An Analysis of Third Party Record Applications Under the *Mills* Scheme, 2012-2017: The Right to Full Answer and Defence versus Rights to Privacy and Equality

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ABSTRACT

Over the last several decades, third-party record applications have begun to eclipse the use of prior sexual history as the main tool for challenging the credibility of sexual assault complainants in criminal trials. This article outlines the early common law and statutory developments governing the use of third-party record applications, identified as the "*Mills* scheme," and analyzes these cases through the lens of how they balance the privacy and equality rights of complainants with the right to full answer and defence of accused persons. The author then examines the decisions of 22 cases at the Ontario Superior Court during the period of 2012-2017 that applied the "*Mills* scheme," finding that in nearly 50% of those cases, disclosure of records in which the complainant had a high privacy interest was ordered by the court.

The author argues that the s. 278 provisions of the *Criminal Code* direct judges to weigh defendant's legal rights against both the privacy and security of the person rights of complainants, in light of the equality context, while

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considering factors such as discriminatory myths and society's interest in having complainants report their experiences to the police. In *Mills*, however, the Court's guidelines for the application of s. 278 rendered the provisions more malleable than they were intended to be. These guidelines include: stress placed on the importance of judicial discretion; the court's description of subsection 278.5(2)'s factors as a "checklist" that "may come into play during a judge's deliberation"; and, most importantly, its holding that fair trial rights must prevail over privacy rights in "uncertain" situations. The author finds that these *Mills* guidelines continue to be relied upon most heavily in cases where production is ultimately ordered. Conversely, in cases where production is not ordered, the analysis more closely follows the provisions themselves. Finally, in some cases, there is no apparent analysis of competing rights at all.

> ...I think they really, truly need to understand there needs to be better education on the side of law enforcement, or on the judicial side, as to why it is so under-reported; why people feel such a sense of shame; why victims will blame themselves or feel responsible [...] why people tend to get away with this and why people are reluctant to come forward...[1]

> I think at all times the victim should be given the utmost of respect. If it's proven, it's proven...and it isn't, it isn't, but by disrespecting the person who was victimized doesn't prove anything. It should be based on proof. The victim shouldn't have to be humiliated once more.[2]

> The rape trial gives sexual violence a public form, while at the same time inscribing it within a discourse in which women are forced to present an inadequate, hysterical subjectivity. The mechanism of records disclosure is a central contemporary enactment of this process of hysterization...[3]

> Like sexual history evidence, information gathered from records is used to create a distinction between the complainant and the 'ideal victim.' If once the ideal

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1 Canada, Research and Statistics Division, *A Survey of Survivors of Sexual Violence in Three Canadian Cities,* by Melissa Lindsay (Ottawa: Department of Justice Canada, 2014) at 25.

2 *Ibid* at 24.

3 Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 Osgoode Hall LJ 251 at 258–259 [Gotell, "Ideal Victim"].

> victim was characterized by her chastity and sexual morality, the new ideal victim is consistent, rational, self-disciplined, and blameless.[4]

Keywords: third party record; sexual assault; *R v O'Connor*; *R v Mills*; section 278; equality rights; privacy rights; right to full answer and defence.

I. INTRODUCTION

Since 1991, Canadian common law surrounding third-party record applications has been developing in response to new information about the realities of sexual assault for complainants. The epigraphs illustrate the importance of discerning the role of third-party record applications in sexual assault trials today; they represent a relatively new site of controversy in Canadian law that has eclipsed the use of prior sexual history as the main tool for challenging credibility.[5] As the law continues to invade the extra-legal settings through which women have been able to express their experiences of sexual violence, such as therapy, complainants must be prepared to endure an "unprecedented level of scrutiny"[6] during trial.[7] This article will outline the common law and statutory developments regarding third-party record applications in sexual assault trials, and examine the decisions of 22 cases over the last five years at the Ontario Superior Court that have applied s. 278 of the *Criminal Code* and *R v Mills*. It will expand upon the earlier works of Canadian legal scholar Lise Gotell, who suggested that prioritization of competing rights in the *Mills* decision has led to inconsistent judicial application of the s. 278 provisions. This article will argue that this trend has continued in the more recent cases, resulting in a near 50% disclosure rate of records in which complainants have a high privacy interest; an interest that is too often ignored or under-analyzed by the judiciary in these cases.

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4 *Ibid.*

5 *Ibid* at 260.

6 *Ibid.*

7 *Ibid*; David M Tanovich, "Whack No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases" (2013) 45 Ottawa L Rev 495 at 505 [Tanovich, "Ethics of Defence"].

II. COMMON LAW AND STATUTORY DEVELOPMENT REGARDING THIRD-PARTY RECORD APPLICATIONS

A. *R v O'Connor* [1995]

R v O'Connor is a leading Supreme Court of Canada decision on disclosure of medical and therapeutic records in criminal cases.[8] A five-person majority held that these records can be disclosed to the defence by order of the judge if they meet several requirements.[9] First, a court must decide whether the document should be disclosed to the judge for further inspection. Here, the accused must establish that the records are "likely relevant" to an issue at trial. At this stage, as the majority in *O'Connor* described it, relevance is expressed in terms of "whether the information may be useful to the defence,"[10] and is meant only to protect against "'speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming requests' for production."[11]

If the defence is successful in showing likely relevance at the first stage, the judge will then review the content of the records to determine whether they should be disclosed to the defence; in whole, in part, or not at all. "Likely relevance," at the production stage, should be a higher threshold than at the disclosure stage. In the words of the Court, "the presiding judge must be satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or to the competence of the witness to testify."[12] At this stage, the judge is to balance the "salutary and deleterious effects" of production.[13] Factors to consider include:

> (1) the extent to which the record is necessary to make full answer and defence;
> (2) the probative value of the record;
> (3) the nature and extent of the reasonable expectation of privacy vested in that record;
> (4) whether production would be premised upon any discriminatory belief or bias, and;

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8 *R v O'Connor*, [1995] 4 SCR 411 at 427, 130 DLR (4th) 235 [*O'Connor*].

