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# Compelled Production of Medical Records

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This article discusses the form of analysis a court is likely to adopt in resolving a dispute concerning the compelled production of medical or psychiatric records in legal proceedings, when the defendant seeks access to the records of the complainant. The principles considered are derived largely from recent decisions of the Supreme Court of Canada in the criminal field. These principles are applied to civil and administrative contexts in the common and civil law jurisdictions of Canada. Consideration is given to the relevance of the *Canadian Charter* to various production disputes, to the common law of privilege and to the law of professional secrecy in Quebec. The argument is made that there is a convergence of principle in all contexts. For the purposes of illustration an example is given of a set of facts which could give rise to simultaneous production disputes in criminal, civil and administrative proceedings.

Dans cet article, l'auteur analyse les principes qui régissent le règlement des conflits concernant la production forcée de dossiers médicaux et psychiatriques dans les procédures judiciaires. Les principes considérés sont en grande partie tirés de décisions de la Cour suprême du Canada en matière criminelle. Ces principes sont appliqués aux contextes civil et administratif des juridictions de droit civil et de common law. Une attention particulière est donnée à la pertinence de la *Charte canadienne* dans les questions d'accès aux dossiers médicaux, l'immunité de divulgation en justice et la loi du secret professionnel au Québec. L'auteur soutient qu'il y a convergence de principes dans tous ces contextes. Pour illustrer son argumentation, il donne en exemple un seul ensemble de faits susceptibles de donner lieu à des conflits simultanés de production dans des poursuites criminelles, civiles et administratives.

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## Introduction

### I. The General Legal Approach

- A. *The Ubiquitous Balancing Test*
- B. *The Nature of the Proceedings*
- C. *The Application of the Canadian Charter*
  - 1. The Element of Government Action
  - 2. The Judicial Order Based on Legislative Authority in Private Litigation
  - 3. Defendants' Interests in Disciplinary Proceedings

### II. Some Features of the Balancing Calculus

- A. *Confidentiality and Privacy*
  - 1. The Two Conceptions
  - 2. Constitutional Protection
  - 3. Statutory Authority for Disclosure
- B. *Full Answer and Defense*
- C. *The Meaning of Relevance*
- D. *Limiting the Extent of Disclosure*

### III. Privilege and Professional Secrecy

- A. *Confidentiality and Privilege under the Common Law*
- B. *Professional Secrecy in Quebec*
  - 1. *Frenette v. Metropolitan Life Insurance*
  - 2. Compelling the Oral Testimony of a Physician in Quebec
- C. *Privilege and Privacy after Production*

## Conclusion

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## Introduction

Canadian law concerning the production of medical records in legal proceedings centres upon a balancing test in which the advantages of using patient information are weighed against the compromises to patient privacy and confidentiality compelled disclosure entails. This balancing of interests occurs in a production process in which a court or tribunal determines the likely existence and relevance of the contested medical information, assesses the potential consequences of its disclosure and fixes the permissible scope of its future circulation. This production procedure brokers the arguments and interests, but ultimately one set of values must prevail as the court will order production or it will not.

Consider an example which illustrates the tensions between interests. A psychiatric patient makes a complaint against a staff member of the hospital in which treatment is being conducted.<sup>1</sup> A young woman, the complainant, under treatment for a psychotic illness, tells a nurse that she has been sexually assaulted by a male clinician, the defendant, in her room. The defendant has not been directly involved in the complainant's treatment, is largely ignorant of her psychiatric condition, and has no immediate claim to have lawful access to her medical notes.

The complaint could give rise to criminal proceedings against the clinician; civil proceedings (*e.g.* in tort, equity or under the *Civil Code of Québec*<sup>2</sup>); an inquiry by a hospital ombudsman, human rights commission, health commissioner or another agency; professional disciplinary proceedings; or an inquiry by the managers of the hospital, who are responsible both for the safety of patients and for the staff's employment. The defendant might be imprisoned, fined, dismissed or banned from professional practice. Damages may be awarded against him and he may suffer serious damage to reputation, family life and social standing.

