
R. v. Stinchcombe: *Defining Disclosure*

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In *R. v. Stinchcombe*, the Supreme Court of Canada held that the accused in criminal cases has a constitutional right to full and complete disclosure of the Crown's case. The Crown therefore has a legal obligation to disclose all relevant information in its possession. The author argues, however, that the judgment provides little guidance as to the meaning of "relevance" and thus gives the Crown wide discretionary powers to withhold information.

In situations where the subject of disclosure is a person's sexual history, one must also consider the admissibility of the information in light of section 276 of the *Criminal Code*. Given that this provision prohibits evidence of the complainant's sexual history to support an inference as to the complainant's character or to the likelihood of consent, it is suggested that the onus is on the defence to make a *prima facie* case that renders the information admissible.

Non-disclosure is justified where privilege applies, subject to the reasonableness of the limitation on the accused's right to make full answer and defence. However, protection of this right is inherent to the law of privilege itself. It is thus unclear in which instances privileged information would *not* constitute a reasonable limit on the right to make full answer and defence. Consequently, the author suggests that *Stinchcombe* did not change the meaning and scope of the right to make full answer and defence, nor did it add to the law with respect to situations where, despite the existence of a privilege, information should be disclosed in the interests of justice.

Dans l'affaire *R. c. Stinchcombe*, la Cour suprême du Canada a conclu que l'accusé, dans des affaires criminelles, avait droit à la divulgation entière et complète des arguments de la Couronne. En effet, la Couronne a l'obligation légale de divulguer toute information pertinente qu'elle possède. L'auteure soutient toutefois que le jugement donne peu d'éclaircissement en ce qui a trait à la signification que l'on doit donner au terme «pertinente», laissant ainsi une grande discrétion à la Couronne pour laisser sous silence certaines informations.

Dans des cas où le sujet de la divulgation est l'histoire sexuelle d'une personne, en vertu de l'article 276 du *Code criminel*, on doit aussi prendre en compte la recevabilité de l'information. Étant donné que cet article interdit toute preuve concernant le comportement sexuel du plaignant qui servirait à maintenir une inférence quant à sa réputation ou à la possibilité de consentement du plaignant, on suggère que le fardeau de la preuve repose sur la défense qui devrait faire un argument qui *prima facie* rendrait ce type d'information admissible.

L'interdiction de divulguer est justifiée lorsque le privilège est applicable, sujet à la nature raisonnable de la limite imposée au droit de l'accusé d'avoir une défense complète. Cependant, la protection de celui-ci est incluse dans le droit concernant ce privilège. Ainsi, il n'est pas clair dans quels cas l'information privilégiée ne constituera pas une limite raisonnable au droit à une défense complète. C'est donc pourquoi l'auteure suggère que l'arrêt *Stinchcombe* n'a pas changé la signification et l'étendue du droit à une défense complète et n'a pas non plus ajouté au droit dans les cas où, malgré l'existence d'un privilège, l'information devrait être divulguée dans l'intérêt de la justice.

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I. Introduction

A. *The Problem*

The Supreme Court of Canada held in *R. v. Stinchcombe*¹ that the accused in criminal cases has a constitutional right to full and complete disclosure of the Crown's case. According to the principles set out by Sopinka J. in the unanimous judgment of the Court, this encompasses more than just the information which will be used by the Crown as part of its case. The Crown is obliged to disclose all information in its possession which is relevant, or at least not clearly irrelevant, and which is not subject to privilege. The Crown retains a discretion to determine relevance and withhold privileged information. This includes discretion with respect to the timing and manner of disclosure in certain circumstances.

Stinchcombe lays out only the general parameters of how disclosure will operate in concrete situations. This paper will center the discussion of *Stinchcombe* around two particular problems: psychiatric information and sexual history. Two recent Canadian decisions have brought these issues into sharp focus. In *Osolin v. R.*,² a majority of the Supreme Court of Canada decided that a trial judge's refusal in a sexual assault case to allow the cross-examination of a complainant on her psychiatric records was a denial of the accused's right to make full answer and defence. The British Columbia Court of Appeal also addressed these issues in the *O'Connor* decisions, in which the Court set out principles and procedures to guide counsel and judges in situations where the disclosure of medical records, including psychiatric records, is in issue.³

The following hypothetical fact pattern provides a framework for the discussion that follows. An examination of how the general principles would apply in this particular context provides a starting point for a more critical examination of the general principles laid out in *Stinchcombe*.

¹ [1991] 3 S.C.R. 326, 8 C.R. (4th) 277 [hereinafter *Stinchcombe* cited to S.C.R.].

² [1993] 4 S.C.R. 595, 86 C.C.C. (3d) 481 [hereinafter *Osolin* cited to S.C.R.].

³ *R. v. O'Connor* (1994), 89 C.C.C. (3d) 109, 29 C.R. (4th) 40 (B.C.C.A.) [hereinafter *O'Connor No. 1* cited to C.C.C.] dealt with the appropriate remedies for a breach of the Crown's disclosure obligations. In *R. v. O'Connor* (1994), 30 C.R. (4th) 55, 90 C.C.C. (3d) 257 (B.C.C.A.) [hereinafter *O'Connor No. 2* cited to C.R.], the Court addressed the separate issue of when medical records should be disclosed. Notice of an appeal as of right to the Supreme Court was filed April 29, 1994 from *O'Connor No. 1*.

1. The Scenario

John Doe had been charged with sexual assault. In the course of the preliminary inquiry, it emerged that the complainant, Mary D., had been undergoing psychiatric treatment since the alleged assault and had also sought therapeutic help prior to the events in question. Upon learning of this history, defence counsel demanded disclosure of the names of all the psychiatrists, therapists, counsellors and others who had treated the complainant at any time in the past, as well as the contents of any of their files which were in the Crown's possession. As it happened, the Crown, with the complainant's consent, had acquired substantial portions of these records. The investigating officers requested the information when they discovered that the complainant had undergone therapy. They were interested in the material to the extent that it could help them assess the strength of the case against the accused before deciding to lay charges. When the charges were laid, the police routinely turned the material over to the Crown, along with all other material gathered during the investigation.

The complainant refused to consent to the disclosure of these records to the defence. The Crown prosecutor also objected, claiming that the material was clearly irrelevant to the issues before the Court and that its non-disclosure was thus within the Crown's discretion. The response of the defence was that it wished to make an application under section 276 of the *Criminal Code*⁴ for a hearing regarding the admissibility of the complainant's sexual activity; those portions of the file which dealt with the sexual history of the complainant, if any, would clearly be relevant for the preparation of that application. The Crown responded that even if the information were to be considered relevant despite its presumptive inadmissibility, it should nonetheless be excluded as privileged information. In this situation, the accused could not demonstrate that the right to make full answer and defence should override that privilege.

B. The Applicable Law: Stinchcombe

Since *Stinchcombe*, there have been several cases where the defence requested disclosure of complainants' or witnesses' psychiatric records.⁵ It must

⁴ R.S.C. 1985, c. C-46, as am. by *An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38 [hereinafter *Criminal Code*].

⁵ *R. v. Mandeville* (1993), 21 C.R. (4th) 272 (N.W.T.S.C.) [hereinafter *Mandeville*]. The accused, charged with sexual assault, sought the disclosure of records from a hospital and an addiction treatment centre regarding the complainant's alcoholism.

R. v. Wittrup (26 February 1993), Vancouver CC911246 (B.C.S.C.). The accused wanted disclosure of records held by the Ministry of Social Services and Housing, and by Clesterfield

be pointed out, however, that such records were not usually in the Crown's possession, but were more often in the hands of third parties, such as hospitals or doctors, who were "strangers" to the litigation. Some courts have held that *Stinchcombe* applies only to situations where the requested material is actually in the possession of the Crown⁶ (which includes the police),⁷ and that it does

House, a society that provided treatment to sexually abused children. The accused had been charged with the sexual assault of two sisters, eight and ten years old respectively.

R. v. S.T.L. (9 November 1992), Brampton 200146 (Ont.Ct. (Prov.Div.)) [hereinafter *S.T.L.*]. The accused was charged with sexually assaulting his younger sisters. The defence requested disclosure of notes and records held by a psychologist in relation to one of the younger sisters, as well as the sister's personal journals.

R. v. Ross (1993), 79 C.C.C. (3d) 253, 18 C.R. (4th) 122 (N.S.S.C.A.D.) [hereinafter *Ross* cited to C.C.C.]. After the accused was convicted of sexual assault, the defence sought disclosure of the complainant's psychiatric records in order to appeal the conviction on the grounds of miscarriage of justice. Note that this case was not decided under the *Stinchcombe* principles.

R. v. Learn (31 March 1992), Cranbrook SC 2301 (B.C.S.C.) [hereinafter *Learn*]. Facing charges of first degree murder, sexual assault, and unlawful confinement, the accused sought disclosure of medical and psychiatric records of the complainant in the sexual assault and confinement charges, who was also the key Crown witness to the murder charge.

R. v. Coon (1991), 74 C.C.C. (3d) 146 (Ont. Ct. (Gen. Div.)) [hereinafter *Coon*]. The accused subpoenaed clinical records of the complainant in a sexual assault case. Again, this was not a motion for disclosure under the *Stinchcombe* principles.

R. v. O'Connor (1992), 18 C.R. (4th) 98 (B.C.S.C.). Disclosure was ordered of all psychiatric records of each of the four complainants in various sexual assault charges. For subsequent treatment of the case, see *supra* note 3.

R. v. Nickerson (1993), 21 C.R. (4th) 262 (N.S.S.C.A.D.) [hereinafter *Nickerson*]. The Court dismissed a motion on appeal from a conviction for two counts of sexually assaulting a mentally handicapped person, where an order was sought requiring a hospital psychiatrist to release all records regarding the complainant.

Children's Aid Society for the Districts of Sudbury and Manitoulin v. G.M. (6 January 1992), Sudbury C178/91 (Ont. Ct. (Prov. Div.)). In a pre-trial hearing regarding child protection proceedings, the respondents sought disclosure of records, which included psychological evidence, held by the Children's Aid Society. Although this was not a criminal proceeding, the Court discussed *Stinchcombe*.

R. v. M.K. (10 June 1994), Toronto OJ 7772/93 (Ont. Ct. (Gen. Div.)). The accused was charged with sexual assault, touching for a sexual purpose a person under 14 and abuse of a position of trust. He sought disclosure of medical records and therapy records from hospitals and a birth control clinic.

R. v. Darby (24 February 1994), New Westminster 35588 (B.C. Prov. Ct.). The accused, charged with sexual assault, indecent assault and gross indecency, requested at the preliminary inquiry disclosure of records from the Superintendent of Child Welfare.

R. v. R.M. (10 March 1994), Vancouver 10199 (B.C. Youth Ct.). A young offender charged with sexual assault and sexual touching of younger children sought disclosure of records of the complainants, who had been undergoing treatment prior to the alleged assaults.

⁶ See e.g. *R. v. Gingras* (1992), 11 C.R. (4th) 294 at 298, 71 C.C.C. (3d) 53 (Alta. C.A.).