9 *Ibid* at 434–435.

10 *Ibid* at 436.

11 *Ibid* at 438.

12 *Ibid* at 436.

13 *Ibid* at 441.

> (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record.[14]

The majority on this issue concluded by saying that the effect of production, or non-production, on the integrity of the trial, is more appropriately dealt with at the admissibility stage of the evidence, and not in deciding whether the information should be produced. Moreover, in considering society's interest in the reporting of sexual crimes, the Court held that there are other avenues available to the judge to ensure that production does not frustrate that societal interest.[15]

The dissent on this issue stated that in deciding whether to order production of private records, the court must exercise its discretion in a way that is consistent with *Charter* values.[16] The values involved in this instance are the right to full answer and defence, the right to privacy, the right to security of the person, and the right to equality without discrimination.[17] Moreover, they held that because third-party records "do not form part of the Crown's 'case to meet,'" it cannot be assumed that such records are likely to be relevant.[18] In the dissent's view, "the burden on an accused to demonstrate likely relevance is a significant one."[19]

The dissenting judges decided that the trial judge must first balance the "salutary and deleterious effects of ordering that the records be produced to determine whether, and to what extent, production should be ordered"[20] having regard to the constitutional issues at play on both sides, before ordering production for judicial inspection.[21] After determining that the records should be produced to the court, the dissent then suggested seven factors to be considered when deciding whether the records should be disclosed to the defence. The first five factors are the same as what the majority decision had outlined, with two additions:

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14 *Ibid* at 442.

15 *Ibid.*

16 *Ibid* at 480.

17 *Ibid.*

18 *Ibid.*

19 *Ibid* at 497.

20 *Ibid* at 493.

21 *Ibid.*

> (6) the extent to which production would frustrate society's interest in encouraging the reporting of sexual offences and the acquisition of treatment by victims; and
> (7) the effect on the integrity of the trial process of producing, or failing to produce, the record, having in mind the need to maintain consideration in the outcome.[22]

Finally, the dissent suggested that "where a court concludes that production is warranted, it should only be made in the manner and to the extent necessary to achieve that objective."[23]

B. Section 278 Provisions [1997]

After the majority decision in *O'Connor* was released, there was significant backlash from women and feminist groups.[24] Extensive consultations were undertaken by the Canadian government at this time, which eventually led to the passing of Bill C-46, later becoming ss. 278.1 to 278.9 of the *Criminal Code* in 1997.[25] These provisions retain the two-step test from *O'Connor*, but expand the range of factors to be considered in production applications to include all the factors that were set out by the dissent, as described above.[26]

C. *R v Mills* [1999]

Two years after the changes to the *Criminal Code*, an eight-person majority of the Supreme Court upheld the s. 278 provisions as constitutional in *R v Mills*.[27] Deference was given to the decision of the federal government in enacting the provisions, despite that they departed from the majority holding in *O'Connor,* because of their lengthy consultations on the subject.[28] To this end, the Court held that "Parliament

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22 *Ibid* at 504.

23 *Ibid* at 506.

24 Ontario Women's Justice Network, "Evolution of the Law about Third-Party Records" (2016), online: <http://owjn.org/2016/05/evolution-of-the-law-about-third-party-records/>.

25 Jennifer Koshan, "Multiple Sexual Offence Proceedings and the Disclosure of 'Records' Under the Criminal Code" (10 November 2010), *ABlawg* (blog), online: <https://ablawg.ca/2010/11/10/multiple-sexual-offence-proceedings-and-the-disclosure-of-"records"-under-the-criminal-code/>.

26 *Criminal Code,* RSC 1985, c C-46, ss 278.1–278.9.

27 *R v Mills*, [1999] 3 SCR 668, 180 DLR (4th) 1 [*Mills*].

28 *Ibid* at 744.

may build on the Court's decision, and develop a difference scheme as long as it meets the required constitutional standards."[29]

In arriving at the decision of constitutionality, the Court considered whether the procedure established in Bill C-46 violated the principles of fundamental justice, two of which seemed to conflict: the right to full answer and defence and the right to privacy. The Court held that "[n]either right may be defined in such a way as to negate the other and both sets of rights are informed by the equality rights at play in this context."[30] In balancing the principles of fundamental justice under s. 7 of the *Charter*, the Court took to defining each of them.

For one, the right of an accused to make full answer and defence was described as "crucial to ensuring that the innocent are not convicted."[31] As explained by the Court, this right does not include the right to evidence that would distort the search for truth.

The right to privacy was framed by the Court as falling within s. 8 of the *Charter*, because an order for the production of records made pursuant under ss. 278.1 to 278.9 of the *Criminal Code* would constitute a seizure under s. 8. The Court delineated the following approach on the right to privacy, which is worth reproducing here:

> An order for the production of records made pursuant to ss. 278.1 to 278.91 of the *Criminal Code* is a seizure within the meaning of s. 8 of the *Charter*. The reasonable expectation of privacy or right to be left alone by the state protected by s. 8 includes the ability to control the dissemination of confidential information. Privacy is also necessarily related to many fundamental human relations. The therapeutic relationship is one that is characterized by trust, an element of which is confidentiality. The protection of the complainant's reasonable expectation of privacy in her therapeutic records protects the therapeutic relationship and the mental integrity of complainants and witnesses. Security of the person is violated by state action interfering with an individual's mental integrity. Therefore, in cases where a therapeutic relationship is threatened by the disclosure of private records, security of the person and not just privacy is implicated.[32]

The Court also took to framing the rights of full answer and defence, and privacy, within the context of equality concerns. Namely, "[a]n

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29 *Ibid.*

30 *Ibid* at 688.

