



Statutory Review on the Provisions and Operation of the *Act to amend the Criminal Code (production of records in sexual offence proceedings)*

Final Report

The Honourable Robert W. Runciman
Chair

The Honourable Joan Fraser
Deputy Chair

**Standing Senate Committee on Legal
and Constitutional Affairs**

December 2012

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**THE STANDING SENATE COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS**

41ST PARLIAMENT, 1ST SESSION

The Honourable Robert W. Runciman
Chair

The Honourable Joan Fraser
Deputy Chair

and

The Honourable Senators:

George Baker, P.C.
Pierre-Hugues Boisvenu
James S. Cowan (or Claudette Tardif)*
Jean-Guy Dagenais
Linda Frum
Serge Joyal, P.C.
Marjory LeBreton, P.C. (or Claude Carignan)*
Paul E. McIntyre
Thanh Hai Ngo
Vernon White
**Ex Officio Members*

***The Honourable Senator Mobina S.B. Jaffer withdrew as a member of the committee for this study due to a past professional association*

Other senators who have participated from time to time on this study
during the First Session of the Forty-First Parliament:

The Honourable Senators: W. David Angus***, Maria Chaput, Consiglio DiNino***, Daniel Lang,
Don Meredith, Nancy Greene Raine, Terry Stratton, Betty Unger and John D. Wallace.

Other senators who participated on this study during the Third Session of the Fortieth Parliament:

The Honourable Senators: Claude Carignan, Leo Housakos, Michael L. MacDonald,
Jean-Claude Rivest and Charlie Watt.

****Retired from Senate*

The committee wishes to acknowledge the special contribution of the Honourable Senator John D. Wallace, former Chair of the Committee in the preparation of this report.

The Committee would also like to thank the following staff for their work in the preparation of the report:

From the Library of Parliament, Parliamentary Information and Research Service:

Erin Shaw, Analyst
Tanya Dupuis, Analyst
Robin MacKay, Analyst
Lyne Casavant, Analyst
Laura Barnett, Analyst
Erin Virgint, Research Assistant

From the Committees Directorate:

Shaila Anwar, Clerk of the Committee
Tracy Amendola, Administrative Assistant

From Senators' offices:

Barry Raison, Policy Analyst, Office of the Honourable Robert W. Runciman, Chair
Céline Éthier, Policy Analyst, Office of the Honourable Joan Fraser, Deputy Chair
François Delisle, Policy Analyst, Office of the Honourable Pierre-Hugues Boisvenu

Extract from the *Journals of the Senate*, Tuesday, October 4, 2011:

The Honourable Senator Wallace moved, seconded by the Honourable Senator Mockler:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report on the provisions and operation of the *Act to amend the Criminal Code (production of records in sexual offence proceedings)*, S.C. 1997, c. 30;

That the papers and evidence received and taken and work accomplished by the committee on this subject since the beginning of the Third Session of the Fortieth Parliament be referred to the committee; and

That the committee report to the Senate no later than June 30, 2012 and retain all powers necessary to publicize its findings until 90 days after the tabling of the final report.

The question being put on the motion, it was adopted.

Extract from the *Journals of the Senate*, Monday, June 11, 2011:

The Honourable Senator Runciman moved, seconded by the Honourable Senator Boisvenu:

That, notwithstanding the order of the Senate adopted on October 4, 2011, the date for the presentation of the final report by the Standing Senate Committee on Legal and Constitutional Affairs to examine and report on the provisions and operation of the *Act to amend the Criminal Code (production of records in sexual offence proceedings)*, S.C. 1997, c. 30 be extended from June 30, 2012 to December 31, 2012; and

That the committee retain all powers necessary to publicize its findings until 90 days after the tabling of the final report.

The question being put on the motion, it was adopted.

Gary W. O'Brien
Clerk of the Senate

INTRODUCTION

On 8 December 2010, during the 3rd Session of the 40th Parliament, our committee received an order of reference from the Senate to examine the provisions and operation of *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*,¹ introduced in the 2nd Session of the 35th Parliament as Bill C-46.² On 7 October 2011, following the 2 May 2011 general election and the convening of the 41st Parliament, our committee received a new order of reference from the Senate to continue its study of these matters. Since receiving its original order of reference in 2010, the committee has held 13 meetings on this study. In total, the committee heard from witnesses representing 14 different organizations and received 14 written submissions from interested organizations and provincial governments.³

Bill C-46 was enacted in 1997 to limit the access by those accused of sexual offences under the *Criminal Code* (the Code)⁴ to personal records of complainants held by third parties. Its provisions were designed to better protect the privacy rights of complainants in sexual offence proceedings, while continuing to ensure that the accused retained the right to make full answer and defence. The bill created the present legislative framework set out in sections 278.1 to 278.91 of the Code that now govern defence applications for the production of third party records (“third party records applications”). Clause 3.1(1) of Bill C-46 provided for a comprehensive review of the provisions and operation of the *Act* by a committee of the House of Commons, the Senate, or a committee of both Houses of Parliament three years after it came into force. Our study is the first statutory review of the bill since its enactment.

OUR STUDY AND ITS CONTEXT

A. Sexual Offences, the Charter, and Canadian Criminal Law Reform

Sexual offence law in Canada changed little between the time that Canada’s first *Criminal Code* came into force in 1893⁵ and adoption of the *Canadian Charter of Rights and Freedoms* (the Charter)⁶ 90 years later. During this time, gender biases and stereotypes permeated the investigation, prosecution and adjudication of sexual offences. Reporting and conviction rates were low, and harassment of presumed victims was common.⁷

The first major, substantive reforms to sexual offences under the Code began in 1968, when homosexual sex between consenting adults was decriminalized.⁸ Other significant legislative reforms

¹ [S.C. 1997, c. 30.](#)

² For the sake of convenience, *An Act to amend the Criminal Code (production of records in sexual offence proceedings)* will be referred to as Bill C-46 throughout this report.

³ A list of witnesses and written submissions may be found in Appendix 4 to this report.

⁴ R.S.C. 1985, c. C-46.

⁵ *Criminal Code*, 1893, 55-56 Vict., c. 29. The *Criminal Code* was revised and consolidated in 1906, 1927, 1953-54, 1970 and 1985. For more information on historical sexual assault law, see the discussion in Alan W. Mewett, “The Canadian Criminal Code, 1892-1992,” *The Canadian Bar Review*, vol. 72, 1993, p. 15.

⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].

⁷ See: Karen Busby, “‘Not a Victim until a Conviction is Entered’ – Sexual Violence Prosecutions and Legal ‘Truth’,” in Elizabeth Comack, ed., *Locating Law*, 2nd ed., Fernwood Publishing, 2006, p. 273.

⁸ *Criminal Law Amendment Act*, S.C. 1968-69, c. 38, s. 7.

followed in 1975, 1982,⁹ 1987,¹⁰ 1992¹¹ and 1997.¹² In 1982, Parliament repealed the offence of “rape” and created a new, gender-neutral offence of “sexual assault.” In 1987, a number of anachronistic sexual offences against children were repealed and new, gender-neutral sexual offences enacted.

Other major changes to sexual offence law during the 1980s and 1990s included: removing statutory requirements that a complainant’s testimony be corroborated by other evidence, requirements that did not apply to other types of offences; adding a definition of “consent” to the Code and codifying the defence of reasonable mistake to require the accused to present some objective basis for the belief that consent was given; abolishing the common law rule of ‘recent complaint,’ which required a person who was sexually assaulted to have told someone about the assault at the earliest opportunity; and making evidence of a complainant’s sexual reputation inadmissible as a means to challenge her credibility.¹³

These reforms were rooted in equality concerns regarding the discriminatory nature of 19th century sexual offence law. They aimed to remove overt gender-bias in the definition of offences and defences, prevent resort to harmful, stereotypical assumptions in the adjudication of sexual offences, and ensure that all children received the benefit of the full protection of the law. These statutory reforms were subject to a number of challenges that reached the Supreme Court.¹⁴

At the same time that criminal legislation began to focus greater attention on the equality rights of women and children under the Charter,¹⁵ the rights of criminal defendants to make full answer and defence to the charges brought against them were also being strengthened. In 1991, in its landmark decision in *R. v. Stinchcombe*, the Supreme Court of Canada held that “the fruits of the investigation which are in its possession are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done.”¹⁶ As a result, the Crown has a duty to ensure that all relevant information is disclosed to the defence, including all evidence that tends to prove or disprove the guilt of the accused, unless the information is subject to privilege.¹⁷ Non-disclosure on these bases must not infringe on the constitutional right of the accused to make full answer and defence, as guaranteed by section 7 of the Charter.

⁹ S.C. 1980-81-82-83, c. 125, s. 19, in force 1983.

¹⁰ *An Act to amend the Criminal Code and the Canada Evidence Act (Sexual Offences)*, R.S.C. 1985 (3rd Supp.), c. 19, in force 1988.

¹¹ Bill C-49, *An Act to Amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38, 3rd Session, 34th Parliament.

¹² Bill C-46.

¹³ This restriction was originally introduced in 1982 and struck down as unconstitutional by the Supreme Court of Canada in *R. v. Seaboyer*, [1991] 2 S.C.R. 577. New legislation introduced in 1992 was upheld by the Supreme Court in *R. v. Darrach*, [2000] 2 S.C.R. 443.

¹⁴ These cases include: *R. v. Osolin*, [1993] 4 S.C.R. 595 (definition of consent and permissibility of cross-examination on medical records); *R. v. O'Connor*, [1995] 4 S.C.R. 411 (creating common law regime for production of third party records); *R. v. Mills*, [1999] 3 S.C.R. 668 (upholding statutory regime for production of third party records); *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (non-existence of a defence of ‘implied’ consent); *R. v. Darrach*, [2000] 2 S.C.R. 443 (upholding revised legislative restrictions on cross-examination on sexual history); *R. v. Shearing*, [2002] 3 S.C.R. 33 (cross-examination on private records in hands of accused, relative importance of different rights); *R. v. J.A.*, [2011] 2 S.C.R. 440 (requirement of on-going, conscious consent).

¹⁵ Equality rights are guaranteed under s.15(1) of the Charter, which guarantees all individuals the equal protection and benefit of the law without discrimination, including discrimination based on the grounds of age or sex. For a more specific definition of the equality guarantee contained in s.15(1) of the Charter, see *infra* note 28.

¹⁶ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

¹⁷ For example, the Crown must include in the initial disclosure of evidence any statement made by a witness to a police officer during the criminal investigation relating to the case before the court.

During a criminal trial, third parties such as complainants and witnesses¹⁸ do not have the same duty as the Crown to disclose their records to the accused. Witnesses and complainants are often unknown to Crown counsel.¹⁹ Furthermore, unlike Crown counsel, they are under no public duty to ensure that justice is done, nor are they required by law to assist the accused with his or her defence.²⁰ As a result, records held by third parties, unlike criminal investigation files, are not produced to the defence in the initial disclosure of evidence.

As traditional avenues of defence in sexual offence trials were narrowed by the legislative reforms in the 1980s and early 1990s, defence counsel developed new strategies to test complainants' credibility that were rooted in the right of the accused to the disclosure of information necessary to make full answer and defence. Defence counsel began to request judicial orders for the disclosure of complainants' personal records that were not in the possession of the Crown, such as psychiatric, counselling and child welfare records, which were then used to cross-examine complainants with the goal of undermining the credibility of their allegations.²¹

During the early 1990s, requests for disclosure of records in the hands of third parties (third party records) by defence counsel became routine and were often granted. Many requests related to large numbers of documents. Witnesses who work with victims of sexual violence²² informed the committee that the frequency with which such disclosure applications were being made by defence counsel and granted by the courts at this time became a subject of concern. Apprehensions arose that the prospect of having third party records disclosed to alleged assailants and used in open court was discouraging victims from reporting these crimes, or going forward with prosecutions.

B. The Supreme Court of Canada, *R. v. O'Connor*, and Bill C-46

1. *R. v. O'Connor*

In 1995, in the decision *R. v. O'Connor*, the Supreme Court of Canada set out the procedure to be observed when the accused requests that records in the possession of third parties be produced.²³ Although the nine judges of the Supreme Court unanimously held in *O'Connor* that anyone charged with sexual assault had a right to access records concerning the complainant that were in the possession of a third party, the Court's decision was divided (5-4) concerning the nature of the tests to be applied by the trial judge to determine whether these records should be produced to the defence, the order in which the judge must apply the tests, and the nature of the onus placed on the accused to justify the request.

¹⁸ For example, a psychiatrist, therapist or doctor.

¹⁹ See also David M. Paciocco and Lee Stuesser, *The Law of Evidence*, Fifth Edition, Irwin Law, 2008.

²⁰ Witnesses and complainants are under a duty to speak and testify truthfully. They are also under a duty not to mislead the Court.

²¹ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 19, 3rd Session, 40th Parliament, 3 February 2011 (Professor Karen Busby); Jamie Cameron, [Victim Privacy and the Open Court Principle](#), Publication No. rr03-VIC-1e, Policy Centre for Victims Issues, Department of Justice Canada, March 2003, Chapter 3. [Cameron, *Victim Privacy and the Open Court Principle*].

²² In this report, reference is made to both "victims" of sexual offences and "complainants" in sexual offence cases. The term "victim" is used throughout this report to refer generally to those who have in fact been the victims of sexual offences or who believe that they have been the victim of sexual offences, regardless of whether they have reported the offences in question to police. The term "complainant" is used to refer to individuals who have alleged to the police that they have been the victim of a sexual offence. In the context of a criminal trial process, the truth of such an allegation and the guilt of the defendant remain to be finally determined by a court of law.

²³ [1995] 4 S.C.R. 411.

In *O'Connor*, the Supreme Court set out a two-stage process for the production of records. At the first stage, the defendant must make an application to have the records produced to a judge for review. At the second stage, the judge must determine whether some, all or any of the records in question will be produced to the defence. This process is now the general common law rule used by courts to determine whether or not third party records should be disclosed to the defence when someone has been charged with an offence other than the sexual offences listed in s. 278.2(1) of the Code.²⁴

At the first stage of the *O'Connor* procedure, the defence must satisfy the judge that the records in question are “likely relevant.” In other words, in order to have the records produced to the judge for review, the defence must satisfy the judge that “there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify”.²⁵ The first stage of the *O'Connor* process is intended to prevent the accused from making speculative, obstructive or otherwise inappropriate requests for production, but the burden on the accused is not intended to be “onerous”.²⁶

The second stage of the *O'Connor* process requires that the judge review the third party records and determine whether they should be disclosed to the defence. At this state of the process, the judge is required to balance the rights of the accused to make full answer and defence, the probative value of the records, and any prejudice to an individual’s dignity, privacy or security that would be occasioned by the production of the record, while taking account of whether production of the record would be based on biases or discriminatory beliefs.²⁷

Since the advent of the Charter, the Supreme Court of Canada has recognized that prejudicial myths and stereotypes can be used to distort the truth-seeking purposes of criminal trials. In *O'Connor*, Justice L’Heureux-Dubé wrote a dissenting judgement that linked the myths and stereotypes about sexual assault with the privacy and equality rights of complainants in sexual offence proceedings.²⁸ She suggested that the personal records of complainants would rarely be relevant in a criminal trial. Justice L’Heureux-Dubé held that judges should consider a wider range of factors and defendants ought to bear a heavier onus in third party records production applications. For example, she was of the view that in deciding whether third party records should be produced to the defence, the judge should also be required to consider “the extent to which production of records of this nature would frustrate society’s interest in encouraging the reporting of sexual offences and the acquisition of treatment by victims.”²⁹ The majority rejected Justice L’Heureux-Dubé’s conclusion on this point, stressing that societal interests were not “paramount” considerations in the balancing exercise.³⁰

²⁴ *R. v. McNeil*, [2009] 1 S.C.R. 66. The *O'Connor* procedure for third party records production is not limited to cases where these records attract a reasonable expectation of privacy.