⁷ See *Stinchcombe*, *supra* note 1 at 345, where Sopinka J. includes "all statements from persons who have provided relevant information to the authorities."

not extend to cases where materials are held by other government departments or ministries, or by other parties generally. The British Columbia Court of Appeal in *O'Connor No. 2*,⁸ however, appears to have greatly expanded the scope of pre-trial disclosure by recognizing that third parties may be compelled to disclose information in order for the court to determine its relevance. There is thus conflicting case law on this particular point. In any event, it is clear that the principles enunciated in *Stinchcombe* apply to our hypothetical scenario, which highlights some of the key problems and uncertainties regarding issues of disclosure and the right to make full answer and defence.

In *Stinchcombe*, the Crown refused to disclose statements made by a witness who gave testimony favourable to the accused at the preliminary inquiry. At trial, the Crown would not call the witness to testify. Defence counsel requested that the witness be called, either by the Crown or by the Court, or at least that her statements be disclosed. The trial judge dismissed the motion, and *Stinchcombe* was found guilty of criminal breach of trust, theft and fraud. The Supreme Court of Canada unanimously overturned that decision, holding that the Crown did have a legal obligation to disclose the material to the defence.

The judgment does, nevertheless, allow for Crown discretion with respect to the timing of disclosure for the purposes of witness protection. It also allows for discretion with respect to the timing required to complete an investigation, although in this case the discretion is somewhat narrower.⁹ The Crown also enjoys a degree of discretion with respect to the relevance of information: “[W]hile the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant.”¹⁰ The exercise of such discretion by the Crown, however, is always reviewable by the trial judge, and on review, “the Crown must justify its refusal to disclose. Inasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule.”¹¹

The reviewing judge¹² must base his or her decision on the general principle

See also *Hartman v. Tisdell* (26 May 1993), Saskatoon 1555 (Sask. Q.B.); *R. v. Burke* (14 December 1992), Prince George 58482 (B.C. Prov. Ct.) [hereinafter *Burke*]; *R. v. Dikal* (5 March 1993), Toronto 8376 (Ont. Ct. (Gen. Div.)) [hereinafter *Dikal*].

⁸ *Supra* note 3 at 65.

⁹ *Stinchcombe*, *supra* note 1 at 336, 339.

¹⁰ *Ibid.* at 339.

¹¹ *Ibid.* at 340.

¹² It should be pointed out that, notwithstanding Sopinka J.'s references to “the trial judge”, the issue of non-disclosure will usually arise in a pre-trial context first. The presiding officer with jurisdiction over those proceedings (whether the preliminary inquiry or other pre-trial motions) must also have jurisdiction over disclosure requests and the review of Crown discretion to withhold information. This was also recognized in *O'Connor No. 2*, *supra* note 3 at 65.

that "information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence unless non-disclosure is justified by the law of privilege."¹³ Even that privilege may be overridden if the trial judge finds that it constitutes an unreasonable limit on the accused's constitutional right to make full answer and defence. Sopinka J. asserted that disputes regarding disclosure will be infrequent "when it is made clear that counsel for the Crown is under a general duty to disclose *all* relevant information."¹⁴ When disputes do arise, the trial judge must resolve them. This may require submissions by counsel, as well as inspection of documents or even *viva voce* evidence.

With respect to the issue of what information should be disclosed, Sopinka J. stated clearly that the obligation extends to all relevant information, including that which the Crown does not intend to introduce into evidence because "[n]o distinction should be made between inculpatory and exculpatory evidence."¹⁵ Regarding statements made by witnesses, the Court concluded that, subject to the Crown's reviewable discretion,

all statements obtained from persons who have provided relevant information to the authorities should be produced notwithstanding that they are not proposed as Crown witnesses ... [A]ll information in the possession of the prosecution relating to any relevant evidence that the person could give should be supplied. ... If the information is of no use then presumably it is irrelevant and will be excluded in the exercise of the discretion of the Crown. If the information is of some use then it is relevant and the determination as to whether it is sufficiently useful to put into evidence should be made by the defence and not the prosecutor.¹⁶

C. *The Issues: Relevance, Admissibility, Privilege and Policy*

This paper will focus on the issues arising from the above hypothetical scenario. We will attempt to solve the problems raised by looking at how the principles enunciated in *Stinchcombe* apply, and by identifying the issues not addressed in the decision. An appropriate framework for dealing with those issues will then be suggested. The first issue to examine is that of relevance in the context of disclosure: when can the Crown withhold information on the ground that it is irrelevant, and what procedures and standards should be applied on a review by the trial judge? Although *Stinchcombe* lays the groundwork for the

¹³ *Stinchcombe*, *supra* note 1 at 340.

¹⁴ *Ibid.* at 340.

¹⁵ *Ibid.* at 343.

¹⁶ *Ibid.* at 345-46.

answers to these questions, large areas of uncertainty remain. A related issue is the link between relevance and admissibility. What effect does the presumptive inadmissibility of particular kinds of information have on the standards required to obtain or withhold disclosure? Should admissibility be considered an aspect of relevance, or a separate issue with separate tests and standards to demonstrate disclosability? We must also ask how far the privilege exception to disclosure extends, and again, what standards and procedures are required to establish disclosability. Finally, given the particular nature of sexual assault and evidence about sexual history, we must examine the extent to which policy considerations can guide decisions on disclosure. Does *Stinchcombe* leave that door open, or must policy decisions about non-disclosure be made within the rubric of the established exceptions of relevance and privilege?

The theme running throughout this inquiry is the scope and meaning of the right to make full answer and defence, which, according to *Stinchcombe*, is the underlying concern in defining the right to disclosure.

II. Relevance

A. *Who Decides Relevance and How?*

1. Crown Discretion

a) *The Principles Set Out in Stinchcombe*

Stinchcombe sets out the nature and extent of the Crown's discretion to withhold material from the defence:

The discretion, which will be subject to review, should extend to such matters as excluding what is clearly irrelevant, withholding the identity of persons to protect them from harassment or injury, or to enforce the privilege relating to informers. The discretion would also extend to the timing of disclosure in order to complete an investigation.¹⁷

Later, Sopinka J. again stated that the obligation to disclose is not absolute but rather "is subject to the discretion of counsel for the Crown. This discretion extends both to the withholding of information and to the timing of disclo-

¹⁷ *Ibid.* at 336. Although in this passage Sopinka J. referred only to the "privilege relating to informers", in an earlier passage he stated that "any rules with respect to disclosure would be subject to [the informer privilege] and other rules of privilege" (*ibid.* at 335).

sure.”¹⁸ He then reasserted the existence of a discretion relating to privilege and the protection of witnesses, and stated that

[a] discretion must also be exercised with respect to the relevance of information. While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant. ... The initial obligation to separate the “wheat from the chaff” must therefore rest with Crown counsel.¹⁹

Gerry Ferguson characterizes this discretion as an exception to the general duty to disclose all relevant information.²⁰ The Crown is given very little guidance, however, as to the determination of relevance. Relevance is a term which has meaning only in context; facts are relevant *to* other facts, and any one fact standing alone may mean nothing at all. In leaving this discretionary power with respect to relevance open-ended, the Court may simply have been recognizing that the defence should have access to almost everything in the Crown’s possession. If the Crown is given extensive powers to withhold, the right to make full answer and defence may be impaired, even though lip service is being paid to the principle of full disclosure. This is clearly the concern behind the statement that the Crown must err on the side of inclusion. The flaw in this argument is that the lack of guiding principles to contain the exercise of the discretion potentially gives such broad withholding powers to the Crown as to virtually empty the right to disclosure of any real meaning. What does full disclosure really stand for if a mere assertion of irrelevance by the Crown can operate to withhold information from the defence unless the latter can demonstrate the relevance of that information without having been granted access to it?

b) The Meaning of Relevance

Relevance is not a term which lends itself to precise and clear definition. Simply put, a fact is relevant “when it is so connected with a fact in issue, whether directly or indirectly ... that evidence given respecting it may reasonably be expected to assist in proving or disproving the fact in issue.”²¹ Further, according to a Canadian text, “the relevance of evidence has to be determined in reference to all the issues which have to be established by the prosecution for

¹⁸ *Ibid.* at 339.

¹⁹ *Ibid.*

²⁰ G. Ferguson, “Judicial Reform of Crown Disclosure” (1991) 8 C.R. (4th) 295.

²¹ J. Burke, ed., *Jowitt’s Dictionary of English Law*, vol. 2, 2d ed. (London: Sweet & Maxwell, 1977) at 1533.

the particular offence charged and any defences raised by the defence.”²²

Disclosure requests will arise at a very preliminary stage of the proceedings, whether in the context of a preliminary inquiry or a pre-trial motion. At this stage, the defence simply wants to know *if* the information *could* be relevant to the accused’s case and thus will not argue the specific relevance of the information. *Stinchcombe* sets the threshold for the Crown’s discretion to withhold at materials deemed “clearly irrelevant”. A determination of “clear irrelevance”, though, is difficult to justify in the pre-trial context of most disclosure requests. It is unclear, at this point in the proceedings, what information will be relevant because the parties do not yet know which facts will be in issue at trial. The term relevance must thus almost be read to mean *potential* relevance. Even then, it will be very difficult to definitively, or even on a balance of probabilities, exclude anything as clearly irrelevant.

This leaves us in a position where the defence has a right to the disclosure of all relevant information, or of all information which is not clearly irrelevant — but we do not know what relevance means. This is the most difficult problem posed by Sopinka J.’s judgment in *Stinchcombe*: the lack of content in the terms he uses to define the defence’s right of disclosure. The determination as to relevance is left, at least initially, to the prosecutor, who has the discretion to withhold “clearly irrelevant” evidence. Aside from the only moderately helpful assertion that Crown counsel must err on the side of inclusion, no principles or boundaries are set out to guide the exercise of that discretion as it applies to relevance. The content of the right to disclosure thus remains extremely vague where relevance is in issue. Where information is clearly relevant, the duty exists and breaches will be sanctioned. However, there are many situations where the relevance of information is unclear given the pre-trial context in which the discretion must be exercised. This is especially true, since the information is in the hands of Crown counsel who cannot evaluate the information’s relevance from a defence point of view. In these cases, the principle that one should “err on the side of inclusion” is not a very convincing enunciation of a supposedly constitutionally entrenched right. The problem is exacerbated by the fact that the defence does not know what the information is, what it contains or even whether the Crown has any information at all. *Stinchcombe* imposes no obligation on the Crown to state what it is not disclosing.²³

²² J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1992) at 23.

²³ See Ferguson’s comment on this problem, *supra* note 20 at 304.

Brian Gover's comment on *Stinchcombe*²⁴ examines the problems of the definition of relevance and the scope of the Crown's discretion. Gover asks the key question of *how* prosecutors will comply with the duty to disclose all relevant information.²⁵ Since Sopinka J. does not require that "relevance be determined with reference to a particular defence or to any defences theoretically available to the accused,"²⁶ Gover suggests that "[t]he duty to assess relevance of information should not ... extend to divining speculative, yet possible, defence theories" while at the same time recognizing that "the judgment poses no such limit."²⁷

Gover's concern is that *Stinchcombe* will be read too broadly and will allow the defence access to information based on purely "speculative" considerations. The concern outlined above, however, is in direct juxtaposition: the lack of restriction on the exercise of discretion will lead to extensive withholding of information which could prove useful to the defence and, arguably, should be disclosed. For example, suppose that in our hypothetical fact pattern it comes to the attention of the prosecutor that Mary D. was also sexually abused as a child, and that during the course of her therapy prior to the events at issue, she had expressed "revenge" fantasies. On its own, this information would mean nothing, and a Crown prosecutor could very easily and in good faith regard it as clearly irrelevant: it related to her recovery from her childhood experiences and did not have any bearing on the issues raised in the case at hand. But if Mary D.'s behaviour was investigated and it was discovered that she had actually taken certain steps towards carrying out some of these fantasies (for example, making plans or purchasing materials), we would be closer to the threshold for relevance. In the hands of the defence, that kind of information could, at the very least, open doors. For example, the psychiatric records alone would not be sufficient to found a claim that the accused is the hapless victim of the complainant's plot. They would, however, provide a starting point from which the defence could begin gathering evidence sufficient to substantiate such a claim or at least to create a reasonable doubt. The question remains whether or not the initial records should be disclosed.

