

## WHEN TITANS CLASH: THE LIMITS OF CONSTITUTIONAL ADJUDICATION

by

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### A. Introduction

The newspaper headline read: "Court rules against rape victims: Advocates shocked as judges give accused right to demand private counselling records."<sup>1</sup> Once again, members of the public are left with the impression that the Supreme Court of Canada has awarded the spoils of battle to the accused at the expense of sexual assault complainants. In this comment, I hope to demonstrate two critical points. First, in fairness to the court, it cannot be asserted that the court has afforded sexual assault victims less protection than other victims and/or witnesses who have legitimate expectations of informational privacy which they wish to assert as a shield to prevent public disclosure of this information in the context of a criminal trial. Second, despite the best intentions of the court, its proposed resolution of the battle between full answer and defence and the complainant's privacy interests is fraught with pitfalls and shortcomings. Nothing short of legislative intervention can establish a meaningful and coherent framework for applications for production of sensitive/confidential material in the hands of third parties.

There are limits to constitutional adjudication, and it is a misguided and naive assumption to expect that the Supreme Court of Canada can successfully mediate the irreconcilable conflict between the rights of the accused and the rights of the victim. This conflict will never be resolved to the satisfaction of the opposing parties because the court has stipulated that there does not exist a hierarchy of rights in the *Charter*.<sup>2</sup> In rejecting the "clash of titans" model of constitutional adjudication, the court has embarked upon an approach to competing

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<sup>1</sup>The [Toronto] *Globe and Mail* (December 15, 1995) 1.

<sup>2</sup>*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 34 C.R. (4th) 269, 94 C.C.C. (3d) 289, 25 C.R.R. (2d) 1, 120 D.L.R. (4th) 12, 175 N.R. 1, 76 O.A.C. 81, at pp. 882-883 S.C.R.; *R. v. Creighton*, [1995] 1 S.C.R. 858, 37 C.R. (4th) 197, 179 N.R. 161, 81 O.A.C. 359, (sub nom. *R. v. Crawford*) 96 C.C.C. (3d) 481, 27 C.R.R. (2d) 1 [hereinafter "*Crawford*"].

constitutional claims in which a balancing exercise is conducted to "give the fullest respect possible to the *Charter* values which underpin these [competing] rights."<sup>3</sup> Given the inherently subjective nature of a balancing exercise, it is not surprising that the opposing parties will never be satisfied with a result which appears to be nothing more than a slight tilting of the balance in favour of one of the warring sides.

### B. The Battlefield

In the last five years we have seen an ever-increasing defence strategy of requesting production of psychiatric and therapeutic records relating to sexual assault complainants. Stripped of its ideological and political context, this phenomena is no different than the flurry of breathalyzer production requests which followed upon the *Bourget* decision in 1987.<sup>4</sup> Ultimately, the breathalyzer production strategy faded into oblivion as the courts imposed an "air of reality" restriction on the applications and indicated that they would not be inclined to order stays of proceedings for failure to produce alcohol standard solutions, representative ampoules and breathalyzer mouthpieces.<sup>5</sup>

Unlike the breathalyzer experience, the issue of producing sensitive and confidential records of complainants is animated by deeply held ideological and political beliefs, and, as such, this issue would not fade into oblivion notwithstanding the "likely to be relevant" threshold restriction which the courts placed upon these applications for production. In this context, battle lines appeared to be carved in stone with little incentive to adopt a compromise settlement. In fact, complainants and custodians of sensitive records have appeared willing to disregard court orders. Beyond the unprofessional conduct of the Crown in *R. v. O'Connor*, reported ante, p. 1, in failing to properly comply with an order of production, we have seen cases in which the records have been destroyed and shredded in an attempt to thwart the request for production. To date, the courts have turned a blind eye to this extra-legal obstruction and have concluded that a stay of proceed-

<sup>3</sup>*Crawford*, *ibid.* at p. 882 S.C.R.