²⁵ *R. v. O'Connor*, para. 22; *R. v. McNeil*, para. 33.

²⁶ *R. v. O'Connor*, para. 24; *R. v. McNeil*, para. 29.

²⁷ *R. v. O'Connor*, para. 31.

²⁸ *Ibid.*, paras. 121-124. Section 15(1) of the Charter provides that:

(1) Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. For a detailed discussion, see Cameron, *Victim Privacy and the Open Court Principle*, chapter 3.

²⁹ *Ibid.*, para. 32.

³⁰ *Ibid.*, para. 33.

2. Bill C-46

Many people felt that the majority decision in *O'Connor* favoured the accused by providing a low threshold for the disclosure of records. In 1997, in response to the Supreme Court of Canada decision in *O'Connor*, Parliament enacted Bill C-46, An Act to amend the Criminal Code (production of records in sexual offence proceedings), which created the current records production scheme in the Code.

The preamble to the bill stressed Parliament's concerns about sexual violence against women and children, and highlighted the need to encourage victims to report sexual offences. The preamble also emphasized Parliament's belief that victims' fear of the possibility of public disclosure of their personal information could stop them from seeking necessary treatment and deter reporting of such crimes.

Bill C-46 set out a two-stage process for obtaining production of records that placed greater emphasis on the equality and privacy rights of complainants, and was therefore a more onerous test for the defence to meet than the process adopted by the Supreme Court in *O'Connor*. The bill also required that a separate hearing be held on every third party records production application and provided the complainant with the opportunity to make submissions during the application process. In addition, the bill prevented any information about the hearing from being published or broadcast. The Honourable Catherine Kane, then the Director General and Senior Counsel at the Criminal Law Policy Section of the Department of Justice, now a justice of the Federal Court of Canada, summarized the bill's provisions for the committee in these terms:

At the first stage, the accused was required to establish that the records contained information likely relevant to an issue at trial or to the competence of a witness to testify. The accused was required to offer a realistic explanation of why he or she believed the information would be likely relevant... .

The judge was required to do a balancing act at that first stage, and to determine what the reasonable expectation for privacy was in those records and the effect o[n] the dignity, privacy and security o[f] any person to whom the record relates, among other factors. After considering all the factors, the judge had to be satisfied that the record was likely relevant and that the production was necessary in the interests of justice.

Once that had been determined, the judge would review the records in camera and then would engage in the same process again to determine if those records should be provided to the accused. However, at the second stage, the judge had the benefit of looking at the records. If the judge determined that the accused should be provided with the records, the judge could determine if ... all or part of the records [should be produced], if any part should be excised and if any condition should be imposed on the production, such as that no further copies be made, that they should not be

shared with anyone else and those types of conditions. Only the records that were considered to be likely relevant would be produced.³¹

The subpoena sent to records-holders was designed to let them know that they should not forward records directly to the defence, but should instead bring the records to the hearing. The scheme also allowed the judge to place conditions on production, such as redacting parts of a text. When Bill C-46 received Royal Assent, sections 278.1-279.91 were added to the Code.

Two years after the enactment of Bill C-46, the court had an opportunity to review the operation of sections 278.1-279.91 of the Code. In *R. v. Mills*,³² the majority of the Supreme Court, including Justice L'Heureux-Dubé, upheld the statutory records production scheme enacted by Parliament, which largely adopted the point of view advanced by the dissent in *O'Connor*. The majority affirmed that the right to make full answer and defence is a core principle of fundamental justice, but stated that this right must be understood in light of the privacy and equality rights of witnesses and complainants.³³

C. The Scope of our Study

The third party records production scheme set out in sections 278.1-278.91 of the Code represents an attempt to reconcile, to the greatest extent possible, the Charter rights of criminal defendants and the rights of sexual offence complainants. The Charter guarantees to the accused a right to a fair trial, including the right to make full answer and defence to the charges against him or her.³⁴ At the same time, the Charter protects the privacy, security, and equality rights of sexual offence complainants.³⁵ To reconcile these differing rights, the statutory scheme addresses the specific factors for judges to consider when deciding third party records application. Some of these factors, such as the societal interest in promoting the reporting of sexual offences and complainants' equality rights, go beyond the individual rights and interests that are normally at play in a criminal trial. These provisions of the Code also deal with the duty to notify complainants and records-holders that third party records are being requested, the independent representation of complainants during records production proceedings, and protection of the complainants' identity.

The breadth and complexity of the rights and interests affected by the third party records production scheme have influenced the committee's approach to this statutory review. In our view, a broader understanding of the third party records production scheme in the Code and the context in which it operates is required. Accordingly, it is necessary for this review to go beyond the provisions and operation of one statute. In particular, in the course of our study, we have come to believe that the effective operation of the records production scheme is closely linked with the administration of justice and the provision of services to victims in areas of shared jurisdiction between the provincial/territorial and federal governments under Canada's constitutional system.³⁶

Our report, therefore, examines the complex nature of the crime of sexual assault. Our recommendations deal not only with the provisions that govern the third party records production

³¹ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 19, 3rd Session, 40th Parliament, 2 February 2011 (Ms. Catherine Kane, Department of Justice Canada).

³² *R. v. Mills*, [1999] 3 S.C.R. 668.

³³ *Ibid.*, para. 94.

³⁴ Sections 7 and 11 of the Charter.

³⁵ Sections 7, 8 and 15(1) of the Charter.

³⁶ *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

scheme in the Code, but also with the manner in which victims and complainants in sexual offence cases interact with the criminal justice system.

D. General Observations

The committee wishes to stress that everything in this report should be viewed in light of our understanding and appreciation of the fundamental right of all defendants to a fair trial, as well as all individuals' rights to security, privacy and equality under the Charter.

In its study, the committee was hampered by the paucity of information available regarding the practical consequences resulting from the passage of Bill C-46, including the relatively small number of reported judgements in third party records applications. The committee's comments, therefore, have been made in relation to the information available, but with the knowledge that the information before the committee does not represent the full record.

THE COMPLEXITY OF SEXUAL OFFENCES

A. The Nature of Sexual Offences in Canada

The Department of Justice explained the sexual offences in the Code to us in the following terms:

Sexual assault is not defined in the Criminal Code but has been interpreted in the case law as an assault of a sexual nature such that, viewed objectively, the sexual integrity of the complainant is violated. Non-consensual activity ranging from fondling or kissing to that which involves full penetration constitutes a sexual assault. In many cases, the issue at play in a trial is the consent. The Criminal Code provides that, in general, a person under 16 years of age cannot consent to any form of sexual activity.

In addition to the sexual assault offences, the Criminal Code also provides specific offences where a child is the victim; for example, sexual interference, invitation to sexual touching, sexual exploitation and sexual exploitation of a person with a disability.³⁷

Throughout its study, the committee heard evidence regarding the complex nature of the crime of sexual assault and other sexual offences. Representatives from Statistics Canada told us that although men and women in Canada are victims of violent crime at similar rates, the types of crimes they experience and the circumstances surrounding the crimes differ. While men are more likely to be victims of physical assault and homicide and are more likely to be victimized by strangers, women make up the overwhelming majority of sexual assault victims and are more likely to be victimized by someone known to them.³⁸ A 2008 Statistics Canada report indicates that women were ten times more likely than men to

³⁷ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 19, 3rd Session, 40th Parliament, 2 February 2011 (Ms. Catherine Kane, Department of Justice Canada).

³⁸ Roxan Vaillancourt, "[Gender Differences in Police-reported Violent Crime in Canada, 2008](#)," Canadian Centre for Justice Statistics Profile Series, Statistics Canada, 2010, pp. 8-9 [Vaillancourt, "Gender Differences in Police-reported Violent Crime in Canada, 2008," 2010]; Samuel Perreault and Shannon Brennan, "Criminal Victimization in Canada, 2009," *Juristat*, vol. 30, no. 2, 2010, p. 11.

be the victims of sexual assaults reported to the police.³⁹ Many sexual offence victims in Canada are young: in 2009, the highest rates of police-reported sexual assault against females were committed against girls between the ages of 13 and 17. Rates for males were highest amongst children and young teenagers.⁴⁰ In 2009, eighty percent of child victims were female.⁴¹

According to the 2009 General Social Survey, which seeks self-reported information about criminal victimization from individuals, Aboriginal people in Canadian provinces reported being the victim of a non-spousal sexual assault at a much higher rate than non-Aboriginal people, and were almost twice as likely to say they had been forced by their spouse to engage in an unwanted sexual act.⁴² In 2009, male youths and adults made up the overwhelming majority of criminally accused persons in sexual offence cases.⁴³

Statistics Canada also reports that in 2009, there were significant differences in police-reported rates of sexual assault by province and territory. Prince Edward Island, Ontario, Quebec, British Columbia and Alberta had relatively lower rates of sexual assaults than other provinces,⁴⁴ while Manitoba and Saskatchewan had sexual assault rates that were close to double those found in Ontario and Quebec.⁴⁵ Susanne Boucher, Senior Counsel at the Nunavut Regional Office of the Public Prosecution Service of Canada (PPSC) told the committee that “[s]exual offences constitute a significant percentage of the cases prosecuted by the PPSC in the North. There is a high incidence of sexual offences in the territories — much higher than in the provinces, by a significant margin.”⁴⁶ The Yukon, the Northwest Territories and Nunavut reported the highest rates of sexual assault in the country with the rate of police-reported sexual assault in Nunavut at more than ten times the national average.⁴⁷

Statistics Canada reports that in 2009, 21,000 sexual assaults against adults⁴⁸ and 2,600 sex offences against children were reported to police.⁴⁹ These figures, however, do not represent a true picture of the

³⁹ Vaillancourt, *ibid.*, p. 5.

⁴⁰ Statistics Canada, “Sexual Offences in Canada,” Presentation to the Standing Senate Committee on Legal and Constitutional Affairs by Julie McAuley, Director, Canadian Centre for Justice Statistics, Statistics Canada, 3 February 2011.

⁴¹ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 19, 3rd Session, 40th Parliament, 3 February 2011 (Ms. Julie McAuley, Statistics Canada).

⁴² Samuel Perreault, “Violent Victimization of Aboriginal People in the Canadian Provinces, 2009,” *Juristat*, 11 March 2011, pp. 5 and 11. Rate of non-spousal sexual assault per 1,000 population: Aboriginal – 70, Non-Aboriginal – 23. Rate of being forced to engage in an unwanted sexual act: 60% of Aboriginal people and 33% of non-Aboriginal people. Aboriginal people were twice as likely as non-Aboriginal people to report incidents of spousal violence to police. The author indicates that this may be because of the greater severity and consequences of spousal violence reported by Aboriginal victims. The study did not consider the rates of sexual assault against Aboriginal people in the territories.

⁴³ Tina Hotton Mahony, “Women and the Criminal Justice System,” in *Women in Canada: A Gender-based Statistical Report*, Statistics Canada, 2011, p. 20.

⁴⁴ Statistics Canada, “Sexual Offences in Canada,” Presentation to the Standing Senate Committee on Legal and Constitutional Affairs by Julie McAuley, Director, Canadian Centre for Justice Statistics, Statistics Canada, 3 February 2011. The mean number of sexual assaults in Canada in 2009 was 62 per 100,000 population.

⁴⁵ *Ibid.* Rates of police-reported sexual offences in 2009, per 100,000 population: Ontario – 54; Quebec – 55; Manitoba – 105; Saskatchewan – 114. The higher rates of police-reported sexual assault are consistent with higher self-reported rates of violent victimization in Manitoba and Saskatchewan found in the 2009 General Social Survey.

⁴⁶ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 19, 3rd Session, 40th Parliament, 2 February 2011 (Ms. Susanne Boucher, Public Prosecution Service of Canada).

⁴⁷ *Ibid.* Rates of police-reported sexual offences in 2009, per 100,000 population: Yukon – 205; Northwest Territories – 428; Nunavut – 656.

⁴⁸ According to Statistics Canada, this represents a 4% decrease over the previous year.

number of sexual offences committed in Canada because these crimes go un-reported to police significantly more often than other types of crime.⁵⁰ For example, fewer than one in ten incidents of non-spousal sexual assault were reported to police in 2009.⁵¹

Witnesses from the Department of Justice presented us with their findings regarding some of the reasons that victims may not report sexual assault. Susan McDonald, Principal Researcher, Research and Statistics Division of the Department of Justice, stressed:

This is where it is important to look at the criminal justice system in the broader context. Women and men cite a number of different reasons for not reporting sexual assault and other sexual offences to police: fear of not being believed; no support from family or friends; and, especially in cases of child sexual abuse, they talk about not knowing that they could report or that they thought this was “normal.”

Therefore, the reasons for not reporting are complex and varied. They depend on the individual; the support they have amongst their family, friends and the community; and what services are available.⁵²

We also heard about the complex nature of sexual offences from representatives of women’s advocacy organizations and other groups that provide assistance to victims. These witnesses advised us that their experience confirmed Statistics Canada’s findings: many sexual offence victims are unwilling to come forward and report the crime to the police, or to proceed with prosecutions. During our hearings, we were reminded that victims often feel ashamed at having been victimized and struggle to come to terms with what has happened to them, often at the hands of a family member or someone they know. These witnesses spoke eloquently about the pressures that the criminal trial process places on all sexual offence victims, emphasizing that Aboriginal and disabled victims, as well as victims who are members of ethnic, religious or linguistic minorities, and those who come from rural or marginalized communities faced even greater difficulties. Witnesses also highlighted the fact that the trauma of victimization was compounded in many cases by participation in the criminal trial process.