31 *Ibid* at 720.

32 *Ibid*; see court-written summary of the case on CanLII.

appreciation of myths and stereotypes in the context of sexual violence is essential to delineate properly the boundaries of full answer and defence."[33]

Ultimately, the Court held that the new *Criminal Code* provisions did not violate s. 7 of the *Charter*. The provisions, by themselves, did not deny access to documents to which the defence is constitutionally entitled. Instead, the Court held that it was open to Parliament to determine a procedure in which it could be delineated by a court whether the records were likely relevant and necessary in the interests of justice, based on a balancing of both the right to full answer and defence, and the right to privacy, as well as security of the person and equality concerns.[34]

To this end, because the privacy rights of complainants in third party record applications were affirmed by the Supreme Court, the *Mills* decision could be viewed as a feminist legal victory. However, despite deferring to the expertise of Parliament, the holding in *Mills* arguably 'watered down' the s. 278 provisions. For example, the Court reverted to the reasoning of the majority in *O'Connor* on the following point: "If a record is established to be "likely relevant" and, after considering the various factors, the judge is left uncertain about whether its production is necessary to make full answer and defence, then the judge should rule in favour of inspecting the document."[35] In *O'Connor*, Justice L'Heureux-Dubé had stated that "[i]n borderline cases, the judge should err on the side of production."[36] Arguably, this logic does not "balance" the competing rights, as Parliament intended, but instead allows for an 'edging out' of the privacy rights of the complainant, in favour of the right to full answer and defence.

Similarly, in addressing the argument that the judge cannot consider factors listed in s. 278.5(2) without looking at the records, the Court in *Mills* suggested that the provision "does not require that the judge engage in a conclusive and in-depth evaluation of each of the factors."[37] Instead, the Court held that it requires the judge only to take the factors "into account."[38] The factors are described as a "check-list" of the various considerations that "may come into play in making the decision regarding

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33 *Ibid* at 727.

34 *Ibid* at 755.

35 *Ibid* at 748.

36 *O'Connor*, *supra* note 8 at 502.

37 *Mills*, *supra* note 27 at 749.

38 *Ibid* at 751.

production to the judge."[39] To this end, the Court in *Mills* does not prescribe that judges adhere strictly to what Parliament outlined in s. 278.5(2).

At the beginning of the *Mills* decision, in deciding to give deference to Parliament (or at least some deference), the unanimous Court in *Mills* emphasized that Parliament can be a significant ally for vulnerable groups:

> In adopting Bill C-46, Parliament sought to recognize the prevalence of sexual violence against women and children and its disadvantageous impact on their rights, to encourage the reporting of incidents of sexual violence, to recognize the impact of the production of personal information on the efficacy of treatment, and to reconcile fairness to complainants with the rights of the accused.[40]

However, the Court's decision ultimately allows for the scales of justice to tip in the direction of the accused, if the judge is so much as "uncertain" about whether the production of private records is necessary to make full answer and defence. This language, albeit subtle, allows room for the lower courts to order the production of records, even when that decision may go against the aforementioned intentions of Parliament in enacting the s. 278 provisions.

D. *R v Batte* [2000]

The most recent higher-court development on this issue occurred in 2000 with the Ontario Court of Appeal decision in *R v Batte*. The case clarified the "likely relevance" threshold set out in the s. 278 provisions. The Court held that therapeutic records pass the "likely relevance" test from s. 278.3 only if there is some basis for concluding that the statements can (a) provide the accused with some added information not already available to the defence, or (b) have some potential impeachment value.[41] The effect of this decision was to slightly raise the threshold for producing records to the court.[42]

While *Batte* represents a favourable development, the "*Mills* scheme" maintains its direction from the Supreme Court that allows for an interpretation of s. 278 which privileges defendants' fair trial rights over

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39 *Ibid* at 749.

40 *Ibid* at 670.

41 *R v Batte*, [2000] 49 OR (3d) 321 at paras 71–72, 145 CCC (3d) 449.

42 Gotell, "Ideal Victim," *supra* note 3.

complainants' rights to privacy and equality. This article examines the interpretations of lower courts, where the *Mills* scheme has been given meaning, to determine whether this prioritization has remained an issue in the most recent cases.

III. THE EARLY CASES

Canadian legal scholar Lise Gotell has examined the early decisions of lower courts in relation to the *Mills* scheme. She found that case law between 1999 and 2002 suggested a reduced likelihood of the disclosure of records, stemming from the insistence in *Mills* and *Batte* on a strong evidentiary basis for the "likely relevant" test.[43] However, even in decisions where the court refused to grant access to the records, the courts' analyses were "highly individualistic"[44] in considering the potential consequences of disclosure. Gotell argued that this framing denied the systemic nature of sexual violence, "containing women's words about their experiences within a rigidly demarcated and depoliticized personal space."[45] Moreover, this sort of judicial analysis ignores Parliament's direction, and the affirmation in *Mills*, that it is important for courts to consider both the equality concerns and the societal issues at play. Decisions to intrude upon this personal space seemed to hinge upon "assertions about the disordered and hysterical character of complainants."[46] These decisions, Gotell argued, have been legitimized by the conception of a fair trial, giving wide scope for rigorous credibility testing of complainants.[47]

Four years after the publication of her first piece, Gotell analyzed another series of third-party record applications from 2002 until 2006. She found that in about half of the cases she analyzed, production of at least some of the personal records was ordered.[48] More specifically, of the fourteen cases analyzed, seven applications were dismissed, seven resulted

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43 *Ibid* at 256.