In the course of making a defense, the defendant may wish to investigate the competence or credibility of the complainant as a witness, the quality of her perception of the alleged events or the effects of medication on her memory. Psychiatric records may illuminate these matters. Should the complainant's record, or some part thereof, be produced to assist the defense despite the complainant's objection? Is the complainant, already under psychiatric treatment and now apparently a victim of sexual assault, to be further traumatised through the compelled production of intimate records of diagnosis and treatment to judges, counsel, managers, experts, disciplinary committees or investigative officers? What effect might the prospect of disclosure have on her willingness to complain and to testify? On the other hand, if the records are not disclosed, how can the complaint be fully evaluated? Is the defendant not always entitled to test the competence and credibility of his accuser?

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<sup>1</sup> Compare the facts of *M.(A.) v. Ryan*, [1997] 1 S.C.R. 3, 143 D.L.R. (4th) 1 [hereinafter *Ryan* cited to S.C.R.] (extent of privilege attaching to the psychiatric records of a plaintiff in civil litigation, when she had sought the assistance of a psychiatrist B following sexual relations with a previous psychiatrist A, and the defendant, psychiatrist A, sought access to psychiatrist B's notes).

<sup>2</sup> Hereinafter C.C.Q.

Must production be ordered, or the proceedings against the defendant stayed, until the complainant agrees to release the notes? Is the complainant forced to surrender her rights to privacy in favour of a right to complain, as if bringing the complaint itself acted as a waiver of any privileged status attaching to this material? Or are her interests in psychological integrity, in the non-disclosure of confidential psychiatric information, so fundamental that the complaint against the clinician should proceed without him or his counsel ever reviewing the documents for possible lines of defense?

The formulation of doctrine in these circumstances could begin with a presumption against the production of medical records or patient information, even for the purposes of legal proceedings, with patients' interests in privacy and confidentiality being given priority. Limited exceptions could then be grafted to that rule to serve other prevailing interests. In every case, outsiders seeking access could bear the burden of persuasion, with hard cases resolved against production. This might be called the "access forbidden unless" approach. It has been followed in some civil law jurisdictions, where conceptions of the obligations attaching to professional secrecy have been influenced by the model of a sacred priest-penitent relationship,<sup>3</sup> and continues to influence the law of Quebec. For example, section 9 of the Quebec *Charter of Human Rights and Freedoms* states the general principle: "Every person has a right to non-disclosure of confidential information."<sup>4</sup>

The opposite premise might also be adopted. Legal proceedings could start with a presumption in favour of disclosure of all material likely to be relevant to any party. Production could be compelled by a court, and *ad hoc* enclaves of privacy would be established only where they could be clearly justified. Those seeking to withhold relevant material could bear the burden of persuasion, with hard cases resolved in favour of production. That might be called the "access permitted except" approach. It has found favour in England, in the common law provinces and in proceedings under the *Criminal Code*.<sup>5</sup>

Situational or relativist positions are also possible. These might recognise the inevitability of choosing between confidentiality or privacy concerns and full disclosure, without any initial ranking of these interests. The burden of justification might then shift at different stages of the production and admission process. It might fall on the party in the best position to present an argument, who might not be the person seeking access to medical records not yet seen. This might be the position upon which the law is converging throughout Canada. It leaves a wider area of discretion to the court.

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<sup>3</sup> See D.W. Shuman & M.F. Weiner, *The Psychotherapist-Patient Privilege: A Critical Examination* (Springfield, Ill.: Charles Thomas, 1987) at 45-77.

<sup>4</sup> R.S.Q. c. C-12 [hereinafter *Quebec Charter*].

<sup>5</sup> R.S.C. 1985, c. C-46.