<sup>4</sup>*R. v. Bourget* (1987), 56 C.R. (3d) 97, 46 M.V.R. 246, 54 Sask. R. 178, 35 C.C.C. (3d) 371, 41 D.L.R. (4th) 756, 29 C.R.R. 25 (C.A.)

<sup>5</sup>See, for example, *R. v. Eagles* (1989), 68 C.R. (3d) 271, 11 M.V.R. (2d) 70, 88 N.S.R. (2d) 337, 225 A.P.R. 337, 47 C.C.C. (3d) 129, 41 C.R.R. 182 (C.A.); *R. v. Timmons* (1994), 132 N.S.R. (2d) 360, 376 A.P.R. 360 (C.A.); *R. v. Anutooshkin* (1994), 7 M.V.R. (3d) 116, 92 C.C.C. (3d) 59, 47 B.C.A.C. 302, 76 W.A.C. 302.

ing is not warranted upon proof of an intent to obstruct but is only warranted if the obstruction truly impaired full answer and defence in a material way.<sup>6</sup>

To understand the intensity of this battle one must recognize that, historically, sexual assault victims have been re-victimized by an insensitive and patriarchal criminal justice system. Fueled by Freud's assertion that women and children are hysterical by nature, we find countless examples of statutory and common law evidentiary rules which treated the evidence of sexual assault victims with great suspicion and skepticism. In *Wigmore's Treatise on Evidence*, the eminent commentator noted that "no judge should ever let a sexual offence charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician."<sup>7</sup>

The ghosts of the past still haunt the criminal justice system, and, as Madam Justice L'Heureux-Dubé noted, "uninhibited disclosure of complainants' private lives indulges the discriminatory suspicion that women and children's reports of sexual victimization are uniquely likely to be fabricated."<sup>8</sup> Therefore, it is not surprising that complainants and custodians of sensitive records would view almost all production requests as a form of character assassination which is premised upon the dangerous Freudian and Wigmorean stereotype of half the population being prone to fabrication.

On the other hand, we have a defence lawyer poised for battle because his/her client has denied the accusation. In most cases of sexual assault, there is an absence of confirmatory evidence and independent witnesses, and this raises the spectre of false accusations. This fear of false accusation is somewhat supported by a recent study by the Canadian Centre for Justice Statistics which revealed that the "unfounded"<sup>9</sup> rate for sexual assault was 14 per cent, 9 per cent and 14 per cent for sexual assault level I (s. 271), level II (s. 272) and level III (s. 273) respectively. These figures were compared to the unfounded rate for non-sexual assault which varied from 8 per cent with respect

<sup>6</sup>*R. v. Carosella* (1995), 102 C.C.C. (3d) 28, 85 O.A.C. 297 (C.A.); *R. v. L. (P.S.)* (November 23, 1995), Doc. CA019674 (B.C. C.A.), [1996] B.C.W.L.D. 027.

<sup>7</sup>*Wigmore on Evidence*, vol. 3A (Chadbourn rev.) (Boston: Little, Brown & Co., 1970), § 924.

<sup>8</sup>*R. v. O'Connor*, ante, at p. 59.

<sup>9</sup>"Unfounded" does not necessarily mean frivolous or false. It is defined as follows: "if the preliminary enquiry conducted by the police reveals that a reported crime has not been committed, this incident is to be classified as unfounded."

to assault level I (s. 266) to 3 per cent with respect to assault level II and III (ss. 267 and 268).<sup>10</sup> Furthermore, a recent study by an American sociologist demonstrated that 40 per cent of all rape charges investigated by city police turned out to be false as determined by recantation by the accuser and supported by other evidence.<sup>11</sup> Although it is conceded that further study must be given in order to explain this high unfounded rate, it is not surprising that defence counsel will search for whatever effective tools may be available to fully explore an accusation of sexual assault in order to ensure that his or her client is not in the category of the unfounded complaint.