44 *Ibid.*

45 *Ibid.*

46 *Ibid.*

47 *Ibid* at 266–267.

48 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*" (2008) 20:1 CJWL 111 at 127 [Gotell, "Tracking"].

in the production of at least some records to the court, and five resulted in the disclosure of records or edited portions of records to the defence.[49] To Gotell, this suggested that access to complainants' records under s. 278 had been "rendered permeable through judicial interpretation"[50] over time.[51] Gotell indicated several factors that she found to have contributed to this trend.

First, Gotell found that the higher threshold requirement from *Batte* was almost universally cited in the 2002-2006 decisions.[52] However, while this may have been expected to reduce the likelihood of records passing the first stage of production, increased reliance on the decision was "offset by cases in which the threshold for production is simply sidestepped, sometimes by agreement of the complainants and/or record holders and sometimes by the disturbing tendency of judges to ignore the threshold standard or bypass this stage entirely."[53] Moreover, even in cases where the standard in *Batte* was used to dismiss applications for record production, Gotell found that judges frequently detailed the ways in which applications might meet the "likely relevance" threshold. This tactic, in Gotell's opinion, highlighted the continued possibilities for hystericizing complainants, which would go against the principles iterated by Parliament in enacting the s. 278 provisions.

Second, Gotell emphasized the role of the *Mills* decision in allowing so many production orders to be granted. While the s. 278 provisions direct judges to weigh defendants' fair trial rights against the privacy and equality rights of complainants, and to consider factors such as society's interest in the reporting of sexual violence, the stress in *Mills* on judicial discretion, and its argument that fair trial rights should prevail when judges are "uncertain," has the effect of allowing production more often than not. The iterations of these *Mills* instructions, as Gotell describes them, are evident in the too-brief analyses of judges in these cases, as well as their excision of equality concerns from the balancing equation, and the privileging of the

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49 *Ibid.*

50 Lise Gotell, "When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2006) 43:3 Alta L Rev 743 at 757.

51 *Ibid.*

52 Gotell, "Tracking," *supra* note 48 at 128.

53 *Ibid.*

legal rights of the accused.[54] These trends, as analyzed and described by Gotell prior to 2006, remain prevalent in many of today's cases as well.

IV. ANALYSIS OF POST-*MILLS* DECISIONS, 2012-2017

A. Methodology

This article examines twenty-two cases at the Ontario Superior Court between 2012 and 2017, each dealing with a third-party records application in the context of a charge of sexual assault or other crimes involving criminal sexual behaviour. The time frame of 2012-2017 was chosen because it allows for in-depth analysis of the most recent third-party record applications, in order to establish whether there are any trends in judicial decision-making that can inform policy-making or jurisprudence in this area going forward. Ontario Superior Court cases were chosen because this is the forum in which most third-party record applications are processed in Ontario. All of the cases analyzed were publicly available on CanLII at the time of writing.

B. Basic Findings

As seen in Appendix A, the most common applications by defence counsel were for counselling records,[55] followed by Children's Aid Society

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54 *Ibid.*

55 *R v MC,* 2012 ONSC 1676 at para 3, 100 WCB (2d) 157; *R v D(C),* 2012 ONSC 7105 at para 3; *R v Beckford and Stone,* 2012 ONSC 7365 at para 4, 276 CRR (2d) 26 [*Beckford*]; *R v Ali,* 2013 ONSC 7124 at para 1, 110 WCB (2d) 635 [*Ali*]; *R v Hughes,* 2013 ONSC 6548 at para 1, 109 WCB (2d) 565 [*Hughes*]; *R v Barbaro,* 2013 ONSC 7970 at para 2, 110 WCB (2d) 857 [*Barbaro*]; *R v RWAP,* 2014 ONSC 3021 at para 1, 113 WCB (2d) 329 [*RWAP*]; *R v MacArthur,* 2014 ONSC 5583 at para 2, 117 WCB (2d) 36 [*MacArthur*]; *R v JAB,* 2014 ONSC 6992 at para 11, 118 WCB (2d) 442; *R v PB,* 2015 ONSC 7220 at para 6, 127 WCB (2d) 87; *R v Hidalgo,* 2016 ONSC 7216 at para 1, 135 WCB (2d) 40 [*Hidalgo*]; *R v A(A),* 2017 ONSC 2678 at para 1, 138 WCB (2d) 570; *R v RN,* 2017 ONSC 2446 at para 1, 139 WCB (2d) 367.

(CAS) records,[56] medical records,[57] and police occurrence reports.[58] The 2014 Supreme Court case of *R v Quesnelle* dealt particularly with police reports, clarifying the correct classification for this type of document.[59] The Supreme Court affirmed that an application must be brought pursuant to s. 278.2, rather than under the lower threshold for disclosure from *R v Stinchcombe,* because police occurrence reports fell under the definition of "records" – that is, documents in which there was a reasonable expectation of privacy and that were not pertaining to the offence in question.[60] The other most popular record requests have not yet been the subject of in-depth analysis by the Supreme Court.

In each of the cases analyzed for this article, defence counsel argued a series of issues at trial to which the records were likely relevant and should thereby be admitted. The chart in Appendix B shows that the most commonly cited issues were the complainant's credibility and reliability, as well as the accused's right to make full answer and defence.[61] Even in the cases where more specific issues were argued – like to prove that no crime was ever committed, or that the complainant made inconsistent statements

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56 *R v Lonergan,* 2012 ONSC 1401 at para 4, 101 WCB (2d) 342 [*Lonergan*]; *R v Blake,* 2013 ONSC 481 at para 10, 108 WCB (2d) 827 [*Blake*]; *RWAP, supra* note 55 at para 1; *R v YCB*, 2014 ONSC 922 at para 2, 111 WCB (2d) 837; *R v BT*, 2016 ONSC 4407 at paras 2–5, 132 WCB (2d) 128; *R v DAB,* 2016 ONSC 4289 at para 1, 131 WCB (2d) 599; *R v RN*, *supra* note 55 at para 1.

