Third Party Records Cases Since R. v. *O'Connor*

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I. INTRODUCTION

IN THE EARLY 1990'S, criminal defence counsel began seeking disclosure of complainants personal records in sexual violence cases. The rise of this practice coincided with amendments to the *Criminal Code*[1] in 1992, which restricted questioning complainants about their sexual history. Subsequently the practice was, in effect, encouraged by the Supreme Court of Canada decision in *R. v. Osolin*,[2] and the rapid emergence of the false memory syndrome gave defendants another reason to seek records. There were a myriad of reasons offered by defendants seeking disclosure of records in early cases, although lower court judges were not always amenable to the applications. In December 1995, the Supreme Court of Canada held, by bare majorities, in *R. v. O'Connor*[3] and *L.L.A. v. A.B.*[4] that defendants should have access to complainants records in a number of situations including: where the record was created close in time to the date of the incidents or the date of the report to the police; where it may contain information concerning the unfolding of events underlying the criminal complaint; or where it may reveal the use of therapy influencing the complainants memory of the events. In February 1997, again by a bare majority, the Supreme Court of Canada, in *R. v. Carosella*[5] stayed proceedings against a school teacher because the rape crisis centre where the complainant had spoken to a

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1 *Criminal Code*, R.S.C 1985, c. C–46, ss. 276–276.5 (as amended by S.C. 1992 c.38 s.2) [hereinafter *Bill* C–49].

2 [1993] 2 W.W.R. 153 [hereinafter *Osolin*].

3 [1996] 2 W.W.R. 153 [hereinafter *O'Connor*].

4 [1996] 44 C.R.(4) 91 [hereinafter *L.L.A.*].

5 [1997] S.C.J. No. 12 [hereinafter *Carosella*].

counsellor had destroyed the counsellor's notes, pursuant to the center's policy of destroying any records where there might be police involvement. The Court reiterated the rationales for access set out in *O'Connor* and added that records should be available if they might assist the defendant in preparing for a cross-examination or if they might contain a prior statement.

In May 1997, Parliament passed amendments to the *Criminal Code*[6] (commonly referred to as "Bill C-46") which, among other things, made a number of rationales for access insufficient to found a records application and gave trial judges more guidance on factors to be considered on records applications. In particular, Bill C-46 explicitly required judges to consider complainants equality rights. The Bill was immediately subject to numerous constitutional challenges and, in early 1999, the Supreme Court of Canada heard *R. v. Mills*,[7] a case out of Alberta where the trial judge held Bill C-46 to be unconstitutional.[8]

For this paper I reviewed all cases on records applications involving sexual or intimate violence available on QuickLaw (Q/L) that were decided between 1 January 1996 and 30 April 1998. The study covers the 16 months between *O'Connor* and the passage of Bill C-46 in addition to the 12 months immediately after Bill C-46 became law. Eighty cases were analysed and are listed in the Appendix. The cases were analysed to determine what information could be obtained about the complainant and defendant, including their relationship, the kinds of records being sought, how frequently records were ordered to be produced for the judge and disclosed to the defendant, and what rationales for disclosure were offered by defendants and accepted or rejected by judges both

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6 *Criminal Code*, R.S.C. 1985, c. C–46, ss. 278.1–278.91 (as amended by S.C. 1997 c. 30 s. 1) [hereinafter *Bill C–46*].

7 [1999] 3 S.C.R. 668 [hereinafter *Mills*].

8 For more detailed analyses of the case law, Bill C–46, and legal practices regarding the use of personal records in sexual violence cases, see: Sadie Bond, "Psychiatric Evidence of Sexual Assault Victims: The Need for Fundamental Change in the Determination of Relevance" (1993) 16 Dalhousie L.J. 416; Karen Busby, "Discriminatory Uses of Personal Records in Sexual Violence Cases", (1997) C.J.W.L. 148; Bruce Feldthusen, "The Best Defence is a Good Offence: Access to Private Therapeutic Records of Sexual Assault Complainants Under the *O'Connor* Guidelines and Bill C–46" (1996) 75 Can. Bar. Rev. 537; Joan Gilmour, "Counselling Records: Disclosure in Sexual Assault Cases" in Jamie Cameron (ed.) *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996); Katharine Kelly, "'You must be crazy if you think you were raped': Reflections on the Use of Complainants' Personal and Therapy Records in Sexual Assault Trials" (1997) 9 C.J.W.L. 178; Marilyn MacCrimmon, "Trial by Ordeal" (1996) 1 Can.Crim. L.R 31; Diane Oleskiw and Nicole Tellier, "Submissions to the Standing Committee on Bill C–46 prepared for National Association of Women and the Law" unpublished, February, 1997 [hereinafter *Oleskiw and Tellier*]; and, Jennifer Scott and Sheila McIntyre, "Women's Legal Education and Action Fund (L.E.A.F.) Submissions to the Standing Committee on Justice and Legal Affairs" in Barbara Crow and Lise Gotell, *Open Boundaries: A Canadian Women's Studies Reader* (Toronto: Prentice Hall, 2000).

before and after Bill C-46 was passed. This research lays the foundation for a more in-depth consideration of the broader social and legal implications of third party record production.

II. Preliminary Observations

MOST RECORDS PRODUCTION CASES involve defendants who are related to the complainants (most commonly their fathers) or professionals who have worked with the complainants. Defendants rely on their own personal information about complainants to determine the existence of records and, frequently, they already have had access to some records prior to making the application. The majority's assertion in *O'Connor* that, "generally speaking, an accused will only become aware of the existence of records because something which arises in the course of the criminal case" is clearly wrong. Rather it is the rare case that a defendant could truthfully assert that he does not know anything about the existence of records on the complainant. Indeed, in the usual case, he already knows her intimately and moreover, has easy access to additional information about her.

The typical complainant is a teenage female and most complaints are made shortly after the incidents giving rise to the charges were alleged to have occurred. Records access has extremely deleterious implications for vulnerable, dependent minors including the possibilities that such access could adversely affect relations with other family members and have long term implications for access to therapy. Yet, these heightened vulnerabilities are factors that judges, including the Supreme Court of Canada, ignore in records applications.

While counselling records are the most commonly sought records, life history records like child welfare records and medical records were sought in almost all cases. Most defendants sought more than one kind of record, and multiple records were sought in all cases where psychiatric hospital, drug and alcohol treatments and correction records were sought. This extraordinary degree of invasiveness into the lives of complainants' who have been heavily documented, will clearly influence the willingness of such women to make criminal complaints and therefore reinforce their already vulnerable status.

Finally, while defence assertions that the complaint suffers from delusions or psychoses are frequent, these assertions are almost always without any foundation. Moreover, most complaints are made to the police shortly after the incidents were alleged to have occurred and, even in the historic cases, there is rarely any evidence (even after a preliminary inquiry) that the memories were recovered in therapy or that the therapy was otherwise improper. These observations demonstrated that judges need to take care to insure that applications for records are not motivated by stereotypical thinking about mental illness or overblown fears about false memories.

III. NOTES ON METHODOLOGY

THIS STUDY IS NOT BROAD enough to determine the kinds of cases by offence where defendants seek third party records. An analysis of the case law in the 18 month period immediately before *L.L.A* was argued in the Supreme Court of Canada showed that third party records were sought almost exclusively in sexual violence cases.[9] A study by Oleskiw and Tellier[10] on all reports of cases accessible at September 1996, on disclosure of third party records, to a defendant, showed that 85 percent of cases (120/140) involved a defendant charged with a sexual offence. Of the 20 exceptional cases, 14 involved violent crimes, eight cases concerned the records of women or children, and four involved inmates. Many judges, including members of the Supreme Court of Canada, have noted that such records applications are being made almost exclusively in sexual violence cases. Parliament, too, recognised that the applications were being made primarily in sexual violence cases. Bill C-46 is limited in application to these offenses. Most of the cases analysed in this study involved sexual offenses. A very small number of these cases involved or included allegations of non-sexual violence between intimates (e.g. a criminal harassment charge against a husband) or prostitution-related offences. These cases are included because the power dynamic between complainant and defendant is similar to the power dynamic in sexual violence cases.

Cases involving applications to stay charges based on lost third party records are included because these cases usually consider an issue central to this research: rationales for production and disclosure of records. Cases relating to police or other investigative reports have not been included unless the application also involved a request for information unrelated to the investigation. For example, a child welfare file may contain investigation reports on the offence, but it may also contain other information the defendant seeks such as counselling notes or foster home reports. Once the list of cases was finalised, all QuickLaw citations to other reasons for decision in the same case where obtained. Such reasons are noted in the list of cases as the 'see also' citations. The 'see also' citations often provided defendant or complainant information which may not have been clear from the reasons in the records application.

This research study is based only on information contained in the reasons for decision available on QuickLaw. The only exception is information obtained from the case on appeal in the *Mills*[11] case and when it is relied upon, reference is made to this source. From a practical perspective, it is difficult, expensive and

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9 *Busby*, *supra* note 8.

10 *Oleskiw* and *Tellier*, *supra* note 8.

11 Busby, *supra* note 8.

sometimes, impossible to review court files, especially the transcripts, for all cases. Moreover, one purpose of this research is to analyse the emerging trends in precedents, and judges and lawyers analysing these precedents would rarely have available or seek information about the case other than that information given in the reasons.

