Court File No. 35390

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N

HER MAJESTY THE QUEEN

Appellant (Respondent)

– and –

VINCENT QUESNELLE

Respondent (Appellant)

– and –

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CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

Interveners

FACTUM OF THE INTERVENER CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

[*Rules of the Supreme Court of Canada,* Rules 37 and 42]

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PART I: STATEMENT OF FACTS

1. The Criminal Lawyers Association ("CLA") accepts the parties' summaries of the facts.

PART II: THE CLA'S POSITION ON THE QUESTIONS IN ISSUE

2. The Appellant has raised two issues:

   (i) Does the definition of "record" in s. 278.1 of the *Criminal Code* include police "occurrence reports" that refer to a witness in a sexual offence prosecution but are otherwise unrelated to the charged offences?

The CLA's position is that the Ontario Court of Appeal correctly held that the s. 278.1 definition *at a minimum* excludes occurrence reports generated by the same police force that investigated the charges before the court. It is unnecessary – and, the CLA submits, inadvisable – for this Court to go further in deciding this appeal;

   (ii) In cases where the s. 278.1ff *Criminal Code* production regime is inapplicable,[1] does the Crown have a duty under *Stinchcombe* to obtain and disclose such occurrence reports?

The CLA submits that occurrence reports that are readily accessible by the investigating police force are effectively within the "control" of the prosecution and thus fall within the scope of the Crown's disclosure and inquiry duties established by this Court in *Stinchcombe* and *McNeil*.[2]

3. Both questions raise fundamental concerns about equal access to the potentially highly relevant information in police computer databases. Most police forces now store occurrence reports[3] and similar records electronically and make them easily accessible and searchable by their own officers and, increasingly, by officers from other forces. Although the police and Crown are formally independent they usually cooperate closely. Police officers are routinely assigned to assist Crown counsel in court during criminal trials, and they regularly run computer "background checks" on witnesses, either on their own initiative or at Crown counsel's request. In practical terms, the information in police computer databases is made freely available to the prosecution. The defence, in contrast, cannot access this information directly. However, a

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[1] At a minimum, this category will include cases where the charges are not among those listed in s. 278.2(1) (*i.e.,*
[2] *R. v. Stinchcombe,* [1991] 3 S.C.R. 326; *R. v. McNeil,* 2009 S.C.C. 3, [2009] 1 S.C.R. 66.
[3] The Toronto Police Service website defines an "occurrence report" as "[a] written document that reflects an occurrence, unusual problem, incident, deviation from standard practice, or situation that requires follow-up action". (TPS Crime Statistics "Glossary of Terms", available online at http://www.torontopolice.on.ca/statistics/intro.php).

reasonably level playing field still exists because of the Crown's dual obligations to disclose the fruits of its own database searches and to make "reasonable inquires" in response to defence disclosure requests. The Appellant's arguments would dramatically skew this balance in the Crown's favour by placing substantial procedural obstacles in the way of defence efforts to get information over which the Crown would still enjoy free access. The resulting asymmetry would have grave implications for both the fairness and efficiency of criminal trials.

4. On the first ground, the CLA's position is that there is no indication that Parliament intended Bill C-46 to skew the balance in sexual offence prosecutions by restricting defence access to police occurrence reports. To the contrary, the specific terms of s. 278.1 suggest that the drafters *did not* intend to change the law governing defence access to police-created documents, and nothing in the legislative record suggests that the Bill was understood by anyone as having that effect. On the second ground, the CLA submits that *McNeil* should be understood as requiring the Crown and police to cooperate with defence requests for occurrence reports. It would be wasteful and unreasonable to force the defence to bring a third party records application to obtain police-held information that is freely available to the Crown for the asking.

PART III: ARGUMENT

A. Do police occurrence reports fall within the s. 278.1 definition of "record"?

5. In non-sexual offence cases the Crown must disclose the fruits of witness "background checks" to the defence unless this information is clearly irrelevant or privileged.[4] The question now before this Court is whether Parliament can be taken to have intended something different when the accused is charged with a sex-related offence.[5] This question turns on the statutory definition of the term "record", defined by s. 278.1 to include "any form of record that contains personal information for which there is a reasonable expectation of privacy", but to exclude "records made by persons responsible for the investigation or prosecution of the offence".

6. The Respondent argues that people who freely give information to the police cannot reasonably expect privacy over it, and that occurrence reports should thus be seen as falling

[4] The Appellant does not dispute this: see Appellant's Factum, ¶51.
[5] Specifically, one of the offences listed in s. 278.2(1) of the *Criminal Code,* which are mainly sexual offences but also include some prostitution-related charges.