The manner in which the opposing interests should be balanced by a criminal court has been considered recently by the Supreme Court of Canada in *O'Connor*<sup>6</sup> and *Beharriell*<sup>7</sup> — sexual assault cases in which the accused sought access to the counselling records of the complainant, the alleged victim of the offence and the principal Crown witness. An amendment to the *Criminal Code* has been enacted by the Canadian Parliament to codify, with some adjustments, the views expressed in these decisions by a majority of the Court.<sup>8</sup>

This article is not intended to provide a full account of these cases,<sup>9</sup> nor a complete review of the doctrine concerning the production and privilege of medical records in the provinces or under the *Criminal Code*.<sup>10</sup> The aim of this article is to identify a larger framework for the resolution of issues concerning the compelled production of medical records in legal proceedings generally; to relate the principles affirmed in the criminal cases to the wider constitutional framework; and to consider how the principles established by the Supreme Court in the criminal cases apply in other contexts, for example, when production of medical records is at issue in civil litigation or in medical disciplinary proceedings.

The focus throughout the discussion will be on situations in which a defendant, in order to answer the allegations made, seeks access to the therapeutic records of the plaintiff or the complainant, without that person's consent (or against express refusal) and without the consent of the current record holder or the treating clinicians.

## I. The General Legal Approach

Inevitably, the law does not provide general answers to the questions raised above. Rather, it provides particular answers in various legal and factual contexts. Nevertheless, it is possible to point to features of these contexts which indicate the approach a court is likely to follow, such as the nature of the proceedings in which production is sought and the relevance of constitutional norms. The court will often work through a disclosure calculus, adopting a conventional style of reasoning — signalled by the “balancing” metaphor — in order to assess the interests at stake. The court will apply criteria of relevance to the information sought and it will fix the least intrusive form of disclosure.

In each form of proceedings the court must identify the sources and the extent of the confidentiality or privacy guarantees covering the contested information. It must

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<sup>6</sup> *R. v. O'Connor*, [1995] 4 S.C.R. 411, 130 D.L.R. (4th) 235 [hereinafter *O'Connor* cited to S.C.R.].

<sup>7</sup> *A.(L.L.) v. B.(A)*, [1995] 4 S.C.R. 536, (*sub nom. R. v. Beharriell*) 130 D.L.R. (4th) 422 [hereinafter *Beharriell* cited to S.C.R.].

<sup>8</sup> *Criminal Code (Production of Records in Sexual Offence Proceedings) Amendments*, S.C. 1997, c. 30, proclaimed in force 12 May 1997, now ss. 278.1-278.91 of the *Criminal Code*, *supra* note 5 [hereinafter *Criminal Code* amendments].

<sup>9</sup> There are several accounts in (1996) 1 Can. Crim. L.R.

<sup>10</sup> See L.E. Rozovsky & F.A. Rozovsky, *Canadian Health Information: A Legal and Risk Management Guide*, 2d ed. (Toronto: Butterworths, 1992) [hereinafter *Rozovsky & Rozovsky*].

determine the weight these guarantees should carry vis-à-vis the authority of adjudicative or investigative bodies to demand the production of documents or evidence in their proceedings. Also the strength of the defendant's rights to procedural fairness must be assessed; fairness would usually require disclosure to the defendant of any material relevant to a full answer and defense.

These elements must be distinguished:

- the *Crown's duty to disclose* information to the defense in criminal proceedings;
- the authority of a court or other body to order the *production* of information *by persons other than the Crown*, who may or may not be parties to the proceedings; and
- the scope of any *privilege* or conception of *professional secrecy* which may prevent the presentation of medical information as *evidence*.

The production and admission process will often involve:

- an application for production, made to a court by the party seeking access;
- an order for production of the records for inspection by the court itself;
- the decision concerning production to the party who is seeking access;
- settling the conditions of access or the limits of the material's circulation;
- production in fact, in the above scenario to the defendant;
- the tendering of the material in evidence;
- the decision concerning its admissibility or exclusion.