The answer lies in determining the scope of the right to make full answer and defence. Clearly, it includes at least the right to be informed of all the elements of the Crown's case, as well as the right to information which could

²⁴ B. Gover, "*Stinchcombe*: Bad Case, Good Law?" (1991) 8 C.R. (4th) 307.

²⁵ *Ibid.* at 311.

²⁶ *Ibid.*

²⁷ *Ibid.* However, subsequent cases have, in certain circumstances, required the defence to lay a foundation for disclosure. This is discussed in detail in Part IV.A, below.

serve to impeach or question aspects of the Crown's case. As several cases, including *Stinchcombe*, have asserted, the right to make full answer and defence includes the right to be fully informed about witnesses and their testimony so as to be able to fully prepare for their cross-examination.²⁸ This right is impaired if information is disclosed too late, or not at all. It thus seems clear that the right to make full answer and defence includes disclosure of information which is susceptible of being placed into evidence at trial, whether directly or as part of the cross-examination of a witness. This begs the question whether it includes the right to obtain access to information which, although it could not be entered at trial (*e.g.* the revenge fantasy statements alone), could lead to an exculpatory claim if followed up by the defence.

c) *Relevance and the Right to Make Full Answer and Defence*

According to Gover, Sopinka J. defined relevant material as “inculpatory or exculpatory information which, if withheld, would give rise to a *reasonable possibility* of impairment of the right of the accused to make full answer and defence.”²⁹ Gover contrasts this interpretation with the approach of the United States Supreme Court, which has held that, in the context of a post-verdict review of disclosure,

[t]he evidence is material only if there is a *reasonable probability* that, had the evidence been disclosed to the defence, the result of the proceeding would have been different. A “reasonable probability” is a probability suf-

²⁸ *Stinchcombe*, *supra* note 1 at 287. “[S]ome of the information will be in a form that cannot be put in evidence by the Crown but can be used by the defence in cross-examination *or otherwise*.” (*ibid.*) [emphasis added]. The scope of these last two words is an issue of considerable importance and uncertainty, and is discussed more extensively in Part III.B., below.

See also, with respect to cross-examination, the comments of Thackray J. in *R. v. O'Connor*, *supra* note 5 at 109-10:

[T]hese [undisclosed] diagrams might have affected the preparation of the case by the defence. They might change the cross-examination of P.B. ... [I]t is unacceptable that defence counsel was put in the position of preparing [for cross-examination] without all of the relevant documents. Good cross-examination does not just happen. It is ... a product of meticulous effort on the part of counsel.

In *Osolin*, *supra* note 2, the central issue was whether the complainant could be cross-examined by defence counsel on her medical records, and on one notation in particular. The records had already been disclosed to the defence. Cory J., for the majority, found that to refuse cross-examination in that case would constitute a denial of the right to full answer and defence. He also, however, set out guidelines as to what issues could appropriately be addressed by such cross-examination. See also *Burke*, *supra* note 7.

²⁹ Gover, *supra* note 24 at 310.

ficient to undermine confidence in the outcome.³⁰

The United States thus seems to have taken an approach which evaluates disclosure in terms of the potential outcome of the case. The Canadian approach, as evidenced by *Stinchcombe*, seems to be more removed and abstract, asking instead whether the right to make full answer and defence was impaired. It is therefore necessary to evaluate whether that right includes only the right to obtain information that may make a difference in the outcome of a trial (*i.e.* the concrete determination of guilt or innocence), or whether the right allows the defence to examine and evaluate material for its usefulness. Sopinka J. appears to favour this latter approach, at least with respect to the relevance of information. Regarding statements given to the authorities, he stated:

If the information is of no use then presumably it is irrelevant and will be excluded in the exercise of the discretion of the Crown. If the information is of some use then it is relevant and the determination as to whether it is *sufficiently useful to put into evidence* should be made by the defence and not by the prosecution.³¹

Echoes of this sentiment can be heard in the dissenting opinion of Marshall J. of the United States Supreme Court in *Bagley*. He would not have required as rigid a standard for the disclosure of evidence as that established by the majority of the Court:

Once the prosecutor suspects that certain information might have favorable implications for the defense, either because it is potentially exculpatory or relevant to credibility, I see no reason why he should not be required to disclose it. After all, favorable evidence indisputably enhances the truth-seeking process at trial. And it is the job of the defense, not the prosecution, to decide whether and in what way to use arguably favorable evidence.³²

Marshall J. also addressed a key problem in the standard endorsed by the majority of the Court, a problem which Sopinka J. avoided in *Stinchcombe*. Marshall J. pointed out that

the Court relies on this review standard [that the result of the proceedings would have been different] to define the contours of the defendant's constitutional right to certain material *prior to trial*. ... [T]he Court permits prosecutors to withhold with impunity large amounts of undeniably favor-

³⁰ *United States v. Bagley*, 473 U.S. 667 at 682, 87 L. Ed. (2d) 481 (1985) [emphasis added, hereinafter *Bagley* cited to U.S.].

³¹ *Stinchcombe*, *supra* note 1 at 292 [emphasis added].

³² *Bagley*, *supra* note 30 at 698.

able evidence, and it imposes on prosecutors the burden to identify and disclose evidence pursuant to a pre-trial standard that virtually defies definition.³³

Marshall J. fears that it will be extremely difficult to make any truly informed or rational decision as to whether information could affect the outcome of a trial when the issues and facts which will be addressed at trial have yet to be identified. The use of relevance alone as the pre-trial standard has its own difficulties, as we have seen, but at least it does not require the Crown prosecutor to play the role of fortune-teller with respect to the outcome of the trial.

There do not appear to be any cases decided since *Stinchcombe* which directly address the scope of the right to make full answer and defence and therefore of disclosure.³⁴ The question usually arises when a claim of privilege is being made with respect to certain information. The courts then balance the relevance, or potential relevance, of the information with countervailing policy concerns, such as the protection of witnesses or, more generally, privacy interests. The conflict between the right of the accused to disclosure and other social interests will be discussed in more detail below. However, for our immediate purposes, it could be suggested that although Sopinka J. appears to advocate an expansive notion of the right to make full answer and defence, at least with respect to disclosure, by focusing on the “usefulness” of the information, he also uses the notions of relevance and privilege to circumscribe that right. Generally speaking then, where the only concern is one of questionable relevance, as Sopinka J. asserted, the Crown should err on the side of inclusion. But where there are other interests at stake, those interests must be taken into account and balanced with the tenuous relevance of the information and the right to make full answer and defence.

We have thus seen that the Crown’s discretion regarding the relevance or irrelevance of information is very vaguely defined. The key issues are therefore the trial judge’s role in reviewing the exercise of the Crown’s discretion and the manner in which the judge reaches a decision as to whether or not the information should be, or should have been, disclosed.

³³ *Ibid.* at 700 [emphasis added].

³⁴ However, in *O’Connor No. 1*, *supra* note 3, the Court addressed the relationship between the right to full answer and defence and the remedies available when the Crown had breached its disclosure obligations. The Court stated, *ibid.* at 148, that, following *Stinchcombe*, “the right of an accused to full disclosure by the Crown is an adjunct of the right to make full answer and defence. It is not itself a constitutionally protected right.”

2. Review at Trial: How Does the Judge Decide?

a) *The Burden of Proof*

The Court stated clearly in *Stinchcombe* that “[i]nasmuch as disclosure of all relevant information is the general rule, the Crown must bring itself within an exception to that rule”³⁵ when the Crown’s exercise of discretion is reviewed by the trial judge. Sopinka J. offered a series of principles to guide the judge in reviewing non-disclosure by the Crown, all of which relate to information the non-disclosure of which is purportedly justified by the rules of privilege.³⁶ With respect to relevance, Sopinka J.’s only guide to the trial judge is his assertion that he is

confident that disputes over disclosure will arise infrequently when it is made clear that counsel is under a general duty to disclose *all* relevant information. The tradition of Crown counsel in this country in carrying out their role as “ministers of justice” and not as adversaries has generally been very high. Given this fact, and the obligation on defence counsel as officers of the court to act responsibly, these matters will usually be resolved without the intervention of the trial judge. When they do arise, the trial judge must resolve them. This may require not only submissions but the inspection of statements and other documents and indeed, in some cases, *viva voce* evidence. A *voir dire* will frequently be the appropriate procedure in which to deal with these matters.³⁷

We still do not know how far relevance extends, however. The same problem arises here as did with respect to relevance. The trial judge must attempt to formulate the appropriate standard without guidance.

A preliminary question of onus arises, however, which is linked to the central issue of determining relevance. According to the Supreme Court, the obligation to disclose all relevant information places the burden on the Crown to justify withholding any materials in its possession. The question, though, as to who must justify the relevance or irrelevance of information remains unanswered. *Prima facie*, since the Crown has the initial obligation of separating “the wheat from the chaff”,³⁸ and has an apparently onerous duty to disclose all relevant information and err on the side of inclusion, it follows that the onus should fall on the defence to show that the information *is* in fact relevant. *R. v.*

³⁵ *Stinchcombe*, *supra* note 1 at 340.

³⁶ See Part IV.A., below.

³⁷ *Stinchcombe*, *supra* note 1 at 340-41.

³⁸ *Ibid.* at 339.

Mandeville,³⁹ applying *Stinchcombe*, takes precisely this approach. In that case, the Court required the defence to explain to what the information was relevant, in other words, to identify which claims the information could support or refute.

Mandeville had been charged with sexual assault against and unlawful confinement of the complainant. The defence made a pre-trial motion for disclosure of documents, which consisted of records maintained by Stanton Yellowknife Hospital and by Northern Addiction Services on treatment of and consultations with the complainant regarding alcohol abuse and addiction. In this instance (somewhat exceptionally), the records in question were actually in the possession of the Crown. The Crown had already provided some of the information in edited form to the defence, but had objected to the disclosure of the unedited documents and of any other documents. The defence argued that they required the information in order to instruct expert witnesses. They said that they intended

to call expert evidence at trial relating to the complainant's alcoholism and the effect of that alcoholism on the reliability of her evidence. Specifically ... on the theories of "confabulation" (the notion that one starts to believe as true things that one thinks may have happened but has no actual memory of) and the effect of alcohol on the ability to recollect at all as a function of brain damage (... Korsakoff's syndrome).⁴⁰

Vertes J. reviewed the allowable uses of expert evidence, and articulated a concern for the complainant's right to privacy as well as her expectation that her records would be kept confidential. He also concluded that "[w]ithout the medical data provided by these records the defence expert cannot begin to formulate a knowledgeable opinion. For these reasons I believe the defence has *established a foundation for disclosure*."⁴¹ Vertes J. then reviewed the records in question and ordered the disclosure of specific documents from the hospital records, which consisted primarily of data and clinical observations. The judge refused to order disclosure of the records maintained by Northern Addiction Services, however, as they were "made up more of subjective comments as opposed to clinical and objective data."⁴² Vertes J. did not find these documents "material" to the defence's case.⁴³

³⁹ *Supra* note 5.

