117 at 142, where the author uses both "morally innocent" and "legally

is probably less than the chance of being convicted of another violent crime. Reporting of sexual offenses is notoriously low.⁶⁸ Rape complaints are no more likely to be false than other criminal complaints.⁶⁹ The chance of any accused being convicted of a sexual crime is lower than that of being convicted of other violent offences.⁷⁰ Nevertheless, the possibility of an innocent person being convicted of a sexual offence exists. Any attempt to restrict the accused person's right of cross-examination must take this possibility into account.

It follows that once when strips away all the nuances, tests, and procedural steps, the recognition of s.15 equality concerns and the Charter status of privacy do not amount to much. The production of private therapeutic records in a sexual assault trial will turn on one thing only: whether the judge determines they are relevant to the accused's right of full answer and defence.⁷¹ So, if there is to be any true and fair balancing of competing rights in sexual assault cases, this is where it must be effected.

A deeper exploration of the right of full answer and defence itself, and the related requirement that the probative value of the evidence outweigh its prejudicial value, might be useful in this regard.⁷² The question is whether the courts might draw a sharper distinction between "using every trick in the book to get the defendant off", a legitimate aim of defence counsel, and the right of full answer and defence, a legitimate social goal to protect the morally innocent. Every informed complainant in a sexual assault case knows she faces the prospect of being stripped emotionally naked before the accused and others in open court. "Whacking the complainant" is the concrete reality, too easily masked by abstract conceptions of privacy or full answer and defence. If one accepts that production orders are routinely sought for the very purpose of

innocent" without explaining whether, and if so how, the terms have a different significance in this context. By innocent, I mean "morally" innocent. To say no "legally innocent" person ought to be convicted of a crime is circular. Many accused persons who are morally guilty of the very crime of which they are charged will, on some technical ground for example, be found legally innocent. This is a price we may be prepared to pay to protect the morally innocent. It is not an end in itself.

⁶⁸ See also *O'Connor*, *supra* footnote 1 at 504-505.

⁶⁹ Torrey, *supra* footnote 60 at 1018. Torrey estimates 2% of criminal complaints are false. As to the difference between what police call "unfounded" complaints, and false complaints, see S. Bond, "Psychiatric Evidence of Sexual Assault Victims: The Need for Fundamental Change in the Determination of Relevance" (1993) *Dalhousie L.J.* 416 at 417 and 424.

⁷⁰ B. Dawson, "Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance" (1987-8) 2 *C.J.W.L.* 310 at 328. Dawson cites a study reporting that 24.2% of such charges result in a finding of guilt, but only 9% are found guilty of the major Crown charge at trial. Torrey, *supra* footnote 60 at 1060 reports that in the United States, the conviction rate is 1-4%, the lowest of all violent crime.

⁷¹ This is no revelation to those who study evidence in sexual assault cases. See for example, Dawson, *supra* footnote 70; Bond, *supra* footnote 69; P. Kobly, "Rape Shield Legislation: Relevance, Prejudice and Judicial Discretion" (1992) 30 *Alberta L. Rev.* 988; Paciocco, *supra* footnote 67.

⁷² Here we are speaking of prejudicial to the determination of the truth rather than prejudicial to the complainant whose privacy is violated.

intimidating witnesses and derailing the trial, the tenuous relationship between the right of full answer and defence and the strategy of "whacking the complainant" needs to be exposed and limited. The minority seems to be well aware of this problem, but refers to it only in generalities, expressing concern for "the effect on the integrity of the trial process of producing, or failing to produce, the record, having in mind the need to maintain consideration in the outcome".⁷³ The majority holds this "... factor is more appropriately dealt with at the admissibility stage and not in deciding whether the information should be produced."⁷⁴ The minority's treatment is far too subtle, and the majority's completely unsatisfactory. Both judgements render invisible one of the "real" issues in the case. Perhaps this question will prove just as intractable as the matter of basic relevance itself. But it seems to have attracted less judicial attention. It might be interesting to see the right of full answer and defence analysed critically and in context, instead of simply asserted by moral fiat.