There are other offences which have higher unfounded rates than sexual assault (arson – 23.8 per cent; trespass at night – 14.3 per cent; abduction of person under 14 – 42.3 per cent),<sup>12</sup> yet we do not see the mad rush to impeach the credibility of Crown witnesses in these cases by resort to psychiatric and therapeutic records. This apparent inconsistency in defence strategy may suggest that defence lawyers still cling to and believe in the Wigmorean assessment of sexual assault complainants. However, it is equally plausible that the reliance on production requests in sexual assault trials is more a reflection of the nature of these trials, which turn largely on credibility battles without the luxury of independent evidence of a confirmatory nature. Regardless of which explanation is correct, it is apparent that both sides to this battle view the other with much suspicion and some disdain.

### C. *The Treaty of O'Connor*

Briefly summarized, future battles over sensitive records in the possession of third parties will be subject to the following regime:

- 1) These guidelines apply to any record, in the hands of a third party, in which a reasonable expectation of privacy lies.
- 2) If the records are already in the possession of the Crown, then there is no reasonable expectation of privacy and the rule in

<sup>10</sup>Juristat, *Canadian Justice Processing of Sexual Assault Cases* (Ottawa: Centre for Justice Statistics, March 1994), vol. 14, no. 7 at p. 10.

<sup>11</sup>E. Kanin, *False Rape Accusations (1994) Archives of Sexual Behavior* (New York: Plenum Press, 1994), at pp. 81-92.

<sup>12</sup>Statistics Canada, *Canadian Crime Statistics 1993* (Ottawa: Centre for Justice Statistics, 1993).

*Stinchcombe*<sup>13</sup> applies (i.e., Crown may withhold disclosure if it can show that the records are clearly irrelevant or subject to privilege).

3) Sexual assault counselling records are not subject to an absolute class privilege, and the applicability of privilege will be decided on a case-by-case basis in accordance with the fourfold criteria articulated by Wigmore and adopted in *Slavutych v. Baker*.<sup>14</sup>

4) In order to obtain production, the accused must bring a formal written application and notice must be given to all affected parties. This initial application should be made to the trial judge seized of the trial.

5) The materials will be produced to the trial judge for inspection if the accused satisfies the judge that the information is *likely to be relevant*. This threshold requirement of demonstrating relevance may be defined as a *reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify*. This burden of persuasion should not be viewed as an "onerous" burden and it is simply a requirement to prevent speculative, fishing expeditions.

6) If this threshold is met, then the records are produced to the trial judge to determine whether, and to what extent, they should be produced to the accused. At this stage, the reviewing judge must balance the ability of the accused to make full answer and defence against the prejudice to the complainant's dignity and privacy.

7) If the records are not produced to the accused, then the accused can only review this decision upon an appeal from conviction. If the records are ordered produced, the complainant and/or the custodian of records may immediately seek review by the Supreme Court of Canada pursuant to s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26.

<sup>13</sup>*R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 8 C.R. (4th) 277, [1992] 1 W.W.R. 97, 83 Alta. L.R. (2d) 193, 68 C.C.C. (3d) 1, 130 N.R. 277, 120 A.R. 161, 8 W.A.C. 161, 18 C.R.R. (2d) 210.

<sup>14</sup>[1976] 1 S.C.R. 254, 38 C.R.N.S. 306, [1975] 4 W.W.R. 620, 75 C.L.L.C. 14,263, 55 D.L.R. (3d) 224.

The minority position in the court is not altogether different from the majority position, except that the threshold requirement is more rigorous and challenging for the accused. The minority tilts the balance in favour of non-production because they view the vast majority of these applications as frivolous or even abusive. By contrast, the majority clearly adopts a different perspective and notes that they "disagree with L'Heureux-Dubé J.'s assertion that therapeutic records will only be relevant to the defence in rare cases."<sup>15</sup>

#### D. *The Level Playing Field*

Although an absolute bar of production would best serve the privacy interests of complainants, it is clear that the compromise reached by the court parallels the approach adopted with respect to production of confidential information in contexts other than sexual assault prosecutions. In addition, the compromise reached by the court reflects the experience of other jurisdictions in this controversial area of law. As a result, the *O'Connor* decision creates a level playing field in which all complainants and witnesses who wish to withhold information from the courts are treated in a similar fashion.