Finally, consideration should be given to the potential range of orders or remedies available to a court or a tribunal faced with a refusal by a medical record holder to disclose that information voluntarily. Often the court will be required to choose between two options: it may enter a stay of the proceedings (barring progress until disclosure occurs) or it may order production. If that order is not obeyed contempt of court proceedings might conceivably follow, or a permanent stay may be entered to prevent abuse of the court's process.

### **A. The Ubiquitous Balancing Test**

According to the current jurisprudence, there are two main points at which the balancing of fairness and privacy concerns should become explicit: first, at the moment of the production decision, when the confidential material has been inspected by the court, its potential relevance established, and a decision on its release to defendant

must be made; and second, when the material is tendered in evidence and the issue of privilege, or its exclusion to protect professional secrecy, must be resolved.

The requirement that the interests of the complainant and defendant be balanced or weighed is found throughout the relevant law.<sup>11</sup> For instance, there is a balancing process to determine the effect of the *Canadian Charter of Rights and Freedoms*,<sup>12</sup> when both the privacy interests of the complainant and the due process interests of the defendant may find protection in the same provision of the *Charter*, section 7. This provision declares: "No person shall be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice." The Supreme Court has now determined that a person's expectation of privacy in therapeutic records is an aspect of liberty or security protected under section 7.<sup>13</sup> Therefore, this provision may limit the circumstances in which privacy may be lawfully infringed and it may dictate the fundamentals of production procedure. On the other side of the balance, the rights of defendants to a fundamentally just trial have also been protected by section 7.<sup>14</sup> As a result, it may be necessary to weigh the privacy of the complainant against fairness to the defendant to determine what the principles of fundamental justice require in a particular production context.<sup>15</sup>

Similar conflicts occur beyond the purview of the Constitution. A balancing of interests may be required to construe the guarantees of professional secrecy in the Quebec *Charter* and to determine the compatibility of those guarantees with other Quebec legislation.<sup>16</sup> Quebec law contains a number of potentially conflicting provisions: rights to privacy and professional secrecy are accorded a quasi-constitutional status by sections 5 and 9 of the Quebec *Charter*;<sup>17</sup> rights to personal privacy are conferred by articles 35 and 36 of the C.C.Q.; and, in a provision with no counterpart in the other provinces, section 42 of the *Medical Act*<sup>18</sup> appears to prohibit any attempt by a court to compel the testimony of a physician.

Disclosure of confidential information is also expressly permitted in Quebec: by authorization of the patient, by "express provision of law,"<sup>19</sup> or by "the order of a

<sup>11</sup> Including now in ss. 278.5(2) and 278.7(2) of the *Criminal Code*, *supra* note 5, per the *Criminal Code* amendments, *supra* note 8.

<sup>12</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Canadian Charter*].

<sup>13</sup> See *O'Connor*, *supra* note 6. The principles of fundamental justice have both substantive and procedural content: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

<sup>14</sup> Section 11(d) of the *Canadian Charter*, *supra* note 12, also guarantees a "fair and public hearing" to any person charged with an offence.

<sup>15</sup> Sopinka J., speaking for the majority discusses the concept of balancing in the interpretation of section 7 in *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519 at 589-96, 107 D.L.R. (4th) 342 at 392-397 [hereinafter *Rodriguez* cited to S.C.R.] (constitutionality of offence of aiding and abetting suicide).

<sup>16</sup> See Professional Secrecy in Quebec, Part III.B, below.

<sup>17</sup> *Supra* note 4.

<sup>18</sup> R.S.Q. c. M-9.