⁴⁰ *Ibid.* at 274.

⁴¹ *Ibid.* at 275 [emphasis added].

⁴² *Ibid.* at 276.

⁴³ *Ibid.*

In this instance, the onus lay on the defence to argue for disclosure of the evidence. Vertes J. had to be satisfied that there was more going on than a "fishing expedition".⁴⁴ The defence thus had to show a sufficient foundation for the evidence by explaining its relevance (to credibility) and that it would be used at trial for the information and instruction of expert witnesses.

Vertes J. did acknowledge that the applicable authority in this situation was *Stinchcombe* and stated the guiding principle: "Disclosure of all relevant information is the rule and information ought not to be withheld if there is a reasonable possibility that the right of the accused to make full answer and defence will be impaired."⁴⁵ That was, however, the extent of the discussion of *Stinchcombe* in *Mandeville*. Clearly, according to Vertes, J., the Crown did not have to justify its exclusion of the information, but rather, the defence had to show the information's relevance.

O'Connor No. 2 seems to have brought some much-needed procedural clarification to this problem. In that case, the Court suggested a two-step approach. At the first stage, the applicant

must show that the information contained in the medical records is likely to be relevant either to an issue in the proceeding or to the competence of the witness to testify. If the applicant meets this test, then the documents meeting that description must be disclosed to the court.

The second stage involves the court reviewing the documents to determine which of them are material to the defence, in the sense that, without them, the accused's ability to make full answer and defence would be adversely affected. If the court is satisfied that any of the documents fall into this category, then they should be disclosed to the parties, subject to such conditions as the court deems fit.⁴⁶

The Court also observed that, in many cases, the only point in the trial at which relevance and materiality could ultimately be determined would be when the issue to which the information relates is addressed. In cases where disclosure could be decided earlier, however, it could be ordered by a pre-trial judge. Such an order would be subject to appropriate safeguards for the reasonable protection of privacy interests. The Court also paid some attention to the notion of "relevance" itself, stating that

⁴⁴ *Ibid.* at 274.

⁴⁵ *Ibid.*

⁴⁶ *O'Connor No. 2*, *supra* note 3 at 58-59.

[w]hile a liberal interpretation of the word "relevant" is to be encouraged, it is not to be encouraged without due regard for other legitimate legal and societal interests, including the privacy interests of complainants in sexual assault cases.⁴⁷

Lee Stuesser's comment on *O'Connor No. 2*⁴⁸ points out that, in the above passage, the Court appears to be confusing "relevance" with "admissibility". According to Stuesser, the first stage of the process should deal with relevance alone and any balancing of interests should take place at the second stage. This paper will follow Stuesser's approach, by separating the two concepts and addressing the societal interests at stake in a later section.

O'Connor No. 2 also sets out several grounds for disclosure which do not meet the test for relevance: credibility of the complainant; recent complaint; prior inconsistent statements; and the inference that having undergone therapeutic treatment renders the testimony unreliable.⁴⁹ The common theme underlying these insufficient grounds, it is suggested, is the oft-asserted principle that the right to make full answer and defence does not include a right to go on unfounded "fishing expeditions".⁵⁰ Moreover, in many situations, the defence requests information not because it is aware of leads which can be followed up but because it is simply hoping for anything that could prove useful to its case. We must remember that at this stage the defence knows nothing about the contents of the records. Few defence counsel have the time to work extra hours as private investigators, and most accused do not have the resources to hire a professional. But does that general incapacity and ignorance mean that the Crown is not obliged, as a matter of law, to disclose information regarding speculative defences? The answer to this question will again turn on our understanding of relevance itself, particularly in the context of the right to make full answer and defence.

O'Connor No. 2 explicitly places the onus on the defence to establish, at the first stage of the disclosure process, the "likely relevance" of the information sought.⁵¹ At the second stage, the court itself will review the material and ultimately decide whether or not disclosure to the defence should ensue. The

⁴⁷ *Ibid.* at 59.

⁴⁸ L. Stuesser, "Reconciling Disclosure and Privilege" (1994) 30 C.R. (4th) 67.

⁴⁹ *O'Connor No. 2*, *supra* note 3 at 63-65.

⁵⁰ *E.g.*, in *Coon*, *supra* note 5 at 157, Then J. stated: "In my view, while the sufficiency of the foundation will of course vary from case to case the right to full answer and defence cannot become synonymous with a fishing expedition."

⁵¹ *O'Connor No. 2*, *supra* note 3 at 58.

Court of Appeal pointed out that the standard should be “less stringent”⁵² at the first stage than at the second, as the information contained in the records will likely not be known to anyone except the witness and the physician, psychiatrist or therapist.

It is a general principle of the *Canadian Charter of Rights and Freedoms*⁵³ that the person alleging a violation of his or her rights must establish the infringement.⁵⁴ It thus appears that an accused who suspects that the Crown is holding something back must bring forward evidence to that effect. But how can any defence counsel possibly meet that burden? At best, they might be able to establish that the Crown has information that has not been disclosed to the accused. Sopinka J. seemed to contemplate that once such an assertion has been made, the Crown will have to explain its non-disclosure of relevant material. What is not made clear, however, and what may well be crucial to whether or not the defence obtains access to records or information held by the Crown, is the extent to which the Crown must justify non-disclosure of purportedly irrelevant material. The language used in *Stinchcombe* could support the approach taken by Vertes J. in *Mandeville*: “Inasmuch as disclosure of all *relevant* information is the general rule, the Crown must bring itself within an exception to that rule.”⁵⁵ The burden with respect to relevant evidence should clearly be on the Crown. Sopinka J., however, did not establish where it should lie when relevance itself is in issue. *Mandeville* placed the burden on the defence: Vertes J. required the defence to establish the “usefulness”, to use Sopinka J.’s language,⁵⁶ of the information to the accused’s case. *O’Connor No. 2* appears to do the same, although the test at the first stage is “less stringent”. Is this appropriate?

This trend of requiring the defence to explain why it wants disclosure of particular records can be seen in several other related situations, most notably those in which there is an issue of privilege. In *R. v. Learn*,⁵⁷ the Court refused to order disclosure of the medical records of a crucial Crown witness since the only basis for the request was the fact that, under cross-examination in the preliminary inquiry, the witness admitted that she had undergone psychiatric

⁵² *Ibid.* at 59.

⁵³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

⁵⁴ *Canada (Director of Investigations & Research) v. Southam*, [1984] 2 S.C.R. 145, 41 C.R. (3d) 97; *Operation Dismantle v. R.*, [1985] 1 S.C.R. 44, 13 C.C.R. 287; *R. v. Collins*, [1987] 1 S.C.R. 265, 56 C.R. (3d) 193.

⁵⁵ *Stinchcombe*, *supra* note 1 at 340 [emphasis added].

⁵⁶ “If the information is of some use then it is relevant” (*ibid.* at 345).

⁵⁷ *Supra* note 5.

treatment. Melnick J. stated that "it is not sufficient, in my view, for an accused to seek the extraordinary rights here pursued simply on the basis of the submissions of counsel, without any factual relevancy being established."⁵⁸ Most of the cases which address the issue of disclosure do so not in the context of Crown disclosure, but on a request or subpoena for information from third parties to which a claim of privilege or confidentiality is attached. Privacy rights are protected to a degree by the requirement that the person seeking the information must show its relevance by laying a "substantial foundation".⁵⁹ The issues of privacy and privilege will be discussed more fully below, but for now it is sufficient to point out that *Mandeville* applied this requirement in the context of a *Stinchcombe* request for disclosure. The appropriateness of that requirement must again be questioned.

It has thus been at least tentatively established that where the Crown has exercised its discretion to withhold clearly irrelevant information, it is up to the defence to demonstrate the "likely relevance" or "usefulness" of the information. This is so notwithstanding that the burden is on the Crown to justify any withholding of *relevant* information on grounds such as privilege or witness protection concerns. It is almost trite to say that the right to make full answer and defence does not extend to allowing mere "fishing expeditions". In order to assert a claim for disclosure, the courts have therefore found it reasonable to require defence counsel to show the potential usefulness of the information and their intended use of it.

If we now reconsider our hypothetical fact pattern, a serious problem arises with the requirement. How can the defence show the potential relevance of information about which it knows little or nothing? This issue has already been addressed by the Supreme Court with respect to wiretap evidence and the sealed packet.⁶⁰ In the past, the law required the defence to justify its request for access to the materials contained in the sealed packet by showing *prima facie* police misconduct, such as material non-disclosure or fraud. However, it was impossible for the defence to make that claim because any potential supporting evidence was contained in those sealed records. In *Dersch*, it was held that the above burden on the defence constituted a denial of the right to make full an-

⁵⁸ *Ibid.* at 7 (integral text of judgment).

⁵⁹ In *R. v. Lyons* (1981), 64 C.C.C. (2d) 73 at 76 (Ont. H.C.J.) [hereinafter *Lyons*], Smith J. stated: "It is clear that some foundation must be laid." In *Mandeville*, *supra* note 5 at 275, Vertes J. stated: "For these reasons I believe the defence has laid a foundation for disclosure." In *Coon*, *supra* note 5 at 157, Then J. stated: "[I]f a sufficient foundation is laid then the privacy interest must yield to the accused's right to full answer and defence".

⁶⁰ *Dersch v. Canada (A.G.)*, [1990] 2 S.C.R. 1505, 80 C.R. (3d) 299 [hereinafter *Dersch* cited to S.C.R.]. The sealed packet contains the affidavits filed in support of the wiretap authorizations.

swer and defence. Is denying disclosure of information, the potential relevance of which the defence cannot demonstrate, *a fortiori* a denial of the right to make full answer and defence?

The problem in *Dersch* lay in the restrictive interpretation of section 178.14 of the *Criminal Code* by the courts. The provision did not seem to limit the discretion of the trial judge in deciding whether to open the sealed packet to the defence. The Supreme Court held that, in light of the *Charter*, such a restrictive interpretation was unconstitutional, although the legislation itself was valid. The terms of *Stinchcombe* are also open enough as to be susceptible to an analogously restrictive interpretation of the principles of disclosure. This appears to be the direction in which the courts are headed: when relevance is in question, disclosure will not be ordered unless the defence can show why it should be.