57 *R v D(C)*, *supra* note 55 at para 3; *Beckford, supra* note 55 at para 4; *Ali, supra* note 55 at para 1; *R v DW,* 2013 ONSC 649 at para 3; *R v Armstrong,* 2016 ONSC 1657 at para 7, 129 WCB (2d) 143 [*Armstrong*]; *MacArthur, supra* note 55 at para 2.

58 *R v Musse,* 2012 ONSC 6097 at para 1, 104 WCB (2d) 268 [*Musse*]; *Beckford, supra* note 55 at para 4; *Blake, supra* note 56 at para 10; *Armstrong, supra* note 57 at para 7.

59 *R v Quesnelle,* 2014 SCC 46, [2014] 2 SCR 390.

60 *Ibid* at paras 67–68.

61 *Musse*, *supra* note 58 at para 1; *R v MC*, *supra* note 55 at para 12; *R v D(C)*, *supra* note 55 at para 9; *Lonergan*, *supra* note 56 at para 12; *Beckford*, *supra* note 55 at para 4; *Blake*, *supra* note 56 at para 11; *Ali*, *supra* note 55 at para 28; *R v DW*, *supra* note 57 at para 10; *R v Hughes*, *supra* note 55 at para 4; *Barbaro*, *supra* note 55 at para 10; *RWAP*, *supra* note 55 at para 3; *R v YCB*, *supra* note 56; *MacArthur*, *supra* note 55 at para 3; *R v JAB*, *supra* note 55 at para 12; *R v PB*, *supra* note 55 at para 25; *Armstrong*, *supra* note 57 at para 2; *Hidalgo*, *supra* note 55 at para 19; *R v BT*, *supra* note 56 at para 30; *R v DAB*, *supra* note 56 at para 15; *R v A(A)*, *supra* note 55 at para 6; *R v JW*, 2017 ONSC 4343 at para 4, 141 WCB (2d) 626; *R v RN*, *supra* note 55 at para 3.

to law enforcement and treatment providers – the underlying idea was that the records would illuminate the complainant's lack of credibility.

C. Records with a High Privacy Interest

Therapeutic records, medical records, and CAS records compel a heightened privacy interest for the complainant. Most of the cases analyzed were requests for these highly sensitive records, with defence counsel citing credibility testing as the main reason for the application. Interestingly, however, judicial discussion about the weighing of competing rights occurred in only about a third of these cases.[62] Further, this kind of analysis happened most often in cases where the application was dismissed, and less often in cases where production was ordered.

In *R v DAB,* for example, the judge's decision stated that the requested documents, mainly CAS records, were likely relevant because "the records in question are not therapeutic counseling records of these two complainants, but their factual disclosure in the first instance for each complainant of the allegations of alleged abuse."[63] The judge did not evaluate, under the threshold test, whether production would be necessary in the interests of justice. As such, the judge ordered production of the records for the court. Following a review of the documents, the judge held that they were satisfied under s. 278.7 "that certain parts of the records produced"[64] were likely relevant and "necessary in the interests of justice."[65] There was no discussion as to how the judge arrived at that result. Disclosure of the records to the defence was thereby ordered despite the lack of judicial analysis that is required by the production provisions. The kind of bare analysis found in this case is consistent with Gotell's findings from the earlier cases that judicial analysis of whether production is necessary "is, for the most part, succinct and economical to the extreme."[66]

Similarly, in *R v M.C.,* the complainant consented to having her therapeutic and medical records produced to the court for review.[67]

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62 See *Blake*, *supra* note 56; *R v MC*, *supra* note 55; *Beckford*, *supra* note 55; *R v D(C)*, *supra* note 55; *Barbaro*, *supra* note 55; *Armstrong*, *supra* note 57; *Hidalgo*, *supra* note 55.

63 *R v DAB, supra* note 56 at para 15.

64 *Ibid* at para 17.

65 *Ibid.*

66 Gotell, "Tracking," *supra* note 48 at 141.

67 *R v MC*, *supra* note 55 at para 13.

However, after reviewing the documents and redacting some limited irrelevant information, the judge ordered production of the records to the defence without any analysis on why the records were likely relevant to matters at issue, or why production would be necessary in the interests of justice.[68] The extent of the judge's analysis of competing rights was to say that she did consider them.[69] Again, this sort of statement is insufficient under a purposive reading of the provisions, and to the extent that *Mills* emphasized the importance of meaningful analysis of competing *Charter* rights.[70] Fortunately, this particular verdict was overruled, the conviction quashed, and a new trial ordered by the Court of Appeal in *R v M.C.* 2014 ONCA 611, primarily for admitting and using records that the judge should not have received under the s. 278 provisions. However, it is important to recognize that, because the records were produced at trial, some level of the complainant's privacy interest had already been lost.

In cases where there has been some discussion of competing rights, the result of whether production is ordered depends on judicial prioritization of those rights. In *R v MacArthur*, the presiding judge reviewed counselling records in possession of Native Child and Family Services (NCFS). The judge considered the "very high expectation of privacy in the therapeutic records sought,"[71] and the "particular vulnerability of women and children from the First Nations communities who are being serviced by the NCFS,"[72] but production was nevertheless ordered (subject to some redaction).[73] This was largely because the complainant was told by the NCFS at the outset of her counselling that, pursuant to a protocol, notes made by the therapist may need to be produced in court.[74] The judge concluded on this note that "[the complainant] must, therefore, have appreciated that at least what she said about the Incident might have to be produced to the court and yet she has sought counselling."[75] This kind of conclusion is concerning, if for no

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68 *Ibid* at para 16.