<sup>19</sup> *Quebec Charter*, *supra* note 4, s. 9(2).

court.”<sup>20</sup> In addition, there are many procedural provisions in Quebec which authorize courts and tribunals to make orders under which documents may be discovered or witnesses compelled. For example, the province’s *Professional Code* requires that in disciplinary proceedings against a doctor, “[t]he [disciplinary] committee must permit the respondent to make a full and complete defence,” it “shall summon such witnesses as it or any party considers useful,” and “[a witness is] bound to answer all questions.”<sup>21</sup> These provisions may prevail over the *Medical Act*, permitting, despite the apparent prohibition in section 42, the compulsion of medical testimony or documents which might exonerate another doctor who has been charged with a disciplinary offence, as in the above scenario.<sup>22</sup>

Section 23 of the Quebec *Charter* further guarantees a right of fair procedure to defendants.<sup>23</sup> Providing a full and fair hearing may also require granting the defendant access to the very kinds of information that section 42 of the *Medical Act* purports to protect. Section 23 applies to the “determination of ... rights and obligations” generally, including those adjudicated in private and administrative proceedings. To resolve these apparent conflicts, priority must be assigned (at least implicitly) to the “right to privacy in the information on the one hand, and the right to full answer and defence on the other.”<sup>24</sup>

Similar balancing is required under the law of evidentiary privilege. In the common law, a claim that a confidential communication between a patient and a physician is inadmissible, and therefore to be excluded, is determined by reference to Wigmore’s four criteria for the establishment of case-by-case privileges. Wigmore’s fourth criterion provides that a communication generated within a confidential relationship may be excluded where “[t]he *injury* that would inure to the relation by the disclosure of the communication [is] *greater than the benefit* thereby gained for the correct disposal of litigation”<sup>25</sup> — a restatement of the balancing test.

In the laws of confidence, evidence and procedure a similar kind of judgment is required;<sup>26</sup> nevertheless, the language of balancing employed may be deceptive. This

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<sup>20</sup> *An Act respecting Health Services and Social Services*, R.S.Q. c. S-4.2, s. 19; see *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647, 89 D.L.R. (4th) 653 [hereinafter *Frenette* cited to S.C.R.].

<sup>21</sup> R.S.Q. c. C-26, ss. 144(1), 146, 149(1).

<sup>22</sup> See *Archambault v. Comité de Discipline du Barreau du Québec* (1992), 45 Q.A.C. 32 at 43-44, (*sub nom. Archambault v. Barreau du Québec, Comité de Discipline*) 92 D.L.R. (4th) 173 at 185-86 [hereinafter *Archambault* cited to D.L.R.].

<sup>23</sup> Section 23(1): “Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him”, *supra* note 4.

<sup>24</sup> *O’Connor*, *supra* note 6 at 434, Lamer C.J.C. & Sopinka J.

<sup>25</sup> J.H. Wigmore, *Evidence in Trials at Common Law*, McNaughton rev. ed., vol. 8 (Boston: Little, Brown, 1961) at 527, para. 2285 [emphasis in original]. The full criteria are reproduced *infra* note 133.

<sup>26</sup> The importance of the balancing of interests was recently reaffirmed by the S.C.C., in the context of civil proceedings, in *Ryan*, *supra* note 1.



metaphorical way of speaking does have advantages: it directs attention to the need to hear those affected; it promotes damage limitation strategies whereby, in giving priority to one value we seek to impair others as little as possible; and it encourages the articulation of reasons for judgment. But the notion of balancing may obscure the incomparable nature of the interests at stake. It may incorrectly suggest that their evaluation can be a quantitative rather than a qualitative exercise, or that the opposing interests can be successfully adjusted, leaving both parties partially satisfied, when in fact a choice must be made. Use of a metaphor may obscure the difficult character of this choice. It may imply that reference to a list of facts can determine it or that judges are especially qualified to make it. It is a way of speaking that may simply use the language of the legal system to obscure the indeterminacy of values which precedes the formulation of its rules.<sup>27</sup>