Case law analysis has some limitations. Most importantly, it may not be an accurate sampling of the range of situations in which records applications are made. Formal reasons for decision are issued in very few cases and, while judges are required to provide reasons for production and disclosure decisions, these reasons are usually provided orally. Oral reasons are not often transcribed and published unless a special request is made. For example, I have transcript copies of the reasons for decision in various Manitoba cases, none of which appear on QuickLaw. Further, judicial practices on the publication of reasons vary across Canada. For example, there are no records application cases on QuickLaw from Quebec. The danger of any case law analysis is that it may only represent unusual cases, although this is somewhat less likely in records cases where judges are required to give reasons. That having been said, common law judicial decision-making is heavily influenced by precedent. As only cases that have reasons for decision can be precedential, such cases are an important source of information on legal trends. Moreover a comprehensive case law analysis is a check against a more common form of legal analysis. This is particularly so in an advocacy context, which is to state a proposition and to cite one case in support of the proposition whilst ignoring the cases which suggest a different proposition. For example, *Balabuck*[12] could be cited for the proposition that judges cannot disabuse themselves of information received when reviewing records at the production stage. However the general application of this proposition could be questioned upon realising that *Balabuck* is the only case where a judge expresses this concern.

A case law review cannot determine whether records applications have become a standard practice in sexual violence cases as such a study only considers cases where the applications have, in fact, been made. Defence counsel have asserted that the failure to seek records in sexual violence cases would amount to professional negligence and judges have noted that the applications are being made in most cases heard since *O'Connor*. While assertions on professional standards for defence counsel and anecdotal observations by judges provide support for the view that records applications are routine in most sexual violence cases, this information is best determined by either a court file review or a properly designed qualitative study (e.g. interviews with defence and Crown attorneys and record-keepers.)

Finally, a case law review cannot determine the use a defendant actually made of the record as this information rarely appears in reasons for decision.

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[12] *R* v. *Balabuck*, [1996] B.C.J. No 355 (Prov. Ct.) [hereinafter *Balabuck*].

Again defence use is best determined through a properly designed qualitative study. Anecdotal self-reports on the use of records by defendants are apt to be partial and incomplete or even inaccurate, and therefore should be treated with skepticism. For example, Gold and Lacy purport to describe sexual violence cases where records were "essential in securing an acquittal, withdrawal or discharge."[13] However, Crown Attorneys who were responsible for the prosecutions of some these cases were contacted and gave very different accounts of the same cases.[14] Reports on the uses or effects of records disclosure should be confirmed by carefully conducted interviews with opposing counsel, complainants and record keepers, in addition to a court file review, including a review of the preliminary inquiry transcript.

IV. INFORMATION ABOUT DEFENDANTS AND COMPLAINANTS

A. Sex

The complainant's and the defendant's sex can usually be determined from the use of personal pronouns or the description of relationships (e.g. father-daughter) in the reasons for decision. Four percent of the complainants are described as male (5/113). (As there was more than one complainant in eight cases, the number of relationships (113) is greater than the number of cases (78).)[15] It is likely that most, if not all, of the other complainants are female. The defendant is described as female in one case, which involved her two daughters and in which the husband/father is also charged. It is likely that the defendants were male in most, if not all, of the other cases.

B. Age

Defendants' ages at the time of the incidents were given in very few cases. Only two defendants were clearly under 18 at the time of the incidents giving rise to the charges. As minors would presumably fall within either the young offenders or juvenile delinquents regimes, it is probable that their status as youth would be apparent somewhere in the decision (i.e. the case would have been in a youth division of court). Therefore, it is safe to assume that most of the other defendants were adults.

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[13] Alan Gold and Michael Lacy, "Therapy and Other Records in Sex Cases: Some Illustrations," published in Alan Gold's Newsletter on Quicklaw in April, 1998.

[14] These interviews were conducted by research assistant Catherine Rosebrugh by telephone in June, 1998.

[15] Two cases (*Mills*, *supra* note 7 and G.A., [1996] O.J. No. 2773 (Gen. Div.)[hereinafter G.A.]) appear twice in the case list but are counted only once on complainant and defendant information.

In contrast, 78 percent of complainants whose records were sought were minors at the time of the incidents giving rise to the charges. 68 percent were between 13 and 18 years of age (77/113); 6 percent were 8 to 12 years of age (7/113); and, 4 percent were seven years of age or under (5/113). The male complainants were all minors. Only 21 percent of the complainants (26/113) were adults.

C. Relationship between the Complainant and the Defendant

The relationship between the complainant and the defendant could be determined from the cases in 82 instances, and it could not be determined in 29 of the cases.

Seventy one percent (58/82) of the instances where the relationship could be determined involved a familial relationship. The specific relationships are shown in Table I. The defendant's initials are used in about one-third of the cases (10/29) where the relationship between the complainant(s) and the defendant cannot be determined. Initials are used either to protect the identity of a minor charged with an offence or to conceal information (such as the same last name) that would identify the complainant. As there is nothing in any of these cases to indicate that the defendant is a minor it is likely that some, if not most, of these cases also involve a family relationship, although none have been included in the table on familial relationship. It is interesting to note that none of the cases involving the use of third party records in sexual violence cases which have reach the Supreme Court of Canada have involved a familial relationship: two cases involved professional relationships (*O'Connor* (priest, teacher, and employer) and *Carosella* (teacher)) and two cases involved personal relationships (*A.B.* (friend's father) and *Mills* (friend)). *Osolin* involved allegations against a man whom the complainant had met on the day of the incidents.

Twenty nine percent (24/82) involved either a person with whom the complainant(s) had a professional relationship (doctor/psychologist-patient, teacher-student), or an employer or acquaintance (like a friend's father). The specific relationships are shown in Table I.

Therefore, in all of the post-*O'Connor* instances where the relationship can be determined (82/82) the defendant and the complainant(s) were acquainted with each other in either a personal or professional capacity. There is not a single records application where the complainant and the defendant were strangers. (In one case the defendant attempted to raise identity as an issue on appeal (that is, which brother abused the sister), but the court rejected this ground as not having an "air of reality." This finding is consistent with a review of the pre-*O'Connor* cases which shows that records were sought in only one stranger case.[16]

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[16] See Busby, *supra* note 8.

Table I: Relationship between Complainant and Defendant

Defendant-Complainant Relationship	Number of Instances
Familial Relationship	
Father-daughter	19
Father-son	2
Mother-daughter	2*
Brother-sister	3
Husband-wife	4
Brother-in-law - (young) sister-in-law	2
Uncle-niece	3
Cousin-cousin	4
Incest charge (but no relationship given)	9
Foster family	1
Familial--but relationship not clear	9
Subtotal (familial)	**58**
Other Relationships	
Professional (e.g. teacher, doctor)	14
Employer-employee	3
Friend's father	3
Pimp-prostitute	2

Other acquaintance	2
Subtotal (Other relationships)	**24**
Strangers	0
Total	**82**

*Same case, father also charged

D. Long-term Abuse Cases

Twenty percent of the complainants (16/82) alleged multiple incidents occurring over more than two years and at least six of these cases involved a time period of eight years or more (e.g. the complainant was between 10 and 18 years of age). In contrast, none of the cases considered by the Supreme Court of Canada have involved allegations of long term abuse. The number of instances involving multi-year, multi-incident allegations could be higher as there are seven cases which give a range of dates but involve more than one complainant (e.g. the reasons for decision state that the incidents occurred between 1983 and 1987 and involved three complainants) or involve a range of ages and a number of complainants (for example, six complainants whose ages ranged from 12 to 18). However as these seven cases are not *clearly* multi-year, multi-incident, they have not been included in this figure. Many, but not all, of the cases involving long term, multi-incident allegations are historic cases (10/16), that is, they were reported to the police more than two years after the last incident which was the subject of the charge.

E. Observations on Historic Abuse Cases

Three of the cases (*O'Connor*, *L.L.A.*, and *Carosella*) which have reached the Supreme Court of Canada on records disclosure have involved historic abuse: situations where the incidents giving rise to the charges occurred more than two years before the complainant made a statement to the police. The other two cases (*Osolin* and *Mills*) involve complaints made within a year of the incidents. About 35 percent (27/78) of the post-*O'Connor* cases where records were sought are historic. At least half of the historic cases involve family members (14/27); 4/27 involve professional relationships. Note that the number of cases is lower than the number of complainants because some of the historic cases involve more than one complainant. In 9/27 of the historic cases the relationship between the complainant(s) and defendant is unclear.

All but one of the historic cases (26/27) involve complainants who were minors when the incidents were alleged to have occurred. Most were teenagers: only 5/27 involved complainants (including one case with three sisters as co-complainants) who were less than seven and in 2/27 cases the complainant was

eight. Most historic cases involved more than one incident (22/27) and a significant number involved multiple incidents occurring over more than two years (10/27). As noted earlier, more than half (10/16) of all long-term sex abuse cases are also historic.

F. Mental Illness, Mental Disability, and Recovered Memory

A review of the Q/L databases for the time period of this study (January 1996 to April 1998) reveals no cases (with the possible exception of *Wyatt*[17] which is discussed below) where an application was made pursuant to the *Canada Evidence Act* for a determination of the competency or reliability of a complainant to testify in sexual violence proceedings. Is this because defendants preferred to rely on the low threshold and almost nonexistent evidentiary requirements of O *Connor* rather than meet the more rigorous *Canada Evidence Act*[18] standards required in all other cases where competence or reliability is questioned? This finding is remarkable, particularly for the pre-Bill C-46 cases, as this Act provides a clear regime for dealing with witness competency issues. Arguably, however, Bill C-46 supercedes the *Canada Evidence Act* provisions when competency is challenged in sexual violence proceedings. Bill C-46 provides that no records shall be produced in proceedings relating to any of the enumerated offences (i.e. sexual violence offences) and the phrase "competence to testify" is used in other sections of the bill.

It is not possible to determine the number of cases in which records relating to complainants who had illnesses or disabilities that affected their memory, perception or ability to communicate were sought. For example, defendants' assertions that complainants may be delusional, or suffer from various disorders (including recovered memories) in circumstances where such assertions appear to be without foundation are so frequent that the calculation would be misleading. Three examples demonstrate the weaknesses of the defendants' foundations for such assertions.

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17 *R* v. *Wyatt*, [1997] B.C.J. No 781 (C.A.) [hereinafter *Wyatt*]

18 *Canada Evidence Act.*, R.S.C. 1985, c. C-5.