outside the s. 278.1 definition even without considering the section's exclusionary clause.[6] The CLA agrees that information already in state control is generally far less private than confidential information held by non-state actors, and notes further that the disclosure of police reports to the defence engages neither s. 8 of the *Charter* nor Parliament's "specific concerns …about protecting the confidential relationship of a patient-therapist".[7] The CLA submits further that the Court of Appeal was correct to take these factors into account when interpreting the s. 278.1 exclusionary clause.[8] However, the CLA's position is that it is unnecessary to address the Respondent's more far-reaching privacy-based arguments here, for several reasons. First, the Court of Appeal ultimately decided this case on the basis of the exemption clause.[9] As construed by the Court of Appeal (correctly, in the CLA's submission), this clause captures all the reports at issue in this case.[10] Second, reference to the exemption clause seems unavoidable here because it is not apparent that the Respondent's privacy arguments would capture occurrence reports that refer to a witness but do not contain information provided by the witness. This would include reports concerning the witness's own alleged wrongdoing,[11] which the Respondent appears to have specifically requested.[12] The CLA submits that the broader privacy arguments raised by the Respondent should wait to be addressed in future case where they arise squarely and where all the potentially relevant constitutional arguments are raised and argued.[13] Focusing on the exemption clause also avoids the practical and procedural confusion that might result if the status of a particular occurrence report under s. 278.1 were seen as depending on the extent to which its particular contents are private – something the defence ordinarily cannot know without seeing the report itself.[14]

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[6] Respondent's Factum, ¶42-43.
[7] *R. v. Shearing,* 2002 SCC 58, [2002] 3 SCR 33 at ¶95. See also *R. v. Bottineau,* 2005 CanLII 63780 at ¶74 (Ont. S.C.J.); *R. v. Y.(W.),* 2013 ONSC 4062 at ¶5-6.
[8] Judgment of the Ontario Court of Appeal, ¶23-44, *Appellant's Record,* Vol. II, Tab 9, pp. 18-24.
[9] See Reasons for Judgment, ¶42, *Appellant's Record,* Vol. II, Tab 9, p. 23.
[10] Specifically, the occurrence reports sought in this case were apparently all generated by the Toronto Police Service, the same police force that investigated the charges against the Respondent.
[11] As Watt J. (as he then was) observed in *R. v. Bottineau, infra* at ¶72, at least in non-sexual offence prosecutions such reports are "routinely disclosed to defending counsel".
[12] See Respondent's Factum, ¶6, 8-9
[13] In particular, the CLA points out that the s. 278.1 exemption clause may be vulnerable to constitutional challenge insofar as it fails to include occurrence reports generated by police forces different from the force that investigated the charges against the accused. The modern era of computerized record keeping and increased interjurisdictional information sharing now often makes such reports freely accessible to Crown prosecutors – something that was not generally the case when the legislation was enacted in 1997.
[14] See *McNeil, supra* at ¶11-12, 37-42

7. The CLA agrees with the Court of Appeal and the Respondent that the s. 278.1 exemption clause, properly interpreted, applies to all documents – including occurrence reports – created by the police force that investigated the charges before the court, regardless of whether or not they were created in connection with that specific investigation. This conclusion flows directly from the shared plain meaning of the English and French texts and is fully supported by the legislative record. As Binnie J. stated in *R. v. Shearing, supra,* "[t]he limits of Parliament's intention, as expressed in the language it has used, should be respected."[15]

8. As the Court of Appeal found, the plain grammatical and ordinary meaning of the English version of s. 278.1 is unambiguous: it exempts all documents "made by persons responsible for the investigation or prosecution of the offence" before the court.[16] Under the broad definition in s. 2 of the *Code* an organization such as a police force qualifies as a "person". The CLA submits that the Ontario Court of Appeal was correct to conclude as it did that:

> [T]here is no language which limits the word "records" to only those records made in relation to the specific offence in issue. Had it been Parliament's intention to limit the exclusion to only those records prepared in relation to the specific offence in issue, it could easily have employed language to accomplish that purpose. It did not.[17]

9. The Appellant argues that the Court of Appeal should have given primacy to the French version, which it claims supports a different construction. The French version states:

> N'est pas visé par la présente définition le dossier qui est produit par un responsable de l'enquête ou de la poursuite relativement à l'infraction qui fait l'objet de la procédure.

The Appellant would read the phrase "relativement à l'infraction qui fait l'objet de la procédure" as modifying both the noun "le dossier" and the phrase "un responsable de l'enquête ou de la poursuite".[18] However, unlike the English version, the French text is ambiguous: the phrase in question can also be read as only modifying the expression "un responsable de l'enquête ou de la poursuite". This alternative construction gives the French version precisely the same meaning as the unambiguous English text.

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[15] *R. v. Shearing, supra* at ¶97.
[16] Although s. 278.1 itself does not specify what "the offence" means, when read in conjunction with s. 278.2 it becomes clear that it refers to the charged offence that is the subject of the "proceedings" described in s. 278.2(1).
[17] Judgment of the Ontario Court of Appeal, ¶37, *Appellant's Record,* Vol. II, Tab 9, p. 22
[18] Appellant's Factum, ¶42-44. As the Appellant notes, on its proposed construction the French text would translate to English as: "Not included in the definition: file materials that were made in relation to the offence which is the subject of the prosecution, by persons responsible for the investigation or prosecution."