### **B. The Nature of the Proceedings**

A critical feature of the context in which the balancing of interests occurs is the nature of the proceedings in which the production of medical records is sought: that is, the judgment will be affected by the criminal, civil or administrative character of the proceedings and the court's assessment of the interests those proceedings may serve or threaten. Obviously, the nature of the proceedings will affect the norms to be applied in terms of rules of privilege, the powers to summon witnesses, or the sources of the defendant's rights; but a more pervasive effect of the nature of the proceedings will be on the form of analysis adopted. The court's view of the public and private interests advanced by the proceedings and their potential impact on the defendant may affect the choice of remedies and procedures, the impact of the *Canadian Charter* and the settling of conflicts between norms. It will certainly influence the manner in which the balancing calculus is conducted.

Clearly, different kinds of interests are advanced and threatened by criminal, civil and administrative proceedings. For example, a criminal prosecution is initiated by the Crown in order to denounce, deter and prevent offending. The interests of the complainant, the putative victim, are not irrelevant to the criminal process. The complainant will be seeking to establish the truth of her complaint and looking for respect for her position within that process. She will be seeking to prevent harm to other potential victims and punishment and retribution in relation to the offender. But the principal purpose of the presentation is not to advance the complainant's individual interests. The prosecution is not initiated by the complainant nor is the Crown her agent. A prosecution is brought to advance societal interests above all.

This has a number of consequences. First, it means that a criminal prosecution is considered a form of government action to which the *Canadian Charter* applies.<sup>28</sup> A prosecution is brought by the Crown against the defendant whose interests in liberty and security are plainly implicated. Faced with this government action and infringement of interests, the defendant may invoke the due process guarantees of the *Can-*

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<sup>27</sup> The author is indebted to Professor Morissette for his comments on this point.

<sup>28</sup> See *infra* note 39.

*dian Charter*.<sup>29</sup> A different conclusion might be reached with regard to civil litigation instigated by the complainant for ostensibly private purposes. Private proceedings might not be considered government action to which constitutional norms apply, a distinction which flows from the different nature of the interests advanced. This distinction might also affect the choice of remedies when voluntary disclosure of records is refused. The usual remedial choice facing the court is between a stay of the proceedings and an order for the records' production. The choice arises when the court, having assessed the balance of interests between the parties, decides that the defendant's interests should prevail. Those interests may then be promoted by the court either through an order for production of the records to the defense or by a stay until the records are disclosed by the complainant.<sup>30</sup>

Considering the public interests involved, the order for production will usually be the remedy of choice in a criminal case, even if the complainant would prefer the entry of a stay. In the above scenario, a criminal court entertaining the prosecution for sexual assault would have in view not only the position of the complainant, but also the position of other patients who might become the defendant's victims in the future. Safety in hospitals, the need for ethical professional conduct, and the concerns of patients' families might all be considered worthy of promotion by the court, which will cast its gaze well beyond the position of the patient who has made the initial complaint. However, these wider interests may not be successfully promoted if the proceedings are permanently stayed, no verdict or formal adjudication is reached, or no action is ever taken against the defendant — who may in fact have abused the complainant as alleged. Thus, to ensure the prosecution continues to a verdict, an order for production might be made in a criminal case even if the complainant would rather see the prosecution cease than be forced to disclose intimate information. This choice of remedy would be grounded in the view that the principal purpose of criminal proceedings is to advance social, not individual, concerns. To express this another way, one could say that the policies which support *Tarasoff* obligations<sup>31</sup> in the United States — requiring disclosure of confidences without the consent of the patient to protect other people's safety — may also support compelled production in criminal proceedings of the medical records of the complainant, when the court might otherwise halt the proceedings with a stay.

Quite a different conclusion might be reached in private litigation. In tort, an action in trespass to the person is initiated by the complainant herself, not by the government.<sup>32</sup> The principal purpose of such proceedings is a vindication of the com-

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<sup>29</sup> *Supra* note 12, ss. 7-14, especially ss. 9-12.