In *Dersch*, the denial of the right to make full answer and defence lay in the fact that the accused would never be able to test the admissibility of information obtained by a wiretap authorization. He or she would simply not have access to that authorization, and would therefore be unable to determine whether the search warrant was obtained lawfully or in violation of section 8 of the *Charter*. According to Sopinka J. in that case:

The right to full answer and defence does not imply that an accused can have, under the rubric of the *Charter*, an overhaul of the whole law of evidence such that a statement inadmissible under, for instance, the hearsay exclusion would be admissible if it tended to prove his or her innocence ... But it does provide, in my view, that the accused be given the opportunity to test the admissibility of a piece of evidence according to the ordinary rules that govern the admissibility of evidence.⁶¹

To the extent that the non-disclosure of information will preclude the defence's ability to test the information's admissibility, it would appear that a restrictive interpretation requiring the defence to identify specifics of the information it wants would violate the constitutional right to make full answer and defence. The defence is being asked to explain why it needs disclosure of information the content of which it may know next to nothing about. This is an absurd position in which to place the defence when there is a supposedly constitutionally entrenched right to full disclosure. Although there may be situations where material is sensitive and where other interests may come into play, such as privacy or social interests, a more appropriate analysis would consider those interests not with respect to the relevance of information, but rather as

⁶¹ *Ibid.* at 1515.

related to the exceptions to disclosure, such as privilege.

But does this mean that the defence should get absolutely everything it asks for? Such an assertion implies that all information in the hands of the Crown is presumptively relevant. This does not appear an attractive alternative either, since much of the information may actually be clearly irrelevant. If, as we have seen, the constitutional difficulty lies in the lack of opportunity to test the admissibility of the information, then an acceptable middle ground may be to require the defence to assert the non-disclosure it suspects as well as the reason for the disclosure request. In other words, the defence must establish the *prima facie* relevance or usefulness of the information. Having demonstrated that there may be a need for the information, the defence will then have to establish the admissibility of the information at the appropriate point in the proceedings. If the information turns out to be irrelevant, then the defence will not be able to use it to its advantage at trial. If it is relevant, however, the accused will not have been denied the constitutional rights to a fair trial and to make full answer and defence.

There will be many situations, though, where the interests of people other than the accused will be affected by the disclosure of information. Depending on the circumstances, the analysis of these situations may turn on the privilege exception to disclosure, which we will examine below. First we will consider the nature of the connection between relevance and admissibility of information.

III. Admissibility, Disclosure and Relevance

A. *Societal Relevance*

A broader concern which arises from our hypothetical fact pattern stems from the nature of the offence of sexual assault. The common law once considered evidence of sexual activity of the complainant in rape cases highly relevant. In essence, its relevance was based on two common assumptions: the belief that "unchaste" women were dishonest and thus less credible on the witness stand; and the universally accepted idea that a woman who had previously consented to sexual activity was more likely to have done so on the occasion in question.⁶² The Canadian legislature has attempted to defeat this presumed

⁶² For a full discussion of the history and impact of these principles, see L'Heureux-Dubé J.'s dissenting judgment in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 7 C.R. (4th) 117 [hereinafter *Seaboyer*].

relevance by expressly disallowing evidence which would be used solely to perpetuate stereotypes.⁶³

At issue here is the social, contextual and political meaning of “relevance”. On a broad scale, relevance pertains not only to the connection of one fact to another, but also extends to attitudes, beliefs, stereotypes and unspoken assumptions. The “outdated” connections between sexual activity and dishonesty, or between past consent and present proclivities are only two examples. The legislature, moreover, has expressly prohibited this line of reasoning. Thus when defence counsel argues that the psychiatric record of the complainant is relevant to her credibility — even putting aside the sexual history aspects of those records — is counsel not drawing on another societal assumption of relevance? Such an assumption might be that people who see psychiatrists have “mental problems”, are disturbed, and cannot be believed. It follows that such people may not be lying on purpose, but that their “mental illness” could affect their view of the world, and that their statements and testimony should therefore be viewed with suspicion. Like sexual history, this assumption of relevance is circumscribed by the conditions of admissibility of this kind of evidence.⁶⁴

The claim that sexual history and psychiatric history are relevant is based on generalizations and assumptions which may have no validity in the particular case. Given these concerns, as well as the conditions of admissibility of these forms of evidence, we must ask whether the complainant’s sexual and psychiatric past is sufficiently relevant to be routinely disclosed to the defence. In addition, we must consider the countervailing policy concerns that may operate to preclude disclosure of the information despite its relevance. Of crucial interest here is the interplay between the principles of disclosure and those of admissibility.

⁶³ See Part III.B., below.

⁶⁴ This is one of the grounds for disclosure discredited by the Court in *O’Connor No. 2*, *supra* note 3. For a recent discussion of these conditions and their application, see *Nickerson*, *supra* note 5. See also the dissenting judgment of L’Heureux-Dubé J. in *Osolin*, *supra* note 2 at 616-17.

B. Section 276 of the Criminal Code: Presumptive Inadmissibility of Sexual History

The Canadian legislature has made it clear that, in the context of sexual crimes, the stereotypes and myths connected with complainants and their sexual histories will not be tolerated. An examination of the legislative history of Canada's "rape-shield" law is beyond the scope of this paper; the discussion here will thus be limited to the present provisions of the *Criminal Code*. Subsection 276(1) prohibits the use of evidence

- that the complainant has engaged in sexual activity, whether with the accused or with any other person ... to support an inference that by reason of the sexual nature of that activity, the complainant
- (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
- (b) is less worthy of belief.

A procedure is set out in sections 276.1 and 276.2 whereby the accused can make an application to bring forward evidence of sexual history, the admissibility of which will be determined at a *voir dire*. Subsection 276(2) lists the criteria for the admissibility of the information: the judge must determine that the evidence

- (a) is of specific instances of sexual activity;
- (b) is relevant to an issue at trial; and
- (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Subsection 276(3) lists the factors to be taken into account in determining whether evidence is admissible under subsection 276(2). The factors include

- (a) the interests of justice, including the right of the accused to make a full answer and defence; ...
- (d) the need to remove from the fact-finding process any discriminatory belief or bias;
- (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (f) the potential prejudice to the complainant's personal dignity and right of privacy;
- (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- (h) any other factor that the judge, provincial court judge or justice considers relevant.

The first stage of our analysis of relevance dealt with the legal concept as generally understood and applied. The so-called "rape-shield" provisions address the problem of "social" or "stereotypical" relevance based on inferences which ensue from unfounded beliefs about women who "cry rape". Those provisions create a *prima facie* presumption of the inadmissibility of sexual history, since sexual history is generally irrelevant to the issues before the court, and is always irrelevant to the likelihood of consent and credibility.

Certain types of evidence (such as hearsay, opinion and character evidence) are generally excluded because they "possess inherent unreliability, lack of probative worth and susceptibility to fabrication."⁶⁵ Evidence of sexual history is *prima facie* inadmissible for this reason. There are also separate exclusionary rules "based upon social values, external to the trial process,"⁶⁶ rendering inadmissible evidence which is otherwise relevant, probative and trustworthy. The privilege rule belongs to this latter category. We will be considering here, from both angles, evidence of sexual history in the context of pre-trial disclosure. We will look first at its general irrelevance and lack of probative worth as factors militating against disclosure, particularly in light of the legislative reinforcement of that premise in section 276. Second, we will examine the privilege which arises from the doctor-patient relationship.

1. The Connection Between Relevance and Admissibility for Purposes of Disclosure

The first question is whether, according to the procedures and standards previously laid out, evidence of past sexual conduct is "potentially relevant" or clearly irrelevant. If there were no prohibitive restrictions, would the defence be entitled to such information?

In the absence of legislative intervention, the defence would be required to demonstrate the *prima facie* usefulness of the information. In other words, the defence would have to show that, without the information, the accused's ability to make full answer and defence would be hampered. To justify the asserted relevance and usefulness of the information, the accused would claim that he had believed in the complainant's consent because he knew of her past sexual activities, whether with others or with himself. The evidence would clearly be disclosable if this were the only issue. Upon review, even a judge who is conscious of the prejudicial effect of unfounded stereotypes would be forced to consider the evidence relevant. This would be the case because, prior to the en-

⁶⁵ Sopinka, Lederman & Bryant, *supra* note 22 at 623.

⁶⁶ *Ibid.*

actment of section 276, an accused charged with sexual assault could invoke the defence of honest belief in consent,⁶⁷ even though this belief was based entirely on a stereotypical notion of the sexual behaviour of women. Therefore, refusing the defence access to the information would, even by the most stringent standards, be a clear violation of the right to make full answer and defence. This is particularly true in light of the fact that the defence of honest belief in consent cannot be put to the jury unless there is an "air of reality" to it. "Air of reality" means that the honest belief in consent must be supported by actual evidence.⁶⁸ If the only available evidence lies in the records of the complainant to which the accused is denied access, then the accused's right to make full answer and defence will obviously be violated.

The current state of the law in Canada has been changed by Bill C-49,⁶⁹ enacted in response to *Seaboyer* and codified in section 276 of the *Criminal Code*. The Supreme Court struck down the previous "rape shield" law on constitutional grounds because the law allowed the exclusion of evidence potentially relevant to the defence and thus violated the right to make full answer and defence. Bill C-49 not only enacted a new rape shield law, but also codified the concept of consent in sexual assault and, more particularly, set out circumstances in which, from a legal perspective, there would be no consent. These provisions, when read together with the preamble of Bill C-49,⁷⁰ speak eloquently of the policy behind this legislation: sexual assault, in all its various forms, is a crime which is intolerably pervasive in Canadian society, and one which is fuelled and perpetuated by myths and stereotypes about the sexual behaviour of men and women. This legislation proposes to defeat the effect of these societal biases by barring them from the courtroom. Section 273.1 stipu-

⁶⁷ *R. v. Pappajohn*, [1980] 2 S.C.R. 120, 14 C.R. (3d) 243.

⁶⁸ *Osolin*, *supra* note 2 at 609.

⁶⁹ *An Act to amend the Criminal Code (sexual assault)*, 3d Sess., 34th Parl., 1992 (assented to 23 June 1992, S.C. 1992, c. 38).

⁷⁰ *Ibid.*, preamble:

Whereas the Parliament of Canada is gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual assault against women and children; ... [and] recognizes the unique character of the offence of sexual assault and how sexual assault and, more particularly, the fear of sexual assault affects the lives of the people of Canada; ... [and] wishes to encourage the reporting of incidents of sexual violence or abuse, and to provide for the prosecution of offences within a framework of laws that are consistent with the principles of fundamental justice and that are fair to complainants as well as to accused persons; ... [and] believes that at trials of sexual offences, evidence of the complainant's sexual history is rarely relevant and that its admission should be subject to particular scrutiny, bearing in mind the inherently prejudicial character of such evidence ...

lates specific situations in which “no consent is obtained,” and section 273.2 reinforces the requirement that consent must now be obtained expressly and cannot merely be assumed. Honest belief in consent will no longer be a defence when the accused’s belief is due to recklessness or wilful blindness. Nor will it be a defence when “the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.”

Both the substantive law and the applicable evidentiary principles have thus been radically changed. The court must not, in general, allow “outmoded” stereotypical assumptions into the courtroom. In the exceptional case, however, assumptions of this nature may be permitted when their factual relevance is demonstrated.