B. The Role of the Prosecutor, the Accused and the Complainant in the Criminal Justice Process

In the adversarial system, the Crown prosecutor is not the lawyer for the complainant. Rather, he or she is considered to be the representative of justice. The Crown prosecutor’s mission is to conduct the prosecution impartially and objectively, to act on behalf of the state and to maintain public trust. He or she, therefore, has no prior knowledge of the complainant or the witnesses. It is not unusual during a

⁴⁹ Mia Dauvergne and John Turner, “[Police Reported Crime Statistics in Canada, 2009](#),” *Juristat*, vol. 30, no. 2, 2010, p. 15. The authors indicate that this figure likely represents under-reporting to the police.

⁵⁰ Vaillancourt, “Gender Differences in Police-reported Violent Crime in Canada, 2008,” 2010, p. 10; Dauvergne & Turner, *ibid.*, p. 15.

⁵¹ Dauvergne & Turner, *ibid.*

⁵² [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 19, 3rd Session, 40th Parliament, 2 February 2011 (Ms. Susan McDonald, Department of Justice Canada). These findings are discussed in more detail in: Susan McDonald and Melissa Northcott, “Reporting Results of Incidents of Child Sexual Abuse and Adult Sexual Assault from the Survivors Survey,” Research Note, Ottawa, Department of Justice Canada, 2011 [McDonald & Northcott].

criminal trial for the interests of the Crown to diverge from those of the complainant⁵³ or for the alleged victim wrongly to believe that the prosecutor represents his or her interests and speaks on his or her behalf.

The complainant does not enjoy the same degree of constitutional protection as the accused. The accused is at risk of losing his or her freedom and is therefore entitled to personal representation by a lawyer in order to defend against the allegations of the Crown. In a sexual offence trial, despite the fact that the complainant is often the main witness for the prosecution, and his or her testimony may well reveal deeply personal aspects of the complainant's private life, he or she, unlike the accused, is not considered to be a party to the trial. To the contrary, the complainant is simply a witness, albeit one with important evidence to give.

C. Reconciling the Rights of the Accused and Those of the Complainant

In our study, we have been constantly reminded of the tension that exists between the right of an accused person to make full answer and defence, which is a cornerstone of our democratic legal tradition, and the rights of complainants and victims of crime to equality, security of the person, and the benefit of the full protection of the law.

Witnesses before the committee stressed that criminal procedure in Canada must comply with the principles of fundamental justice. The accused enjoys the right to a fair and impartial trial, the right to make full answer and defence, and the right to be presumed innocent.⁵⁴ Among the rights enjoyed by complainants, on the other hand, are security, privacy and equality. In *Mills*, the Supreme Court made it clear that these competing rights must be reconciled to the greatest extent possible.

The right to privacy is not expressly included in the Charter. However, it is implicitly protected by the constitutional guarantees contained in section 8, which protect individuals against unreasonable search and seizure. Medical or therapeutic records in the possession of third parties contain information about intimate aspects of a complainant's private life. Consequently, these records arguably require a guarantee of additional protection when they are the subject of an application for production by the accused, which, if granted, constitutes a search and seizure by the state. The right to privacy is also linked to the right to security of the person in section 7 of the Charter, since an application for production to the accused of records held by a third party can have psychological and other security-related consequences for the alleged victim.⁵⁵ The majority of the Supreme Court stated in *Mills* that "the protection of the therapeutic relationship protects the mental integrity of complainants and witnesses."⁵⁶ Under the common law, it is recognized that the right to security also includes the right to physical and psychological security of the person.⁵⁷

⁵³ For example, when a complainant no longer wishes to testify against the attacker or changes his or her testimony.
⁵⁴ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 4, 1st Session, 41st Parliament, 3 November 2011 (Mr. Phil Downes, Canadian Council of Criminal Defence Lawyers); [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 5, 1st Session, 41st Parliament, 16 November 2011 (Professor Don Stuart). The full range of the accused's rights is set out in ss. 7, 8, 11, 15 and 28 of the Charter.
⁵⁵ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 6, 1st Session, 41st Parliament, 24 November 2011 (Ms. Sarah Kaplan, Cornwall Community Hospital Assault and Sexual Abuse Program).
⁵⁶ *R. v. Mills*.
⁵⁷ *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

Canada's Privacy Commissioner underscored the "scope and magnitude" of complainants' privacy interests in third party records production proceedings, telling us that in these applications, extremely vulnerable victims' "most personal and sensitive private records are being sought, typically for cross-examination by defence counsel in court."⁵⁸ Ms. Sarah Kaplan, Manager of the Cornwall Community Hospital Assault and Sexual Abuse Program, told the committee that, in her experience, when records are released to the accused, "clients can feel like they have lost control over a very intimate piece of their life".⁵⁹

We were also told that records production can have a detrimental effect on the provision of services to complainants and victims of sexual offences because "trust and confidentiality are crucial components of the therapist-patient relationship." Ms. Kaplan told us that in her view, for sexual offence complainants, "[d]iscovering that the one place they thought was safe for them is another place where they have no control is counter-therapeutic. ... [T]his is one of the major roadblocks to recovery for individuals who have been sexually assaulted."⁶⁰ A number of witnesses who appeared before our committee informed us that the mere possibility that the confidentiality of the therapeutic relationship may be breached can reduce a victim's desire to report the crime or to seek therapeutic assistance. In order to address victims' concerns in this regard, we were told that rape crisis centre counsellors often take only minimal notes in relation to clients, hampering their ability to deliver counselling services. Furthermore, witnesses informed the committee that women's shelters and centres often lack the resources to hire lawyers to protect both their own interests and the interests of their clients in records production proceedings.⁶¹

Testimony before the committee highlighted the importance of the equality rights at stake in records production applications, including the rights of women, children and the disabled. Section 28 of the Charter provides that constitutional rights and freedoms are guaranteed equally to male and female persons. Section 15 of the Charter provides that all individuals are equal under the law and that the law applies equally to all. In upholding the third party records production scheme in the Code, the majority of the Supreme Court in *Mills* held that "[t]he accused is not permitted to 'whack the complainant' through the use of stereotypes regarding victims of sexual assault."⁶² The majority also stressed the need to ensure that the intimate nature of sexual assault does not disadvantage the victims of such crimes, who are overwhelmingly women and children, from seeking redress, as compared to victims of other wrongs.⁶³

Several witnesses stated that, in their view, judges tend to focus on balancing the privacy implications of records production for complainants against the rights of accused persons to answer the charges

⁵⁸ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 3, 1st Session, 41st Parliament, 20 October 2011 (Ms. Jennifer Stoddart, Privacy Commissioner of Canada).

⁵⁹ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 6, 1st Session, 41st Parliament, 24 November 2011 (Ms. Sarah Kaplan, Cornwall Community Hospital Assault and Sexual Abuse Program).

⁶⁰ Ibid.

⁶¹ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 3, 1st Session, 41st Parliament, 26 October 2011 (Ms. Lee Lakeman, Canadian Association of Sexual Assault Centres and Ms. Stefanie Lomatski, Ottawa Coalition to End Violence against Women).

⁶² *R. v. Mills*, para. 90.

⁶³ Ibid., paras 89–92.

against them.⁶⁴ We were told that more attention to equality rights by all actors in the justice system was required.⁶⁵ On the other hand, Professor Don Stuart argued that the consideration of equality rights in the context of a records production application in a criminal trial created difficulties and led to anomalous results because the broad policy issues involved go beyond the individual case.⁶⁶

A number of witnesses also reminded us that it is necessary to consider the context in which therapeutic records are created. These records do not always provide a reliable account of the events in question. The Canadian Psychiatric Association's Position Statement on the confidentiality of psychiatric records and the patient's right to privacy states:

Psychotherapy notes may not be verbatim, systemic, or all inclusive. They tend to identify themes and develop hypothesis; their content may be highly selective or impressionistic. ... the therapist may include speculation and analogy as well as verifiable, factual data. What is recorded is usually determined by the exigencies of diagnosis and treatment.

... [P]sychiatric records are not designed to provide a basis for ethical, moral or legal judgements.⁶⁷

To the extent that the accused does not seek to distort the trial's goal of seeking the truth the Supreme Court has held that the need to avoid convicting an innocent person should prevail over the right to privacy.⁶⁸ The principle of the presumption of innocence is accordingly very closely linked with a full answer and defence. In the event that the record in question contains relevant information, a failure to disclose it to the accused could infringe the defendant's right to make full answer and defence, and impair the presumption of innocence. The Honourable Phil Downes, then the Director of the Canadian Council of Criminal Defence Lawyers and now a judge of the Ontario Court of Justice, reminded us that "[t]he fundamental bedrock of our criminal justice system is the presumption of innocence ... no one can be convicted unless the prosecution has proved its case beyond a reasonable doubt."⁶⁹

Mr. Downes emphasized to us that "there may be evidence in some of these records that will be helpful as [to] one aspect of a defence, not the ultimate issue and not the ultimate factor that succeeds in a

⁶⁴ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 6, 1st Session, 41st Parliament, 24 November 2011 (Professor Lise Gotell); [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 5, 1st Session, 41st Parliament, 16 November 2011 (Professor Don Stuart). See: Renate M. Mohr, [Research Report – Words are not Enough: Sexual Assault: Legislation, Education and Information](#), Department of Justice Canada, 2002, pp. 20, 25, 34 [Mohr, *Words are not Enough*, 2002]; Susan McDonald, Andrea Wobick and Janet Graham, [Research Report – Bill C-46: Records Applications Post Mills, A Caselaw Review](#), Department of Justice Canada June 2004, p. vi [McDonald, Wobick & Graham, *Bill C-46: Records Applications Post Mills*, 2004]; Lise Gotell, "When Privacy is not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records," *Alberta Law Review*, vol. 43, 2006, pp. 743-778.

⁶⁵ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 19, 3rd Session, 40th Parliament, 3 February 2011 (Professor Karen Busby); [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 6, 1st Session, 41st Parliament, 24 November 2011 (Professor Lise Gotell).

⁶⁶ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 5, 1st Session, 41st Parliament, 16 November 2011 (Professor Don Stuart).

⁶⁷ Canadian Psychiatric Association's Position Statement – The Confidentiality of Psychiatric Records and the Patient's Right to Privacy, 2001, paras. 4.1-4.2, contained in the Submission to the Standing Senate Committee on Legal and Constitutional Affairs of Child, Adolescent and Family Mental Health (Alberta), 4 October 2011.

⁶⁸ *R. v. Mills*, para. 94.

⁶⁹ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 4, 1st Session, 41st Parliament, 3 November 2011 (Mr. Phil Downes, Canadian Council of Criminal Defence Lawyers).

defence, but one factor that a trial judge or a jury may take into account.”⁷⁰ Professor Don Stuart argued that the current regime made it very difficult for the defence to gain access to third party records and in some cases may be unjust to some accused. Professor Stuart was also of the view that any amendments that would make access to third party records more difficult “would inevitably lead to successful Charter challenges.”⁷¹ In support of this contention, he suggested that in *R. v. Shearing*,⁷² the Supreme Court had backed away from its position in *Mills* that the right to full answer and defence had to be understood in light of the competing Charter rights of complainants. He contended that in *Shearing*, the Court had implicitly prioritized the rights of the accused, whose liberty interest was at stake.

It became evident during our study that whether, and under which circumstances, it is appropriate for a judge to order third parties to produce medical, therapeutic or other personal records of a sexual offence complainant to the defence remains the subject of debate. Each case requires a detailed and fact-specific analysis in which the judge must consider the “salutary and deleterious effects” the production decision would have on both the rights of the accused to make full answer and defence and on the complainant’s rights to privacy, security and equality.

THE COMMITTEE’S FINDINGS AND RECOMMENDATIONS

We are persuaded that the records production scheme in the Code, for the most part, is working well. We believe that the scheme in the Code strikes an appropriate balance between the competing interests of complainants and defendants in the unique context of sexual offence trials. It is the committee’s view that the scheme could benefit from some minor adjustments, but that it does not require fundamental changes. This view was echoed by some of the provincial governments that sent us their perspectives on our study.⁷³

The testimony that we heard, however, has left us in no doubt that the Code’s third party records production scheme will only succeed in balancing the rights of the accused and the rights of the complainant, as intended, in situations where complainants are able to benefit fully not only from all of the legal protections set out in the scheme and in the Code as a whole, but also from the support and assistance of health care and counselling professionals and victims’ support groups. Witnesses told us time and again how critical these legal and social supports were to encouraging the reporting of sexual offences and facilitating the recovery of sexual offence victims. We were told that it is important to:

look at the disproportional effect of the production and disclosure of records on marginalized communities: for example, a refugee woman who may be concerned about her immigrant status; an Aboriginal woman who may face

⁷⁰ Ibid. See also [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 5, 1st Session, 41st Parliament, 16 November 2011 (Professor Don Stuart).

⁷¹ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 5, 1st Session, 41st Parliament, 16 November 2011 (Professor Don Stuart).

⁷² *R. v. Shearing*.

⁷³ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 5, 1st Session, 41st Parliament, 17 November 2011 (The Honourable Andrew Swan, M.L.A., Minister of Justice and Attorney General, Government of Manitoba); Written Submissions to the Standing Senate Committee on Legal and Constitutional Affairs from: the Hon. Felix Collins, Minister of Justice and Attorney General of Newfoundland and Labrador, 3 December 2011; Director of Public Prosecutions, Nova Scotia Public Prosecution Service, 8 September 2011, p. 1; Prince Edward Island Premier’s Action Committee on Family Violence Prevention, 8 December 2011.

racism and discrimination on a daily basis; a woman who may have been diagnosed with a mental illness.⁷⁴

The committee is deeply concerned about the situation of victims of sexual offences who face greater barriers than do others in Canada in order to access legal representation, psycho-social or medical assistance. The Charter guarantees the benefit of equal protection of law to everyone in Canada, regardless of where they live, their background or their abilities.⁷⁵

The committee is of the view that the criminal law, including its rules of evidence and procedure, must not place complainants in sexual offence proceedings at a disadvantage compared to those who make complaints about other types of offences. As a result, the criminal law should not permit accused persons to advance arguments based on prejudices or stereotypes about, for example, women, the disabled, those with mental health problems, or regarding the nature of sexual violence. These prejudices are aimed at discouraging complainants from coming forward or continuing with a prosecution or at seeking to diminish their credibility. Such prejudices and stereotypes have the potential to distort the truth-seeking process in a criminal trial, thus depriving sexual offence complainants of the protection that the criminal law affords to other members of society. We agree, therefore, that complainants' right to equality, set out in the preamble to Bill C-46 and reflected in section 278.5(2) of the Code, is an important factor to be weighed by judges when they consider third party record production applications.

A. Recommendations on Sections 278.1 to 278.91 of the *Criminal Code*

In its written submissions to the committee, the Nova Scotia Public Prosecution Service stated:

At the outset, we note that in general these sections work and fulfill their main goal. ...The section has undergone and survived a great deal of litigation and constitutional challenge. We caution that any attempts to "improve" the section may impact on its current successful use in the courts.⁷⁶

In formulating our recommendations that the Government of Canada give consideration to amending certain specific sections of the Code which govern third party records production, we have kept this advice in mind. The recommendations below do not suggest that the Government of Canada consider overhauling the regime in a significant way. Rather, we have identified areas where changes to the provisions under review could provide greater specificity regarding the use of third party records in the hands of the accused and could improve the effectiveness and clarity of legislation that, overall, we consider to be balanced and appropriate.