X. Bill C-46: The Legislative Repudiation of the O'Connor Decision

On June 12, 1996 Bill C-46, *An Act to amend the Criminal Code (production of records in sexual offence proceedings)* was introduced in the House of Commons. The Bill is a prompt and obvious rejection of the majority decision in *O'Connor*. It responds directly to virtually all of the criticisms of the majority decision made above. Assuming it survives in the House, and withstands the inevitable Charter challenge before the same court that decided *O'Connor*, the Bill constitutes the best reconciliation of competing rights and interests that can be expected in Canada today.

The purpose of *Bill C-46* is clearly and repetitively stated in an eight paragraph preamble that emphasizes the importance of protecting the privacy interests of those affected by sexual violence. With some justification, the equality interests of women and children in particular are noted. Members of other groups whose equality interests are affected adversely by the *O'Connor* decision — persons with disabilities and aboriginal persons to mention two who were actively involved in the *O'Connor* litigation — may, also with some justification, wonder about their exclusion.

Bill C-46 applies only to sexual offence proceedings.⁷⁵ In theory, there is no reason why witnesses in other criminal matters ought not to enjoy the same protections. However, the Bill responds to practical reality: access to private records is sought almost exclusively in sexual assault cases; it is used best as a "whacking" tactic in sexual assault cases; access may be too readily granted in such cases because of deeply ingrained myths about sexual assault; and private records invariably exist about sexual assault victims. The Bill appropriately recognizes this as an equality issue as much or more than a privacy

⁷³ *O'Connor*, *supra* footnote 1 at 504.

⁷⁴ *Ibid.* at 442.

⁷⁵ S. 278.2(1)

issue.

The Bill applies to any form of record that contains personal information for which there is a reasonable expectation of privacy, including personal journals and diaries.⁷⁶ It applies to records in control of any person, including the prosecutor unless “complainant or witness to whom the record relates has expressly waived” the Bill’s protections.⁷⁷ A waiver is therefore required, rather than presumed as was the case in the majority judgement in *O’Connor*. This section may prove problematic, however, if the Crown is able to employ or withhold relevant information about which the defendant is ignorant. One of the stronger arguments for withholding information not in the possession of the Crown is that such information is not part of the case the accused is required to meet. This sub-section may be particularly vulnerable to a Charter challenge. At least, the fact that the Crown has had access to the information should buttress the accused’s argument that access to the record is necessary to make a full answer and defence.⁷⁸

An accused seeking production of private records must do so by written application served on the prosecutor, the person in whose possession or control the record lies, the complainant or witness, and any other person to whom the record relates.⁷⁹ The application may be made only to the trial judge, at or before trial; application at a preliminary inquiry is expressly forbidden.⁸⁰ The application must identify the record and record holder.⁸¹

As in *O’Connor*, the application must specify grounds on which the record is “likely relevant to an issue at trial or to the competence of a witness to testify”.⁸² S. 278.3(4) is perhaps the most important section in the Bill. It reads as follows:

(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;

⁷⁶ S. 278.1.

⁷⁷ S. 278.2(2).

⁷⁸ S. 278.5(2)(a).

⁷⁹ S. 278.3.

⁸⁰ S. 278.3(1) and (2).

⁸¹ S.278.3(3)(a). Query whether a witness can be compelled to answer questions about the existence and location of private records, at the preliminary hearing or at trial.

⁸² S. 278.3(3)(b).

- (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

This section, which is more detailed and explicit than the minority judgement in *O'Connor*, is intended to do two things. First, it is intended to preclude production orders based on stereotypical assumptions alone: e.g. that sexually active complainants are more likely to have consented to the conduct at issue; or, that those in therapeutic counselling are unreliable witnesses. Second, it is intended to curtail fishing in the records in the hope something of relevance should turn up. Subsections (d), (e), (f), and (g) all preclude the judge from ordering production merely because the record "may" reveal what could well be relevant information. The accused is required to do more, to give some concrete reason to believe that the record *will* reveal the information. It remains to be seen how much (or little) else judges will require of the accused in the application. It also remains to be seen whether these strict conditions will survive a Charter challenge.