69 *Ibid* at para 17.

70 *Mills*, *supra* note 27.

71 *MacArthur*, *supra* note 55 at para 32.

72 *Ibid.*

73 *Ibid.*

74 *Ibid.*

75 *Ibid* [emphasis added].

other reason than because it suggests that if complainants do not want notes from their counselling sessions to be produced in criminal proceedings, they should not seek counselling at all. Moreover, the analysis does not meaningfully weigh the complainants' rights against the fair trial rights of the accused; it privileges the latter with little explanation as to why.

In many of the cases in which production of therapeutic, medical, or CAS records were ultimately not ordered, there was a more fulsome *Charter* analysis that meaningfully considered the heightened privacy interests in such records. In one particularly strong analysis, from *R v Blake*, the presiding judge balanced not only the right to full answer and defence with the right to privacy, but also considered "the equality of individuals whose lives are heavily documented."[76] Drawing on the analysis in *R v Medwid*, the judge in *Blake* considered how applications involving CAS records tend to place an already marginalized group at a further disadvantage, by "making them the subject of additional scrutiny based solely on the fact that their lives have been documented by reason of their involvement with social agencies."[77] Moreover, he considered how therapeutic records developed from contact with social agencies hold a particular privacy interest, because there is often an inherent assumption of trust and confidentiality.[78] Thus, the judge was engaged not only with the privacy and equality interests involved in third party records, but also with some of the underlying principles inherent to those interests.

The judge's analysis in *Blake* is a marked difference from the analysis provided by many of the judges presiding over the early cases, as described by Gotell, and many of the recent cases that were analyzed for this article. It must be recalled that the production provisions direct judges to weigh the legal rights of defendants against the privacy and equality rights of complainants.[79] However, as has been demonstrated in the jurisprudence since 1999, this context-sensitive balancing exercise either has not happened

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76 *Blake*, *supra* note 56 at para 26.

77 *Ibid* at para 27. The effect of heavy documentation on the likelihood and consequences of record production has also been described in the context of women with mental disabilities who report sexual assault: see Lauren Katz, "When Equality Calls for Privilege: Sexual Assault and the Disclosure of Mental Health Records in Police Possession in Canada" (2016) 1 Cambridge L Rev 77.

78 *Ibid.*

79 Gotell, "Tracking," *supra* note 48 at 140.

at all, or has been narrowed through judicial interpretation because of the inconsistencies between the provisions and the *Mills* decision.

V. Section 278 Provisions Versus *Mills* – A Question of Judicial Interpretation

The s. 278 provisions were enacted to limit judicial discretion by directing judges to engage in a multi-stage balancing exercise before ordering the production and disclosure of third-party records in sexual assault cases. Subsection 278.5(1) requires judges to evaluate both the likely relevance of the records to an issue at trial, and whether the production and disclosure of the records is necessary in the interests of justice.[80] The provisions also direct judges to weigh defendant's legal rights against both the privacy and security of the person rights of complainants, in light of the equality context, while considering factors such as discriminatory myths and society's interest in having complainants report their experiences to the police.[81] In *Mills,* however, the Court's guidelines for application of s. 278 have allowed judges to render the provisions more malleable than they were intended to be. These guidelines include: stress placed on the importance of judicial discretion;[82] the court's description of subsection 278.5(2)'s factors as a "checklist" that "may come into play during a judge's deliberation";[83] and, most importantly, its holding that fair trial rights must prevail over privacy rights in "uncertain" situations.[84] These *Mills* guidelines continue to be relied upon most heavily in cases where production is ultimately ordered, such as in *R v D.C., R v Beckford and Stone, R v MacArthur,* and others. Conversely, in cases where production is not ordered, the analysis more closely follows the provisions themselves, such as in *Blake.*[85] Finally, in some

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80 *Criminal Code, supra* note 26, s 278.5(1).

81 *Ibid*, s 278.5(1)(a)–(h).

82 *Mills*, *supra* note 27 at 742.

83 *Ibid* at 749.

84 *Ibid* at 748. Interestingly, none of the cases, not even those that did balance the competing rights, touched on how disclosing the contents of the records might actually *detract* from the fairness of the trial process *and* simultaneously impinge on equality rights by introducing harmful myths about complainants.

85 See *Blake*, *supra* note 56 at para 38.

cases, such as *R v DAB*, there is no apparent analysis of competing rights at all.

VI. CONCLUSIONS

Out of the twenty-two cases analyzed, a total of thirteen applications for record production were dismissed, while nine were allowed. This statistic leans slightly more towards dismissal than Gotell's 50% statistic from 2006, but it remains that judicial interpretation of *Mills*, in concert with the production provisions, has led to inconsistent findings. The stage at which each record application was dismissed or produced is found in Appendix C.[86]

Mills was the first case in which the Court invoked the equality guarantees of the *Charter* in deciding a sexual assault case.[87] However, the majority's gestures to equality rights were tempered by its narrow framing of privacy rights. The ruling emphasized that the disclosure of confidential information in the context of sexual assault trials infringes on privacy rights of the complainant.[88] In the context of relationships between therapist and patient, privacy is essential for trust and, where confidentiality is threatened, "so too is the complainant's mental integrity and security of the person."[89] However, as Gotell has argued, a highly individualistic understanding of complainants' concerns underpins this discussion.[90] This kind of analysis ignores the power relations that influence victims' abilities to engage in the productive importance of speaking about sexual assault inside and outside