1. Definition of a "record" (section 278.1 of the *Criminal Code*)

For the purposes of sections 278.2 to 278.91 of the Code, "record" includes any form of record that contains personal information for which there is a reasonable expectation of privacy, and includes,

⁷⁴ [*Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*](#), Issue 3, 1st Session, 41st Parliament, 26 October 2011 (Ms. Sandy Onyalo, Ottawa Rape Crisis Centre).

⁷⁵ Charter, s. 15.

⁷⁶ Written Submission to the Standing Senate Committee on Legal and Constitutional Affairs from the Director of Public Prosecutions, Nova Scotia Public Prosecution Service, 8 September 2011, p. 1.

without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature. However, in order not to infringe the right of the accused to make full answer and defence, the definition of a “record” does not include records made by persons responsible for the investigation or prosecution of the offence.

A distinction is made in section 278.1 of the Code between what constitutes a “record” containing personal information of a complainant, which will be subject to review under the third party records production process by a court before being produced to the defence, and a document made by persons responsible for the investigation and prosecution of an offence, which will not be the subject of a review under the statutory scheme. The Nova Scotia Public Prosecution Service drew our attention to the possibility that this distinction may become blurred when the authority that produces a record in the investigation of a sexual offence plays both a social service or child welfare role, for example, as well as a role in investigating the offence in question.⁷⁷ This concern can best be illustrated with a hypothetical example.

A young child is removed from her home by child welfare authorities because her parents are drug addicts. That child is placed in foster care and is transferred to several different foster homes over a number of years. During this time, the child welfare authority creates a variety of records about the child relating to her education, behavioural issues, and several brushes with the law. When the child is a teenager, she reveals to child welfare authorities that she is being sexually abused by her foster father. The child welfare authority contacts police and an investigation ensues in which the child welfare authority is involved. Charges are brought and the foster father, now the accused in a criminal proceeding, brings an application to have the child welfare authority produce all the records in its possession regarding the girl. Which records are subject to the records production scheme in the Code and which documents fall outside the definition of a “record” in s. 278.1 because they were “made” by a person responsible for the investigation of an offence?

The committee believes that in this example, there is a strong argument that only those child welfare records relevant to the investigation of the sexual abuse by the foster father should be excluded from the definition of a “record.” All other records made by the child welfare authority, such as those relating to the girl’s education, behavioural issues and contact with police during the years between her entry into care and the allegation of abuse, should be produced to the defence only following the rigorous scrutiny provided for in the third party records production scheme in the Code.

The committee agrees in principle with the submission of the Nova Scotia Public Prosecution Service; in our view, however, victims of sexual offences and their advocates ought to be consulted about the desirability of making such a change to the Code before such a step is undertaken.

⁷⁷ Ibid., p. 2.

Recommendation 1

That the Government of Canada consider modifications to the definition of “record” found at section 278.1 of the *Criminal Code* to clarify that the only records not subject to the regime set out in the *Criminal Code* are those made by persons responsible for the investigation or prosecution of the offence that are relevant to the offence in question.

2. Production of a record to the accused: Application of provisions, waiver of protections, and prosecutor’s duty to notify the defence (section 278.2 of the *Criminal Code*)

Section 278.2 of the Code lists the types of offences for which complainants’ records may not be released to an accused, except in accordance with sections 278.3 to 278.91. The list includes a number of sexual offences involving children, incest, prostitution, indecent acts, sexual assaults and other sex-related offences. The list also includes certain historical sexual offences under the Code as it existed prior to 1983⁷⁸ or 1988.⁷⁹

The Public Prosecution Service of Canada brought to the committee’s attention the fact that this list may not include historical sexual offences committed prior to 1970, which could be particularly relevant in prosecutions of sexual offences committed against Aboriginal children in residential schools. The committee is concerned that at least two courts have interpreted the legislation to exclude from the statutory scheme sexual offences committed prior to 1970 where the accused has been charged under historical Code provisions.⁸⁰ It also appears that this section contains some drafting errors. For example, the different degrees of sexual assault, as they appeared in the Code between 1983 and 1985, are not listed in the section; rather, the section of the Code that criminalized physical assaults against police officers during that period seems to have been included by mistake.⁸¹

Recommendation 2

That the list of offences in section 278.2(1) of the *Criminal Code* be reviewed and amended if necessary to clarify that third party records production applications in trials for all historical sexual offences be dealt with under the *Criminal Code* regime, regardless of the date of commission of the offence.

In addition, it is important to note that sections 278.2(2) and 278.3 permit complainants to “expressly” waive the application of the records production scheme in relation to records held by the Crown, which would mean that personal and private records could be produced to the defence without going through the rigorous scrutiny required by the regime set out in the Code.

Witnesses told us that sexual assault complainants often feel re-victimized by the release of confidential records and, in some cases, they feel betrayed by the justice system. Complainants may believe that

⁷⁸ Section 278.2(1)(b) of the Code.

⁷⁹ Section 278.2(1)(c) of the Code.

⁸⁰ *R. v. G.(F.)*, [1997] N.W.T.J. No. 47, 1997 CarswellNWT 94 (decision of 20 June 1997) (NWT SC); *R. v. Lasik*, 1999 CarswellNfld 30, (sub nom. *R. v. L. (R.J.)*) 173 Nfld. & P.E.I.R. 342, (sub nom. *R. v. L. (R.J.)*) 530 A.P.R. 342, 41 W.C.B. (2d) 499 (Nfld SC). On the other hand, the British Columbia Court of Appeal reached the opposite conclusion in *R. v. M.H.*, (2005), 201 C.C.C. (3d) 47, 2005 BCCA 419 (BCCA). See also the detailed reasoning on the issue in *R. v. Gibson*, (2010), 264 C.C.C. (3d) 121, 2010 ONSC 6374 (Ont. SCJ).

⁸¹ *R. v. Gibson*, *ibid.*, para. 5.

they provided personal records to police and prosecutors in confidence, only to find that those records are then used to try to discredit them after being turned over to the defence pursuant to the Crown's obligation to disclose relevant information and evidence under *R. v. Stinchcombe*.⁸² In this context, witnesses highlighted the need for complainants to make fully informed decisions about the release of personal records to investigators and prosecutors.⁸³ The committee believes that additional protections are needed to ensure that a complainant's waiver of the protection offered by the Code regime is fully informed and freely given. In the committee's view, it would be helpful for complainants to receive such an explanation in writing and in plain language.

Recommendation 3

That the Public Prosecution Service of Canada consider the most appropriate way to provide complainants with a standard, written explanation of the waiver provisions found at sections 278.2(2) and 278.3 of the *Criminal Code*, formulated in clear and easy-to-understand language, and that the Public Prosecution Service of Canada share the results of this study with its provincial counterparts. The explanation should also be available in all of the official languages of the Northwest Territories and Nunavut, and in the Aboriginal languages used in the Yukon.

Since the Public Prosecution Service of Canada has primary responsibility for *Criminal Code* prosecutions only in the territories, most sexual offences in Canadian provinces will be prosecuted by the provincial Attorneys General. The committee believes that it is important that complainants receive clear and consistent information about the waiver provisions in sections 278.2(2) and 278.3 of the Code in all Canadian provinces and territories. The committee, therefore, would encourage provincial prosecution services to consider adopting a similar practice.

Section 278.2 sets out the circumstances in which the third party records production regime will apply. The Privacy Commissioner of Canada told us that she was concerned about the possible use or misuse of records in which a complainant has a privacy interest, but which are already in the hands of the defendant. Such situations fall outside the scope of section 278.2 of the Code.

⁸² Tina Hattem, [Survey of Sexual Assault Survivors](#), Research Report No. 2000-4e, Department of Justice Canada, Ottawa, 2000, p. 20.

⁸³ Ibid.; Written Submission of Danièle Tessier and Carole Tremblay, Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel (CALACS), Montreal, 2 February 2012; Written Submission to the Standing Senate Committee on Legal and Constitutional Affairs from the Director of Public Prosecutions, Nova Scotia Public Prosecution Service, 8 September 2011, p. 3.

In the case of *R. v. Shearing*, a cult leader, accused of sexually abusing a teenager who resided in the cult's group residence, lawfully came into possession of the girl's abandoned diary years after the alleged offences took place. Defence counsel wished to cross-examine the complainant on the contents of the diary, in order to raise doubts about her credibility. The Supreme Court held that the third party record production scheme in the Code did not apply to the use or admissibility of the diary by the accused. Instead, in considering whether to allow for cross-examination on the diary, a judge was required to determine whether such cross-examination would create prejudice to the complainant that "*substantially outweighed*" its potential probative value to the accused. The default position in such circumstances was that the accused would be allowed to proceed with the cross-examination.

In making its determination in *R. v. Shearing*,⁸⁴ the Supreme Court was careful to draw a distinction between third party records proceedings, where evidence is not already in the hands of the accused, and admissibility hearings, where the accused is already in possession of the evidence. The Supreme Court indicated that the balancing of interests tests set out in *O'Connor* and in sections 278.2 to 278.91 of the Code were developed to deal with a situation where "the accused is not entitled to disclosure, and seeks the intervention of the state to put aside the privacy of a third party complainant."⁸⁵ This test could not be applied to limit cross examination or the admissibility of evidence because, in this case, "the state is asked by the complainant to intervene against the accused to deny him the use of information already in his possession. It is true that some of the same values must be weighed (e.g., full answer and defence, privacy, equality rights, etc.) but both the purpose and the context are quite different."⁸⁶

The committee could imagine similar problems arising where a person alleges that he or she was the victim of a sexual assault by that person's psychologist. Since the psychologist would have access to the records of a complainant's counselling sessions, defence counsel could use those records as a basis for cross-examination in a sexual assault trial.

The committee is mindful that the Supreme Court has held that the *Criminal Code* scheme governing records production is distinct from the rules that govern the admissibility of evidence or the permissible lines of cross-examination during criminal trials.⁸⁷ The principles of fundamental justice prevent the exclusion of evidence that tends to prove an issue in a case, unless its prejudicial effect substantially outweighs its probative value. We agree with Justice L'Heureux-Dubé's dissenting opinion in *R. v. Shearing*, however, that the "[p]rivacy rights and equality rights of the complainant overlap to some extent in assessing the potential prejudice of the questioning and the concomitant limits that should be placed on the right to full answer and defence."⁸⁸

We are of the view that accused persons should not be able to use information or adduce evidence obtained through possession of complainants' private records for the purpose of advancing "groundless myths and fantasized stereotypes" that encourage inferences pertaining to the consent or credibility of

⁸⁴ See *R. v. Shearing*, paras. 104-109.

⁸⁵ *Ibid.*, para. 107.

⁸⁶ *Ibid.* The Supreme Court found that in the specific circumstances of the case, the complainant's privacy interest in her diary did not substantially outweigh the accused's right to test the complainant's memory by cross-examination. See also: *R. v. Seaboyer*, p. 611; *R. v. Osolin*.

⁸⁷ See *R. v. Shearing*, paras. 94-98, 101-106. In her dissent, Justice L'Heureux-Dubé applied the same test.

⁸⁸ *R. v. Shearing*, paras. 164, 170, per L'Heureux-Dubé J.

sexual offence victims.⁸⁹ The committee agrees with the Privacy Commissioner that individuals may retain important privacy interests in information that is in the possession of an accused person. Moreover, we see no logical reason to deny to individuals who have been sexually victimized by persons with access to their personal records the same legal protection of their privacy, security and equality rights afforded to other victims of sexual offences.

Therefore, we believe that in a trial on a sexual offence charge, in which an accused is in lawful possession of a complainant's private records and wishes to use these records for the purposes of cross-examination or seeks to introduce them into evidence, judges should take into account, when weighing prejudicial effect against probative value, factors similar to those governing their determinations on third party records applications under section 278.5(2) of the Code and the admissibility of evidence of a complainant's prior sexual activity under section 276(3) of the Code.⁹⁰ These factors include:

- the interests of justice, including the right of the accused to make a full answer and defence;
- society's interest in encouraging the reporting of sexual offences;
- whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- the need to remove from the fact-finding process any discriminatory belief or bias;
- the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury and the effect of the determination on the integrity of the trial process;
- the nature and extent of the reasonable expectation of privacy with respect to the record in question and the potential prejudice to the complainant's personal dignity and right of privacy;
- society's interest in encouraging the obtaining of treatment by complainants of sexual offences;
- the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and,
- any other factor that the judge, provincial court judge or justice considers relevant.

In this context, the right of the accused to make full answer and defence ought to be understood in light of a complainant's privacy and equality interests, as set out by the majority of the Supreme Court in *Mills*, as well as the complainants' right to security of the person, including the individual's personal safety.⁹¹ In addition, the committee is of the view that the privacy, security and equality interests of complainants may, in some circumstances, require that a judge place limits on the ability of the accused to take personal possession of records. The evidence we have heard during this study has convinced us that an *in camera* hearing should be held before either the trial judge or a case-management judge to determine these issues. We are of the view that complainants should have the opportunity to make submissions during these hearings and should be granted procedural protections similar to those found

⁸⁹ *R. v. Mills*, para. 90; *R. v. Seaboyer*.

⁹⁰ See: *R. v. C.(T.)* (2004), 189 C.C.C. (3d) 473 (Ont. C.A.), paras. 28-30, per Rosenberg, J.A.: "That is not to say that in measuring the prejudicial effect of the use of the records under the *Seaboyer* test for the purpose of determining their admissibility, a trial judge cannot at least take into account the complainant's very high privacy interests in records relating to a therapeutic relationship." (para. 28)

⁹¹ *R. v. Mills*, para 94.

in the third party records production scheme, adapted as necessary to the determinations on the permissible use and admissibility of evidence. These protections should include the ability to request that the judge place conditions on access by an individual accused to records held by third parties.

Recommendation 4

That the Government of Canada consider amending the *Criminal Code* to set out a procedure governing the admissibility and use during trial of a complainant's private records, as defined in section 278.1 of the *Criminal Code*, which are not wrongfully in the hands of the accused. This procedure should define the purposes for which such records may not be admitted or used and set out the relevant factors for trial or case-management judges to consider in making their determinations, bearing in mind the rights of the accused under the *Canadian Charter of Rights and Freedoms*.

That complainants have the opportunity to make submissions at an *in camera* hearing and that appropriate procedural protections, along the lines of those contained in sections 278.1-278.91 of the *Criminal Code* be made applicable to such hearings.