From then on, the two-step procedure in the Bill is much like that established in *O'Connor*. The process begins with an *in camera* hearing to determine whether all or part of the record must be produced to the court for review by the judge alone. The person in whose possession or control the record lies, the complainant or witness, and any other person to whom the record relates may appear at the hearing, but they are not compellable witnesses and no order of costs may be made against them.⁸³ The test for production to the judge alone is whether "the accused has established that the record is likely relevant to an issue at trial or to the competence of a witness to testify".⁸⁴ S.278.5(2) specifies the factors the judge must consider in making this determination. It reads as follows:

(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:

⁸³ S. 278.4.

⁸⁴ S. 278.5(1).

- (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.

This is significantly different from the majority judgement in *O'Connor* in that the court is directed to take into account both privacy and equality interests on the issue of production to a judge alone, as well as later on the matter of production to the accused.⁸⁵ Subsection (f) directly contradicts the majority in *O'Connor*, and (g) and (h) draw attention to factors ignored by the majority. These same tests and relevant factors then guide the judge in deciding whether to order the records disclosed to the accused,⁸⁶ in whole or in part and on what conditions.

Conclusion

The majority judgement in *O'Connor* indicated little or no appreciation of the equality interests involved in the issue of production of private records. It also gave little weight to the privacy concerns of victims, or to the impact of disclosure tactics on reporting, treatment, or fair trials. *Bill C-46* constitutes a direct, almost point by point repudiation of the majority judgement. The Bill vindicates the approach taken by the minority. As is appropriate for legislation, it addresses the minority's general concerns with precise and specific guidelines and conditions.

The Bill is perhaps more forceful and allows for less judicial discretion than s. 276(3) of the Code, passed in response to *Seaboyer*. As such, it must be regarded as vulnerable to constitutional challenge before the present court. The majority made it clear in *O'Connor*, as it did in *Seaboyer*, that it will not approve of any rigid restrictions on the accused's right of full answer and defence. Even the minority's attempt to restrict the most obvious abuses was rejected by the majority in *O'Connor*.

The second question is, assuming the legislation survives intact, will it make a significant difference? *O'Connor* itself illustrates the strikingly

⁸⁵ S. 278.7(2) requires the court to take the same factors listed in 278.5(2) into account at both stages.

⁸⁶ S. 278.7.

different judicial background assessment of relevance that exists in sexual assault cases. The real problem is how to come to grips with that. One suspects that guidelines such as those listed in S.278.5(2), however sensible and unambiguous, can not make a dent in culturally entrenched attitudes, including, of course, background biases that exist against victims of sexual assault, and members of vulnerable minority groups. This is why the intervenors sought outright prohibition of access to private records. The majority and minority in *O'Connor* agree completely that stereotypical attitudes ought not to determine relevance. Yet what defence lawyer would not prefer to have Lamer C.J. or Sopinka J. rule on production instead of L'Heureux-Dubé or McLachlin J.J.?

Bill C-46 is as good a piece of legislation as anyone can reasonably expect on this subject today. It will certainly make a practical difference at the margin. It will have a useful educational function. It explicitly acknowledges the dangers of sex and age discrimination in the very aspects of criminal law supposedly designed to protect women and children. It enriches our appreciation of the dynamics of criminal law beyond the inadequate traditional model that considers only the abstract state and the individual accused. Its shortcomings are not the limits of the particular Bill, but the limits of legislation generally.

Perhaps the best that will come of *O'Connor* is the frank exposure of what we all know, but often tend to deny: the law is intricately connected to the beliefs, values and attitudes of everyone involved: citizens, perpetrators, victims, police, lawyers and judges. Few things in life shape our beliefs, values and attitudes more than race and gender. That is where we have to look to understand law and that is where we have to work to change law.