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86 *Musse*, *supra* note 58 at para 21; *R v MC*, *supra* note 55 at para 17; *R v D(C)*, *supra* note 55 at para 47; *Lonergan*, *supra* note 56 at paras 23, 28; *Beckford*, *supra* note 55 at para 45; *Blake*, *supra* note 56 at paras 44, 61; *Ali*, *supra* note 55 at para 41; *R v DW*, *supra* note 57 at para 11; *R v Hughes*, *supra* note 55 at para 11; *R v Barbaro*, *supra* note 55 at para 22; *R v RWAP*, *supra* note 56 at para 22; *R v YCB*, *supra* note 56 at para 56; *MacArthur*, *supra* note 55 at para 43; *R v JAB*, *supra* note 55 at para 36; *R v PB*, *supra* note 55 at para 32; *Armstrong*, *supra* note 57; *Hidalgo*, *supra* note 55 at para 23; *R v BT*, *supra* note 56 at para 55; *R v DAB*, *supra* note 56 at para 17; *R v A(A)*, *supra* note 55 at para 8; *R v JW*, *supra* note 61 at para 24; *R v RN*, *supra* note 55 at para 22.

87 Gotell, "Ideal Victim," *supra* note 3 at 269.

88 *Mills*, *supra* note 27 at 722.

89 Gotell, "Ideal Victim," *supra* note 3 at 269.

90 *Ibid.*

the courtroom.[91] These are precisely the kinds of relations that the s. 278 provisions had called upon judges to consider, but that many judges in the most recent cases have either minimized, or ignored.

The *Charter* protects the right of accused persons to make full answer and defence vis-à-vis ensuring the opportunity to delineate the credibility of witnesses. Section 278 of the Code and the common law ensure that this right is subject only to reasonable limits, such as what is necessary to ensure that complainants' rights to privacy and equality remain relatively uncompromised. A corresponding purpose of all relevant legislation and jurisprudence is to ensure that confidence is not lost in the Canadian justice system. Thus, where Parliament has directed judges to balance the right to full answer and defence against rights of privacy and equality of complainants, it is important – and necessary – that judges do so; to ensure a fair trial, to combat the systemic disadvantages facing sexual assault complainants in the justice system, and to bolster public confidence in the consistency of the justice system.

Similarly, lawyers must execute their role as "zealous advocates" responsibly, including in third-party record applications involving sexual assault or violence. In her article, "The Ethical Identity of Sexual Assault Lawyers," Elaine Craig detailed some of the ways in which defence counsel have described their own role in sexual assault trials. Notably, one lawyer offered the following explanation for why sexual assault complainants, like the women in the epigraph to this article, continue to report their experience of the criminal justice system as traumatic:

> It's the way we as defence council have to approach the problem. You know, you gotta attack the alleged victim. If the issue of credibility is going to be decided by the judge, then of course, you gotta attack the victim. And they feel that they are on trial. And you know, it's amazing as to what you, the type of questions you can do based on the information you have.[92]

Lawyers must take care not to cross into the realm of "whacking the complainant,"[93] including by requesting more confidential records than are

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91 *Ibid.*

92 Elaine Craig, "The Ethical Identity of Sexual Assault Lawyers" (2016) 47 Ottawa L Rev 73 at 95 [emphasis added].

93 *See generally* Tanovich, "Ethics of Defence," *supra* note 7; and David M Tanovich, "An Equality-Oriented Approach to the Admissibility of Similar Fact Evidence in Sexual Assault Prosecutions" in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Practice &*

necessary or by misusing the records that are permitted to enter into evidence. In *Mills*, the Supreme Court warned that:

> Equality concerns must…inform the contextual circumstances…[A]n appreciation of myths and stereotypes in the context of sexual violence is essential to delineate properly the boundaries of full answer and defence… The accused is not permitted to 'whack the complainant' through the use of stereotypes regarding victims of sexual assault.[94]

The use of this language in *Mills* is indicative of legal and ethical norms grounded in equality values, that can serve as guidance for defence lawyering in sexual assault cases, including in third-party record applications. Despite the reservations about *Mills* that have been detailed throughout this article, the case retains its value in its direction towards a nuanced conversation about the competing rights involved in these cases, and the importance of delineating an ethical approach to sexual assault lawyering that takes into consideration evolving societal norms about sexual violence. Thus, as has been argued by David Tanovich, ethical lawyering in the context of sexual assault cases is possible.[95] I would add that it is absolutely necessary.

Women's Activism (Ottawa: University of Ottawa Press, 2012) at 554.

94 *Mills*, *supra* note 27 at 727 [emphasis added].

95 Tanovich, "Ethics of Defence," *supra* note 7 at 508.

Appendix A

Type of record sought for production	**Number of cases in which the defence was seeking this record**	**Names of cases in which the defence was seeking this record**	**Number of cases in which the record was ultimately produced to the defence**	**Cases in which the record was ultimately produced to the defence**
Therapy/Counselling/Psychology/Psychiatry Records	13	*R v* MC *R v DC* *R v Beckford and Stone* *R v Ali* *R v Hughes* *R v Barbaro* *R v RWAP* *R v MacArthur* *R v JAB* *R v PB* *R v Hidalgo* *R v A(A)* *R v RN*	4	*R v* MC *R v DC* *R v Beckford and Stone* *R v MacArthur*
Children's Aid Society Records	7	*R v Lonergan* *R v Blake* *R v RWAP* *R v YCB* *R v BT* *R v DAB* *R v RN*	4	*R v YCB* *R v BT* *R v DAB* *R v RN*
General Medical Records (hospital, clinic, or doctor)	6	*R v DC* *R v Beckford and Stone* *R v Ali* *R v DW* *R v MacArthur* *R v Armstrong*	4	*R v DC* *R v Beckford and Stone* *R v DW* *R v MacArthur*