The position of the law with respect to the admissibility of evidence of prior sexual conduct now appears to be settled. What then is the position, and what *should* it be, with respect to the disclosure of such information to the defence? Is it relevant because it will assist in drawing up the application for a hearing to determine its admissibility? On the other hand, is it “clearly irrelevant”, both as a matter of common understanding and public policy, because it is presumptively inadmissible? Or is there a middle ground of potential relevance? Here, the policy concerns animating the *Criminal Code* provisions would militate against wholesale disclosure of the information. The defence would have to show something beyond the mere existence of prior sexual conduct to demonstrate the information’s relevance and to invoke the right to make full answer and defence. This approach would in effect shift the analysis from “relevance” to considerations of policy and the effective administration of justice. In essence, this approach parallels a privilege argument. The public interest in the administration of justice operates to deny disclosure unless infringement of the right to make full answer and defence can be demonstrated.

We have already argued that the appropriate burden to impose on the defence to justify a request for disclosure is one of *prima facie* relevance. In the context of information about sexual history, however, we must ask whether that *prima facie* standard is appropriate, given the clear policy reflected in section 276 that such information is generally irrelevant, often highly prejudicial, and should be considered very carefully before being admitted. The issue here is whether the same disclosure standard for relevance is appropriate when evidence is *prima facie* inadmissible. How much influence should presumptive inadmissibility have on disclosure?

Since the withholding of the information would thus be based on policy

concerns external to the information's actual content, the defence no longer has to demonstrate the relevance of information about which it knows nothing. According to Sopinka J. in *Dersch*, the right to make full answer and defence does not require that all information be rendered admissible.⁷¹ The defence would therefore have to show that the accused's right to make full answer and defence was being impaired not by the *prima facie* inadmissibility of the information but in spite of it. In other words, where the public interest dictates the inadmissibility of information, it seems reasonable to assert that it would be equally prohibitive of disclosure *unless* the defence could show that the information is susceptible of being rendered admissible. Although this may seem a very low threshold, there will be circumstances, which would not violate the right to make full answer and defence, where the defence will be unable to meet this threshold. For example, in the context of sexual assault, section 276 has changed the very nature of the relevance of sexual history. There will be instances where sexual history is "clearly irrelevant", most notably when the defence of honest belief in consent has been precluded by the operation of section 273.2. Conversely, there will be many cases in which the key issue is the operation of that provision, and the trier of fact will have to determine whether the accused was intoxicated, reckless or wilfully blind, or whether he had taken sufficient steps to ascertain the existence of consent. Where the defence has an interest in the information for these purposes, then the right to make full answer and defence must be respected by disclosing the information.

We therefore suggest the following analysis. Information which is of no use to the defence is clearly irrelevant and can be withheld by virtue of the Crown's discretion. Here, the defence would not be able to meet the minimum threshold of demonstrating the usefulness of the information. When the information could be of some use but is presumptively inadmissible, however, the defence must satisfy the threshold test. The information's presumed inadmissibility places it in the same category as information the relevance of which is unclear, and the threshold onus to justify non-disclosure is thus placed on the defence rather than on the Crown. This threshold test, where admissibility is at stake, would require the defence to make the *prima facie* case that the information could be rendered admissible. Finally, information may be absolutely inadmissible for certain uses; for example, evidence of previous sexual conduct as showing likelihood to lie. This information may be admitted, however, if the defence can show that it could be subject to one of the given exceptions.

There may still be situations in which the defence knows so little about the content of the information that it is simply unable to demonstrate anything

⁷¹ *Dersch*, *supra* note 60 at 1515.

about it. In that circumstance, the right to make full answer and defence can only be adequately preserved by disclosure of the information, or of at least sufficient portions of it. This would be within the trial judge's discretion on review. We have suggested a threshold analysis in recognition of the legitimacy and importance of the policy goals in the particular context of sexual assault. There must be room in the judicial process for consideration of these interests even in preliminary arguments regarding disclosure. It would not be appropriate for the courts to read *Stinchcombe* so restrictively as to render meaningless the right to disclosure. But *Stinchcombe* should not, nonetheless, be used to justify an abdication of the court's responsibility to make difficult decisions involving the public interest, by a blanket requirement that all information be disclosed. The defence should not have access to information which it will clearly not be able to use. Where a potential use can be demonstrated and admissibility must be determined, the defence should have access to the information to enable it to make that determination.⁷²

2. Disclosure and the Administration of Justice

A broader issue remains, however, which is less likely to arise in the context of evidence of sexual conduct but which may be even more acute in other situations, such as those in which the information is inadmissible as hearsay. If such a statement were disclosed to the defence, it could perhaps investigate further and obtain the evidence in an admissible form from the original source. The defence may even be able to use the information for the purpose of preparing for the cross-examination, to damage the credibility of Crown witnesses. A variation on the same problem is our "revenge fantasy" example. How extensive is the right to make full answer and defence?

Civil discovery requires that all relevant information be disclosed, regardless of its admissibility, subject to claims of privilege.⁷³ On one hand, the constitutional right to make full answer and defence in the criminal context, where a liberty interest is at stake, would seem to strongly support adoption of that same principle. There is, however, a fundamental difference between civil and crimi-

⁷² Another possible approach is that suggested in *O'Connor No. 2*, *supra* note 3. The documents are disclosed to the court once the defence has demonstrated their "likely relevance." The court then reviews the documents to determine which are material to the defence. However, the Court of Appeal in that case was not addressing the admissibility of such documents. When admissibility is an issue, the defence will have to establish it and will generally not be able to do so without access to the information. Review of the documents by the court in such a case will not, generally, be sufficient to protect the right to make full answer and defence.

⁷³ Law Reform Commission of Canada, *Discovery in Criminal Cases* (Study Report) (Ottawa: Information Canada, 1974) at 40.

nal procedure. In civil cases, the adversarial process dictates that there are generally two individuals in direct conflict, one claiming to be wronged by the other. The criminal law is concerned not with conflicts between individuals, but rather with the state regulation of conduct considered detrimental to the public interest. As Sopinka J. emphasized in *Stinchcombe*, the role of the prosecutor is not purely adversarial, but also representative of the public interest:

[T]he role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.⁷⁴

Further on he stated that

the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done.⁷⁵

In a criminal procedure, the complainant is not suing the defendant for reparation although the defendant may have caused suffering to the complainant. The complainant, unlike the plaintiff in a civil case, has no control over the process in which she or he may be the key witness. Given this reality, the prosecutor, in his or her role as representative of the public interest, should accord some value to the protection of the integrity and privacy of those individuals who are relied upon to further the pursuit of justice. The discretion of the Crown prosecutor would then include the consideration of these interests when withholding information.

In addition to the individual interests of complainants, there are more amorphous, but nonetheless crucial, public interests at stake. These include: avoiding the creation of disincentives to the reporting of sexual assaults or other crimes where witnesses or complainants have undergone psychiatric treatment; preventing the perpetuation of stereotypes or prejudices that impede the truth-seeking process; and attempting to ensure that the individual rights of those other than the accused are recognized and accorded value in the judicial process. These arguments are but a facet of the concern expressed above that the procedure for disclosure should allow broader social and individual interests to be taken into account in conjunction with the accused's right to make full answer and defence.

⁷⁴ *Stinchcombe*, *supra* note 1 at 333, quoting Rand J. in *R. v. Boucher* (1954), [1955] S.C.R. 16, 20 C.R. 1.

⁷⁵ *Stinchcombe*, *ibid.*

IV. Privilege and Policy: The Outer Boundaries of Disclosure

A. *Privilege: General Principles*⁷⁶

In his discussion of the guiding principles for a review of the Crown's exercise of its discretion, Sopinka J. stated that "information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence unless the non-disclosure is justified by the law of privilege."⁷⁷ Where a privilege does apply, it is still within the judge's powers to order the disclosure of information if he or she concludes that "the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence."⁷⁸ Similarly, the decision to withhold information on grounds of the safety of the witness may also be reviewed by the trial judge. According to Sopinka J., in these circumstances,

while much leeway must be accorded to the exercise of the discretion of the counsel for the Crown with respect to the manner and timing of the disclosure, the absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure.⁷⁹

The first problem is to determine what Sopinka J. meant when he stated that "the law of privilege" will justify non-disclosure. What constitutes "privileged information"?⁸⁰

It is clear that the most important form of privilege or immunity is that accorded to those who have provided information to the prosecution. Their need for protection, and the broader concern of ensuring the efficient administration of justice, are two of the most compelling reasons for recognizing that in certain circumstances relevant evidence should be withheld. Notwithstanding

⁷⁶ The particular common law privilege which was recognized in *R. v. Gruenke*, [1991] 3 S.C.R. 263, 67 C.C.C. (3d) 289 [hereinafter *Gruenke*] will be discussed in the following section regarding policy grounds for denying disclosure.

⁷⁷ *Stinchcombe*, *supra* note 1 at 340.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ The only specific example provided is the informer privilege. Interestingly, Sopinka, Lederman & Bryant, *supra* note 22 at 805, characterize the informer "privilege" as an immunity, but that distinction is not relevant for our purposes. Sopinka J. in *Stinchcombe* apparently contemplates the extension of the Crown discretion to privileges other than the informer privilege (see *supra* note 17).

these concerns, Sopinka J. gives precedence to the right to make full answer and defence. If the privilege is not a reasonable limit on that right, disclosure will be ordered.

The protection provided by the rules of privilege has never been absolute. Exceptions have always been admitted in criminal proceedings when the right to make full answer and defence could have been impaired by the non-disclosure of information. What remains unclear is “the required degree of materiality to justify disclosure.”⁸¹ Unfortunately, *Stinchcombe* does nothing to clarify the issue, but merely restates the general principle that the privilege must not unreasonably restrict or impede the right to make full answer and defence. However, with respect to the “material witness” exception to the informer privilege, it has been noted that

despite these rather broad expressions of the exception, the courts have not held that disclosure is required for the defence in all cases where the accused has simply alleged that the information could potentially assist in the defence. In many of those cases where disclosure has been required the informant had witnessed or been involved in the commission of the offence.⁸²

Here we encounter again the question of burden of proof. *Stinchcombe* asserts that it is up to the Crown to justify exceptions to the principle of full disclosure which are based on privilege. The rules of privilege, however, require more than a simple claim of necessity of disclosure before they will allow the privilege to be set aside.

A privilege is, by definition, an exclusionary rule of evidence based on social interests external to the particular trial. The privilege makes inadmissible otherwise relevant, probative and trustworthy evidence. In their discussion of the “innocence at stake” exception to the informer privilege, Sopinka, Lederman & Bryant point out that

[r]eference to the statements from *Rideout* and *Roviaro* suggests that whenever the information is “relevant” to the defence the evidence would be necessary for the full defence of the accused. On the other hand, the last paragraph of Sopinka J.’s comments retreats from the view that the exception would always apply in such cases. He suggests that *even if the information is relevant* some weighing of the accused’s need for the evidence *against the public interest in law enforcement* would have to be made by the trial judge. If relevance were the only criterion then there really would be no special police/informant rule in criminal cases. An accused should

⁸¹ Sopinka, Lederman & Bryant, *ibid.* at 809-10.