10. As LeBel J. observed in *Schreiber v. Attorney General*:

> A principle of bilingual statutory interpretation holds that where one version is ambiguous and the other is clear and unequivocal, the common meaning of the two versions would *a priori* be preferred.[19]

When only one version is ambiguous, "[t]he common meaning is the version that is plain and not ambiguous"[20] This rule applies unless "the common meaning seems incompatible with the intention of the legislature as indicated by the ordinary rules of interpretation".[21] There is a further presumption that "criminal statutes … should, where there is uncertainty or ambiguity of meaning, be construed in favour of rather than against an accused".[22] The Appellant has failed to rebut these twin presumptions by pointing to any evidence that Parliament actually meant the s. 278.1 exemption to capture only police documents specifically generated in relation to the investigation of the accused. To the contrary, the Parliamentary record reveals that the legislators who enacted Bill C-46 were focused on the issue of sexual offence complainant's therapeutic records – documents created by third parties to which neither the Crown nor the defence ordinarily have unfettered access. It was never suggested by anyone that the Bill would create a new regime in sexual offence cases in which police-created documents would remain freely available to the Crown but be made largely off-limits to the defence.[23]

11. Bill C-46 was enacted in direct response to this Court's decision in *O'Connor*.[24] A central premise of the *O'Connor* majority decision was that "[f]airness requires that the accused be treated on an equal footing" with the Crown.[25] Since the police could obtain therapeutic records with a search warrant, s. 7 of the *Charter* accordingly required the defence to have access to a broadly analogous judicial process for obtaining this same information. Bill C-46 modified certain aspects of the majority's decision but did not challenge this basic underlying

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[19] *Schreiber v. Attorney General,* [2002] 3 S.C.R. 269, 2002 SCC 62 at ¶56. See also R. Sullivan, *Construction of Statutes* (5th ed.) at pp. 99-121

[20] *R. v. Daoust,* [2004] 1 S.C.R. 217, 2004 S.C.C. 6 at ¶28. Further, when neither or both versions are ambiguous, "the common meaning is normally the narrower version" (at ¶29). In the case of s. 278.1, a broad reading of the exemption clause narrows the overall reach of the definition.

[21] *R. v. Daoust, infra,* at ¶26, per Bastarache J, quoting approvingly from P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 324.

[22] *R. v. McLaughlin,* [1980] 2 S.C.R. 331 at p. 335, *per* Laskin C.J.C.

[23] The relevant Hansard excerpts and Committee transcripts are in the *Appellant's Book of Authorities,* Tabs 28-40.

[24] *R. v. O'Connor,* [1995] 4 S.C.R. 411. See also *R. v. Mills,* [1999] 3 S.C.R. 668 at ¶125.

[25] *O'Connor, supra* at ¶34, *per* Lamer C.J.C. and Sopinka J. (dissenting in the result, but writing for the majority on this point).

constitutional premise.[26] Seen in this context, the complete absence of any discussion in the Parliamentary record of any intention to circumscribe defence access to police occurrence reports is particularly striking. The Appellant's proposed interpretation of s. 278.1 would sharply skew the informational balance in sexual offence cases in the Crown's favour, to a degree that would at the very least raise significant constitutional concerns.[27] If Parliament truly intended to create this asymmetry deliberately, it is astonishing that this objective was never discussed openly or debated. The far more likely explanation for this legislative silence is that Parliament did not intend to skew the playing field in sexual offence trials in this manner, and that the legislators – if they turned their minds to the point at all – assumed that the exemption clause in s. 278.1 would be taken to mean what it unambiguously says in the English version and in accordance with the shared meaning rule governing bilingual legislation. As Binnie J. observed in *R. v. Shearing*, a court cannot "rewrite the text of the statute to accord with the court's own extrapolation of Parliament's purpose".[28] That, in essence, is what the Appellant is seeking to have this Court do here.

12. The Appellant argues that the shared meaning interpretation leads to the "incongruous" and "illogical" result that only occurrence reports created by the same police force that investigated the accused are excluded from the s. 278.1 definition.[29] When Bill C-46 was enacted in 1997, police forces were still in the early stages of computerizing their records and data-sharing between forces was minimal or non-existent.[30] As a consequence, police officers ordinarily only had ready access to their own force's occurrence reports and other documents. Seen from this perspective, there is nothing particularly "illogical" about scope of the s. 278.1 exemption clause. Rather, it can be seen as intended to ensure that the new legislation did not deny the defence access to the information that was usually freely available to Crown prosecutors in 1997. While technological advances and increased data-sharing between forces may now give the Crown easy access to additional information, this does not justify retroactively attributing to Parliament in 1997 the goal of substantially curtailing defence access to police files. In any case, the Appellant's proposed interpretation also produces "incongruous" results

[26] See, *e.g., R. v. Mills, supra* at ¶111.
[27] See, *e.g., R. v. Yumnu,* 2012 S.C.C. 73, [2012] 3 S.C.R. 777 at ¶51.
[28] *R. v. Shearing, supra* at ¶95.
[29] Appellant's Factum, ¶46.
[30] See, e.g., S. Lysecki, "Ontario police IT system to allow database exchange" (June 27, 2006), *Respondent's Book of Authorities,* Vol. II, Tab 48

that are difficult to reconcile with its characterization of Parliament's intent. For instance, if Parliament truly intended to restrict defence access to police occurrence reports in sexual offence cases, it is puzzling that the legislation does not address the disclosure of sexual offence-related occurrence reports in prosecutions for non-sexual crimes.