Recommendation 5

That any new procedure governing the admissibility and use of complainants' private records in the hands of the accused give a complainant the opportunity to seek an order placing conditions on the use or disclosure of the records by the defence lawyer or the accused outside the trial context. There should also be consideration given to creating a mechanism by which a complainant can seek an order for the return of any or all records in the hands of the accused, effective immediately, or following the final disposition of the case.

3. Application for the production of records: Content, grounds and service (section 278.3 and 278.4 of the Criminal Code)

Section 278.3 of the Code states that at least seven days before an *in camera* hearing under section 278.4 is held to determine whether or not a third party record should be produced to the court for review, the accused is required to serve the production application on the prosecutor, on the person who has possession or control of the record, on the complainant or witness, as the case may be, and on any other person to whom the record relates. This application may be made fewer than seven days prior to the hearing if the judge decides that it would be in the interests of justice to do so.

An accused is required to serve a subpoena on the person who has possession or control of the record at the same time as the application is served.

As noted earlier, an accused who wishes to obtain the disclosure of a personal or therapeutic record, as defined above, must apply to the judge before whom the accused is going to be or is being tried. Such an application may not, however, be made at the preliminary inquiry. The application should be made in writing and contain information that will make it possible to identify the record and the name of the

person who has it in his or her possession. The accused must also provide reasons as to why the record is “likely relevant to an issue at trial or to the competence of a witness to testify.”⁹²

Section 278.3(4) lists the statements that, either individually or together, are insufficient to establish the likely relevance of the record.

The likely relevance threshold in section 278.3(3)(b) has been interpreted by the Ontario Court of Appeal in the case of *R. v. Batte* to mean that the accused must point to “case specific evidence or information” to justify the assertion that the records sought “contain information which is not already available to the defence or has potential impeachment value.”⁹³ The committee is of the view that this more precise and restricted understanding of likely relevance enhances protection for the privacy and equality rights of complainants. We have been told that this standard also has had the positive effect of restricting so-called “fishing expeditions” by the defence. While the *Batte* decision is binding on lower courts in Ontario, the decision does not bind courts across Canada. We believe that applying the *Batte* standard of “likely relevance” nationwide might be beneficial.

Recommendation 6

That section 278.3(3)(b) of the *Criminal Code* be closely reviewed and amended if necessary to reflect the interpretation of the “likely relevant” standard set out by the Ontario Court of Appeal in *R. v. Batte* (2000), 145 C.C.C. (3d) 449.

The Nova Scotia Public Prosecution Service suggested to us that section 278.3(1) of the Code does not ensure that third party records production applications are made well before trial, where possible.⁹⁴ In addition, they told us that the requirement in section 278.3(5) for the defence to serve the application on the complainant at least seven days before the date of the *in camera* hearing⁹⁵ does not give complainants enough time to decide how to respond to the application or to seek representation by independent counsel of their choice.⁹⁶ As a result, hearing dates may be adjourned, valuable court time wasted, and the trial process delayed. In our view, this concern is compounded in jurisdictions where the complainant needs to navigate the complexities of a provincial legal aid scheme in order to pay for a lawyer.

In considering this proposal, we were particularly concerned about how the seven-day notice period might affect complainants in remote or rural communities, where it may be difficult to have access to victim support services or to secure representation by counsel in such a short time. The committee agrees that a somewhat longer notice period between the application and the hearing would be more appropriate. The rules of criminal procedure that apply to proceedings before the superior courts in each province and territory set out timelines for applications in criminal proceedings, including for the timing of

⁹² Section 278.3(3)(b) of the *Code*.

⁹³ (2000), 145 C.C.C. (3d) 449, 49 O.R. (3d) 321, 134 O.A.C. 1, 34 C.R. (5th) 197, [2000] O.J. No. 2184 (Ont. C.A.), para. 75, per Doherty, J.

⁹⁴ The Nova Scotia Public Prosecution Service suggested that section 278.3(1) ought to require that applications be made at least 90 days prior to trial and that a 30-day notice period should apply in s. 278.3(5).

⁹⁵ This hearing is held under s. 278.4(1) of the *Code*.

⁹⁶ Information received by the committee from the Justice Services Branch, Ministry of the Attorney General of British Columbia on 20 December 2011 indicates that it is the practice in British Columbia for the Crown to request an adjournment where the complainant wishes to be represented by independent counsel on a third party records production application.

constitutional challenges. The committee believes that these rules could provide guidance as to any revised notice period for records production applications and observes that a notice period of roughly 15 days may be appropriate. Any new notice period must be fixed with due regard to the right of the accused to make full answer and defence and should be subject to waiver by the judge in the interests of justice.

Recommendation 7

That the Government of Canada consider amending section 278.3(5) of the *Criminal Code* to lengthen the minimum period of time between the service of the application for records production by the defence on relevant parties and the time of the hearing under section 278.4(1).

Here the committee pauses to consider the language in the subpoena referred to in sections 699(7) and 700(1) of the Code, which is the document to be served on third party records holders instructing them to bring records to the *in camera* hearing before a judge held pursuant to section 278.4. Witnesses have told the committee that there have been cases in which records-holders have mistakenly sent records directly to the defence or to the Crown after receiving subpoenas, apparently out of confusion. The committee believes that such problems could be avoided more easily if the subpoena were written in plain language that clearly outlined the witnesses' obligations.

We also believe that records holders should be notified of their entitlement, discussed further below, to make submissions during third party records production hearings in the form of a subpoena. This conclusion is closely connected with the important role that independent counsel plays in assisting complainants to defend their rights and interests in such proceedings.

Recommendation 8

That the form of the subpoena under sections 699(7) and 700(1) of the *Criminal Code* (form 16.1) be reviewed with the goal of:

- **providing clear instructions to witnesses and record holders in plain language.**
- **informing record-holders in plain language that they are entitled to make submissions during a hearing under section 278.4(2) or section 278.6(2) of the *Criminal Code*.**

A written explanation of the contents of the subpoena should also be available in all of the official languages of the Northwest Territories and Nunavut, and in the Aboriginal languages used in the Yukon.

- 4. Order that a record be disclosed to the judge for review and order for production of all or part of record to the accused: Factors and Considerations (sections 278.5 and 278.7 of the *Criminal Code*)**

Section 278.5 of the Code permits a judge to order the third party record-holder to produce records, in whole or in part, to the court for review. Before issuing such an order, the judge must be of the opinion that the application was made appropriately; that the record is likely relevant to an issue or the competence of a witness to testify; and, that disclosure would serve the interests of justice.

Section 278.5(2) of the Code requires the judge to consider “the salutary and deleterious effects” of his or her determination on the accused’s right to make full answer and defence and on the right to privacy and equality of the complainant or the witness, as the case may be, or on any other person to whom the record relates.

In particular, the judge is directed to take the following factors into account:

- the extent to which the record is necessary for the accused to make a full answer and defence;
- the probative value of the record;
- the nature and extent of the reasonable expectation of privacy with respect to the record;
- whether production of the record is based on a discriminatory belief or bias;
- the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
- society’s interest in encouraging the obtaining of treatment by complainants of sexual offences; and,
- the effect of the determination on the integrity of the trial process.

Similarly, sections 278.7(1) and (2) permit a judge to order, on the basis of the tests and in light of the factors set out in section 278.5, that the record be disclosed, in whole or in part to the accused.

Where the judge orders production of a record, section 278.7(3) allows the judge to impose conditions to protect the interests of justice and the privacy and equality interests of the complainant or witness. Such conditions might include:

- editing of the record by the judge;
- the production of a copy rather than the original record;
- a requirement that the contents not be disclosed outside the courtroom;
- a requirement that the record be reviewed at the court and not copied; and,
- a requirement that only a certain number of copies be made of the record and that identifying information such as addresses, name and place of employment be removed from the record.

Complainants, witnesses, records holders and any other person to whom the records in question relate may make submissions during any hearings on third party records applications.⁹⁷

The committee observes that while a sexual offence complainant’s right to security of the person is included in the preamble to Bill C-46, it is not included in the list of factors that a judge must consider when deciding whether to order the production of records for review under section 278.5. Similarly, personal security is not listed as a basis for making a judicial order placing conditions on the production of a record under section 278.7(3). A study by the Department of Justice provided to our committee tells of a woman who “reported that her self-represented abuser found her address on the police file

⁹⁷ Sections 278.4(2) and 278.6(3) of the *Code*.

[released to the defence], enabling him to intimidate her during the trial.”⁹⁸ Although this lapse occurred in the context of *Stinchcombe* disclosure, and not in the production of third party records, the committee believes that there may be cases where the disclosure of third party records could jeopardize a complainant’s security or the security of another person. In the committee’s view, such security risks may arise at the pre-trial phase and, in the event of a conviction, while the offender is serving a sentence or on parole, and after warrant expiry.

In our view, the implicit inclusion of security concerns in the context of the right to privacy is insufficient. We believe that counsel and judges in third party records production proceedings should be explicitly directed to consider the security interests of complainants and persons to whom the personal records may relate. We also believe that judges should be empowered, through explicit provisions in the Code, to impose conditions to protect the security of the complainant or another person if, in the judge’s view, security risks could arise as a result of the production of records to the defence.

The committee observes that in addition to the possibility of making the amendments to the Code that we propose below, there are opportunities for the Government of Canada to improve the safety and security of complainants by enhancing cooperation with its provincial and territorial counterparts in the provision of services to victims of crime. We discuss ways to improve this cooperation further in the next part of our report.

Recommendation 9

That the Government of Canada consider amending section 278.5(2) of the *Criminal Code* to add the complainant’s right to personal security as one of the factors to be considered by judges in the records production process.

Recommendation 10

That the Government of Canada consider amending section 278.7(3) of the *Criminal Code* to direct judges to take into account the effects of records production orders on the right to personal security of the complainant or any other person.

Section 278.7(4) of the Code states that any record ordered to be produced must also be released to the prosecutor, unless the judge is of the view that it is not in the interests of justice to do so. Records produced under this section are not permitted to be used in any other proceedings, pursuant to section 278.7(5). Unless a court orders otherwise, section 278.7(6) requires any records not produced to be sealed until the expiry of any appeal period, and then returned to the holder. Section 278.7(4) of the Code gives a judge the option of refusing to provide records to the Crown following a successful defence application for the production of third party records.

The Public Prosecution Service of Nova Scotia suggested that the Crown should always have access to records produced to the defence.⁹⁹ The committee agrees that the interests of a fair trial will best be served if the Crown has access to this information. In exceptional circumstances, however, the

⁹⁸ Hattem, *Survey of Sexual Assault Survivors*, 2000, pp. 20-21.

⁹⁹ Written Submission to the Standing Senate Committee on Legal and Constitutional Affairs from the Director of Public Prosecutions, Nova Scotia Public Prosecution Service, 8 September 2011, p. 5.

committee believes that it may be necessary for the judge to impose conditions with respect to the information disclosed to the Crown.

In addition, the concerns that the committee expressed earlier in this report regarding the possible need for judges to place conditions on use of or access to records by an individual accused, where the defence is already in possession of those records, apply equally in the context of records production applications under the Code.

Section 278.7(6) of the Code sets out requirements for dealing with records that are reviewed by the judge but that are not produced to the accused, including a requirement that the records should be returned to the complainant or the person lawfully entitled to their possession at the expiry of any appeal period and the completion of any appeal. We see no reason why records that are produced to the accused should not also be returned to the holder after the expiry of any appeal period. The committee believes that consideration should be given to amending the Code in consequence.

Recommendation 11

That the Government of Canada consider amending section 278.7(4) of the *Criminal Code* to delete the words “unless the judge determines that it is not in the interests of justice to do so” and instead make provision for the imposition of conditions relating to disclosure to the Crown.

Recommendation 12

That the Government of Canada consider adding a new subsection to section 278.7 of the *Criminal Code* to require that any records produced to the accused, and all known copies of such records, unless a court orders otherwise, be returned to the person lawfully entitled to possession or control of the records, within a reasonable time following the expiration of the time for any appeal and the completion of any appeal in the proceedings against the accused.

B. Recommendations Related to Sexual Offence Policy Development and the Provision of Assistance to Complainants and Victims of Crime

1. The Need for Comprehensive Assistance to Victims of Crime and Criminal Complainants

a. The Nature of the Problem

Throughout our study, we have heard testimony regarding the immense strains that the criminal trial process puts on complainants and their families. Undoubtedly, the difficulties associated with participating in a criminal trial are compounded by the intimate nature of sexual offences. We remain cognizant that criminal proceedings are exceptionally difficult for accused persons as well, who are presumed to be innocent of the charges laid against them. Nevertheless, we believe that there is a need to focus greater attention on the availability of support and treatment options for victims of sexual offences, whether or not they choose to go forward with criminal prosecutions. In our view, improving these victim services could enhance confidence in the justice system and, potentially, could encourage more victims of sexual offences to report crimes and pursue prosecutions.

The Department of Justice provided our committee with the results of a study involving sexual offence complainants that concluded, in relation to complainants in cases where a third party records application had been made, that these complainants lacked an “understanding of the criminal justice system overall and third party records applications in particular. Participants often responded that they did not know what had happened or did not understand the questions around the criminal justice procedures.”¹⁰⁰ Several participants whose personal records had been sought by the accused under the third party records production procedure in the Code were unaware of whether any of their records had actually been produced to the defence.¹⁰¹ Despite the small number of participants involved in this study, the committee is very concerned by these findings. Sexual offence complainants need to remain apprised of developments in cases that may affect their security, privacy and equality interests, in order to make informed decisions about how to proceed.

We believe that more effective services for crime victims and complainants need to be provided in Canadian courts. We are confident that this can be done without infringing on the rights of accused persons.

The committee also would like to stress the desirability of public awareness campaigns to increase public understanding of sexual offences and knowledge of the services available to victims.

b. Independent Counsel to Represent Complainants in Third Party Records Production Proceedings is Vital

Under sections 278.4(2) and 278.6(3) of the Code, complainants are entitled to make submissions in third party records production proceedings.¹⁰² In our view, representation by independent counsel can make a significant difference to a complainant’s ability to navigate the third party records application process, to assess any privacy or security risks that the process may create, and to make informed choices about how they wish to proceed. We are convinced that sexual offence complainants need to be represented by independent counsel in the context of third party records production applications under the Code. Witnesses who testified before us, including the Privacy Commissioner of Canada, those representing women’s and victims’ advocacy organizations, academics, provincial government representatives, and the defence Bar emphasized repeatedly that the most effective way for complainants to protect their privacy, security and equality interests is to have their own lawyer.¹⁰³ The

¹⁰⁰ McDonald & Northcott, 2011, p. 8.

¹⁰¹ Ibid. This finding related to the four of 34 individuals surveyed who hailed from the Northwest Territories and had been involved in records production applications.

¹⁰² In addition to complainants, the person in possession or control of the record, a witness, or any other person to whom the record relates may also appear: Code, s. 278.4(2).