In *R.J.B.*,[19] the defendant brought an application for the complainant's medical records stating his belief that she "...suffers from possible delusions or other mental difficulties that may affect her ability to give honest and true testimony." Her memory problems were evident, according to the defendant, from the inconsistencies in her evidence at the first trial. The trial judge rejected the request. In giving reasons he stated that the inconsistencies were nothing out of the ordinary and were to be expected when a complainant gives testimony a few years following the incident about events which occurred when she was between 11 and 13 years of age.

The *Miller*[20] case provides a second example. In this case, the defendant attempted to found a records application on stereotypes about people with mental illnesses and misleading evidentiary support. The Crown had disclosed to the defendant that the complainant had been diagnosed with a "personality disorder" and a "bipolar disorder." The defendant then filed an application for disclosure of her medical files and filed excerpts from the Diagnostic and Statistical Manuel of Mental Disorders (commonly called the "DSM-IV") which focussed on "histrionic personality disorder" and "antisocial personality" disorder. In denying the application the judge noted that the defendant was relying on the stereotype that

> ...simply because a person is receiving or has received psychiatric treatment or indeed, has been assigned a general diagnosis, that person automatically cannot be relied upon to tell the truth in a judicial proceeding.

He went on to note that

> ...in referring to a diagnosis of "Personality Disorder", counsel for the applicant has drawn my attention to two manifestations of that generic illness. According to the evidence before the court, there are many more manifestations of the Personality Disorder Syndrome than those selectively drawn to my attention by the applicant in his written materials. Many of the subsets within this disorder may or may not reflect general characteristics of unreliability, manipulation, or deceitfulness. .... The same may be said of the symptoms displayed in a diagnosis of Bi-Polar Disorder. The allegations of credibility weaknesses are at this point, at best, mere speculation based on textbook generalities and not based on one specific circumstance or situation relating to the complainant. I find that I am even being asked at this stage to speculate on the specific type of personality disorder for which the complainant has received or is receiving treatment. Parliament could have not intended that an applicant could ground a successful application by selectively appending a few pages of a medical text referring to general characteristics relating to general groups of people without anything else relating to the specific characteristics and activities of a complainant or witness to justify an intrusion into the most private aspects of his or her life.

The *R.J.B.* and *Miller* cases are examples of situations where the court has questioned the stereotypes about those who have received counselling or psychiatric

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[19] *R* v. *R.J.B.* , [1997] N.S.J. No 80 (C.A.); (1997) N.S.R. (2d) 263 [hereinafter *R.J.B.*].

[20] *R* v. *Miller*, [1997] N.J. No 207 (Prov. Ct.) [hereinafter *Miller*].

treatment and where the court has questioned the quality of the evidence filed in support of records applications based on complainants' memory, perception or communicative abilities.

The third case, *Mills*, is an example of judicial willingness to order production and disclosure of records if there is any suggestion by the defendant of mental illness or recovered memories. A review of the case on appeal — as this information is not reflected in the reasons for decision.— in *Mills* shows that the complainant made a statement to the police and charges were laid in June, 11 months after the events giving rise to the charges occurred. From August to October she attended at an organisation that assists families in crisis and became involved with a family support worker. (Note that the counselling is not contemporaneous with either the incident or the decision to lay charges.) In September, when the police could find only one page of her original statement (this page did not disclose an offence but only the events of the earlier part of the evening when the events were alleged to occur), the complainant prepared a second statement. Upon receiving the second statement, the defendant sought the family counselling records, stating in his affidavit that

> ...her statement contained more details and extensive facts that [sic] previously complained of. I understand that this has been very much due to the complainant being assisted in recovering memory by [the family support worker].

The basis for the defendant's belief that the complainant recovered memories is not stated, nor does he indicate that he saw the complainant's first statement. He does not mention that the material portions of the original statement seem to have been lost. Nevertheless the counselling records were ordered to be produced for the defendant.[21] In an affidavit supporting a subsequent application to disclose hospital records, a legal secretary opines that based on her review of records already disclosed, the complainant may be delusional and suffer from "an acute psychosis." This opinion is not one she (or, for that matter, even a family support worker) is qualified to give. She also asserts that the complainant's second statement is "very much a different version...than initially complained of." Again there is no evidence that the legal secretary saw the first statement, nor is there mention of the lost portions of the first statement. When the judge heard the second application, he again failed to comment on the insufficiency of the evidence, simply stating that the hospital records were "likely relevant" and ordering that they be produced.

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[21] The reasons for this decision are not available on QuickLaw.

In only two or three cases[22] is it clear that the complainant's testimony would be based on recovered memories, although defence assertions of recovered memories are made in many cases, like *R.J.B.*, *Mills*, and *A.P.B*[23]. in circumstances where the assertions have no air of reality. The very low number of recovered memory cases is not surprising given decisions like *R. v. E.F.H.*[24] where the Ontario Court of Appeal discouraged prosecution of recovered memory cases. The court noted that recovered memories are inherently frail in the context of a criminal prosecution and are therefore in need of support by significant confirmatory evidence.

In only one case, *Wyatt*, did a complainant clearly have a mental disability. Prior to the trial, the Crown realised that the complainant might have some difficulties testifying. When the Crown raised this problem prior to trial, defence counsel indicated that he, "was opposed to [the Crown] calling that sort of evidence," and the Crown did nothing further. When it became apparent at trial that the complainant could not be subject to cross-examination, the judge adjourned the proceedings so that the Crown could obtain an expert opinion on the conditions, if any, under which the complainant could be cross-examined. The judge's authority for making such an order is not stated in the decision; implicitly it may have been a *Canada Evidence Act* application.

G. Other information about Complainants and Defendants

Very little other information about complainants or defendants can be gleaned from a reading of the reasons for decision. For example, not one case mentions the race, Aboriginal status, or ethnicity of a complainant or defendant or gives other information from which such facts could be safely inferred. In one case the 13 year-old babysitter says that one reason she waited a number of months to tell her mother about the incidents was that the defendant was rich and she

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22 In *R. v. Kliman*, [1996] B.C.J. No 551 (S.C.), see also [1996] B.C.J. No. 2285, [1998] B.C.J. No. 49 (S.C.) [hereinafter *Kliman*] and *R. v. J.G.L.*, [1997] O.J. No. 4953 (C.A.) [hereinafter *J.G.L.*], it was clear when the records applications were made that the charges were founded on the complainants' recovered memories. Kliman was acquitted because the court found that there were too many inconsistencies and the alleged events were inherently unlikely. In *J.L.* the court held that recovered memories alone were too unreliable a basis on which to found a conviction. However, the defendant was convicted on one count where the complainant's testimony was based on a recovered memory respecting an incident that the defendant admitted and on charge involving a different complainant respecting an incident which the defendant denied but which was very similar to the admitted offence. The information given in the reasons for decision in R. v. *Herbert*, [1997] O.J. No. 4769 (Gen. Div.) [hereinafter *Herbert*] about the nature of the evidence offered in support of the defence assertion of recovered memories is insufficient to determine whether there was a foundation for the assertion.

23 R. v. *A.P.B.*, [1997] O.J. No. 1875 (Gen. Div.) [hereinafter *A.P.B.*].

24 [1996] O.J. No.553, affirming [1994] O.J. No. 452 (Gen Div.).

was poor and therefore she did not think she would be believed, but otherwise the economic differences between complainants and defendants are not evident in the reasons for decision. Some of the cases involved relationships which are or could be grossly distorted by power imbalances between the defendant and the complainant. Examples include two cases where the minor complainant made sexual assault and prostitution-related allegations against the defendant, and where juvenile delinquents made allegations against a prison psychologist. Except for references to the complainant's or the defendant's status as a married person, there is little information on sexual orientation: a 13 year-old girl who apparently engaged in consensual sexual relations with the daughter of the man charged with sexually assaulting her, is described as a "lesbian" but the boy in his mid-teens who engaged in apparently consensual sexual relations with a peer is not described as "gay" or "homosexual."

V. REPRESENTATION OF COMPLAINANTS AND RECORD KEEPERS

THE O'CONNOR DECISION PROVIDED that complainants and record keepers could have standing and be represented by counsel on motions for the production to judges and disclosure to defendants of third party records. Prior to this decision the law on standing was unclear and, most often, complainants and record keepers were not represented. The four complainants in *O'Connor*, for example, were denied status before the British Columbia Court of Appeal, although a coalition of equality-seeking organisations was given intervenor status before the court.

Since *O'Connor*, complainants or record keepers have been represented by counsel in 45 percent of cases studied (35/78). Complainants alone (or, in cases with more than one complainant, at least one complainant) were represented in nine percent of the cases (7/78); record keepers alone in 16 percent of the cases (13/78); and both complainants and record keepers were represented in 19 percent of the cases (15/78).

In some cases record keepers appeared in person and objected in court to production of the file, but in a few cases the record keeper simply sent the file to court on receipt of the notice. In at least one case, the record keeper sent the file to court with a strong letter of objection. The court also heard directly from unrepresented complainants and record keepers in a few cases.

VI. KINDS OF RECORDS SOUGHT BY DEFENDANTS

A. Defendants' Sources of Information about Records

About 76 percent of the cases (61/80) describe at least one of the defendant's sources of information about the existence of third party records. In some cases

more than one source of information is given. The most common source is personal knowledge arising out of the relationship between the defendant and the complainant. In at least 31 percent of the cases (19/61), the information is known by virtue of a familial relationship. (The actual number is probably higher since, as noted elsewhere in this paper, 71 percent of the complainants are related to the defendant and family members are very likely, by virtue of the relationship to have more information on the source of records. The relationship as the source of the information is obvious in the reasons for decision in only 19 of the cases.) Other sources of information include: questions at the preliminary inquiry (15/61); Crown disclosure (e.g. information contained in a statement to the police) (12/61); defendants' personal knowledge about the complainant (non-familial cases) (5/61); information taken from third party records previously received (6/61); evidence given at the first trial (3/61); examination at trial (3/61); pre-C-46 agreement between Crown and defendant (2/61); adjournment application due to complainants' illness (2/61); and other (3/61).