13. Finally, the Appellant's *in terrorem* suggestion that the Court of Appeal's interpretation of s. 278.1 will lead to the wholesale disclosure of irrelevant and potentially embarrassing occurrence reports is unfounded. Occurrence reports falling outside the s. 278.1 definition will continue to be subject to Crown vetting for relevance. Reports pertaining to matters such as a witness's "missing child" or "parent suffering from dementia"[31] will ordinarily not be disclosed to the defence because in most cases they will be "clearly irrelevant".

B. The scope of the Crown's *Stinchcombe* disclosure obligations

14. The Ontario Court of Appeal stated that if the Respondent's counsel were to request "copies of other occurrence reports"[32] relating to the two complainants the Crown would be "required to produce these records in accordance with its *Stinchcombe* disclosure obligation".[33] The Appellant objects that this places new and unduly burdensome obligations on the Crown.[34]

15. The CLA takes no position with respect to the particular occurrence reports in this case, but submits that the Court of Appeal's comment, properly understood, is fully consistent with this Court's existing disclosure jurisprudence. Under *Stinchcombe,* the Crown must disclose all relevant and non-privileged information within its "possession or control". In *McNeil, supra* this Court recognized a "corollary duty" on the part of the police "to disclose to the Crown all relevant material in their possession". *McNeil* held further that Crown counsel must "assist in bridging the gap between first party disclosure and third party production" by making "reasonable inquiries" of third parties in response to defence disclosure requests when "it is reasonably feasible to do so".[35] Charron J. specifically noted (at para. 50) that:

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[31] Appellant's Factum, ¶39 (p. 26).
[32] That is, occurrence reports in addition to the "four or five" reports relating to the witness T.R. that were previously accessed and reviewed by the investigating officer. The Appellant has conceded that if its s. 278.1 interpretive argument fails these latter reports must be disclosed (Appellant's Factum, ¶51).
[33] Judgment of the Ontario Court of Appeal, ¶43, *Appellant's Record,* Vol. II, Tab 9, p. 24.
[34] Appellant's Factum, ¶50-59.
[35] *McNeil, supra* at ¶47, 49. See also D. Paciocco, "*Stinchcombe* on Steroids: The Surprising Legacy of *McNeil* (2009), 62 C.R. (6th) 26.

> The same duty to inquire applies when the Crown is informed of potentially relevant evidence pertaining to the credibility or reliability of the witnesses in a case.

When the Crown's inquiries bear fruit, Crown counsel must vet the information in the ordinary way and disclose it to the defence if it is not privileged or clearly irrelevant. Information in the Crown's hands is disclosable under *Stinchcombe* and *McNeil* even if it engages third party privacy interests, since these residual interests can be protected in other ways and ordinarily cannot defeat the accused's right to full answer and defence.[36]

16. These established principles are squarely engaged when the defence seeks occurrence reports relating to a witness. Most police forces now store these reports digitally and have gone to great lengths to make them readily accessible to their own officers and, increasingly, to officers from other police forces. Crown counsel routinely have the police search these databases for information about witnesses when this suits the prosecution's interests. They expect the police to cooperate with such requests and they are rarely disappointed, in part because modern technology has made these searches easy to perform. In the language of *Stinchcombe,* the information in the police databases that are readily accessible to the investigating office is within the Crown's effective "control", in the sense that the Crown can ordinarily get it from the police merely by asking for it. In the language of *McNeil,* when this information is requested by the defence it will generally be "reasonable" and "feasible" to expect the Crown make the necessary inquiries because this takes only minimal effort: typically no more than a phone call or email from the Crown, and a few keystrokes by the investigating officer on his or her computer.

17. The Appellant's argument, in essence, is that the Crown should be entitled to sit on its hands and make no effort to assist defence requests for relevant information about Crown witnesses, even though the Crown routinely obtains this same information for its own purposes in relation to defence witnesses. Prosecutors routinely arrange to have the police conduct database "background checks" of defence witnesses without knowing in advance whether or not any relevant information is likely to be found in police files. However, the Appellant disparages similar defence requests in relation to Crown witnesses as "fishing expeditions", and complains that the Crown should not be required to seek out and vet documents that might "easily run to

[36] See, *McNeil, supra* at ¶41-46; *P.(D.) v. Wagg* (2004), 184 C.C.C. (3d) 321 (Ont. C.A.)

many dozens or hundreds of pages".[37] These submissions are contrary to both the letter and spirit of *McNeil.* As this Court held in *McNeil,* "[t]he Crown and the defence in a criminal proceeding are not adverse in interest for the purpose of discovering relevant information that may be of benefit to an accused".[38] Charron J. explained further (at para. 49):

> The Crown is not an ordinary litigant. As a minister of justice, the Crown's undivided loyalty is to the proper administration of justice. As such, Crown counsel who is put on notice of the existence of relevant information cannot simply disregard the matter. Unless the notice appears unfounded, Crown counsel will not be able to fully assess the merits of the case and fulfill its duty as an officer of the court without inquiring further and obtaining the information if it is reasonably feasible to do so.