The right to full answer and defence is considered fundamental and primary and it has been noted by the court that "the right to a fair trial is fundamental and cannot be sacrificed."<sup>16</sup> In order to achieve full answer and defence, the accused is entitled to the most extensive and probing cross-examination as is consistent with the rules of evidence. Every opportunity must be given to the accused to expose the frailties of Crown witnesses, and this opportunity to impeach goes far beyond the restriction imposed with respect to the cross-examination of an accused person. As the Supreme Court has noted:

I think it essential to stress the purpose for which the cross-examination is permitted, namely, in order that the defence may explore . . . the frailty of the evidence called by the prosecution. That the accused as he stands in the prisoner's box on trial for murder is deemed to be innocent until proven guilty beyond a reasonable doubt is one of the fundamental presumptions inherent in the common law and as such the accused is entitled to employ every legitimate means of testing the evidence called by the Crown to negative that presumption and in my opinion this includes the right to explore all circumstances capable of indicating that any of the prosecution

<sup>15</sup>*O'Connor*, ante, decision of Chief Justice Lamer and Justice Sopinka at p. 25.

<sup>16</sup>*Dagenais*, supra, note 2 at p. 949 S.C.R.; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 7 C.R. (4th) 117, 128 N.R. 81, 6 C.R.R. (2d) 35, 66 C.C.C. (3d) 321, 83 D.L.R. (4th) 193, 48 O.A.C. 81, at p. 607 S.C.R.

witnesses had a motive for favouring the Crown.<sup>17</sup>

Further, "medical evidence is admissible to show that a witness suffers from some disease or defect or abnormality of the mind, that effects [sic] the reliability of his or her evidence."<sup>18</sup> Psychiatric evidence, indicating that the testimony of a witness may be manifestly unreliable, is admissible with respect to both the issue of witness' competence to testify and with respect to the issue of the credibility of the witness.<sup>19</sup> The following principles appear to have emerged with respect to the admission of psychiatric evidence to impeach the competence or credibility of a Crown witness:

- 1) It is irrelevant whether the evidence is characterized as going to credibility or competence, and the only relevant question for the trial judge is "whether the light which might be shed by the expert is or is not essential, necessary, useful or superfluous";<sup>20</sup>
- 2) Expert evidence may not be necessary if the reliability problems are disclosed by means other than a psychiatric assessment;<sup>21</sup>
- 3) The defence is entitled to request that the witness/complainant undergo a psychiatric assessment if he/she is willing to do so and the Crown cannot act to thwart this request as there is no property in a witness;<sup>22</sup>

<sup>17</sup>*R. v. Titus*, [1983] 1 S.C.R. 259, 33 C.R. (3d) 17, 2 C.C.C. (3d) 321, 144 D.L.R. (3d) 577, 46 N.R. 477, at pp. 263-264 S.C.R.

<sup>18</sup>*R. v. Desmoulin* (1976), 30 C.C.C. (2d) 517 (Ont. C.A.), at p. 522.

<sup>19</sup>*Toohy v. Metropolitan Police Commissioner*, [1965] A.C. 595, 49 Cr. App. R. 148, [1965] 1 All E.R. 506 (H.L.).

<sup>20</sup>*R. v. Julien* (1980), 57 C.C.C. (2d) 462 (Que. C.A.), at p. 477.

<sup>21</sup>*R. v. French* (1977), 37 C.C.C. (2d) 201 (Ont. C.A.), at p. 212 (lack of reliability disclosed in cross-examination); *R. v. Hedstrom* (1991), 63 C.C.C. (3d) 261 (B.C. C.A.) (problems with complainant's mental capacity disclosed by complainant's own admission) *R. v. Nickerson* (1993), 21 C.R. (4th) 262, 81 C.C.C. (3d) 398, 121 N.S.R. (2d) 314, 335 A.P.R. 314 (C.A.) (trial judge was made aware that victim was mentally handicapped).