In some cases the Crown and the police provided information to the defendant on the source of third party records about the complainant. For example, in *R.J.K.* the Crown was ordered to ask the complainant whether she had seen a counsellor and, if so, to obtain the counsellor's name. The case on appeal in *Mills* indicates that the defendant learned of the counselling records by making an inquiry to the Crown who, in turn, obtained this information from the police. Defendants have also obtained information about other record keepers by simply calling those record keepers they know about and asking whether they know of others who may have records on the complainant. In *Hurrie*[25] the defendant argued that Bill C-46 was unconstitutional because, amongst other things, it would "impair the preparation of the defence because witnesses [would] be chilled in their discussions with defence counsel." This argument is difficult to credit as most record keepers are bound by confidentiality rules which should prevent such discussions in any event.

B. Records Sought Prior to O'Connor

While child welfare records were the most commonly sought records prior to the O'Connor decision, such records have not been sought in any of the records cases considered by the Supreme Court of Canada. Counselling or therapy records have been the subject records in all of the Supreme Court of Canada cases and, in addition (although this fact was inexplicably ignored by the Court in its reasons for decision), residential school records were one of the subject records in the O'Connor case. Prior to O'Connor, defendants also sought disclosure of records from abortion and birth control clinics; adoption agencies, residential and public schools; drug and alcohol treatment centres; other doctors;

[25] *R. v. Hurrie*, [1997] B.C.J. No 2634 (S.C.) [hereinafter *Hurrie*].

employers; the military; psychiatric hospitals; lawyers' files relating to settlements with institutional defendants; the Crown on unrelated charges against the complainant; personal diaries; reporters' notes; victim/witness assistance programs; criminal injuries compensation boards; correction facilities; social welfare agencies; and immigration offices.[26]

C. Records Sought After *O Connor*

The kind of record sought by the defendant was not indicated in every case; most notably those cases where a procedural issue arose or a constitutional challenge was made. The type of record could be determined in 43 of 47 cases decided before Bill C-46 became law and in 22 of the 33 cases decided after Bill C-46 became law.

Counselling or therapy records were the most commonly sought records after *O Connor* and prior to Bill C-46: they were sought in about half of the cases (22/43). Other records sought included medical (18/43); child welfare (13/43); hospital (8/43); school (4/43); diaries (4/43); correction facilities or probation (3/43); shelters (2/43); adoption (1/43); service organizations (1/43); criminal injuries compensation (1/43); and victim services (1/43).

The most commonly sought records after Bill C-46 (in cases where the nature of the record being sought can be determined) are again, counselling records: these were sought in half the cases (12/22). Other records sought include: child welfare (10/22); medical (8/22); school (6/22); hospital (3/22); correction facilities or probation records (3/22); substance abuse treatment (3/22); victim services (2/22); diaries (2/22), College of Physicians and Surgeons (1/22) and social welfare (1/22).

As noted earlier, the Supreme Court of Canada has treated the issue of records disclosure as though it involved only counselling or therapy records despite the fact that records applications before lower courts involve almost every imaginable record. Thus the Supreme Court of Canada's decisions provide no guidance on defence access to other forms of records, particularly life history records (e.g. child welfare, medical and school records) or records which are unrelated to the incidents giving rise to the charges but which may reflect poorly on the complainant's creditworthiness (e.g. correction facilities, drug treatment or, again, child welfare records). These records are sought at least as often as counselling or therapy records must be kept in mind when reviewing not only rationales for disclosure of records but also the deleterious impacts of records disclosure. An important feature of Bill C-46 is that Parliament did recognize that a wide range of records were being sought by defendants. Bill C-46 governs applications for

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[26] Busby, *supra* note 8.

> ... 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 service 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.[27]

D. Applications for Multiple Records

The records of more than one record keeper or institution were sought in 58 percent of the pre-Bill C-46 cases (25/43). Often, the records were not specifically identified. For example, "all medical records;" or, "all records...kept...by the Department of Social Services in connection with services provided to [the complainants] and any other member of the W. family." The records of more than one record keeper or institution were sought in 67 percent of the post C-46 cases (14/22). Again, opened-ended descriptions of the records sought were, in spite of Bill C-46, common, for example, "records of the Department of Health and Social Services of the Government of the North West Territories." Of the five Supreme Court of Canada cases, two involve requests for multiple records. In *O'Connor*, residential school and counselling records were sought and in *Mills* counselling, hospital, medical, and possibly, child welfare records[28] were being sought.

Defendants sought disclosure of more than one set of records in 60 percent of all of the post-*O'Connor* cases where the kind of record being sought is specified (39/65). In 77 percent of the cases where the defendant sought disclosure of child welfare records (17/22), they also sought disclosure of other records as well such as counselling and medical records. Note that the child welfare files sought in records production cases are *not* records that were created as part of a child welfare investigation into the events giving rise to the charges. Obviously such investigation reports must be disclosed in accordance with the Crown disclosure obligations. However child welfare files will also contain detailed accounts of the daily lives of children and teenagers under protection orders including drug and alcohol use, involvement with the police, and sexual activity. They may further contain counselling notes including the complainant's feelings about other family members. As files recording the complainant's life history, child welfare files are sought to determine whether, for example, they con-

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27 *Supra* note 6.

28 Disclosure of records from an organisation called Changes was granted to the defendant in *Mills*. This organisation calls itself a "for profit organisation for families." In a telephone interview conducted by the author in June, 1998, the director stated that they are "predominately a child welfare organization" providing family counselling, and foster placement and supervision.

tain a reference to a recent complaint (especially in historic cases), a history of discreditable conduct by the complainant, something to which a motive could be ascribed, prior abuse by others, and as a source of information about other records.

As already noted, it is not possible to determine the number of cases where records relating to women with mental disabilities or illnesses affecting memory, perception or ability to communicate were sought because it is apparent that defendants' assertions on incompetence are often groundless. However, psychiatric hospital records were sought in five cases and, in each case, other kinds of records were sought. Psychiatric hospital records are highlighted here not because they are examples of situations where complainants are incompetent witnesses for many mental illnesses have no effect on memory or perception. As noted earlier, stereotypes about people with mental disabilities do animate psychiatric records applications. Rather, such records are an example of another record, unrelated or tenuously connected to the incidents giving rise to the charges, which may contain life history information that the defendant seeks together with other records, to attack a complainant's general credibility or for information on collateral issues like past abuse at the hands of others.

In all the cases where drug and alcohol treatment records (3/3), or correction facility or probation records (6/6) were sought, the defendant also sought disclosure of other third party records. Again, these records are sought by the defendant because they, like child welfare files, although unrelated or tenuously connected to the incidents giving rise to the charges, may contain life history information or may focus on discreditable conduct.

T.P.[29] illustrates the rationales asserted by one defendant for disclosure of multiple records, in this case, child welfare, young offender, and youth detention files. T.P., the complainant's father, sought her child welfare files to show a pattern of alcohol and drug consumption and to paint "a somewhat less than virtuous picture of the complainant." The judge also noted that the defendant alleged that "it is entirely possible that the Children's Aid Society Records might shed light on the accused's [sic] motive to lay certain charges against her father." The defendant asserted that "probation records may or may not reveal discreditable conduct on the part of the complainant." He also claimed that, as a parent, the *Young Offenders Act*[30] gave him the right to see probation records. The court refused to review the records holding that the defendant had failed to submit credible evidence in support of the application and therefore did not meet the criteria set out in Bill C-46.

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[29] R. v. T.P., [1998] O.J. No. 1498 (C.J. (Gen. Div.)[hereinafter T.P.].

[30] R.S.C. 1985, c.Y-1.

VII. Rationales for Production Prior to Bill C-46

Surprisingly, most of the reasons for decisions in the pre-Bill C-46 cases do not state why the defendant is seeking disclosure of third party records. Such information is given in only 26 percent of the cases where a production or disclosure decision was made (9/35), and in 36 percent of all pre-C-46 cases (17/47). Judges' reasons for determining that the threshold for production or disclosure is not stated or are unclear in 6/35 of the pre-Bill C-46 cases where a production or disclosure decision was made. In many of the other cases, the judge's reasoning is not set out in any detail. There might be, for example, a simple assertion, without more, that a particular record relates to credibility or contains a reference to the defendant. As noted earlier, judges ordered disclosure to the defendant in 52 percent of the cases where both production and disclosure decisions could be found.

As noted earlier in the methodology section, a case law review cannot determine what use a defendant actually made of the records as this information would rarely appear in any reasons for decision emanating from the trial. Defendant use of the material is best determined through a properly designed qualitative study and anecdotal self-reports on the use of records should be treated with skepticism.

A. Crown "Possession and Control"

In 7/17 pre-Bill C-46 cases, the defendant argued that the records were in the Crown's "possession or control" and therefore were required to be disclosed pursuant to Crown disclosure obligations as set out in *R.* v. *Stinchcombe*.[31] In some cases the police had obtained the information either on warrant or they simply made a request to the record holder. In many cases it is apparent that the seized or received records were disclosed to the defendant although in some cases this disclosure occurred before the O'*Connor* decision was pronounced. In G.A.,[32] it was held that where records were released to the police without the complainant's consent O'*Connor*, not *Stinchcombe*, applies. However, this view was not shared by all judges. In C.E.S.,[33] the Crown read a child welfare file at the defendant's request in order to determine if it contained any material that was relevant. The court determined that if the Crown had read the file, it had to be disclosed. In *Bramwell*,[34] the Crown simply agreed that it was required to turn over seized hospital records. The issue on a stay application in that case before the British Columbia Court of Appeal was whether the Crown was obliged to

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31 [1993] S.C.R. 326 [hereinafter *Stinchcombe*].