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The prosecution cannot refuse to make reasonable inquiries about its own witnesses – indistinguishable from the ones it routinely makes about defence witnesses – merely because it would prefer potentially discrediting information about its own witnesses to remain hidden or because it thinks it will gain a tactical advantage by forcing the defence to pursue a time- and resource-consuming third party records application. Moreover, a Crown inquiry should be seen as "reasonable" and "feasible" within the meaning of *McNeil* if the inquiry can be made without undue effort and if there is a reasonable likelihood it will result in the information sought being provided to the Crown. The ensuing work the Crown must do to vet the information should not be a relevant consideration here, any more than it is in the ordinary disclosure context.

20 18. To adopt the language of *McNeil,* the Appellant's suggestion that the defence should be required to bring *O'Connor* applications to obtain police occurrence reports regarding Crown witnesses is "neither efficient nor justified".[39] *McNeil* increases the Crown's workload to some extent but does so because the alternatives would be far more burdensome for the justice system as a whole. As Doherty J.A. stated in *R. v. Ahluwalia,* "[t]he Crown has obligations to the administration of justice that do not burden other litigants."[40] In an age of overburdened courts and declining legal aid budgets, it makes no sense to demand or encourage pre-trial litigation over material the Crown can obtain merely by asking for it. As Professor Paciocco[41] notes:

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[37] Appellant's Factum, ¶6, 36, 50-51 53, 55.
[38] *McNeil, supra* at ¶50.
[39] *McNeil, supra* at ¶59.
[40] *R. v. Ahluwalia* (2000), 149 C.C.C. (3d) 193 at ¶72 (Ont. C.A.)
[41] Now a judge of the Ontario Court of Justice.

> It is far simpler, cheaper and a more rational use of court time for prosecuting Crowns to use their good offices in an effort to secure relevant Crown information than it is to require court applications to be brought.[42]

19. In summary, there is nothing novel or radical about the Court of Appeal's characterization of the Crown's disclosure obligations. Read in context, the Court's comment can be understood as simply a shorthand reference to the Crown's twin duties, if asked, to request occurrence reports from the Toronto Police Service and, if the police provide them – as they almost certainly would if the Crown were to ask – disclose to the defence those that are not clearly irrelevant or privileged. Moreover, there is no inconsistency with this Court's observation in *McNeil* that "production of criminal investigation files involving third parties … usually [fall] to be determined in the context of an *O'Connor* application."[43] In the judgment on appeal the Court of Appeal was specifically contemplating a future defence request for occurrence reports – investigative summaries stored in readily accessible and searchable police computer databases. Different considerations might arise if the Respondent were later to seek disclosure of the complete file from a past police investigation.[44]

PARTS IV & V: SUBMISSIONS ON COSTS AND REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

20. The CLA does not seek costs and asks that none be awarded against it. The CLA seeks leave to make oral submissions of not longer than 10 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th DAY OF MARCH, 2014.

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[42] D. Paciocco, "*Stinchcombe* on Steroids", *supra* at p. 30. More recently, speaking judicially, he observed that "*Quesnelle* provides a more resource efficient way to ensure access to relevant information than an *O'Connor* application": *R. v. Gebrekirstos*, 2013 ONCJ 265 at ¶16.

[43] *McNeil, supra* at ¶25.

[44] Likewise, different considerations might arise if the Respondent were to seek file documents from a different police service, which may or may not be willing to provide them to the Crown on request: see, *e.g., R. v. Thompson*, 2009 ONCA 243. As Paciocco J. concluded in *R. v. Gebrekirstos, supra* (at ¶14), there is no "irreconcilable conflict" between the judgment on appeal and *McNeil* or *Thompson*.

PART VI: LIST OF AUTHORITIES

Paragraph

Cases

Books, Articles and Reports

Parliamentary Debates and Committee Hearings

PART VII: LIST OF RELEVANT STATUTES

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

DEFINITIONS
2. In this Act

…

"every one", "person" and "owner", and similar expressions, include Her Majesty and an organization;

DEFINITION OF "RECORD"

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

PRODUCTION OF RECORD TO ACCUSED

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

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

Code criminel, L.R.C. (1985), ch. C-46

DÉFINITIONS
2. Les définitions qui suivent s'appliquent à la présente loi

…

« quiconque », « individu », « personne » et « propriétaire » Sont notamment visées par ces expressions et autres expressions semblables Sa Majesté et les organisations.