<sup>22</sup>*French*, *ibid.* at p. 213. It should be noted that in *R. v. Olscamp* (1994), 30 C.R. (4th) 106, 91 C.C.C. (3d) 180 (Ont. Gen. Div.) the court dismissed an application to order the complainant to undergo a psychiatric assessment.

4) It is not necessary for the expert to have examined the complainant and he/she can provide an expert opinion on the basis of hypothetical questions.<sup>23</sup>

Therefore, there is a juridical basis for seeking therapeutic records for impeachment purposes; however, a claim of privilege could defeat this impeachment strategy. Over the years, the Supreme Court of Canada has expressed a reluctance to expand the categories of "class privilege" in recognition that claims of privilege operate to thwart the truth-seeking function of a trial.<sup>24</sup> There was little surprise when the court declined to extend a class privilege to therapeutic records in the case at bar. Whether the complainant's interest is characterized as an evidentiary privilege or a constitutional right to privacy, all roads lead to the fourth factor of Wigmore's fourfold criteria for determining whether to protect confidential communications: whether "The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation."<sup>25</sup> In other words, a claim of privilege or confidentiality will be upheld only if it does not substantially impair the fairness of the trial.

In *A. (L.L.) v. B. (A.)*, reported ante, p. 91, L'Heureux-Dubé J. carefully examines case law dealing with privilege and confidential information, outside of the context of sexual assault prosecutions, including that relating to police informants, solicitor-client privilege, and Cabinet privilege. The courts have consistently ordered production if there is a real possibility that the documents will assist in the establishment of innocence. The cases do not generally impose a stringent threshold requirement on the accused, and in most cases the court will undertake an inspection of the document to determine its materiality for the defence.

On a comparative front, we can also see that the Supreme Court's resolution of the production issue is consistent with the ap-

<sup>23</sup>*R. v. Wald*, 68 C.R. (3d) 289, 65 Alta. L.R. (2d) 114, [1989] 3 W.W.R. 324, 94 A.R. 125, 47 C.C.C. (3d) 315 (Alta. C.A.), at pp. 350-351 C.C.C., p. 325 C.R.

<sup>24</sup>*R. v. Fosty*, [1991] 3 S.C.R. 263, 8 C.R. (4th) 368, [1991] 6 W.W.R. 673, 130 N.R. 161, 75 Man. R. (2d) 112, 6 W.A.C. 112, 7 C.R.R. (2d) 108, (sub nom. *R. v. Gruenke*) 67 C.C.C. (3d) 289, at p. 296 S.C.R. See also *R. v. S. (R.J.)* (1985), 45 C.R. (3d) 161, 19 C.C.C. (3d) 115, 8 O.A.C. 241 (C.A.), at p. 129 C.C.C., pp. 176-177 C.R.; *Kelly v. R.* (1994), 32 C.R. (4th) 121, (sub nom. *Kelly v. Canada*) 79 F.T.R. 186, at pp. 123-124 C.R.

<sup>25</sup>*Wigmore on Evidence*, vol. 8 (McNaughton rev.) (Boston: Little, Brown & Co., 1961), § 2285.

proach adopted in other jurisdictions. The United States Supreme Court has had one occasion to deal with the issue of production of confidential records in the possession of a third party. In that case, the accused argued that he should be entitled to child welfare files "because the file might contain the names of favourable witnesses, as well as other, unspecified exculpatory material." Despite the bald generality of the request, the court held that the accused was entitled to an in camera review of the material by the trial judge. The court stated:

At this stage, of course, it is impossible to say whether any information in the CYS records may be relevant to Ritchie's claim of innocence, because neither the prosecutor nor defence counsel has seen the information, and the trial judge acknowledged that he had not reviewed the full file . . . Although we recognize that the public interest in protecting this type of information is strong, we do not agree that this interest necessarily prevents disclosure in all circumstance. . . .