32 *R.* v. G.A. , [1996] O.J. No 2773 (Gen. Div.) [hereinafter G.A.].

33 *R.* v. C.E.S., [1996] S.J. No. 307 (Q.B.) [hereinafter C.E.S.].

34 *R.* v. *Bramwell*, [1996] B.C.J. No 503 (C.A.) [hereinafter *Bramwell*].

seek other third party records (from another hospital) relating to competency or credibility *only* on a defence request or whether such an obligation existed even in the absence of such a request. The Crown did not contest and the court apparently did not raise whether this "obligation" regarding either the seized records or the other records was inconsistent with the minimal protections given to the complainant as described by *O Connor*.

A difficult post-*O Connor* issue is whether a record is considered to be in the Crown's control even if it is not in the Crown's possession. Very shortly after *O Connor*, in *Blyth*,[35] the New Brunswick Court of Appeal held that:

> Crown counsel had a duty to make reasonable inquiries of other Crown agencies or departments that could reasonably be considered to be in possession of evidence... If the Crown is denied disclosure of another agency's file, this should be disclosed to the defence ... .

The "evidence" sought in *Blyth* was child welfare files related to counselling and, as the Crown had failed to disclose these files, the charges were stayed. In *Carosella*, the Court observed that the sexual assault centre had entered protocol arrangements with various government departments, including the Department of Justice. These comments could be understood as imposing higher obligation on counselling services that receive public funding, namely counselling and psychiatric services. It should be noted that the pre-*O Connor* decision of *R. v. R.M.*[36] the judge found that since the centre where the complainants received counselling was publicly funded, their files should be subject to *Stinchcombe* disclosure. In only one decision did the Court expressly reject Crown "control" arguments, where argument was based on either the fact that a government department held the file or the government had funded the service. In *Re Hemming*,[37] the Court found that a victim services office which performed no investigative functions, even though it had close connections with the police, was not covered by the *Stinchcombe* disclosure obligations.

In summary, the pre-Bill C-46 case law does not provide clear guidance on the very difficult issue of when confidential records, other than investigative records, held by either other government departments or organisations funded by governments, are considered to be in the Crown's "possession and control."

B. Generic Defence Applications

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35 *R. v. Blythe*, [1996] N.B.J. No. 107 (C.A.) [hereinafter *Blythe*].

36 (10 March 1994) Vanc. Reg. 10199 (B.C.Y.C.) [hereinafter R.M.].

37 [1996] B.C.J. No. 1933 (S.C.) [hereinafter *Hemming*].

In some of the 17 cases where the defendants' rationales for access are available, the request could best be characterised as "a dog's breakfast." In *Pritchard*,[38] for example, the defendant stated that,

> ... the purpose of this Application is to seek evidence (1) to confirm that the complainant T.K. had valid medical reasons for seeking two adjournments of the Trial (2) that there has been no further abuse of drugs in the five years since the offence date (3) to confirm her testimony from the preliminary hearing and/or the Trial previously held as to (4) why she moved to the Fraser Valley (5) injuries sustained by the alleged attack upon her (6) any alleged trauma attendant to the Court appearances (7) her non attendances in Court and any other relevant facts that might assist the defence (8) her history as a prostitute.

In *Chisholm*,[39] the defendant argued that the teenaged complainant did not have a privacy interest in matters such as her "relationship with her parents, drug and alcohol usage, school performance, interaction with boyfriends, sexual history, criminal conduct and court involvement" because she had discussed these matters with the expert psychologist retained by the Crown. Her counselling records, for counselling which started three years after the incidents giving rise to the charge following injuries in a car accident, were ordered produced to the defendant. (The application was made four years after the incidents because a mistrial had been declared following an earlier trial.)

More commonly, the defendant simply reiterates the grounds set out in *O'Connor* asserting that the record may contain information concerning the unfolding of events underlying the criminal complaint, reveal the use of therapy which influenced the complainant's memory of the alleged events, or contains information that bears on the complainant's credibility. After the *Carosella* decision, defendants added that the record might contain a prior statement, may assist in the preparation of a cross-examination, or might disclose other witnesses. More than one rationale was offered by the defendant in most cases where this information is available from the reasons for decision.

As noted, the judges' reasons for determining that the threshold for production or disclosure is not stated, are unclear in a few cases and, in many other cases, this reasoning is not set out in any detail. J.C.B., therefore, is unlike most judicial pronouncements in that it contains a smorgasbord of reasons why the judge determined that various records should be produced to him for review. (The defendant already had the complainant's victim impact statement and had cross examined her about records at the preliminary inquiry.) The judge stated:

> (Being careful not to prepare the accused's case), there are a number of examples I can point out, by which the accused might be able to use the information: the mental condition of the complainant on the night of the incident, at the Preliminary Inquiry, and/or at trial; her expressed hatred toward men following the incident; her anger, whether it existed before the incident, whether it affected or affects her reliability or

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38 R. v. *Pritchard*, [1996] B.C.J. No. 1768 (S.C.) [hereinafter *Pritchard*] at para. 9.

39 R. v. *Chrisholm*, [1997] O.J. No. 1816 (Gen. Div.) [hereinafter *Chrisholm*].

> testimonial capacity; that the incident was central to her thoughts throughout 1996, which would have included the time of the preliminary inquiry, and will also include the trial; that something similar happened before, and whether this experience influenced her and her reporting regarding this incident; that whereas she says sometimes she's not in reality, whether she was in reality at the time of the incident, at the time of the Preliminary Inquiry, and/or at the time of the trial; that whereas she says she is on and off medication, whether she was on medication at the time of the Preliminary Inquiry. There is a variety of purposes for which the accused may use the information regarding the complainant's recollection: testimonial capacity; credibility; competence on the night of the alleged incident, in which she indicates she consumed substantial alcohol, had been involved in sexual relations with a man. Her statements indicate her treatment and counselling occurred before and after, although not at the time of the incident. She says in her statements she had flashbacks when drinking, and she was drinking at the time of the incident.
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> Counsel's inquiries at the preliminary inquiry are taken not to be driven by myths and stereotypes regarding females; they are asked to determine if the complainant's recollection could have been affected as a result of the treatment or a form of treatment. The standard of likely relevance is met. With regard to arguable relevance, the accused says in his application the issues are credibility and competence. The accused does not have the information that is contained in the third party records; but he knows from the complainant's own statements that the complainant endured experiences which could well affect her credibility or competence, and that she was counselled by both and placed in the Kings County Hospital following the incident relating to her depressed state. [40]

If this judge's assessments as to when records might be relevant is correct, few records of any sort would ever escape scrutiny!

C. Competency

Some form of a perceptual problem is noted by the judge in the reasons for decision as the rationale offered by the defendant in 10/17 of the pre-Bill C-46 cases. This finding is not surprising given that the majority decision in O*Connor* states that records may be useful if they have any bearing on the complainants' "perception of events at the time of the offence and their memory since." However, no judge explicitly relied on or rejected this rationale in making a production or disclosure decision.

The use of therapy which may have influenced the complainant's memory is another rationale noted by the Supreme Court of Canada in O*Connor*, and is asserted in 9/17 case. (Note that more defendants relied on this ground, such as the defendant in *Mills* as described above, but such cases are not included in this figure as it only includes those cases where the reasons for decision expressly set out this rationale as one asserted by the defendant. The information about *Mills* is from the case on appeal not the reasons for decision). Judges ex-

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[40] R. v. J.C.B., [1997] P.E.I.J. No. 26 (S.C.) [hereinafter J.C.B.] at paras. 24–25.

pressly accepted this rationale in four cases, rejected it in four cases, and were silent in one case.

Records relating to drug or alcohol (ab)use were sought in 6/17 cases. This ground was accepted in one case; in another five cases the court rejected this rationale either implicitly or by stating that the usage was obvious and did not need to be confirmed by records.

Finally, as noted earlier, in *Wyatt*, the Crown was ordered to obtain an expert opinion (which also required both a psychiatric interview with the complainant and disclosure of the complainant's medical records) when it became clear that the complainant's mental disability adversely affected her communication skills. The Court ultimately stayed the proceedings on the ground that the complainant could not be subjected to a cross- examination.

D. Credibility

1. Motive to Fabricate

Motive to fabricate is the most commonly articulated reason by the defendants for disclosure of records in the pre-Bill C-46 cases: this ground is asserted in 15/17 pre-Bill C-46 cases where defendant rationales can be determined. More particularly, the specific motive is: *animus* towards the defendant (4/17); to avoid discipline (3/17); to gain advantage in a custody battle (2/17); to explain a sexually transmitted disease or loss of virginity (2/17); to get away from home (1/17); in retaliation for being placed in care (1/17); and to undermine the relationship between the defendant and the complainant's mother (1/17). (More than one possible motive was asserted in some cases.) Motive, without more, is stated as the rationale in the three cases.

Judges accepted the motive rationale in 5/10 cases, rejected it in 5/10 cases, and were silent in 5/10 cases. The cases where motive is accepted as a reason to produce or disclose do not elaborate on the sufficiency of the rationale. For example, in *Morganstein*,[41] the judge disclosed to the defendant (the complainant's husband) material stating only that "it may, when taken with other information, provide to the defence a theory for motivation." In the two *animus* cases where the rationale is rejected, the court stated that there was no evidence that the complainant's *animus* towards the defendant was founded in anything other than the incidents giving rise to the charges. Motive was rejected in both of the advantage-in-custody cases as the court found that such a motive could be explored on a cross examination without the benefit of records.