Copies of police occurrence reports or trial records from other charges "involving" the complainant	4	*R v Musse* *R v Beckford and Stone* *R v Blake* *R v Armstrong*	1	*R v Beckford and Stone*[96]
General information regarding the current case from the police (i.e. dates of statements made, dates of preliminary inquiries, etc.)	2	*R v BT* *R v Hidalgo*	1	*R v BT*
Copies of police statements made by a third party (not the complainant herself)	1	*R v JW* (this was a novel claim in Ontario)	0	N/A
Records from Youth/Family Services Programs	2	*R v DC* *R v Blake*	1	*R v DC*
School Records	2	*R v BT* *R v DAB*	2	*R v BT* *R v DAB*
OHIP Billing Records	1	*R v Armstrong*	0	N/A
ODSP Records	1	*R v DC*	1	*R v DC*
Canada Pension Plan Records	1	*R v DC*	1	*R v DC*
Foster Care Services Records	1	*R v Lonergan*	0	N/A

[96] This is the only case in which the defense took the position that their application did not fall under the *Mills* scheme definition of a "record," but that the documents should nevertheless be produced.

Appendix B

Issue for which defence counsel explicitly argued that production is both likely relevant and necessary in the interests of justice	**Number of cases in which defence counsel argued under this issue**	**Names of cases in which defence counsel argued this issue**
Complainant's credibility and reliability	17	*R v Musse* *R v MC* *R v DC* *R v Beckford and Stone* *R v Blake* *R v Ali* *R v DW* *R v Hughes* *R v Barbaro* *R v MacArthur* *R v JAB* *R v Hidalgo* *R v DAB* *R v AA* *R v JW* *R v PB* *R v BT*
For the right to full answer and defence / the right to a fair trial	11	*R v Musse* *R v DC* *R v Lonergan* *R v Beckford and Stone* *R v Blake* *R v Ali* *R v RWAP* *R v MacArthur* *R v JAB* *R v DAB* *R v JW*
To prove that no crime was ever committed / that the allegations were fabricated	4	*R v Blake* *R v MacArthur* *R v JAB* *R v Hidalgo*

To obtain possible evidence of inconsistent statements made by the complainant to their treatment providers and/or the police and the court about the alleged incidents	3	*R v Ali* *R v MacArthur* *R v BT*
To point at whether the complainant "confused their alleged sexual assaults" by the accused with later or earlier sexual assaults committed against them by others (A.A. para 31); or otherwise to prove that the complainant's trauma "emanates from incidents unrelated to the charges in this case" (M.C. para *12*)	3	*R v Ali* *R v RN* *R v MC*
To inform the court about an unfolding of events, given memory problems of the complainant; or otherwise illuminate the ways in which claimed mental health issues affect the complainant's ability to recall the events in question	2	*R v DC* *R v Hughes*
To determine whether counselling sessions played a role in "reviving, refreshing, or shaping the memory of the complainant" (*Barbaro*, para 12)	2	*R v Barbaro* *R v PB*
To obtain evidence regarding why a complainant made delayed disclosure	2	*R v Ali* *R v Hughes*
Whether the applicant was the cause of the complainant's mental health issues / panic attacks	1	*R v DC*
To test an assertion made during trial by the complainant	1	*R v Armstrong* (in this case, the complainant claimed she had never had an STD; the accused wanted to refute this claim with the extra evidence)
To explore the facts behind a previous trial involving the complainant	1	*R v Armstrong*
To prove that the complainant had not made any earlier complaints against the accused	1	*R v Lonergan*

To point to the possibility that the records contain information about animus towards the accused that might have motivated the allegations against him rather than actual abuse	1	*R v Ali*
"That the records may contain evidence of prior sexual abuse by others and might also reveal that those allegations of sexual abuse did not result in any charges or criminal convictions" (*Blake*, para 17)	1	*R v Blake* (defence argued that if this was true, they could suggest that the complainant fabricated allegations of sexual abuse against Mr. Blake and that those allegations also had no merit)

Appendix C

Cases in which the application was dismissed because it was found not to meet the "likely relevance" threshold	**Cases in which the records were found to be "likely relevant," but the application was nevertheless dismissed because production was not "necessary in the interest of justice"**	**Cases in which the applications that were accepted on the grounds of likely relevance and necessity that were ultimately not produced to the accused after the judge's review of the records**	**Cases in which the records were ultimately produced to the defence**
R v Musse *R v Blake* (the CAS records and police records) (judge goes further to say that production was not necessary in the interest of justice, despite also saying they were not relevant – para 44) *R v Ali* (2013) *R v RWAP* (the counselling records) (the CAS records mentioned in the case were not dealt with by the judge in this instance) *R v JAB* *R v Armstrong* (except for the time and place of a previous trial involving the comp, which were to be produced by the Crown) *R v Hidalgo* *R v Hughes*	*R v Barbaro* (Crown, defence, and complainant counsel all agreed that the records were likely relevant, judge reviewed them, and decided it should not be produced to accused) *R v JW*	*R v Lonergan*	*R v MC* *R v DC* *R v Beckford and Stone* (the police reports and the medical and therapeutic records) *R v DW* (all ten documents) *R v YCB* (respondent consented to likely relevance of documents relating to **named** complainants and witnesses for the same investigation, but not those which relate to unnamed persons, because they are not relevant) *R v MacArthur* *R v BT* *R v DAB* *R v RN* (the CAS records)

R v A(A) *R v RN* (the counselling records)			
TOTAL: 10	**TOTAL: 2**	**TOTAL: 1**	**TOTAL: 9**