We find that Ritchie's interest (as well as the Commonwealth) in ensuring a fair trial can be protected fully by requiring the CYS files be submitted only to the trial judge for *in camera* review. Although this rule denied Ritchie the benefits of an "advocate's eye", we note that the trial court's discretion is not unbounded. If a defendant is aware of specific material contained in the file . . . he is free to request it directly from the court, and argue in favor of its materiality.<sup>26</sup>

Most American courts have ruled that requests for production should be dealt with on a case-by-case basis while avoiding rigid, formalistic rules for resolution of this issue. In addition, the courts have held that upon judicial in camera inspection, once the court determines that some material may assist the defence, the judge must provide counsel with access to the material and not simply provide a summary of the gist of the helpful material.<sup>27</sup>

Many courts do not require the demonstration of a threshold requirement of need and materiality before undertaking judicial inspection. Often, the relevant test is simply that inspection is left to the "sound discretion" of the reviewing judge. The courts have tilted the balance in favour of automatic inspection for two reasons: first, inspection permits a far more informed resolution of the issue of whether the records contain material information, and, second, produc-

<sup>26</sup>*Pennsylvania v. Ritchie*, 107 S.Ct. 989 at 1001-1003 (1987).

<sup>27</sup>*State v. Storlazzi*, 464 A.2d 829 at 833 (Conn. 1983); *United States v. Lindstrom*, 698 F.2d 1154 at 1165-1167 (1983); *State v. Harris*, 631 A.2d 309 at 317-318 (Conn. 1993).

ing the records for inspection creates a record which allows for more meaningful appellate review.<sup>28</sup> Some courts have tilted the balance even further in favour of the accused's right to full answer and defence by requiring that the in camera review be conducted in the presence of counsel, with counsel being provided access to the materials in order to make meaningful submissions.<sup>29</sup>

Inspection of confidential, therapeutic records is constitutionally mandated. Even in states which have passed Victims' Bills of Rights, it has been held that statutory rights granted to victims (e.g., in Arizona the victim can refuse to be interviewed by the defence) cannot override constitutional requirements of due process.<sup>30</sup>

Although many courts simply leave the issue of judicial inspection to the "sound discretion" of the court, there are other courts which require a particularized showing of need prior to having the judge embark upon the in camera screening. Different formulations abound; however, the threshold requirement appears to be set fairly low. The different formulations of the threshold are: "particular need to discover"; "particularized factual showing in support of assertion that access" is needed; "reason to believe that [it] would provide a source of impeachment material"; "preliminary showing that there is reasonable ground to believe that the failure to produce the record would likely impair his right to impeach the witness"; "records are likely to contain material relevant to the defence."<sup>31</sup>

Finally, deference to the legislature is the accepted practice when the legislature has responded to this difficult issue by passing protective legislation. The courts' approach to production in the face of legislation is threefold: (1) if a statutory privilege is created for certain therapeutic relationships, the court will still engage in balancing if the statutory privilege contains some exceptions; (2) if the statutory privilege is absolute then the material is not subject to disclosure under any circumstances; (3) if the privilege is merely recog-

<sup>28</sup>*United States v. Phillips*, 854 F.2d 273 at 277-278 (1988); *Hulett v. State*, 552 N.E.2d 47 at 49-50 (Ind. Ct. App. 1990).

<sup>29</sup>*Zaal v. State*, 602 A.2d 1247 at 1262-1263 (Md. App. 1992); *Commonwealth v. Stockhammer*, 570 N.E.2d 992 at 1002 (Mass. 1991); *Commonwealth v. Lloyd*, 567 A.2d 1357 (Pa. 1989).

<sup>30</sup>*State ex. rel. Romley v. Superior Court*, 836 P.2d 445 at 451-454 (Ariz. Ct. App. 1992); *State v. Kalakosky*, 852 P.2d 1064 at 1075-1076 (Wash. 1993).