DÉFINITION DE « DOSSIER »

278.1 Pour l'application des articles 278.2 à 278.9, « dossier » s'entend de toute forme de document contenant des renseignements personnels pour lesquels il existe une attente raisonnable en matière de protection de la vie privée, notamment : le dossier médical, psychiatrique ou thérapeutique, le dossier tenu par les services d'aide à l'enfance, les services sociaux ou les services de consultation, le dossier relatif aux antécédents professionnels et à l'adoption, le journal intime et le document contenant des renseignements personnels et protégé par une autre loi fédérale ou une loi provinciale. N'est pas visé par la présente définition le dossier qui est produit par un responsable de l'enquête ou de la poursuite relativement à l'infraction qui fait l'objet de la procédure.

COMMUNICATION D'UN DOSSIER À L'ACCUSÉ

278.2 (1) Dans les poursuites pour une infraction mentionnée ci-après, ou pour plusieurs infractions dont l'une est une infraction mentionnée ci-après, un dossier se rapportant à un plaignant ou à un témoin ne peut être communiqué à l'accusé que conformément aux articles 278.3 à 278.91 :

a) une infraction prévue aux articles 151, 152, 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272 ou 273;

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

(c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,

or in any proceedings in respect of two or more offences that include an offence referred to in any of paragraphs (a) to (c), except in accordance with sections 278.3 to 278.91

APPLICATION OF PROVISIONS

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

DUTY OF PROSECUTOR TO GIVE NOTICE

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

APPLICATION FOR PRODUCTION

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

NO APPLICATION IN OTHER PROCEEDINGS

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

FORM AND CONTENT OF APPLICATION

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

b) une infraction prévue aux articles 144, 145, 149, 156, 245 ou 246 du Code criminel, chapitre C-34 des Statuts revisés du Canada de 1970, dans sa version antérieure au 4 janvier 1983;

c) une infraction prévue aux articles 146, 151, 153, 155, 157, 166 ou 167 du Code criminel, chapitre C-34 des Statuts revisés du Canada de 1970, dans sa version antérieure au 1er janvier 1988.

APPLICATION

(2) L'article 278.1, le présent article et les articles 278.3 à 278.91 s'appliquent même si le dossier est en la possession ou sous le contrôle du poursuivant, sauf si le plaignant ou le témoin auquel il se rapporte a expressément renoncé à l'application de ces articles.

OBLIGATION D'INFORMER

(3) Le poursuivant qui a en sa possession ou sous son contrôle un dossier auquel s'applique le présent article doit en informer l'accusé mais il ne peut, ce faisant, communiquer le contenu du dossier.

DEMANDE DE COMMUNICATION DE DOSSIERS

278.3 (1) L'accusé qui veut obtenir la communication d'un dossier doit en faire la demande au juge qui préside ou présidera son procès.

PRÉCISION

(2) Il demeure entendu que la demande visée au paragraphe (1) ne peut être faite au juge ou juge de paix qui préside une autre procédure, y compris une enquête préliminaire.

FORME ET CONTENU

(3) La demande de communication est formulée par écrit et donne :

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

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

a) les précisions utiles pour reconnaître le dossier en cause et le nom de la personne qui l'a en sa possession ou sous son contrôle;

b) les motifs qu'invoque l'accusé pour démontrer que le dossier est vraisemblablement pertinent quant à un point en litige ou à l'habileté d'un témoin à témoigner.

INSUFFICIENT GROUNDS

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

(a) that the record exists;

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

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

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

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

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

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

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

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

INSUFFISANCE DES MOTIFS

(4) Les affirmations ci-après, individuellement ou collectivement, ne suffisent pas en soi à démontrer que le dossier est vraisemblablement pertinent quant à un point en litige ou à l'habileté d'un témoin à témoigner :

a) le dossier existe;

b) le dossier se rapporte à un traitement médical ou psychiatrique ou une thérapie suivis par le plaignant ou le témoin ou à des services de consultation auxquels il a recours ou a eu recours;

c) le dossier porte sur l'événement qui fait l'objet du litige;

d) le dossier est susceptible de contenir une déclaration antérieure incompatible faite par le plaignant ou le témoin;

e) le dossier pourrait se rapporter à la crédibilité du plaignant ou du témoin;

f) le dossier pourrait se rapporter à la véracité du témoignage du plaignant ou du témoin étant donné que celui-ci suit ou a suivi un traitement psychiatrique ou une thérapie, ou a recours ou a eu recours à des services de consultation;

g) le dossier est susceptible de contenir des allégations quant à des abus sexuels commis contre le plaignant par d'autres personnes que l'accusé;

h) le dossier se rapporte à l'activité sexuelle du plaignant avec l'accusé ou un tiers;

i) le dossier se rapporte à l'existence ou à l'absence d'une plainte spontanée;

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

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

j) le dossier se rapporte à la réputation sexuelle du plaignant;

k) le dossier a été produit peu après la plainte ou l'événement qui fait l'objet du litige.

SERVICE OF APPLICATION AND SUBPOENA

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

SIGNIFICATION DE LA DEMANDE

(5) L'accusé signifie la demande au poursuivant, à la personne qui a le dossier en sa possession ou sous son contrôle, au plaignant ou au témoin, selon le cas, et à toute autre personne à laquelle, à sa connaissance, le dossier se rapporte, au moins sept jours avant l'audience prévue au paragraphe 278.4(1) ou dans le délai inférieur autorisé par le juge dans l'intérêt de la justice. Dans le cas de la personne qui a le dossier en sa possession ou sous son contrôle, une assignation à comparaître, rédigée selon la formule 16.1, doit lui être signifiée, conformément à la partie XXII, en même temps que la demande.