¹⁰³ See, e.g.: [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 3, 1st Session, 41st Parliament, 20 October 2011 (Ms. Jennifer Stoddart, Privacy Commissioner of Canada); [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 4, 1st Session, 41st Parliament, 3 November 2011 (Mr. Phil Downes, Canadian Council of Criminal Defence Lawyers); [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 5, 1st Session, 41st Parliament, 17 November 2011 (The Honourable Andrew Swan, M.L.A., Minister of Justice and Attorney General, Government of Manitoba); [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 3, 1st Session, 41st Parliament, 26 October 2011 (Ms. Lee Lakeman, Canadian Association of Sexual Assault Centres; Sandy Onyalo, Ottawa Rape Crisis Centre, Mr. Steve Sullivan, Ottawa Victims Services); [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 19, 3rd Session, 40th Parliament, 3 February 2011 (Professor Karen Busby).

Federal Ombudsman for Victims of Crime highlighted the same point in her written submission to our committee.¹⁰⁴

The committee heard that in some cases complainants may be unaware that they are entitled to be represented by independent counsel during records production applications; they also may be unsure of how to engage such a lawyer and have difficulty accessing financial support in a timely manner where it is available. In some situations, there is confusion as to who should inform complainants about their entitlement to make submissions.¹⁰⁵

The committee requested and received responses regarding the provision of financial support for independent counsel in third party records production hearings from several provinces and territories.¹⁰⁶ The committee would like to thank the provincial and territorial governments and entities that provided information to us in the course of our study. The responses demonstrate that provinces and territories take different approaches to funding independent counsel for sexual offence complainants.

Several jurisdictions indicated that they do provide funding to allow complainants to retain independent counsel to represent them in third party records production hearings. In terms of the way in which such funding is provided, some jurisdictions fund complainants' independent counsel through their legal aid programmes, which pay a lawyer of the complainant's choice at the legal aid rate.¹⁰⁷ Other jurisdictions assist complainants in engaging counsel through their provincial victims' services programmes.¹⁰⁸

¹⁰⁴ Sue O'Sullivan, *Submission to the Standing Senate Committee on Legal and Constitutional Affairs, Statutory Review of Bill C-46 (1997) Production of records in Sexual Offence Proceedings*, Ottawa, Office for the Federal Ombudsman for Victims of Crime, December 2011 [Written Submission from the Federal Ombudsman for Victims of Crime]. Information received from the Information and Privacy Commissioner of Prince Edward Island on 15 November 2011 echoed this sentiment.

¹⁰⁵ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 19, 3rd Session, 40th Parliament, 2 February 2011 (Ms. Susan McDonald, Department of Justice Canada); [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 19, 3rd Session, 40th Parliament, 3 February 2011 (Professor Karen Busby); [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 3, 1st Session, 41st Parliament, 26 October 2011 (Mr. Steve Sullivan, Ottawa Victims Services).

¹⁰⁶ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 5, 1st Session, 41st Parliament, 17 November 2011 (The Honourable Andrew Swan, M.L.A., Minister of Justice and Attorney General, Government of Manitoba); Brief from the Northwest Territories Department of Justice to the Standing Senate Committee on Legal and Constitutional Affairs, *Response to the Legislative Review of the Operation of the Act to Amend the Criminal Code (Production of Records in Sexual Offence Proceedings)* S.C. 1997, c. 30, December 2011. Information was also received from: Nova Scotia Legal Aid, 28 November 2011; Prince Edward Island Legal Aid, 1 December 2011; the Honourable Marie-Claude Blais, Q.C., Attorney General of New Brunswick, 1 December 2011; the Honourable Felix Collins, Minister of Justice and Attorney General of Newfoundland and Labrador, 3 December 2011; The Justice Services Branch, Ministry of the Attorney General of British Columbia, 20 December 2011.

¹⁰⁷ British Columbia Justice Services Branch; Nova Scotia Legal Aid. Witnesses indicated to the committee that in Ontario, the provincial legal aid program generally covers the cost of independent counsel. However, the committee did not receive information from the province of Ontario and does not have precise details regarding the procedures followed: [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 19, 3rd Session, 40th Parliament, 2 February 2011 (Ms. Susan McDonald, Department of Justice Canada); [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 4, 1st Session, 41st Parliament, 3 November 2011 (Mr. Phil Downes, Canadian Council of Criminal Defence Lawyers); [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 19, 3rd Session, 40th Parliament, 3 February 2011 (Professor Karen Busby).

¹⁰⁸ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 5, 1st Session, 41st Parliament, 17 November 2011 (The Honourable Andrew Swan, M.L.A., Minister of Justice and Attorney General, Government of Manitoba); Nova Scotia Legal Aid; Minister of Justice and Attorney General of Newfoundland and Labrador.

Alternatively, certain jurisdictions provide complainants with financial assistance to engage independent counsel on an ad-hoc basis following an application by the complainant.¹⁰⁹

In jurisdictions where financial assistance for independent counsel is provided, funding may or may not be contingent on the complainant's financial means.¹¹⁰ There may also be limits on the types of records applications that are covered by the assistance program – in at least one jurisdiction, financial assistance is only available in third party records applications where counselling, medical or therapeutic records are sought.¹¹¹

In some jurisdictions there is no program to fund independent counsel for complainants in third party records production proceedings,¹¹² although we were informed that it is within the power of the court to appoint a lawyer for a complainant who wished to be represented in a records production application.¹¹³ The committee notes however, that there is no wording in sections 278.1-278.91 of the Code that explicitly reference's the court's power to appoint such counsel. The committee further notes that the power to appoint counsel does not necessarily constitute a guarantee of funding.¹¹⁴

In addition, in the course of our study we learned that the current Federal-Provincial-Territorial *Agreement Respecting Legal Aid in Criminal Law, Youth Criminal Justice Act and Immigration and Refugee Matters* focuses on legal assistance to persons charged with a criminal offence and is silent regarding the provision of financial assistance for the legal representation of complainants under section 278.1-278.91 of the Code.¹¹⁵

The committee underscores Justice Binnie's observation in *R. v. Shearing* that, in a third party records application, an accused person who is not entitled to disclosure of information is seeking the assistance of the state to set aside the complainant's privacy interests.¹¹⁶ In other words, such applications may be viewed as a search and seizure by the state that invokes the complainant's privacy rights.¹¹⁷ Prince Edward Island Legal Aid, which is able to provide financial assistance to help complainants engage independent counsel on an ad-hoc basis only, spoke to the issue in the following terms:

¹⁰⁹ Prince Edward Island Legal Aid.

¹¹⁰ The following jurisdictions indicated to us that they fund independent counsel regardless of a client's means: Manitoba, British Columbia, Nova Scotia, Newfoundland and Labrador. Information received from Prince Edward Island Legal Aid on 1 December 2011 appears to indicate a means test is applied in that province.

¹¹¹ Nova Scotia Legal Aid. Information received from Prince Edward Island Legal Aid indicates that the organization takes a variety of factors into account in determining whether to provide financial assistance to complainants.

¹¹² Brief from the Northwest Territories Department of Justice; Attorney General of New Brunswick.

¹¹³ Ibid.

¹¹⁴ Prince Edward Island Legal Aid noted there are at least four sections of the Code that empower the court to appoint counsel to be paid either by legal aid or by the Attorney General in the hearing and the power to tax disputed accounts: s. 672.24, s. 672.5, s. 684, and s. 694. Section 486.3 of the Code authorizes the court to appoint counsel to cross-examine a vulnerable witness in cases where the accused is self-represented, but neither this section nor the Code's third party records production provisions contain a reference to funding. Taxing a disputed account requires the court to consider the account of expenses submitted by counsel and determine the appropriate rate at which counsel will be paid by the Attorney General.

¹¹⁵ Prince Edward Island Legal Aid. The Government of Canada announced on 30 April 2012 that federal funding for the legal aid program will continue at current levels: Department of Justice, News Release, "[Government of Canada Announces Renewal of Legal Aid Program and Aboriginal Justice Strategy](#)," 30 April 2012.

¹¹⁶ *R. v. Shearing*, para. 107.

¹¹⁷ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 6, 1st Session, 41st Parliament, 24 November 2011 (Professor Lise Gotell). See also *R. v. Shearing*, para. 95.

Applicants, and in particular the families of young applicants, tend to have strong feelings of inequity about the entire process. They feel the complainant has already been victimized by the criminal offence and now she/he is being dragged into court and expected to spend significant sums of money to protect personal privacy and avoid further victimization. They are aggrieved when they see Crown and Legal Aid lawyers paid by the state, but yet they are expected to pay significant sums of money to retain their own lawyer.¹¹⁸

On the other hand, Professor Stuart noted that the complainant's entitlement to have independent counsel make submissions in records production hearings is anomalous in Canadian criminal law. He pointed out that the Crown prosecutor protects both the interests of the state and the interests of the complainant in other types of procedural and evidentiary hearings held during trials where the equality, security and privacy interests of a complainant are at stake, including hearings on the permissibility of questioning a sexual offence complainant on the complainant's past sexual history.¹¹⁹ Professor Stuart cautioned against imposing additional burdens on provincial budgets for the administration of justice and the provision of legal aid that are already stretched thin.¹²⁰

Given the important rights and interests at play in third party records production proceedings, the committee is of the view that all levels of government and the judiciary need to do more to ensure that complainants' entitlement to be represented by independent counsel is clearly communicated to them and to provide complainants with adequate information and assistance in order to engage counsel to act on their behalf. We hope that all provinces and territories will aspire to develop effective victims' services programmes, and to cover the costs associated with representation by independent counsel for complainants in all records applications proceedings, without recourse to a means test.

Recommendation 13

That the Government of Canada consider reviewing and amending the *Criminal Code* to require the judge to inform the complainant of his or her entitlement to independent counsel during any hearing held under sections 278.4(1) and 278.6(2) of the *Criminal Code*.

c. More Effective Victims' Services and Advocacy Programmes are Needed

In our study, we were told repeatedly that, beyond the narrow context of third party records applications, victims of sexual offences and criminal complainants have difficulty navigating the criminal justice system as a whole. Some witnesses suggested that it would be helpful for victims and complainants to have access to the assistance of advocate programmes that could help them to navigate the records production and trial processes. Such assistance would also be useful before criminal charges are laid and after a trial is finished. Witnesses suggested that such advocates could be provided through local community and advocacy organizations, through police forces, through provincial legal aid or victims' services programmes, or through other means. We were told that a number of such programmes

¹¹⁸ Prince Edward Island Legal Aid.

¹¹⁹ This procedure is set out in s. 276.1-276.2 of the Code.

¹²⁰ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 5, 1st Session, 41st Parliament, 16 November 2011 (Professor Don Stuart).

already exist that could be used as models, but that these programmes need to be implemented more widely.¹²¹

We are concerned that the provision of support and assistance for crime victims and criminal complainants appears to be uneven across Canada. We believe that concerted federal-provincial-territorial cooperation is needed to enhance the effectiveness of assistance to victims of crime and criminal complainants. We observe that victim fine surcharges may be a source of revenue that could be used by provincial governments to fund such programmes. It is our view that the provision of support and treatment services to victims of crime should be a topic for discussion at the next federal-provincial-territorial conference of Ministers of Justice and Public Safety.

The committee also believes that it is time to start a national dialogue about the needs of victims of crime and complainants in criminal trials and their participation in the criminal justice system. We believe that public input and discussion on these issues are needed to inform sound policy-making at the federal level. Such consultations could also benefit provincial and territorial governments seeking to improve their own programmes related to the administration of justice.

Recommendation 14

That at a subsequent federal-provincial-territorial conference, the Government of Canada discuss with its territorial and provincial counterparts ways to enhance cooperation, improve program delivery, and reduce discrepancies between urban and rural areas, and between the provinces and territories themselves, in the support and treatment programmes available to victims of crime and criminal complainants generally, and victims of sexual offences in particular.

d. Research, Support and Assistance to Meet the Specific Needs of Aboriginal, Northern and Disadvantaged or Marginalized Communities are Required

The committee wishes to draw attention to the unique needs of sexual offence complainants in northern, Aboriginal and disadvantaged or marginalized communities. Victims, complainants, accused persons, and convicted offenders from these communities experience crime and the criminal justice process in a sociological context very different from that prevailing in major urban centres.

The Ottawa Rape Crisis Centre told the committee that it is important to look at the differences in the effects of the production of records on marginalized communities, including immigrant and Aboriginal women or the mentally ill, whose members may face racism and discrimination on a daily basis. Both Ms. Sarah Kaplan, manager of the Cornwall Community Hospital assault and sexual abuse program, and Professor Lise Gotell emphasized that significant effort must be put into making Aboriginal people or women and men from marginalized or disadvantaged groups feel comfortable reporting sexual offences and seeking medical and psychological assistance. Professor Gotell highlighted for us the particularly detrimental effect that the production of complainants' records could have on such relationships by destroying the fragile trust that has taken a very long time to build.

¹²¹ [*Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*](#), Issue 3, 1st Session, 41st Parliament, 26 October 2011 (Ms. Lee Lakeman, Canadian Association of Sexual Assault Centres; Sandy Onyalo, Ottawa Rape Crisis Centre; Ms. Stefanie Lomatski, Ottawa Coalition to End Violence Against Women).

Witnesses from Statistics Canada who testified before our committee noted that there is a much higher incidence of sexual assault in the territories than in the provinces. Similarly, the Public Prosecution Service of Canada told us that sexual offences constitute a significant percentage of the cases that they prosecute in Canada's North.¹²²

The committee is concerned that sexual offence victims and complainants in these communities may not have access to the services and advice available in larger centres, such as independent counsel on records applications and other victims' services. We believe that it is important to address the specific needs of these communities in the context of broader efforts to improve the administration of criminal justice in Aboriginal, northern, rural, minority and disadvantaged or marginalized communities generally.

The committee agrees with witnesses that research to identify strategies for addressing the unique needs of victims of crime and complainants in northern, Aboriginal, rural and disadvantaged or marginalized communities is necessary.

2. The Need for Further Research

As indicated earlier in this report, we were told repeatedly during our study that there was a paucity of recent and comprehensive research available examining how the third party records scheme under the Code has been applied over the last 15 years. A number of studies were commissioned by the Department of Justice between 2002 and 2004 but, for the most part, these studies have not been updated.¹²³ In addition, several surveys of case-law have been undertaken by academic researchers to try to determine the prevalence of records applications, the rate at which judges grant or refuse these applications and the type of factors that are usually considered.¹²⁴ We were told that the available research indicates that records are obtained in roughly 30% of the cases in which they are sought, but we were warned that these results may not represent the complete picture.¹²⁵

There is a significant discrepancy in the availability of published decisions on records applications in different jurisdictions, and there is no way of knowing how many unpublished decisions exist. In our view, the lack of published decisions makes it difficult to understand how often records applications are made or how the legislation is being interpreted and applied across Canada. On the other hand, the committee takes seriously the Privacy Commissioner of Canada's concern that the electronic publication, in widely-accessible public databases, of such decisions could have a negative impact on the privacy rights of complainants and defendants.