<sup>31</sup>*State v. Vincent*, 591 A.2d 65 at 68 (Vt. 1991); *People v. District Court*, 719 P.2d 722 at 727 (Colo. 1986); *People v. Foggy*, 521 N.E.2d 86 at 92 (Ill. 1988); *State v. Joyner*, A.2d 791 at 806 (Conn. 1993); *Kalakosky*, supra, note 37 at 1077.

nized at common law, then disclosure is the norm and defence access to the records for the purpose of showing materiality is the accepted practice.<sup>32</sup>

Surprisingly, Commonwealth jurisdictions, other than Canada, have had little or no experience regarding production requests for therapeutic records. However, in the generic area of “public interest immunity” the Commonwealth courts have ordered production of sensitive information if the accused has shown “good reason” for the request.<sup>33</sup> Furthermore, these courts have accepted that production for inspection by the judge may be necessary to determine if there is a “good reason” to order production.<sup>34</sup> Similar to the Supreme Court of Canada’s formulation, the courts have articulated the following definition of “materiality” as the pre-condition for production to the defence:

“I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution:

- (1) to be relevant or possibly relevant to an issue in the case;
- (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use;
- (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2).<sup>35</sup>

Non-disclosure on the basis of “sensitive” or “private delicacy to the maker” is considered an insignificant ground upon which to deny disclosure. “Such trivial grounds could not possibly support a legal objection to the production of documents which are relevant and

<sup>32</sup>*Commonwealth v. Eck*, 605 A.2d 1248 at 1252-1253 (Pa. 1992); *Commonwealth v. Kennedy*, 604 A.2d 1036 at 1044-1047 (Pa. 1992); *Commonwealth v. Kyle*, 533 A.2d 120 at 125-131 (Pa. 1987).

<sup>33</sup>*R. v. Hennessey and Others* (1978), 68 Cr. App. R. 419 (C.A.), at pp. 425-426; *R. v. Agar* (1989), 90 Cr. App. R. 318 (C.A.), at p. 324; *R. v. Turner*, [1995] 1 W.L.R. 264, [1995] 2 Cr. App. R. 94, [1995] 3 All E.R. 432 (C.A.).

<sup>34</sup>*R. v. Brown*, [1994] 1 W.L.R. 1599 (C.A.), at pp. 1607-1608; *R. v. K. (T.D.)* (1993), 97 Cr. App. R. 343 (C.A.), at p. 346; *Alister v. R.* (1984), 154 C.L.R. 404, 58 A.L.J.R. 97, 51 A.L.R. 480, 50 A.L.R. 41 (Aust. H.C.), at pp. 456-457 C.L.R.

<sup>35</sup>*R. v. Keane*, [1994] 1 W.L.R. 746, 99 Cr. App. R. 1, [1994] 2 All E.R. 478 (C.A.) at p. 6 Cr. App. R.; *R. v. Brown*, *ibid.* at p. 1606.

may exculpate a defendant.”<sup>36</sup>

In conclusion, it can be seen that the Supreme Court’s resolution of the battle between full answer and defence and the complainant’s right to privacy is consistent with principles and rules articulated in other contexts and in other jurisdictions. In fact, the court’s approach is arguably more restrictive on full answer and defence than is the approach in these other contexts and jurisdictions. Therefore, it may be unfair to accuse the court of unjustifiably siding with the accused in this controversy, unless one is prepared to argue that the approach of virtually every court in all English-speaking jurisdictions, with respect to the production of confidential and private material, is misguided and insensitive.