SERVICE ON OTHER PERSONS

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

SIGNIFICATION À D'AUTRES PERSONNES (

6) Le juge peut ordonner à tout moment que la demande soit signifiée à toute personne à laquelle, à son avis, le dossier se rapporte.

HEARING IN CAMERA

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

AUDIENCE À HUIS CLOS

278.4 (1) Le juge tient une audience à huis clos pour décider si le dossier devrait être communiqué au tribunal pour que lui-même puisse l'examiner.

PERSONS WHO MAY APPEAR AT HEARING

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

DROIT DE PRÉSENTER DES OBSERVATIONS ET INCONTRAIGNABILITÉ

(2) La personne qui a le dossier en sa possession ou sous son contrôle, le plaignant ou le témoin, selon le cas, et toute autre personne à laquelle le dossier se rapporte peuvent comparaître et présenter leurs arguments à l'audience mais ne peuvent être contraints à témoigner.

COSTS

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

DÉPENS

(3) Aucune ordonnance de dépens ne peut être rendue contre une personne visée au paragraphe (2) en raison de sa participation à l'audience.

JUDGE MAY ORDER PRODUCTION OF RECORD FOR REVIEW

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

(a) the application was made in accordance with subsections 278.3(2) to (6);

(b) the accused has established that the record is likely relevant to an issue at trial or to the competence of a witness to testify; and

(c) the production of the record is necessary in the interests of justice.

FACTORS TO BE CONSIDERED

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

(a) the extent to which the record is necessary for the accused to make a full answer and defence;

(b) the probative value of the record;

(c) the nature and extent of the reasonable expectation of privacy with respect to the record;

(d) whether production of the record is based on a discriminatory belief or bias;

(e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;

(f) society's interest in encouraging the reporting of sexual offences;

ORDONNANCE

278.5 (1) Le juge peut ordonner à la personne qui a le dossier en sa possession ou sous son contrôle de le communiquer, en tout ou en partie, au tribunal pour examen par lui-même si, après l'audience, il est convaincu de ce qui suit :

a) la demande répond aux exigences formulées aux paragraphes 278.3(2) à (6);

b) l'accusé a démontré que le dossier est vraisemblablement pertinent quant à un point en litige ou à l'habileté d'un témoin à témoigner;

c) la communication du dossier sert les intérêts de la justice.

FACTEURS À CONSIDÉRER

(2) Pour décider s'il doit rendre l'ordonnance prévue au paragraphe (1), le juge prend en considération les effets bénéfiques et préjudiciables qu'entraînera sa décision, d'une part, sur le droit de l'accusé à une défense pleine et entière et, d'autre part, sur le droit à la vie privée et à l'égalité du plaignant ou du témoin, selon le cas, et de toute autre personne à laquelle le dossier se rapporte et, en particulier, tient compte des facteurs suivants :

a) la mesure dans laquelle le dossier est nécessaire pour permettre à l'accusé de présenter une défense pleine et entière;

b) sa valeur probante;

c) la nature et la portée de l'attente raisonnable au respect de son caractère privé;

d) la question de savoir si sa communication reposerait sur une croyance ou un préjugé discriminatoire;

e) le préjudice possible à la dignité ou à la vie privée de toute personne à laquelle il se rapporte;

f) l'intérêt qu'a la société à ce que les infractions d'ordre sexuel soient signalées;

(g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and

(h) the effect of the determination on the integrity of the trial process.

g) l'intérêt qu'a la société à ce que les plaignants, dans les cas d'infraction d'ordre sexuel, suivent des traitements;

h) l'effet de la décision sur l'intégrité du processus judiciaire.

REVIEW OF RECORD BY JUDGE

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

EXAMEN DU DOSSIER PAR LE JUGE

278.6 (1) Dans les cas où il a rendu l'ordonnance visée au paragraphe 278.5(1), le juge examine le dossier ou la partie en cause en l'absence des parties pour décider si le dossier devrait, en tout ou en partie, être communiqué à l'accusé.

HEARING IN CAMERA

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

POSSIBILITÉ D'UNE AUDIENCE

(2) Le juge peut tenir une audience à huis clos s'il l'estime utile pour en arriver à la décision visée au paragraphe (1).

PROVISIONS RE HEARING

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

APPLICATION DE CERTAINES DISPOSITIONS

(3) Les paragraphes 278.4(2) et (3) s'appliquent à toute audience tenue en vertu du paragraphe (2).

JUDGE MAY ORDER PRODUCTION OF RECORD TO ACCUSED

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

COMMUNICATION DU DOSSIER

278.7 (1) S'il est convaincu que le dossier est en tout ou en partie vraisemblablement pertinent quant à un point en litige ou à l'habileté d'un témoin à témoigner et que sa communication sert les intérêts de la justice, le juge peut ordonner que le dossier — ou la partie de celui-ci qui est vraisemblablement pertinente — soit, aux conditions qu'il fixe éventuellement en vertu du paragraphe (3), communiqué à l'accusé.