⁸² *Ibid.* at 810.

not be entitled to the information simply on the basis that it is relevant.⁸³

The exclusion exists because a policy choice has been made which recognizes a

social interest in preserving and encouraging particular relationships that exist in the community at large, the viability of which are [sic] based upon confidential communications.⁸⁴

Sopinka, Lederman & Bryant further state that, in general, "Anglo-Canadian law has ... given priority to the administration of justice over external social values. In fact, the trend in Canada is to limit the recognition of privileges in favour of the search for truth in the judicial process."⁸⁵

In *Stinchcombe*, Sopinka J. claims that imposing an obligation of full disclosure will further, rather than impede, the pursuit of truth.⁸⁶ The trial judge is given the discretionary power to weigh privilege against the right to make full answer and defence according to the criteria set out by Sopinka J. However, since the rules of privilege already provide for exceptions, how does the trial judge know when the non-disclosure of privileged information is not a reasonable limit on the right to full answer and defence? The rule of privilege with respect to informers was developed in conjunction with the right to make full answer and defence, and exceptions were established to protect the rights of the accused. Therefore, aside from those cases already provided for within the privilege rule, it is unclear when (at least in the context of the police informer privilege) the privilege will be unreasonable.

It is beyond the scope of this paper to discuss all the types of privilege, but one which is particularly relevant to our hypothetical situation is that between doctor and patient. Despite ethical and professional obligations to maintain confidentiality with their patients, doctors are compellable to divulge information before the courts.⁸⁷ Nonetheless, the importance of protecting confidentiality has been recognized with respect to the particular relationship involved in psychiatric treatment.⁸⁸ Thus a "qualified privilege for psychiatric communica-

⁸³ *Ibid.* at 813 [emphasis added].

⁸⁴ *Ibid.* at 623.

⁸⁵ *Ibid.* at 623-24.

⁸⁶ Although it may well be argued that a reciprocal disclosure obligation would provide, to the extent possible in an adversarial process, the most *complete* picture of the truth.

⁸⁷ Sopinka, Lederman & Bryant, *supra* note 22 at 712.

⁸⁸ *Ibid.* at 713.

tions [has] gained a tentative foothold in Canada.”⁸⁹ This privilege has been discussed in several cases where disclosure of psychiatric records in the hands of third parties (the doctors or hospitals holding the records) was requested.⁹⁰

In *R. v. Learn, Stinchcombe* was considered even though the material requested was not in the possession of the Crown. The motion — a blanket request for the names and records of all physicians who had treated the Crown’s key witness — was based on an admission by the witness at the preliminary inquiry that she had received “psychiatric help” in the past and was currently undergoing treatment. Melnick J. reviewed the conditions for the admissibility of such evidence, but stated that

there is nothing in the evidence at the preliminary inquiry ... which shows that her psychiatric history either makes her more likely to have committed the crime or is someone who has a hidden propensity to lie. It is not sufficient, in my view, for an accused to seek the extraordinary rights here pursued simply on the basis of the submissions of counsel, without any factual relevancy being established.⁹¹

Learn also cites the decision of the Ontario Court of Appeal in *R. v. Lyons*,⁹² which is consistently repeated as an elaboration of the general principle that

in the appropriate case ... of an accused person’s attention being drawn to the psychiatric history of the key witness for the Crown, he ought to be entitled to an order for the production of the records so that same may be inspected under, of course, supervision, in an attempt to steer a course between the right for an accused to be made aware of any mental, personality disorder that may affect the reliability of the evidence of an important Crown witness and this applies directly, I suppose, to the credibility of the complainant in a rape case, and on the other hand, the right to privacy and confidentiality possessed by our citizens in this country ... *It is clear that some foundation must be laid.*⁹³

⁸⁹ *Ibid.* at 715.

⁹⁰ Some cases have also discussed this type of information in the context of the common law privilege recognized in *Gruenke*. These will be discussed in more detail in Part IV.B., below. A recent decision of the British Columbia Court of Appeal, *A.M. v. Ryan* (21 October 1994), Vancouver CA017610 (B.C.C.A.), seems to indirectly recognize this privilege, but only when invoked by a party to the civil action. In that case, the privilege was invoked by the psychiatrist who had treated the plaintiff when the defendant sought production of the records. The Court ordered that the records be disclosed.

⁹¹ *Learn, supra* note 5 at 7 (integral text of judgment).

⁹² *Supra* note 59.

⁹³ *Ibid.* at 76 [emphasis added].

R. v. Coon,⁹⁴ a case of sexual assault involving an on-duty police officer, states the issue somewhat more elegantly. The defence in that case requested disclosure of the psychiatric records of the complainant, who had been an in-patient at the time of the alleged assault. Then J. states two “important propositions” governing the disclosure of such records:

First, in ordering production a balance must be struck between the right of the accused to full answer and defence and the right of the complainant (the disclosure of whose records are at issue) to privacy and confidentiality which is embodied in the legislation. Secondly, the right of the accused to full answer and defence will prevail if a sufficient foundation is laid to enable the judge to determine that disclosure is necessary in the interest of justice.⁹⁵

It should be noted that in these cases the court was dealing with a statutory privilege that limited disclosure of hospital records. Nonetheless, the basic principle remains clear: in light of a) the existence of a right to privacy and confidentiality; b) the intensely personal nature of psychiatric evidence; c) the generally questionable or tenuous relevance of such information; and d) the conditions attached to the admissibility of such information, the onus is on the defence to show that the records are relevant and potentially necessary to ensure complete protection of the right to make full answer and defence.

We are once again faced with the problem of who should bear the burden of proof. When the Crown claims privilege, it must justify withholding evidence, but the defence, in order to defeat the privilege, is required to show the *relevance* of the information. In this privilege, as in the police informer privilege, the rule protecting confidentiality is itself balanced with considerations of the right to make full answer and defence. We therefore question whether *Stinchcombe* contributed to this area of the law. Granted, it established the new obligation of full disclosure, but the purported “exception” to the disclosure principle, limited by the right to make full answer and defence, has always been circumscribed by the same consideration. If we interpret *Stinchcombe* such that the exceptions to disclosure must be read *more* restrictively and the right to make full answer and defence read more expansively, the law of privilege will be reduced to a mere incantation without practical significance. *Stinchcombe* did not change the *meaning* of the right to make full answer and defence; it clarified the obligation of the Crown to behave consistently in regard to it. Therefore the rules of privilege should continue to apply as they always have, in constant tension with the rights of the accused and the broader interests of

⁹⁴ *Supra* note 5.

⁹⁵ *Ibid.* at 152.

the community. In other words, once a privilege has been established by the Crown, disclosure will not be ordered unless an exception to the privilege can be claimed. If the exception does not exist within the rules applicable to the privilege, then the inquiry should go no further. It is not necessary to repeat the analysis to determine whether, under *Stinchcombe*, the right to make full answer and defence is impaired by non-disclosure.

This exception analysis works most visibly in the context of the police informer privilege because it is subject to a number of exceptions. In the context of the doctor-patient privilege for psychiatric information, however, the approach is more fluid. The information is privileged unless the accused can demonstrate that the information is sufficiently relevant to affect the right to make full answer and defence. As such, the defence must demonstrate that the complainant's privacy and personal security interests are outweighed by the fact that disclosure of these personal records is required to safeguard a constitutional right. When the requested information is privileged, however, the balance of interests is altered. Because the fundamental nature of the interests militate against disclosure, the defence must show more than the *prima facie* possibility that the information deemed irrelevant by the Crown may indeed be relevant. The defence must demonstrate that the accused's interest actually outweighs those interests protected by the privilege.

B. The Common Law Privilege: Considerations of Policy

There is, however, another type of privilege which may be invoked: the "common law" privilege recognized by the Supreme Court in *Gruenke*. The Court noted in that case that, unless there are compelling policy reasons, the first principle, that all relevant evidence is admissible until proven otherwise, will take precedence. The majority drew a distinction between a blanket or class privilege, such as the informer privilege, and a case-by-case privilege which the court may recognize if the communications in the particular case meet the "Wigmore criteria":

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the cor-

rect disposal of litigation.⁹⁶

So far, we have focused on disclosure in the context of the right to make full answer and defence. Countervailing rights or interests, most notably those of privacy and fairness to “victims” or complainants, have also been discussed. It is now appropriate to address those concerns in light of the potential case-by-case privilege mentioned above, and to examine their impact on the application and interpretation of disclosure principles.

The right to privacy has always been considered fundamentally important, and it forms the basis for the class privilege accorded to communications in the psychiatric or counselling relationship. In that context, the right to make full answer and defence of an accused facing a criminal charge is in direct conflict with a complainant’s expectation of the confidentiality and privacy of her personal history. Moreover, psychiatric records extend beyond the objective facts of someone’s life: to be effective, psychiatry, and therapy in general, requires thorough, painful probing of the most intimate aspects of the self. Once a criminal charge is laid, however, the pursuit of justice sometimes necessitates that the complainant’s psychiatric records be claimed as relevant to the trial. Despite the fact that the decision to lay charges may not even be within the complainant’s control but is entirely a matter of Crown discretion (as is the rest of the judicial process), the complainant’s mental and emotional history is subject to analysis and discussion not only in open court, but by the very person who has allegedly committed the assault. The importance of the right to privacy has often been invoked by the courts in confronting this dilemma:

There is no doubt that privacy “ranks high in the hierarchy of values meriting protection in a free and democratic society” and is essential for the well-being of the individual.⁹⁷

The courts have, and should continue to recognize the personal affront to human dignity that obtains as a result of intrusion into private matters and personal information and the embarrassment, grief or loss of faith that can flow from the use and dissemination of the particulars of one’s intimate private life. The law is designed to afford protection against the personal anguish and loss of dignity that may result from having the intimate details

⁹⁶ J.H. Wigmore, *Evidence in Trials at Common Law*, rev. J.J. McNaughton, vol. 8 (Boston: Little, Brown, 1961) at para. 2285, p. 527.

⁹⁷ *Ross*, *supra* note 5 at 255, quoting *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326, [1990] 1 W.W.R. 577 [hereinafter *Edmonton Journal*] and *R. v. Dymont*, [1988] 2 S.C.R. 417, 55 D.L.R. (4th) 503 [hereinafter *Dymont*].

of one's private life publicly exposed.⁹⁸

In *Coon*, following *People First*, Then J. affirmed that the court must attempt to strike a balance

between the right of the accused by cross-examination to test motive, disposition, veracity and reliability of the witness and the witness' right to privacy and confidentiality in respect of medical records ... [I]f a sufficient foundation is laid then the privacy interest must yield to the accused's right to full answer and defence.⁹⁹

This statement shows the extent to which all of the issues discussed in this paper — relevance, admissibility, privacy — intertwine and commingle. The *O'Connor* decisions recognized the complainant's privacy interest in her medical records, and emphasized that any disclosure order should take those interests into account by placing conditions on the order, banning publication, or selectively disclosing only relevant portions. *O'Connor No. 2* attempted to provide guidance as to how to reconcile the competing interests of privacy and the right to make full answer and defence.

L'Heureux-Dubé J.'s dissenting opinion in *Osolin* also canvassed the privacy interest. After reviewing some of the case law on the issue, most notably *Dyment*, she concluded that a privacy interest in medical records has been recognized as an independent value separate from the particular concerns regarding the fairness of a trial. She stated:

In my opinion, the inescapable conclusion is that the arguments expressed in *Dyment* in respect of privacy interests are equally applicable, if not more compelling, in the case of witnesses called by the Crown in a criminal matter.¹⁰⁰

There are, however, other policy interests at stake. The judgments of the Supreme Court in *Osolin* provide a thorough review of some of these concerns in sexual assault cases where psychiatric records are requested. In *Osolin*, the complainant alleged that she had been kidnapped and sexually assaulted by the accused, while he claimed that she had been a willing, if passive, participant. The complainant had a history of psychiatric treatment, and during the trial her mental health records were admitted so that an expert could evaluate her com-

⁹⁸ *People First of Ontario v. Porter* (1991), 5 O.R. (3d) 609 at 632, 85 D.L.R. (4th) 174 (Div. Ct.), Donnelly J. [hereinafter *People First*], summarizing the views of the Supreme Court in *Dyment* and *Edmonton Journal*.