### E. *The Need for Legislative Intervention*

The court’s proposal is doomed to fail for two reasons. First, the court does not adequately address the “Catch-22” of requiring the accused to establish “likely relevance” for documents which he/she has never seen. Thus, the proposed procedure cannot serve to prevent miscarriages of justice in all cases. Second, judicial inspection for materiality (i.e., to determine whether to produce the information to the defence) is less than satisfactory because the judge cannot perform the role of defence counsel (i.e., exercise the “advocate’s eye”) while exercising his/her judicial function. As the Manitoba Court of Appeal has noted in another context:

The reason why defence counsel must be allowed a full opportunity in that regard [i.e. cross-examination] is that he has the best opportunity of knowing what is the best defence for his client and what type of questions in cross-examination will be most effective to that end. He has an advantage denied to the trial judge – the advantage of knowing the position taken by the defendant, the evidence he will adduce in support of that position, and the evidence opposed to it which he must render as ineffective as possible.<sup>37</sup>

From the point of view of the complainant and the custodian of records, the proposed resolution is also fraught with difficulties. First, if the complainant is ordered to produce material, he/she must undertake a costly appeal to the Supreme Court of Canada with no

<sup>36</sup>*Brown*, *ibid.*

<sup>37</sup>*R. v. Ignat* (1965), 53 W.W.R. 248 (Man. C.A.), at p. 250. See, also, *R. v. Brouillard*, [1985] 1 S.C.R. 39, (sub nom. *Brouillard (Chatel) c. R.*) 44 C.R. (3d) 124, [1985] R.D.J. 38, 17 C.C.C. (3d) 193, 16 D.L.R. (4th) 447, 57 N.R. 168, at p. 43 S.C.R.

guarantee that the trial judge will stay proceedings pending a review of the order of production. Second, in light of the intrusiveness of a production order, there should be statutory rules respecting: (a) protective mechanisms to minimize the intrusion; (b) sanctions for breach of confidence; and (c) clear procedures for a *prompt* resolution of the application. As it stands, the court contemplates applications being made to the trial judge, and this can only serve to occasion delay.<sup>38</sup> In some cases, the requested material (often handwritten) may fill countless boxes, and it is unrealistic to assume that the production request can be expeditiously resolved on the eve of trial.

Constitutional adjudication works well for remedying past injustices and violations of constitutional rights. The traditional adversarial process does not work as well when it comes to fashioning rules to operate in a prospective fashion. The need for legislative intervention is clear because only a consultative process can serve to effectively address some of the following issues:

1) To what extent will production orders negatively impact on the therapeutic process and on the reporting of sexual assault?

2) Should absolute statutory privileges be created for certain types of therapeutic records? If so, should there be a statutory duty imposed on the custodian of records to disclose any information which casts serious doubt on the truthfulness of the accusation?

3) Should a special administrative tribunal be established to entertain claims for production? Should the decision of the tribunal be reviewable? Should time-limits be placed upon production claims to ensure that the issue is finally resolved prior to trial?

4) In the event of production, what protective measures should be in place to minimize the intrusion upon privacy?

Finally, it must be recognized that tinkering with evidentiary and procedural rules cannot effectively serve to ease the plight of rape victims and prevent re-victimization by the process. We must not rely exclusively on the judicial process to assist victims, as this process is

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<sup>38</sup>In fact, Madam Justice L'Heureux-Dubé held that the preliminary hearing is not a proper forum for production requests. It is unclear if the majority agree with this proposition, and it is directly contrary to a recent decision of the Ontario Court of Appeal in *R. v. R. (L.)* (1995), 39 C.R. (4th) 390, 28 C.R.R. (2d) 173, 100 C.C.C. (3d) 329, 127 D.L.R. (4th) 170.

structured and designed to facilitate full answer and defence and is, accordingly, weighted in favour of the rights of the accused. Although fiscal constraints are a reality, it is incumbent upon both the federal and provincial governments to provide meaningful assistance through properly-funded shelters and counselling services.

Criminal trials will always be emotionally-jarring and painful experiences, and there is only so much a court can do to make the process as painless as possible for victims. The Supreme Court of Canada should not be forced into the position of being the only institution with a mandate to protect the interests of victims. The compromise resolution reached by the court with respect to this issue of production of confidential records underscores the need to start looking for meaningful victim assistance to be provided outside the courtroom. One cannot expect that evidentiary and procedural rules can serve both the accused's interest in full answer and defence and the victim's right to privacy and dignity. Although a court can resolve individual battles, it can do little to bring the war to an end.

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