¹²² [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 19, 3rd Session, 40th Parliament, 3 February 2011 (Ms. Julie McAuley, Statistics Canada); [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 19, 3rd Session, 40th Parliament, 2 February 2011 (Ms. Susanne Boucher, Public Prosecution Service of Canada).

¹²³ McDonald, Wobick & Graham, *Bill C-46: Records Applications Post-Mills*, 2004; Cameron, *Victim Privacy and the Open Court Principle*, 2003; Renate M. Mohr, [Words are not Enough: Sexual Assault: Legislation, Education and Information, Bills C-49 and C-46 Key Informant Study](#), Department of Justice Canada, Ottawa, 2002; Hattem, *Survey of Sexual Assault Survivors*, 2000; Tina Hattem, [Highlights from a Preliminary Study of Police Classification of sexual Assault Cases as Unfounded](#), *JustResearch*, No. 14, Department of Justice Canada, 2007, pp. 32-36.

¹²⁴ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 19, 3rd Session, 40th Parliament, 3 February 2011 (Professor Karen Busby); Lise Gotell, "Tracking Decisions on Access to Sexual Assault Complainants' Confidential Records: The Continued Permeability of Subsections 278.1–278.9 of the Criminal Code," *Canadian Journal of Women & the Law*, vol. 20, no. 111, 2008 [Gotell, "Tracking Decisions," 2008].

¹²⁵ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 19, 3rd Session, 40th Parliament, 3 February 2011 (Professor Karen Busby).

Researchers told us that their ability to study the effectiveness and impacts of the Code's third party records production regime was hampered because they were only able to access small sub-sets of data, such as published judicial decisions or interviews with a small number of key informants. As a result, the committee has considered the research findings presented to us with caution.

Provincial governments provided us with some quantitative information regarding third party records applications. Our committee had the pleasure of hearing from the Minister of Justice and Attorney General of Manitoba who told us that, since Bill C-46 came into force in 1997, there have been a total of 128 cases in Manitoba in which independent counsel was appointed and funded by the province to represent a complainant on a third party records production application.¹²⁶ This figure is roughly similar to that in British Columbia, where we were informed that the province's Legal Services Society has received an average of 15 requests per year under their referral program since 2001/2002.¹²⁷ The province of Newfoundland and Labrador has provided funding for legal representation of complainants in 19 sexual assault cases since the legislation came into force in 1997,¹²⁸ and Prince Edward Island has provided funding, on average, for fewer than one case each year over the last decade.¹²⁹

Witnesses from Statistics Canada noted that they lacked statistical data on applications for third party records. Statistics Canada indicated that third party records applications are not part of the published data set because they are not criminal charges. While it is working on collecting more data about matters in criminal courts, Statistics Canada has not fully investigated the possibility of linking motions and applications in the criminal justice process to individuals and their charges.¹³⁰ We believe that Statistics Canada should explore the possibility of creating and applying survey codes that could be used by the police and the courts to assist in tracking different steps in sexual offence proceedings as they move through the courts.

Professor Stuart suggested to us that the effectiveness of the third party records regime could be better understood if a wider range of statistical data were collected regarding the progress of sexual assault cases through the courts. He suggested that the following data ought to be collected:

- the number of sexual assault cases that are tried in provincial court where there is no preliminary inquiry;
- the number of preliminary inquiries that occur prior to the trial of sexual assault cases in Superior Courts;
- the numbers of written and oral rulings respecting third party records production; and,
- whether complainants are represented by counsel in records production hearings.

Professor Stuart also stressed that more research was needed into the impact of the 2004 changes restricting the use of preliminary inquiries in criminal cases to situations where such a hearing is

¹²⁶ [*Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*](#), Issue 5, 1st Session, 41st Parliament, 17 November 2011 (The Honourable Andrew Swan, M.L.A., Minister of Justice and Attorney General, Government of Manitoba).

¹²⁷ British Columbia Justice Services Branch.

¹²⁸ Minister of Justice and Attorney General of Newfoundland and Labrador.

¹²⁹ Prince Edward Island Legal Aid.

¹³⁰ [*Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*](#), Issue 19, 3rd Session, 40th Parliament, 3 February 2011 (Mr. Craig Grimes, Statistics Canada).

requested by the defence or the prosecution;¹³¹ whether defence counsel are able to effectively establish an evidentiary basis for third party records applications under the current scheme; and, the ways in which complainants secure legal representation in such applications.¹³² We also agree with the suggestion of the Privacy Commissioner that research is needed to determine whether judges do, in fact, order the imposition of conditions on records that are produced to protect the privacy rights of complainants and witnesses.¹³³ The rate of imposition of conditions to protect complainants' rights to equality and security should also be a focus of study. The committee believes that comprehensive and detailed information on these issues would be of value in assessing the effectiveness and impact of the third party records production scheme.

The committee would also like to stress the urgent need for more research on the crime of sexual assault in Canada in general. We agree with the Federal Ombudsman for Victims of Crime that there is a clear need for comprehensive research to be conducted on the functioning and impacts of the third party records production scheme in the Code, as well as the under-reporting of sexual assault more broadly.¹³⁴

The committee shares the concerns of the Privacy Commissioner, who highlighted the growing impact of the internet and other electronic means of communication on the privacy rights of individuals involved in the justice system. Research on the ways in which privacy concerns could be reconciled with other rights guaranteed under the *Canadian Charter of Rights and Freedoms* at play in the criminal justice process and the need to maintain the open court principle would be valuable.

In our opinion, input on these issues from a broad range of stake-holders, including federal and provincial departments and agencies, advocacy organizations, academics, and the general public, would be helpful.

Recommendation 15

That the Government of Canada support qualitative and quantitative research into the effectiveness of the records production scheme under the *Criminal Code*, the crime of sexual assault more generally and the adequacy of existing support services and justice sector responses.

Recommendation 16

That the Government of Canada explore the feasibility of studying the adequacy of data relating to victims of sexual offences in connection with sexual offence proceedings, as well as exploring the under-reporting of crime (lack of complaints) brought by victims.

¹³¹ These changes were contained in Bill C-15A: *An Act to Amend the Criminal Code and to Amend Other Acts*, S.C. 2002, c. 13, 3rd Session, 37th Parliament, ss. 24-46, 59, 89, 90. For more information on these changes, see: David Goetz, Gérald Lafrenière, [Legislative Summary of Bill C-15A: An Act to Amend the Criminal Code and to Amend Other Acts](#), 12 October 2001, Ottawa, Library of Parliament, Parliamentary Information and Research Service.

¹³² [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 5, 1st Session, 41st Parliament, 16 November 2011 (Professor Don Stuart).

¹³³ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 3, 1st Session, 41st Parliament, 20 October 2011 (Ms. Jennifer Stoddart, Privacy Commissioner of Canada).

¹³⁴ Written Submission from the Federal Ombudsman for Victims of Crime, pp. 6-7.

3. The Need for Additional Training Directed at Justice System Participants

Witnesses told the committee that providing sensitivity and other training to judges, Crown attorneys, and others in working in the justice sector on sexual offences and records production applications is vital. The testimony that we heard made clear that the full scope of the equality and privacy interests of complainants in sexual offence proceedings is not always well understood by the different players in the justice system.¹³⁵ Witnesses emphasized that training on third party records production proceedings should be on-going and specific to the region of the country in which these officials operate.¹³⁶ However, women's advocacy organizations who testified before our committee indicated that they had encountered difficulty providing input into judicial training programmes.¹³⁷

The committee believes that appropriate and on-going training for judges and Crown attorneys on sexual offences in general, and on third party records production applications in particular, is essential. We were pleased to learn that such training programmes do exist,¹³⁸ but we believe that this is an area in which more can be done. Training for justice sector workers should take care to sensitize participants to the importance of the privacy, security and equality interests to be taken into account in such proceedings, with a view to ensuring that all of these interests are fully considered in third party records production hearings. Training should give particular attention to the situation of Aboriginal, disadvantaged, marginalized and, where relevant, remote and northern communities. Such training programmes should be based on the input of a broad range of stakeholders, including advocacy organizations.

We observe that training such as that described above could also usefully be provided at the provincial level. Similarly, we hope that the findings and observations in this report may be of interest to the judiciary in the development of their own training programmes.

The possibility of creating specialized courts for sexual offences was also raised during our hearings.¹³⁹ The committee is of the view that better training for judges and Crown attorneys on the rights and interests at stake in third party records applications would be more useful at this point than the creation of specialized sexual violence courts.

¹³⁵ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 19, 3rd Session, 40th Parliament, 3 February 2011 (Professor Karen Busby); [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 6, 1st Session, 41st Parliament, 24 November 2011 (Professor Lise Gotell); [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 3, 1st Session, 41st Parliament, 20 October 2011 (Ms. Jennifer Stoddart, Privacy Commissioner of Canada); Mohr, *Words are Not Enough*, pp. 20, 25, 34; Gotell, "Tracking Decisions," 2008.

¹³⁶ See, e.g.: [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 19, 3rd Session, 40th Parliament, 3 February 2011 (Professor Karen Busby); [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 3, 1st Session, 41st Parliament, 26 October 2011 (Ms. Lee Lakeman, Canadian Association of Sexual Assault Centres; Ms. Stefanie Lomatski, Ottawa Coalition to End Violence Against Women; Ms. Sandy Onyalo, Ottawa Rape Crisis Centre); Written Submission from the Federal Ombudsman for Victims of Crime; [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 6, 1st Session, 41st Parliament, 24 November 2011 (Ms. Sarah Kaplan, Cornwall Community Hospital Assault and Sexual Abuse Program).

¹³⁷ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 3, 1st Session, 41st Parliament, 26 October 2011 (Ms. Stefanie Lomatski, Ottawa Coalition to End Violence Against Women).

¹³⁸ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 3, 1st Session, 41st Parliament, 26 October 2011 (Ms. Sandy Onyalo, Ottawa Rape Crisis Centre); [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 4, 1st Session, 41st Parliament, 3 November 2011 (Mr. Phil Downes, Canadian Council of Criminal Defence Lawyers).

¹³⁹ Ibid. Ms. Onyalo was in favour of specialized courts, while Ms. Lakeman and Mr. Downes expressed reservations.

Recommendation 17

That the Government of Canada ensure that all prosecutors employed or engaged by the Public Prosecution Service of Canada, as well as military prosecutors, receive specialized training on sexual offences and third party records production applications as a matter of course, including training on the unique needs of Aboriginal, northern, rural, minority and disadvantaged or marginalized communities. Training should continue to be conducted periodically throughout the course of an individual's career.

4. The Need for Attention to the Security of Victims of Crime and Criminal Complainants

One of the issues that our committee struggled with throughout these hearings is the persistent under-reporting of crimes of sexual violence. As we have discussed above, the reasons for under-reporting are complex and cannot be attributed to one single factor. We note that officials from Statistics Canada told us that, in most cases, victims of sexual offences know their assailants. In such a context, stigma, shame and fear, as well as a lack of faith in the justice system to provide effective redress, may all contribute to under-reporting. The problem of under-reporting cannot be solved through the third party records production procedure or the Code in isolation. We have recommended already that the Government of Canada support further research to look at the root causes of this important problem.¹⁴⁰ In this section, we review other avenues to address this pressing concern.

The evidence that we heard during this study has convinced us that more attention to the personal security of sexual offence complainants is needed as prosecutions make their way through the courts. We are also concerned about the security of victims of sexual offences after an offender is finally convicted and sentenced. For example, security concerns may arise as a result of an incarcerated offender's unwanted communications or from unwanted contact with the offender following conditional release from imprisonment or after the expiry of the offender's sentence. The mere prospect that an offender, un-monitored and unrestrained by enforceable release conditions, may be back in a victim's community within a few months or years of the offence could be enough to discourage reporting.

In order to begin to address these concerns, we believe that the existing legal and regulatory framework under the Code and the *Corrections and Conditional Release Act* (CCRA) could be used more effectively to protect the personal security of victims of sexual offences.¹⁴¹ Significant changes were

¹⁴⁰ [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 19, 3rd Session, 40th Parliament, 2 February 2011 (Ms. Susan McDonald, Department of Justice Canada); [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 3, 1st Session, 41st Parliament, 26 October 2011 (Ms. Stefanie Lomatski, Ottawa Coalition to End Violence Against Women; Ms. Sandy Onyalo, Ottawa Rape Crisis Centre); [Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs](#), Issue 6, 1st Session, 41st Parliament, 24 November 2011 (Ms. Sarah Kaplan, Cornwall Community Hospital Assault and Sexual Abuse Program).

¹⁴¹ [S.C. 1992, c. C-20](#).

introduced to the CCRA in Bill C-10, which received Royal Assent on 13 March 2012.¹⁴² For example, the timely and effective exchange of information with victims is now one of the purposes of the CCRA and a guiding principle for the Parole Board as it carries out its responsibilities.¹⁴³ In the committee's view this is an important improvement to the CCRA and one upon which additional protections for victims of sexual offences could be built.

If an offender is released prior to the end of the full term of sentence,¹⁴⁴ that offender is considered to be on conditional release.¹⁴⁵ Under section 133(3) of the CCRA, the Parole Board may place conditions on such an offender, for example by restricting his or her place of residence, during this time.¹⁴⁶ Following the coming into force of Bill C-10, the CCRA now allows the Parole Board to disclose additional information to victims of sexual offences about an offender, including information about the location of the offender on conditional release.¹⁴⁷ Victims also have the opportunity to make statements to the Parole Board prior to their assailant's temporary or conditional release.¹⁴⁸ It is the committee's view that these existing legislative provisions could offer an effective means of enhancing the safety and security of victims of sexual offences after an offender has been convicted and sentenced. Accordingly, all victims of sexual offences need to be informed in a timely fashion of the opportunity, if they so desire, to make submissions regarding any conditions that they wish to see placed on the individual in question.

The security of sexual offence victims and complainants could also be protected by the imposition of conditions on suspects, criminal defendants and convicted offenders under sections 810, 810.1 or 810.2 of the Code. These sections of the Code offer a supplementary tool to address security concerns, in particular before charges are laid, while an accused is on bail,¹⁴⁹ while an offender is on conditional release, if an offender's sentence is to be served in the community, or once an offender has completed his or her sentence. We are aware that these provisions have been criticized as difficult to enforce or time-consuming, tiring and traumatizing for victims. On the other hand, an individual who breaches conditions imposed under these sections of the Code can be arrested immediately by a police officer. In

¹⁴² [An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts](#), S.C. 2012, c. 1 [Bill C-10]. For an explanation of the changes that this bill made to the CCRA and other acts, see: Laura Barnett, Tanya Dupuis, Cynthia Kirkby, Robin MacKay, Julia Nicol & Julie Béchar, [Legislative Summary of Bill C-10: An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts](#), Library of Parliament, Parliamentary Information and Research Service, 5 October 2011 [Legislative Summary of Bill C-10].