<sup>30</sup> On the stay as a remedy in criminal proceedings see *R. v. Carosella*, [1997] 1 S.C.R. 3 at 80, 142 D.L.R. (4th) 595 [hereinafter *Carosella* cited to S.C.R.] (stay of proceedings ordered when sexual assault counselling centre shredded notes of interview between the complainant and counsellor, thereby depriving the defendant of access for the purposes of informing cross-examination of the complainant).

<sup>31</sup> *Tarasoff v. Regents of the University of California*, 551 P. 2d 334 (Cal. S.C. 1976).

<sup>32</sup> The private litigant does not, however, waive or forfeit a right to confidentiality or privilege simply by commencing the proceedings: *Ryan*, *supra* note 1 at 168 and 180.

plainant's own interests such as to obtain compensation. This difference in purpose affects the choice of remedies. In contrast to the criminal case, no overriding public policy reasons exist in such private litigation to compel the disclosure of records to the defendant in order to ensure that the proceedings continue. Whether private proceedings go forward is a matter for the private litigant, not the government, which will not compel their continuation against the wishes of the plaintiff. Faced with the prospect of an unwelcome court order for the production of her records, the private plaintiff may be permitted to allow her suit to lapse.<sup>33</sup> The complainant is able to make that choice based on private, not public, considerations. She would thereby retain a degree of control over the course of the proceedings, brought to vindicate her interests, control which she would not retain over the progress of a criminal prosecution, a legal process of a different kind.

Assessing the potential impact of the proceedings on the defendant will also influence the analysis; it will affect the extent of procedural fairness extended. In accordance with the usual approach to fairness,<sup>34</sup> the defendant's interests in mounting a full defense will carry greater weight when the impact of the proceedings on him may be particularly serious. This may lead to a greater willingness on the part of a court to grant access to the records and to allow a wider extent of disclosure.<sup>35</sup> In addition, because the defendant is protected by the principles of fundamental justice under section 7 of the *Canadian Charter* only if the result of the proceedings may deprive him of life, liberty or security of the person, the characterization of the effect on the defendant will determine whether the *Charter* applies and therefore whether the defendant's procedural entitlements are enhanced by this form of constitutional protection. Assessing the impact of the proceedings on the defendant will also affect non-constitutional procedural arguments, such as the application of the principles of natural justice, and the interpretation of any ruling procedural code.

To summarize, the resolution of a dispute concerning the compelled production of medical records must commence with a careful analysis of the interests advanced and threatened by the particular proceedings. How those interests are characterized will determine the relevance of constitutional norms, will affect the extent of procedural fairness extended to the defendant, and will influence the manner in which the defendant's rights to mount a full defense are weighed against the complainant's rights to privacy. The assessment of the interests may affect the construction of doctrine as a whole and the interpretation of legislative and constitutional instruments. Where there is a high degree of public interest in the proceedings and the possibility of a severe impact on the defendant, disclosure of confidential or private information is more likely to be compelled by a court. Where there is little public interest in the proceed-

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<sup>33</sup> An analogy may be drawn with the approach in personal injury litigation when the complainant declines a medical examination of a reasonable character required by the defendant: the complainant must agree to undergo the examination, with the results communicated to the defendant, or a stay will be entered: *Edmeades v. Thames Board Mills*, [1969] 2 Q.B. 67 (C.A.).

<sup>34</sup> See J.M. Evans *et al.*, *Administrative Law: Cases, Text and Materials*, 4th ed. (Toronto: Emond Montgomery, 1995) c. 3.

<sup>35</sup> A point made by McLachlin J. for the majority in *Ryan*, *supra* note 1 at 178-79.

ings and the likelihood of a lesser impact on the defendant, compelled disclosure is less likely, although the defendant may still benefit in these circumstances from the entry of a stay.