⁹⁹ *Coon*, *supra* note 5 at 157.

¹⁰⁰ *Osolin*, *supra* note 2 at 616.

petence to testify. The defence failed to establish that the complainant was an unreliable witness. However, counsel for the defence sought leave to cross-examine the complainant on these records. Defence was particularly interested in one notation mentioning that after the incidents at issue, the complainant had expressed concern to her doctor that "her attitude and behaviour may have influenced the man to some extent," and that she was "having second thoughts about the entire case."¹⁰¹ The purpose of this cross-examination, according to counsel, was to "show what kind of person the complainant is."

The trial judge refused to allow cross-examination on the medical records as they had been admitted only for the narrow purpose of determining competence; any further exploration would therefore be a violation of the complainant's right to privacy. The British Columbia Court of Appeal found that the trial judge had erred in basing his refusal on the right to privacy and that, if the cross-examination went to the complainant's credibility, it should have been permitted. The Court of Appeal nonetheless denied this ground of appeal as there was no record of the questions defence counsel had intended to ask.

A majority of the Supreme Court of Canada held that the accused's constitutional rights had been violated by the refusal to permit cross-examination. Cory J. emphasized the importance of cross-examination in the adversarial system as the ultimate means of demonstrating truth and testing veracity, and of ensuring that the accused is able to make full answer and defence. He also stressed, however, that there were limits to cross-examination; in particular, that the information must be relevant to be admissible. The trial judge was thus correct in finding that defence counsel's stated objective of "showing what kind of person she was" was not a proper foundation. However, Cory J. held that, notwithstanding defence counsel's submissions, the trial judge should have ensured that the accused's rights with respect to cross-examination were protected. It would have been appropriate to permit cross-examination on the records to see if there was any motive to fabricate, or if the complainant's conduct could have led the accused to believe she consented. In the result, the accused was denied a fair trial.

Cory J. did recognize, however, several particular concerns which arise in sexual assault cases. He pointed out, relying on *Seaboyer*, that

eliciting evidence from a complainant for the purpose of encouraging inferences pertaining to consent or the credibility of rape victims which are

¹⁰¹ *Ibid.* at 661.

based on groundless myths and fantasized stereotypes is improper.¹⁰²

Cory J. then summarized the principles that should guide the cross-examination of complainants in these circumstances:

Cross-examination for the purposes of showing consent or impugning credibility which relies upon "rape myths" will always be more prejudicial than probative. Such evidence can fulfil no legitimate purpose and would therefore be inadmissible to go to consent or credibility. Cross-examination which has as its aim to elicit such evidence should not be permitted. ...

In each case the trial judge must carefully balance the fundamentally important right of the accused to a fair trial against the need for reasonable protection of a complainant, particularly where the purpose of the cross-examination may be directed to "rape myths". ... As a general rule the trial of an accused on a charge of sexual assault need not and should not become an occasion for putting the complainant's lifestyle and reputation on trial. The exception to this rule will arise in those relatively rare cases where the complainant may be fraudulent, cruelly mischievous or maliciously mendacious.¹⁰³

In dissent, L'Heureux-Dubé J. stated that the medical records should never have been disclosed to the defence in the first place, an issue which was not addressed by the majority. L'Heureux-Dubé J. addressed several problems which, in her view, militate against both the disclosure and use of medical records in sexual assault trials. If victims of sexual assault are aware that their medical records can be placed into evidence at trial, those victims might be deterred from seeking professional assistance after they have been sexually assaulted. L'Heureux-Dubé J. also stated that

routine disclosure of medical records and unrestricted cross-examination upon disclosure threaten to function very unfairly against anyone who has undergone mental or psychiatric therapy, whatever the precipitating event or nature of the treatment, as compared to other members of the public. Such persons would be subject to an invasion of their privacy not suffered by other witnesses who are required to testify. They may have to answer to details of their personal life reflected in their records and effectively overcome a presumption, most often entirely unfounded, that their medical history is relevant to their credibility and ability to testify on the matter in issue.¹⁰⁴

Medical records are also problematic because they are hearsay and because they are created in a context entirely different from that of a trial. As such, there

¹⁰² *Ibid.* at 670.

¹⁰³ *Ibid.* at 671-72.

¹⁰⁴ *Ibid.* at 622.

is a serious risk that statements made in therapy “could be taken piecemeal out of the context in which they were made to provide a foundation for entirely unwarranted inferences by the trier of fact.”¹⁰⁵ L’Heureux-Dubé J. also pointed out that credibility is at issue in many criminal trials and particularly in sexual assault cases. Therefore, using “credibility” as the ground for disclosure means that medical records will inevitably be disclosed to the defence, and nothing would prevent defence counsel from using those records for purposes of cross-examination. In addition, the particular nature of sexual assault has an important effect on the context of the analysis. L’Heureux-Dubé J. stated that

because of the beliefs which have typically informed notions of relevance and credibility in sexual assault trials, the mere existence of challenges to credibility on mental or psychiatric grounds in a sexual assault trial raises serious questions about the persistence of rape myths. ...

[M]yths about the extraordinary need for caution with respect to the credibility of complainants continue to play a role in the prosecution of sexual assaults. To illustrate their persistence, it is only necessary to point out that, apart from cases of sexual assault, it is rare to encounter a suggestion that the psychiatric history of a witness is at all relevant to the trial of the issue.¹⁰⁶

Finally, she invoked the cost both to witnesses and to the trial process of admitting medical reports and allowing cross-examination. Disincentives are created both to the reporting of assaults and to the seeking of professional assistance after an assault, and the health of a witness will be adversely affected by the disclosure of medical records. She thus concluded that “the compulsion to disclose such records may only occur where there is serious reason to believe that, absent such disclosure, a miscarriage of justice is likely.”¹⁰⁷

In light of these statements by the Supreme Court, the case-by-case privilege recognized in *Gruenke* should be considered carefully with respect to the use of psychiatric records in sexual assault trials. Given the nature of the relationship between a doctor, psychiatrist or therapist and his or her client, it seems fairly clear that the first three criteria set out by Wigmore would be met. The fourth requirement states that “the injury that would inure to the relation by the disclosure must be greater than the benefit thereby gained for the correct disposal of the litigation.”¹⁰⁸ The injuries potentially caused by such disclosure

¹⁰⁵ *Ibid.* at 623.

¹⁰⁶ *Ibid.* at 624, 625.

¹⁰⁷ *Ibid.* at 630.

¹⁰⁸ Wigmore, *supra* note 96 at para. 2285, p. 527.

are canvassed in detail in L'Heureux-Dubé J.'s dissent. Perhaps most importantly for future consideration, the Court unanimously recognized that not all uses claimed for disclosure will be beneficial to "correct disposal of the litigation". For example, the information may not be used for irrelevant or prejudicial purposes, such as the perpetuation of, or reliance upon, myths or stereotypes concerning rape. Thus, unless defence counsel can demonstrate that the need for disclosure is well-founded, it would appear that a privilege may be invoked to prohibit the disclosure of such information.

Conclusion

As we have seen, *Stinchcombe* does not change the meaning or scope of the right to make full answer and defence, and the principles enunciated in the case with respect to the Crown's discretion to withhold privileged information add nothing new to the law of privilege. *Stinchcombe* entrenches the general principle that the Crown must provide to the defence all relevant information that is not otherwise protected by privilege.

It would appear that the "privilege" mentioned, but not precisely defined, in *Stinchcombe* is one of the case-by-case privileges now available under *Gruenke*. In other words, the Crown has a discretion to exclude on *policy* grounds information which satisfies the criteria elaborated in *Gruenke*. In some situations, the case-by-case privilege will be used where information is clearly relevant, and in those situations, the policy consideration must be of primary importance to override the right to make full answer and defence. The police informer privilege, for example, is crucial to the very existence of a judicial system which seeks to administer justice effectively while protecting people's safety and lives. In other situations, however, the relevance of the material may be marginal at best. This is true, generally speaking, of psychiatric records, and almost always true of sexual history. Here it is appropriate, and most conducive to the efficient administration of justice, to require the defence to demonstrate the basis for its belief that this information could assist its case. If the information is neither relevant nor useful, and its disclosure would be a painful intrusion into someone's privacy, the right to make full answer and defence never even comes into play. Although the right is constitutionally-entrenched and historically long-standing, it is hardly violated by the non-disclosure of information which has no impact, effect or relevance to the defence. Since the right is a principle of courtroom procedure, it should not extend to sources of investigation. Such an extension would arguably open the floodgates because it would then be impossible to say with certainty or high probability that a piece of information would not be useful to the defence at some point in the investi-

gation process. The chain of causation must end somewhere. With respect to Crown disclosure, it must end at irrelevant material or at privileged information, where the social interest in non-disclosure outweighs the information's usefulness to the defence. That balancing exercise will often be difficult, but it must always be done carefully and conscientiously, taking full account of all the factors involved.

There are several forces at work, even with respect to the preliminary question of disclosure: the interests of the accused and the right to make full answer and defence; the complainant's right to privacy; respect in the judicial process; and the State's interest in the fair and efficient administration of justice. All of these interests must be recognized and given their due weight. When the only issue is the relevance of information, the accused must be given access in order to demonstrate its *prima facie* usefulness. When other interests are at stake, these too must be weighed in the balance. There can be neither categorical exclusions nor absolute freedom of access.

The conflicting interests are most acute with respect to psychiatric evidence and sexual history. The traumatic effects of sexual assault and abuse are a societal phenomenon requiring strong remedial measures. Nevertheless, allowing concern for victims or complainants to override an individual's right to defend himself to a criminal charge would be an equally grave injustice. The courts must thus explicitly take all of these factors into account and weigh them against each other, as the criminal law has done for centuries.

The judicial system has not always been sympathetic to survivors of sexual assault, but attempts have been made to change that. Some would argue that allowing access to psychiatric records is a large step backwards because it provides yet another way to blame the victim, question his or her credibility, and discourage him or her from bringing the assailant to justice. There can be no doubt that these are significant and pressing concerns which must be considered by the courts during evaluation of disclosure requests. These interests, however, must always be weighed against the right to defend oneself. Sexual assault is a significant problem in Canadian society, but we must not deny the right of the accused to attempt to establish his or her innocence. The suggestions made in this paper attempt to establish guidelines which respond to both the pressing importance of state concerns and the individual's right to answer the case against him or her. In the majority of cases, the disclosure of certain information would probably be of no assistance to the defence and would be either irrelevant or inadmissible. The judiciary must diligently monitor the uses sought for such information, particularly in light of the Supreme Court's recognition in *Osolin* of the dangers of stereotypes which, unfortunately, persist.

While there can be no black and white answers to this problem, situations do arise where such information may be relevant and thus essential to a full answer and defence. To hold otherwise would violate fundamental principles of justice and fairness.