2. Credibility at Large

The next most common ground relating to credibility asserted by defendants for records disclosure in the pre-Bill C-46 cases is credibility at large: it was asserted

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[41] *R. v. Morgenstein*, [1997] O.J. No. 3781 (Prov. Div.) [hereinafter *Morgenstein*].

in 9/17 cases. Judges accepted this rationale in 3/9 cases, rejected it in five, and were silent in one. Judges do not elaborate on their determinations respecting credibility at large other than in *J.C.B.* (quoted above) and in *Pritchard*, (a case which stands in stark contrast to the reasoning in *J.C.B.*), where the judge stated:

> In the result, I see no open door to disclosure of private or confidential records which may reveal that the witness has something to hide — has been guilty of something in the past or currently, even something which smacks of dishonesty. Surely the purpose of this type of application is not to allow a complainant or witness' life — unrelated to the event itself — to become the subject of interminable, embarrassing and even traumatic cross-examination. How many complainants or witnesses are so free of the hint of guilt-inducing behaviour that the specter of such an invasion of ones private life would not inhibit coming forward in a proper case. To allow such a far-reaching spotlight to shine on anyones private life because of alleged involvement directly or indirectly in the commission of a criminal offence either as victim or someone with information relevant to the commission of the offence is to participate in creating a destructive illusion. That is, that generally reliable decent and honest persons cannot be made to look unreliable, indecent and dishonest by being subjected to such a broad-ranging and searching cross-examination. [42]

E. Sexual History or Prior Abuse

Pre-Bill C-46 defence requests founded on disclosure of information on sexual history or sexual abuse (either before or, in historic cases, after the incidents) were made in 8/17 cases. The defendant sought disclosure to determine, for example, history as a prostitute, or information relating to virginity, promiscuity, sexually transmitted diseases, and sexual abuse by others. (Cases like *Chisholm* and *J.C.B.* are not included in this figure because, while disclosure of sexual history seems to animate, at least in part, the application, this rationale is not expressly noted by the judge as one of the grounds asserted by the defendant.) Information relating to past sexual abuse is sought based on highly problematic reasoning including: to investigate the possibility of "blurring" (that is, that the complainant has been abused, but that she is confused about who abused her); for the source of sexual knowledge; to explain her anger towards men; and to identify distorted sexual perceptions. The court expressly accepted sexual history or sexual abuse as a ground in 2/8 cases, rejected it in 4/8 cases, and stated that it was more properly the subject of a sexual history application than an O *Connor* application in 2/8 cases. However in two cases where this ground was rejected the records were nevertheless disclosed: in one case because the court determined that the child welfare file had to be disclosed pursuant to Crown disclosure obligations and, in another case, because the file might relate to motive — the authoritarianism of the complainant's father (the defendant) and mother.

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[42] *Pritchard*, *supra* note 38 at para. 21.

F. Prior Statement

The possibility that a record might contain a prior statement was asserted in 8/17 cases and accepted as a sufficient rationale in six of these cases. Given the very opened-ended nature of the majority's reasoning in the *Carosella* decision , the slightest possibility that the record may contain some kind of account of the incidents giving rise to the charge is sufficient reason to disclose it to defendants.

G. Recent Complaint

The absence of contemporaneous complaint was the specific ground for disclosure in only one pre-Bill C-46 case (and it was accepted in that case), but in two other cases, the judge took the initiative and offered this as the reason to disclose child welfare files to the defendant. Disclosure of files in order to show that they do not contain something requires disclosure of the whole file. Acceptance of this rationale, therefore, will result in wholesale disclosure of life history records like child welfare, medical or psychiatric files and diaries. Moreover, this reasoning makes the problematic assumption that the record keeper would have noted the disclosure. *Whitehouse*[43] (a post-Bill C-46 case) illustrates this problem. The judge disclosed the complainant's psychiatric records stating that

> I have determined that the notes of Dr. DeCoutere ought to be disclosed because the complainant in her statement to the police indicated that she had disclosed the alleged abuse to a psychiatrist in 1983 but that psychiatrist was only interested in knowing whether she enjoyed the sex and whether she was jealous of the accused's wife. The documents reviewed do not address the points mentioned by the complainant in her statement to the police and therefor go directly to her credibility.
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> A psychiatrist who asked a teenager if she enjoyed a sexual assault by her teacher may have thought it unwise to include such a reference to either the incidents or his response to her disclosure in notes made after the interview. In any event, the connection between the psychiatrist's notes and the complainant's credibility in these circumstances is extremely tenuous.

H. Other Credibility Issues

Records relating to possible recantations were sought in two pre-Bill C-46 cases and granted in one. Records on school performance were sought in two cases and granted in one (in one case to corroborate the complainant's assertion that her grades fell after the assault and in another to show that since her grades were unaffected, nothing traumatic had occurred).

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[43] *R.* v. *Whitehouse*, [1997] N.S.J. No. 431 (S.C.) [herinafter *Whitehouse*].

I. Other Grounds

Young offender records were sought in two cases: granted in one and denied in the other. In two historic cases, disclosure of the complainants' records were ordered because they were the only contemporaneous records still in existence and might assist the defendant in establishing time posts.

VIII. AFTER BILL C-46

AS NOTED EARLIER, RECORDS WERE ORDERED to be disclosed to defendants in 6/13 post-Bill C-46 cases where the final outcome of the application could be determined. (In two cases only the production decision is available.) Defendants' rationales for disclosure are set out in the reasons for decision in 11/17 of the cases where a production or disclosure decisions was made. Judicial explanations for accepting or rejecting rationales are given in all cases and, in general, are described in more detail than the pre-Bill C-46 cases.

A. Meaning of "Assertion" in Bill C-46

Bill C-46 provides that a number of assertions are not sufficient to establish that a record is likely relevant and, therefore, the record should be neither produced nor disclosed. Such assertions include: that the record relates to medical or psychiatric treatment; therapy or counselling; relates to the subject matter of the proceeding; may disclose a prior inconsistent statement; the presence or absence of recent complaint; the complainant's sexual activity; sexual abuse by others; may relate to the credibility or reliability of the complainant; or was made contemporaneously with the incidents given rise to the charge or the making of the complaint.

An issue which arose immediately in the case law is the meaning of the phrase "assertions ... are not sufficient." The reading which will curtail disclosure of complainants' records is that the assertion, in the sense of ground or rationale, is impermissible *per se* and will never be sufficient to support the production or disclosure of a complainant's private records. In other words, the defendant's reason for disclosure would have to be a reason other than any of the wholly impermissible assertions set out in the legislation. The alternative reading, which will have little, if any, effect in curtailing defence access to records, is that an allegation unsupported by any evidence is insufficient to support an application. If the second interpretation prevails, the defendant need only produce some evidence that the record, for example, relates to the incident or recent complaints, in order to secure production. The post-Bill C-46 case law is evenly split on which interpretation is correct.

B. Generic Defence Rationales

Bill C-46 did not stop defendants from stating numerous rationales for record disclosure. The *O'Connor* and *Carosella* grounds are asserted in most of the cases. In *Murray*,[44] for example, medical, counselling, hospital, victim services records, and the complainant's diary were sought. The defendant in this case, who already had disclosure of some medical records, offered every imaginable defence rationale for disclosure of these additional records.. However, the Court did not order production of the records holding that the application did not meet the evidentiary requirements of Bill C-46.

C. Crown "Possession or Control"

The issue of Crown possession or control rarely surfaces in the post-Bill C-46 cases. Defendants offered this ground as a rationale in only one case and no judge relied upon it. There are two explanations for this. First, by the time Bill C-46 passed, the pre-*O'Connor* cases where the Crown had obtained third party records other than in accordance with the *O'Connor* waiver requirements had probably been resolved and Crown attorneys and the police recognised the implications of obtaining records and changed their pre-*O'Connor* practices. The more important reason is that Bill C-46 provides that the records production regime contained in the Bill applies even to documents in the Crown's possession or control.

D. Competency

The defendant made assertions respecting complainants' general competency in two cases, but these rationales were rejected in both cases, including *Miller*. Defendants sought disclosure of records to determine the complainant's susceptibility to counselling influences or respecting recovered memories in 7/11 cases. Disclosure was granted on this basis in two cases, denied in four cases, and not decided in one. Records were sought respecting drug or alcohol (ab)use in two cases; one judge rejected this rationale and the other did not explicitly refer to this ground.

E. Credibility

Defendants asserted that the documents were relevant to the complainants' credibility in every post-Bill C-46 case (11/11) where such rationales are stated. That the document may contain a prior statement is the most common ground related to credibility (9/11 cases) and credibility at large is stated in 4/11 cases. Records containing information about a possible motive were sought in 4/11 cases, more particularly, *animus* towards the defendant (2 cases); to avoid discipline (1 case); and because the father/defendant was too strict (1 case). Records relating to school performance were sought in two cases. The following ration-

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[44] *R. v. Murray*, [1997] N. J. No. 210 (S.C. (T.D.)) [hereinafter *Murray*].

ales are given in only once: history of lying; character or reputation; recent complaint; and "behavioral concerns."

Judges accepted the prior statement rationale in two cases. In one of these cases, *Whitehouse*, the judge also appears to rely on recent complaint. In one of the *animus* cases, the application was adjourned to trial. The record was disclosed in the case where "behavioral concerns" were alleged, but the basis for disclosure is not clear. Other than these 2/11 (or, possibly, 3/11) cases, credibility rationales were rejected either explicitly or implicitly in all other cases either because the evidence offered was insufficient or the assertion itself would never support a records application.

F. Other Grounds

Information on abuse at the hands of others was sought in 3/11 cases, but this ground was expressly rejected in all three cases as lacking any air of reality for the inferences to be drawn from such information. Information on sexual history was not asserted as the rationale in any case. Disclosure of the complainant's records was granted in one case to assist the defendant in piecing together events as it was the only contemporaneous record in an historic case.