FACTORS TO BE CONSIDERED

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

FACTEURS À CONSIDÉRER

(2) Pour décider s'il doit rendre l'ordonnance prévue au paragraphe (1), le juge prend en considération les effets bénéfiques et préjudiciables qu'entraînera sa décision, d'une part, sur le droit de l'accusé à une défense pleine et entière et, d'autre part, sur le droit à la vie privée et à l'égalité du plaignant ou du témoin, selon le cas, et de toute autre personne à laquelle le dossier se rapporte et, en particulier, tient compte des facteurs mentionnés aux alinéas 278.5(2)a) à h

CONDITIONS ON PRODUCTION

CONDITIONS

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

(a) that the record be edited as directed by the judge;

(b) that a copy of the record, rather than the original, be produced;

(c) that the accused and counsel for the accused not disclose the contents of the record to any other person, except with the approval of the court;

(d) that the record be viewed only at the offices of the court;

(e) that no copies of the record be made or that restrictions be imposed on the number of copies of the record that may be made; and

(f) that information regarding any person named in the record, such as their address, telephone number and place of employment, be severed from the record.

COPY TO PROSECUTOR

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

RECORD NOT TO BE USED IN OTHER PROCEEDINGS

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

RETENTION OF RECORD BY COURT

(3) Le juge peut assortir l'ordonnance de communication des conditions qu'il estime indiquées pour protéger l'intérêt de la justice et, dans la mesure du possible, les intérêts en matière de droit à la vie privée et d'égalité du plaignant ou du témoin, selon le cas, et de toute personne à laquelle le dossier se rapporte, notamment :

a) établissement, selon ses instructions, d'une version révisée du dossier;

b) communication d'une copie, plutôt que de l'original, du dossier;

c) interdiction pour l'accusé et son avocat de divulguer le contenu du dossier à quiconque, sauf autorisation du tribunal;

d) interdiction d'examiner le contenu du dossier en dehors du greffe du tribunal;

e) interdiction de la production d'une copie du dossier ou restriction quant au nombre de copies qui peuvent en être faites;

f) suppression de renseignements sur toute personne dont le nom figure dans le dossier, tels l'adresse, le numéro de téléphone et le lieu de travail.

COPIE AU POURSUIVANT

(4) Dans les cas où il ordonne la communication d'un dossier en tout ou en partie à l'accusé, le juge ordonne qu'une copie du dossier ou de la partie soit donnée au poursuivant, sauf s'il estime que cette mesure serait contraire aux intérêts de la justice.

RESTRICTION QUANT À L'USAGE DES DOSSIERS (

5) Les dossiers — ou parties de dossier — communiqués à l'accusé dans le cadre du paragraphe (1) ne peuvent être utilisés dans une autre procédure.

GARDE DES DOSSIERS NON COMMUNIQUÉS À L'ACCUSÉ

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

(6) Sauf ordre contraire d'un tribunal, tout dossier — ou toute partie d'un dossier — dont le juge refuse la communication à l'accusé est scellé et reste en la possession du tribunal jusqu'à l'épuisement des voies de recours dans la procédure contre l'accusé; une fois les voies de recours épuisées, le dossier — ou la partie — est remis à la personne qui a droit à la possession légitime de celui-ci.

REASONS FOR DECISION

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

MOTIFS

278.8 (1) Le juge est tenu de motiver sa décision de rendre ou refuser de rendre l'ordonnance prévue aux paragraphes 278.5(1) ou 278.7(1).

RECORD OF REASONS

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

FORME

(2) Les motifs de la décision sont à porter dans le procès-verbal des débats ou, à défaut, à donner par écrit.

PUBLICATION PROHIBITED

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

(a) the contents of an application made under section 278.3;

(b) any evidence taken, information given or submissions made at a hearing under subsection 278.4(1) or 278.6(2); or

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

PUBLICATION INTERDITE

278.9 (1) Il est interdit de publier ou de diffuser de quelque façon que ce soit :

a) le contenu de la demande présentée en application de l'article 278.3;

b) tout ce qui a été dit ou présenté en preuve à l'occasion de toute audience tenue en vertu du paragraphe 278.4(1) ou 278.6(2);

c) la décision rendue sur la demande dans le cadre des paragraphes 278.5(1) ou 278.7(1) et les motifs mentionnés à l'article 278.8, sauf si le juge rend une ordonnance autorisant la publication ou diffusion après avoir pris en considération l'intérêt de la justice et le droit à la vie privée de la personne à laquelle le dossier se rapporte.

OFFENCE

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

INFRACTION

(2) Quiconque contrevient au paragraphe (1) commet une infraction punissable sur déclaration de culpabilité par procédure sommaire.

APPEAL

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

APPEL

278.91 Pour l'application des articles 675 et 676, la décision rendue en application des paragraphes 278.5(1) ou 278.7(1) est réputée constituer une question de droit.