¹⁴³ Bill C-10, ss. 54, 71, amending ss. 4 and 101 of the CCRA, respectively. For more information, see the Legislative Summary of Bill C-10, [section 6.2.1.3](#), on changes to the CCRA relating to victims of crime.

¹⁴⁴ Conditions under s. 133(1)(a) of the CCRA may be applied to offenders released on statutory release, parole, or on unescorted temporary absences authorized by the Parole Board under s. 116(1) of the CCRA. Statutory release, parole and unescorted temporary release are defined in s. 99(1) of the CCRA.

¹⁴⁵ CCRA, s. 128.

¹⁴⁶ Section 133(4.1) of the CCRA permits the releasing authority to require that an offender reside in a community-based residential facility or a psychiatric facility if there is an undue risk that the offender will commit certain offences, including most of the sexual offences to which the *Criminal Code* third party records production regime applies.

¹⁴⁷ [Bill C-10, s. 57\(2\)](#), amending s. 26(1)(b)(vi) of the CCRA.

¹⁴⁸ [Bill C-10, s. 96\(2\)](#), amending s. 140 of the CCRA. While review hearings must be held before an offender may be statutorily released or released on either day parole or full parole, the hearing is discretionary prior to the authorization of temporary absences: s. 140(1) and (2).

¹⁴⁹ Bail conditions may be placed on a criminal defendant under s. 515 of the *Code*. Many of these conditions are similar to those in ss. 810-810.2 of the *Code*. Bail conditions continue to apply to an individual for the duration of that person's release on bail.

our view, the challenge is to ensure that those who need protection are able to access it effectively. All victims should be informed of these tools in a timely fashion.

Furthermore, the committee is of the opinion that there needs to be a discussion between government, the legal and law enforcement communities, and civil society stakeholders around the more frequent imposition of lengthy post-release probation periods on offenders.

We also wish to highlight the dearth of easily-accessible and comprehensive information about sentencing in Canada. In our view, ensuring that real consequences attach to the commission of sexual offences, and that greater sustained attention is paid to sentencing for such offences, could increase victims' confidence in the justice system and may encourage more victims to come forward with complaints.

C. Concluding Comments

The committee is conscious that many of the recommendations in this report are practical in nature and would be of greatest interest to a specialist audience. We wish to ensure that this report reaches a broad range of such stakeholders outside the federal government. We hope that the conclusions and observations in our report will be of interest to provincial and territorial governments and to the judiciary as they grapple with issues relating to records production applications in their respective fields of competence.

Recommendation 18

That the Government of Canada report back to this committee on progress concerning matters in this report within two years of the tabling of the report in the Senate.

APPENDIX 1 – LIST OF ABBREVIATIONS

Bill C-10 - *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee protection Act and other Acts*, S.C. 2012, c. 1, introduced in the 1st Session of the 41st Parliament.

Bill C-46 - *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, S.C. 1997, c. 30, introduced in the 2nd Session of the 35th Parliament.

CCRA – *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

Charter – *The Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

Code – *Criminal Code*, R.S.C., 1985, c. C-46.

Third party records application – an application pursuant to the procedure set out in sections 278.1 – 278.91 of the *Criminal Code* for the production of a complainant's private records (as defined under section 278.1 of the *Criminal Code*), which is made by the accused in a criminal trial on a sexual offence charge.

APPENDIX 2 – LIST OF RECOMMENDATIONS

Recommendation 1

That the Government of Canada consider modifications to the definition of “record” found at section 278.1 of the *Criminal Code* to clarify that the only records not subject to the regime set out in the *Criminal Code* are those made by persons responsible for the investigation or prosecution of the offence that are relevant to the offence in question.

Recommendation 2

That the list of offences in section 278.2(1) of the *Criminal Code* be reviewed and amended if necessary to clarify that third party records production applications in trials for all historical sexual offences be dealt with under the *Criminal Code* regime, regardless of the date of commission of the offence.

Recommendation 3

That the Public Prosecution Service of Canada consider the most appropriate way to provide complainants with a standard, written explanation of the waiver provisions found at sections 278.2(2) and 278.3 of the *Criminal Code*, formulated in clear and easy-to-understand language, and that the Public Prosecution Service of Canada share the results of this study with its provincial counterparts. The explanation should also be available in all of the official languages of the Northwest Territories and Nunavut, and in the Aboriginal languages used in the Yukon.

Recommendation 4

That the Government of Canada consider amending the *Criminal Code* to set out a procedure governing the admissibility and use during trial of a complainant’s private records, as defined in section 278.1 of the *Criminal Code*, which are not wrongfully in the hands of the accused. This procedure should define the purposes for which such records may not be admitted or used and set out the relevant factors for trial or case-management judges to consider in making their determinations, bearing in mind the rights of the accused under the *Canadian Charter of Rights and Freedoms*.

That complainants have the opportunity to make submissions at an *in camera* hearing and that appropriate procedural protections, along the lines of those contained in sections 278.1-278.91 of the *Criminal Code* be made applicable to such hearings.

Recommendation 5

That any new procedure governing the admissibility and use of complainants’ private records in the hands of the accused give a complainant the opportunity to seek an order placing conditions on the

use or disclosure of the records by the defence lawyer or the accused outside the trial context. There should also be consideration given to creating a mechanism by which a complainant can seek an order for the return of any or all records in the hands of the accused, effective immediately, or following the final disposition of the case.

Recommendation 6

That section 278.3(3)(b) of the *Criminal Code* be closely reviewed and amended if necessary to reflect the interpretation of the “likely relevant” standard set out by the Ontario Court of Appeal in *R. v. Batte* (2000), 145 C.C.C. (3d) 449.

Recommendation 7

That the Government of Canada consider amending section 278.3(5) of the *Criminal Code* to lengthen the minimum period of time between the service of the application for records production by the defence on relevant parties and the time of the hearing under section 278.4(1).

Recommendation 8

That the form of the subpoena under sections 699(7) and 700(1) of the *Criminal Code* (form 16.1) be reviewed with the goal of:

- providing clear instructions to witnesses and record holders in plain language.
- informing record-holders in plain language that they are entitled to make submissions during a hearing under section 278.4(2) or section 278.6(2) of the *Criminal Code*.

A written explanation of the contents of the subpoena should also be available in all of the official languages of the Northwest Territories and Nunavut, and in the Aboriginal languages used in the Yukon.

Recommendation 9

That the Government of Canada consider amending section 278.5(2) of the *Criminal Code* to add the complainant’s right to personal security as one of the factors to be considered by judges in the records production process.

Recommendation 10

That the Government of Canada consider amending section 278.7(3) of the *Criminal Code* to direct judges to take into account the effects of records production orders on the right to personal security of the complainant or any other person.

Recommendation 11

That the Government of Canada consider amending section 278.7(4) of the *Criminal Code* to delete the words “unless the judge determines that it is not in the interests of justice to do so” and instead make provision for the imposition of conditions relating to disclosure to the Crown.

Recommendation 12

That the Government of Canada consider adding a new subsection to section 278.7 of the *Criminal Code* to require that any records produced to the accused, and all known copies of such records, unless a court orders otherwise, be returned to the person lawfully entitled to possession or control of the records, within a reasonable time following the expiration of the time for any appeal and the completion of any appeal in the proceedings against the accused.

Recommendation 13

That the Government of Canada consider reviewing and amending the *Criminal Code* to require the judge to inform the complainant of his or her entitlement to independent counsel during any hearing held under sections 278.4(1) and 278.6(2) of the *Criminal Code*.

Recommendation 14

That at a subsequent federal-provincial-territorial conference, the Government of Canada discuss with its territorial and provincial counterparts ways to enhance cooperation, improve program delivery, and reduce discrepancies between urban and rural areas, and between the provinces and territories themselves, in the support and treatment programmes available to victims of crime and criminal complainants generally, and victims of sexual offences in particular.

Recommendation 15

That the Government of Canada support qualitative and quantitative research into the effectiveness of the records production scheme under the *Criminal Code*, the crime of sexual assault more generally and the adequacy of existing support services and justice sector responses.

Recommendation 16

That the Government of Canada explore the feasibility of studying the adequacy of data relating to victims of sexual offences in connection with sexual offence proceedings, as well as exploring the under-reporting of crime (lack of complaints) brought by victims.

Recommendation 17

That the Government of Canada ensure that all prosecutors employed or engaged by the Public Prosecution Service of Canada, as well as

military prosecutors, receive specialized training on sexual offences and third party records production applications as a matter of course, including training on the unique needs of Aboriginal, northern, rural, minority and disadvantaged or marginalized communities. Training should continue to be conducted periodically throughout the course of an individual's career.

Recommendation 18

That the Government of Canada report back to this committee on progress concerning matters in this report within two years of the tabling of the report in the Senate.

APPENDIX 3 – SECTIONS 278.1 – 278.91 OF THE *CRIMINAL CODE*

DEFINITION OF "RECORD"

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

PRODUCTION OF RECORD TO ACCUSED

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

(a) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272 or 273,

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

(c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the [Criminal Code](#), chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988, or in any proceedings in respect of two or more offences that include an offence referred to in any of paragraphs (a) to (c), except in accordance with sections 278.3 to 278.91.

APPLICATION OF PROVISIONS

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

DUTY OF PROSECUTOR TO GIVE NOTICE

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

APPLICATION FOR PRODUCTION

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

NO APPLICATION IN OTHER PROCEEDINGS

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

FORM AND CONTENT OF APPLICATION

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

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

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

INSUFFICIENT GROUNDS

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

(a) that the record exists;

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

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

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

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

(f) that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;

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

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

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

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

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

SERVICE OF APPLICATION AND SUBPOENA

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

SERVICE ON OTHER PERSONS

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

HEARING IN CAMERA

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

PERSONS WHO MAY APPEAR AT HEARING

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

COSTS

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

JUDGE MAY ORDER PRODUCTION OF RECORD FOR REVIEW

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

- (a) the application was made in accordance with subsections 278.3(2) to (6);
- (b) the accused has established that the record is likely relevant to an issue at trial or to the competence of a witness to testify; and
- (c) the production of the record is necessary in the interests of justice.

FACTORS TO BE CONSIDERED

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

- (a) the extent to which the record is necessary for the accused to make a full answer and defence;
- (b) the probative value of the record;
- (c) the nature and extent of the reasonable expectation of privacy with respect to the record;
- (d) whether production of the record is based on a discriminatory belief or bias;
- (e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;

- (f) society's interest in encouraging the reporting of sexual offences;
- (g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
- (h) the effect of the determination on the integrity of the trial process.

REVIEW OF RECORD BY JUDGE

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

HEARING *IN CAMERA*

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

PROVISIONS RE HEARING

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

JUDGE MAY ORDER PRODUCTION OF RECORD TO ACCUSED

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

FACTORS TO BE CONSIDERED

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

CONDITIONS ON PRODUCTION

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

- (a) that the record be edited as directed by the judge;
- (b) that a copy of the record, rather than the original, be produced;
- (c) that the accused and counsel for the accused not disclose the contents of the record to any other person, except with the approval of the court;

- (d) that the record be viewed only at the offices of the court;
- (e) that no copies of the record be made or that restrictions be imposed on the number of copies of the record that may be made; and
- (f) that information regarding any person named in the record, such as their address, telephone number and place of employment, be severed from the record.

COPY TO PROSECUTOR

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

RECORD NOT TO BE USED IN OTHER PROCEEDINGS

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

RETENTION OF RECORD BY COURT

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

REASONS FOR DECISION

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

RECORD OF REASONS

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

PUBLICATION PROHIBITED

278.9 (1) No person shall publish in any document, or broadcast or transmit in any way, any of the following:

- (a) the contents of an application made under section 278.3;
- (b) any evidence taken, information given or submissions made at a hearing under subsection 278.4(1) or 278.6(2); or

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

OFFENCE

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

APPEAL

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

APPENDIX 4 – LIST OF WITNESSES AND SUBMISSIONS

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

ORGANIZATION	NAME, TITLE	DATE OF APPEARANCE	COMMITTEE ISSUE No.
41st Parliament 1st Session			
Office of the Privacy Commissioner of Canada	Stoddart, Jennifer	2011-10-20	3
Office of the Privacy Commissioner of Canada	Morris, Regan	2011-10-20	3
Canadian Association of Sexual Assault Centres	Lakeman, Lee	2011-10-26	3
Ottawa Victims Services	Sullivan, Steve	2011-10-26	3
Ottawa Rape Crisis Centre	Onyalo, Sandy	2011-10-26	3
Ottawa Coalition to End Violence Against Women	Lomatski, Stefanie	2011-10-26	5
Canadian Council of Criminal Defence Lawyers	Downes, Phil	2011-11-03	4
Stuart, Donald, as an individual	Professor, Queen's University	2011-11-16	5
Minister of Justice and Attorney General of Manitoba	Swan, The Honourable Andrew	2011-11-17	5
University of Alberta	Gotell, Lise	2011-11-24	6
Cornwall Community Hospital Assault and Sexual Abuse Program	Kaplan, Sarah	2011-11-24	6
40th Parliament 3rd Session			
Public Prosecution Service of Canada	Boucher, Susanne	2011-02-02	19
Public Prosecution Service of Canada	Tulloch, Bonnie	2011-02-02	19

ORGANIZATION	NAME, TITLE	DATE OF APPEARANCE	COMMITTEE ISSUE NO.
Department of Justice Canada	Kane, Catherine	2011-02-02	19
Department of Justice Canada	McDonald, Susan	2011-02-02	19
Statistics Canada	McAuley, Julie	2011-02-03	19
Statistics Canada	Grimes, Craig	2011-02-03	19
Statistics Canada	Dauvergne, Mia	2011-02-03	19
Busby, Karen, as an individual	Professor, University of Manitoba	2011-02-03	19

WRITTEN COMMUNICATIONS AND BRIEFS RECEIVED BY THE COMMITTEE:

- Federal Ombudsman for Victims of Crime
- The Honourable Marie-Claude Blais, Q.C., Attorney General of New Brunswick
- The Honourable Felix Collins, Minister of Justice and Attorney General of Newfoundland and Labrador
- Department of Justice of the Northwest Territories
- The Honourable Marian C. Horne, Minister of Justice of the Yukon
- Information and Privacy Commissioner of Prince Edward Island
- Prince Edward Island Legal Aid
- Premier's Action Committee on Family Violence Prevention (Prince Edward Island)
- Provincial Victims Services Program, Court Services Division, Department of Justice of Nova Scotia
- Public Prosecution Service of Nova Scotia
- Justice Services Branch, Ministry of the Attorney General of British Columbia
- Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel (Regroupement des CALACS)
- Making a Difference Canada
- Child Adolescent and Family Mental Health, Alberta (CASA)