Young offender files were sought in 3/11 cases. Disclosure was not granted to a defendant-father who claimed a statutory right of disclosure as a parent of such records—the judge held that Bill C-46 prevailed over the *Young Offenders Act* in these circumstances. In the second case, the judge stated that disclosure of a young offender's record could only be obtained in accordance with that specific provision of the Act. The third case, *Aka*,[45] is one of the most troubling post-Bill C-46 decisions. Counsel for the defendant stated that the sexual assault and prostitution-related charges against his client resulted from a police investigation of the complainant; the complainant in this case was being investigated for a break, enter and theft of the defendant's premises. Counsel sought all investigation reports relating to the theft charges, the complainant's young offender record, pre-sentence reports and "all custodial facility reports." The judge ordered production of all of these records stating that the offences were all bound-up together. The relationship between any part of a "custodial facility report" and the sexual assault and prostitution-related charges is not obvious and it, like the pre-sentencing report, would have contained life history information which was also irrelevant. Yet, after making a passing reference to Bill C-46, the judge determined that editing the records was too difficult and ordered that all records be disclosed to the defendant.

IX. Frequency of Production and Disclosure of Third Party Records

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[45] R. v. *Aka*, [1998] O.J. No. 1414 (Gen. Div.) [hereinafter *Aka*].

DEFENCE COUNSEL HAVE ASSERTED that failure to seek all possible records in sexual violence cases would amount to professional negligence and judges have noted that the applications are being made in most cases heard since *O'Connor*. However, a case law review cannot determine whether applications for records have become a standard practice in sexual violence cases as it only considers cases where the applications have, in fact, been made. Moreover, the findings of a case law review on the issue of the frequency of production to the judge or disclosure to the defendant cannot safely be extrapolated to answer the question of the likelihood that records will be produced or disclosed in cases where records applications are made. A case law review only gives an impression of the likelihood of records production and disclosure.

A. Production to Judges

The cases reviewed in this study reveal that it is not uncommon for the defendant to have already obtained some third party records prior to a disclosure application, especially if the first disclosure application was made before the *O'Connor* decision was released. These records were obtained, for example, by police seizure, pursuant to Crown disclosure obligations, pre-*O'Connor* order, or by agreement with the complainant or record keeper.

Production or disclosure decisions were made by judges in sexual violence cases in 35 pre-Bill C-46 cases. In more than two-thirds of these cases (24/35) all or most of the records were ordered to be produced to the judge. Production or disclosure decisions were made in 15 of the post-C-46 cases. In 8/15 of these cases, all or most of the records were ordered to be produced to the judge. Both before and after Bill C-46 the record keeper was always asked to submit the whole record to the judge, even in cases that had voluminous records (like the prison records or child welfare records) or records which could not have even a scintilla of relevance except for one reference (like the medical records of an adult complainant who saw her personal physician after the single incident given rise to the charge.

In two pre-Bill C-46 cases (*Chisholm* and *C.R.*[46]) judges commented that the *O'Connor* tests placed a heavy burden on trial judges, although these comments are not critical of the tests. In two other cases (*Ross*[47] and *Denley*[48]), the trial judges were explicitly critical of the strain that *O'Connor* puts on judicial resources. In *Balabuck*, the judge stated that Parliament should consider the records issue because *O'Connor* gives rise to both practical difficulties (such as who pays the photocopying costs) and ethical problems (such as the impossibil-

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[46] *R. v. C.R.*, [1996] O.J. No. 4762 (Gen. Div.) [hereinafter *C.R.*].

[47] *R. v. Ross*, [1996] O.J. No. 2105 (Gen. Div.) [hereinafter *Ross*].

[48] *R. v. Denley*, [1998] O.J. No. 725 (C.S. (Prov. Div.)) [hereinafter *Denley*].

ity of judges' disabusing themselves in some cases of the information they received in reading the files). The judge in *Balabuck* declared a mistrial after ordering production stating that he could not disabuse himself of information he knew about both the complainant and the defendant. Other than these five cases, no judge has commented on the implications for judges in the *O'Connor* decision.

Other than a few judges who comment on the difficulty of assessing the deleterious and salutary effects at the stage of production to a judge, only one judge in the post-Bill C-46 cases comments on the difficulty of the process itself. In *Aka*, the judge held that editing the records being sought (including "all custodial facility reports" and the complainant's young offenders files) was "too difficult" and ordered that all of the records be produced to the defendant.

B. Disclosure to Defendants

In the 24 pre-Bill C-46 cases where records were ordered to be produced, 67 percent (16/24) were ordered to be disclosed to the defendant. In 17 percent of the cases (4/24) no disclosure was ordered and in 17 percent of the cases (4/24) the disclosure decision was not available. Therefore, in the pre-Bill C-46 cases where both the production and disclosure decision can be found, the defendant obtained disclosure of third party records in 52 percent of the pre-C-46 cases (16/31) and was denied disclosure in 48 percent of the cases (15/31).

In the eight cases where the records were ordered to be produced to the judge in the post-C-46 cases, some or all of the records were ordered to be disclosed to the defendant in 6/8 cases. In two of the eight cases the disclosure decision was not available. Therefore in the post-Bill C-46 cases where the outcome can be determined disclosure to the defendant was ordered in every case where the record was ordered produced to the judge (6/6). The defendant obtained disclosure of third party records in 6/13 of the post-Bill C-46 cases where the final outcome of the application could be found.

This analysis may suggest that the defendant obtained (or was denied) disclosure of records in about 50 percent of the cases both before and after Bill C-46. However, such a conclusion is weak given the small number of post-Bill C-46 cases where a final determination of the application is available, and because of the uncertainty around the Bill given that it was immediately subject to constitutional challenges.

X. SUMMARY OF RESEARCH FINDINGS

SIXTY EIGHT PERCENT OF THE COMPLAINANTS in cases where records were sought were teenagers at the time of the incidents giving rise to the charges, and another ten percent were under 12 years of age. Almost all of the defendants in these cases were adult men. At least 71 percent of the complainants

and defendants were related to each other. In all of the post-*O'Connor* cases where the relationship between the complainants and the defendants can be determined, the parties were acquainted with each other in a personal or professional capacity. At least 20 percent of the cases involved allegations of long-term sexual abuse, that is, the complainant alleged multiple incidents over a period of more than two years. About 35 percent of the cases involve historic abuse. Many, but not all, of the long-term sexual abuse cases are also historic cases.

There were no cases on QuickLaw for the time period of this study in which a *Canada Evidence Act* application was made to determine the competency or reliability of a complainant in a sexual violence case. However, defendants frequently asserted that complainants may have been delusional or suffering from various psychoses to justify access to records. In most cases the assertions were without any foundation.

The defendant's most common source of information about records was the defendant's personal knowledge about the complainant arising out of their relationship (either familial or professional). Questioning at the preliminary inquiry or Crown disclosure are other common sources of information. Frequently defendants had already obtained some records prior to making their disclosure application.

Counselling or therapy records are the most commonly sought documents and are requested in about half of the cases. Child welfare or medical files were sought in about 40 percent of the cases. Other records sought by defendants included hospital; school; diaries; correction facilities or probation; adoption; criminal injuries compensation; victim services; substance or alcohol treatment; service organisations; College of Physicians and Surgeons; and social welfare records. Defendants sought access to more than one set of records in about 60 percent of the cases and they sought access to more than one set of records in all cases where psychiatric hospital, drug and alcohol treatment, and correction facility or probation records were sought. In 77 percent of the cases where defendants sought access to child welfare records, they also sought disclosure of other sets of records.

The post-*O'Connor* case law conflicts on the issue of when a record is to be considered as falling within the Crown's possession or control and, therefore, subject to the *Stinchcombe* rather than the *O'Connor* standard. This issue arose in nearly half of the pre-Bill C-46 cases. Defendants asserted that the complainants suffered from some sort of perceptual problem in at least 10/17 of the pre-Bill C-46 cases. Improper therapy influences or recovered memories are the rationales offered in 9/17 of the cases. No judge ever expressly relied on perceptual problems to support disclosure to the defendant, although the possibility of improper therapy influences is accepted in 4/9 of the cases. Motive to fabricate is asserted as a rationale for disclosure on almost every pre-Bill C-46 case (15/17) where defence rationales are noted in the reasons for decision. Motive

to fabricate was accepted by the judge in one third of the cases where it was asserted; rejected in one third of the cases; and a third of the cases are silent on the issue. Credibility at large was asserted by the defendants in 9/17 cases, but it was accepted in only three of these cases. Sexual history or prior sexual abuse was asserted by the defence in about half of the cases and accepted by the judge as the basis for disclosure in 2/17 cases. The possibility that a record might contain a prior statement was asserted in 8/17 cases and accepted as a sufficient rationale in six of these cases. The absence of contemporaneous complaint was the specific ground for disclosure in only one pre-Bill C-46 case (and it was accepted in that case), but in two other cases a judge gave this as the reason to disclose child welfare records.

The case law is evenly split on the meaning of "assertions ... are not sufficient" in Bill C-46. Some judges have accepted the view that the enumerated assertions are impermissible grounds and will never be sufficient to support the production or disclosure of a complainant's private records. Other judges have interpreted this section as meaning only that an asserted rationale would be insufficient to support production unless the basis for the assertion is established by evidence. The latter interpretation will result in more records being disclosed to defendants than the former interpretation.

Defendants questioned the complainant's competency in more that half the post-Bill C-46 cases (7/11), but disclosure was granted on this basis in only two cases. Defendants asserted that the documents were relevant to the issue of the complainant's credibility in every case. The possibility that the record may contain a prior statement was asserted in 9/11 cases but only accepted in 2/11 cases. Other than these two cases (and, possibly, one other), credibility rationales were rejected either explicitly or implicitly in all other cases. Information about prior abuse was sought in three cases and rejected in all three.

It is not uncommon for defendants to have already obtained some third party records prior to making disclosure applications. In more than two thirds of the pre-Bill C-46 cases and in about half of the post-Bill C-46 cases, the records were ordered produced to the judge. The defendant was granted disclosure to third party records by order in about half of both the pre- and post-Bill C-46 cases.

XI. CONCLUSION

MOST RECORD PRODUCTION CASES INVOLVE defendants who are related to the complainant (most commonly their fathers), or professionals who have worked with the complainant. Defendants rely on their own personal information about complainants to determine the existence of records and, frequently, they already have had access to some records prior to making the application. The majority's assertion in *O'Connor* that "generally speaking, an accused will only become aware of the existence of records because of something which arises in the

course of the criminal case" is clearly wrong. Rather, it is the rare case that a defendant could truthfully assert that he does not know anything about the existence of records on the complainant. Indeed, in the usual case, he already knows her intimately and, moreover, has easy access to additional information about her.

The typical complainant is a teenaged female and most complaints are made shortly after incidents giving rise to the charges were alleged o have occurred. Record access has extremely deleterious implications for vulnerable, dependent minors — including the possibility that such access could adversely affect relationships with other family members and have long term implications for access to therapy. Yet, these heightened vulnerabilities are factors that judges, including the Supreme Court of Canada, ignore in records applications.

While counselling records were the most commonly sought, life history records like child welfare records and medical records were sought in almost as many cases. Most defendants sought more than one kind of record. Multiple records were sought in all cases where psychiatric hospital, drug and alcohol treatment and correction records were sought. This extraordinarily high degree of invasion into the lives of complainants who have been heavily documented will clearly influence the willingness of such women to make criminal complaints — and therefore reinforce their already vulnerable status.

Finally, while defence assertions that the complainant suffers from delusions or psychoses are frequent, these assertions are almost always without any foundation. Moreover, most complaints are made to the police shortly after the incidents were alleged to have occurred and, even in the historic cases, there is rarely any evidence (even after a preliminary inquiry) that the memories were recovered in therapy or that the counselling was otherwise improperly conducted. Such observations demonstrate that judges need to take care to insure that record applications are not motivated by stereotypical thinking about mental illness or overblown fears about false memories.

APPENDIX: TABLE OF CASES

Production or Disclosure Cases Prior to Bill C-46:

R. v. *A.P.B.*, [1997] O.J. No. 1875 (Gen. Div.)
R. v. *Balabuck*, [1996] B.C.J. No. 355
R. v. *Bane*, [1996] O.J. No. 2750 (Gen. Div.)
R. v. *C.E.S.*, [1996] S.J. No. 307 (Q.B.)
R. v. *Chisholm*, [1997] O.J. No. 1816, see also: [1997] O.J. No. 1817, 1818, 1819 (Gen.Div)
R. v. *C.R.*, [1996] O.J. No. 4762 (Gen. Div.)
R. v. *O.(D.A.)*, [1997] 114 C.C.C. (3d) 374 (B.C.C.A.)
R. v. *D.D.W.*, [1997] B.C.J. No. 744 (C.A.)
R. v. *Denley*, [1998] O.J. No. 725 (C.S. (Prov. Div.))
R. v. *D.S.*, [1996] N.J. No. 277 (S.C. (T. Div.)
R. v. *Hardes*, [1997] B.C.J. No. 32 (S.C.)
Re Hemming, [1996] B.C.J. 1933 (S.C.)
R. v. *H.K.L.*, [1996] B.C.J. No. 1201 (S.C.), see also, [1997] B.C.J. No. 1355 (C.A.)
R. v. *H.P.P.*, [1996] M.J. No. 607 (C.A.), see also [1995] M.J. No. 333 (Q.B.)
R. v. *J.C.B.*, [1997] P.E.I.J. No. 26 (S.C.)
R. v. *J.G.L.*, [1997] O.J. No. 4953 (C.A.)
R. v. *Kliman*, [1996[B.C.J. No. 551 (C.A.), see also [1996] B.C.J. No. 2285, [1998] B.C.J. 49 (S.C.)
R. v. *MacCallum*, [1996] N.S.J. No. 203 (S.C.)
R. v. *Maramba*, [1996] O.J. No. 4721 (Gen Div.), see also [1996] O.J. 4719 and 4720 (Gen. Div.)
R. v. *Mills*, [1997] A.J. No. 511 (Q.B.), see also the post-Bill C-46 decisions in the same case respecting different records noted below
R. v. *M.L.W.*, [1996] S.J. No. 776 (Q.B.)
R. v. *Morganstein*, [1997] O.J. No. 3781 (Prov. Div.)
R. v. *Nitsiza*, [1997] N.W.T.J. No. 14 (S.C.)
R. v. *N.R.*, [1997] O.J. No. 80 (Prov. Div.)
R. v. *Olson*, [1997] B.C.J. 791 (C.A.)
R. v. *P.S.*, [1996] O.J. No. 1515 (C.A.)
R. v. *Pritchard*, [1996] B.C.J. No. 1768 (S.C.)
R. v. *R.H.*, [1996] N.J. No. 344 (S.C.)
R. v. *R.J.B.*, [1997] N.S.J. No. 80 (C.A.), see also [1994] N.S.J. No. 269 (C.A.)
R. v. *R.M.*, [1997] B.C.J. No. 1308 (C.A.)
R. v. *Ross*, [1996] O.J. No. 2105 (Gen. Div.), see also [1995] O.J. No. 2019; [1997] O.J. 2772, [1997] O.J. No. 4627
R. v. *R.P.H.*, [1997] A.J. No. 4 (Q.B.)

R. v. Russell, [1996] B.C.J. No. 1362 (S.C.)
R. v. W.M., [1996] O.J. No. 3141 (Prov. Div.)
R. v. Wyatt, [1997] B.C.J. No. 781 (C.A.)

Pre-Bill C-46 Cases (in which a substantive decision was not made because of procedural issues):

R. v. Blyth, [1996] N.B.J. No. 107 (C.A.)
R. v. Bramwell, [1996] B.C.J. No. 503 (C.A.)
R. v. Carosella, [1997] S.C.J. No. 12 (S.C.), see also [1995] 26 O.R. (3) 209 (C.A.)
R. v. C.V.B., [1996] A.J. No. 16 (Prov. Ct.)
R. v. G.A., [1996] O.J. No. 2773 (Gen. Div.) see also the post-Bill C-46 decisions in the same case respecting different records noted below.
R. v. L.J.S., [1996] A.J. No. 73 (Q.B.)
R. v. Meyntz, [1996] O.J. No. 39 (Gen. Div.)
R. v. Reid, [1996] O.J. No. 2133 (Gen. Div.)
R. v. R.F.C.L., [1996] O.J. No. 4262 (Gen. Div.)
R. v. R.J.K., [1996] S.J. No. 503 (Q.B.)
R. v. Verma, [1996] O.J. No. 2621 (Gen. Div.)
R. v. Whalley, [1996] O.J. No. 173 (Gen. Div.)

Production or Disclosure Cases After Bill C-46:

R. v. A.D.J.A., [1998] B.C.J. No. 793 (S.C.)
R. v. Aka, [1998] O.J. No. 1414 (Gen. Div.)
R. v. C.V.G., [1997] S.J. No. 621 (Q.B.)
R. v. E.A.N., [1997] B.C.J. No. 3001 (S.C.)
R. v. G.L.T., [1997] N.S.J. No. 552 and No.553 (Prov. Ct.)
R. v. Herbert, [1997] O.J. No. 4769 (Gen. Div.)
R. v. Hnyda, [1997] B.C.J. No. 2600, [1998] B.C.J. No. 328 (S.C.)
R. v. I.D.B., [1997] O.J. No. 3198 (Gen. Div.)
R. v. J.F.G., [1997] N.W.T.J. No. 38 and No. 47 (S.C.)
R. v. Miller, [1997] N.J. No. 207 (Prov. Ct.)
R. v. Murray, [1997] N.J. No. 210 (S.C. (T.D.))
R. v. R.C., [1998] O.J. No. 877 and 977 (Gen. Div.)
R. v. Romano, [1997] B.C.J. No. 2437 (Prov. Ct.)
R. v. T.P., [1998] O.J. No. 1498 (C.J. (Gen. Div.))
R. v. Whitehouse, [1997] N.S.J. No. 431, see also [1998] N.S.J. No. 82 (S.C.)

Post-Bill C-46 Cases (in which a substantive decision was not made):

R. v. *Bell*, [1997] O.J. No. 3508 (Prov. Div.)
R. v. *Chartrand*, [1998] M.J. No. 106 (Q.B.)
R. v. *Curti*, [1997] B.C.J. No. 2367 (S.C.)
R. v. *D.H.C.*, [1998] N.J. No. 118
R. v. *Fanjoy*, [1997] O.J. No. 4828 (Gen. Div.)
R. v. *G.C.B.*, [1997] O.J. No. 5019 (Gen. Div.)
R. v. *G.J.A.*, [1997] O.J. No. 5354 (C.J. (Gen. Div.)), see also the pre-Bill C-46 decisions in the same case (G.A.) respecting different records noted above
R. v. *Grimes*, [1998] 122 C.C.C. (3d) 331 (Alta. C.A.)
R. v. *Hurrie*, [1997] B.C.J. No. 2634 (S.C.)
R. v. *Jarema*, [1996] A.J. No. 782 (C.A.)
R. v. *J.F.S.*, [1997] O.J. No. 5328 (C.J. (Prov. Div.))
R. v. *J.K.*, [1997] N.W.T.J. No. 74 (S.C.)
R. v. *Kingsbury*, [1997] O.J. No. 4855 (C.S. (Prov. Div.))
R. v. *L.C.*, [1997] B.C.J. No. 2375 (S.C.)
R. v. *Lee*, [1997] O.J. 3795 and 3796 (Gen.Div.)
R. v. *Mills*, [1997] A.J. No. 891 and 1036 (Q.B.) see also the pre-Bill C-46 decisions in the same case respecting different records noted above.
R. v. *Stromner*, [1997] A.J. No. 872 (Prov. Ct.)
R. v. *Weeseekase*, [1997] S.J. No. 790 (Q.B.)