### C. *The Application of the Canadian Charter*

One function of the *Canadian Charter* is to provide a means of categorizing fundamental interests of the person. Generally speaking, in a medical records production dispute if either party's interests are *Charter*-protected then these interests would carry greater weight in the balancing process and could be vindicated through constitutional remedies. Moreover, it would be more difficult to justify infringement by the legislature of interests that are constitutionally protected.

Constitutionalizing the complainant's privacy rights is likely to have a limited effect on the analysis. It will be limited because privacy rights in medical records are well recognized in other sources within the legal system. A court faced with a decision to compel production should already have those privacy rights in view, whether constitutionalized or not. The courts should be interpreting or developing those other sources of law in a manner that is consistent with *Charter* values.<sup>36</sup> Moreover, even when privacy rights are constitutionally protected, they may still be compromised or subject to reasonable limits.<sup>37</sup>

Grounding privacy rights in the *Canadian Charter* may still have some consequences, particularly when the predominant metaphor for judgment is a careful balancing of interests. Constitutional rights are likely to carry more weight than other

<sup>36</sup> See *Ryan*, *ibid.* at 171-72; *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835 at 876-77, 120 D.L.R. (4th) 12 at 36-37 [hereinafter *Dagenais* cited to S.C.R.] (injunction was granted to prevent the screening of a television mini-series presenting a fictionalised account of events that were the subject of forthcoming criminal trials); *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 1159-72, 129 D.L.R. (4th) 129 at 148-58 [hereinafter *Hill* cited to S.C.R.], Cory J. (application of the *Charter* to the common law of defamation in proceedings between private litigants).

The precise significance of the *Charter's* application is very difficult to determine. It appears to affect the form of legal analysis a court should adopt. Cory J. declares in *Hill* that:

it is important to distinguish between those cases in which the constitutionality of government action is challenged, and those in which there is no government action involved. It is important not to import into private litigation the analysis which applies in cases involving government action .... Care must be taken not to expand the application of the *Charter* beyond that established by s.32(1), either by creating new causes of action, or by subjecting all court orders to *Charter* scrutiny (*ibid.* at 1169-70)

and that:

The *Charter* represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the *Charter* (*ibid.* at 1169).

This seems to suggest that the important distinction between government and private action is actually one without a difference.

<sup>37</sup> *Canadian Charter*, *supra* note 12, s. 1.

forms of legal entitlement when balanced on the scales. The priority accorded privacy rights with respect to other interests may be altered by giving them a constitutional status. For example, details of the production procedure, down to the burden of proof on the party seeking disclosure, might be adjusted.

A situation in which constitutionally entrenched privacy rights might have made a difference is the case of *Frenette*,<sup>38</sup> involving private proceedings on a contract of life insurance. If the record holders had been able to assert a constitutional right to privacy, the Supreme Court might not have concluded so readily that disclosure should be ordered of the complete hospital records of the insured man. In the Court's view, a mere power to summon documents found in a provincial code of civil procedure was sufficient to authorise a judicial order of disclosure. Such a power might not be sufficient to trump a constitutional right. At the least, the court's weighing of patient privacy concerns against the rights of the defendant to present a full defense to the insurance claim, or the scope of disclosure ordered by the court, might have changed.

Constitutionalizing the right to obtain access to medical information as an element of full answer and defense may similarly alter the balancing process. It would also mean that any clear statutory rule which appeared to preclude production of medical records to the defense, or appeared to grant those records a privileged status, could be the subject of a constitutional challenge.

### 1. The Element of Government Action

The *Canadian Charter* applies only to government action which affects certain protected rights and freedoms. There are two main preconditions to the application of the *Charter*: there must be an element of government action and that government action must adversely affect the rights and freedoms protected by the *Charter*. Whether these preconditions are met in a dispute over the compelled production of medical records will depend on the nature of the legal proceedings and their potential impact on the person who is seeking to invoke constitutional protection. For not all production disputes involve government action, nor do all forms of legal process threaten to deprive a person of life, liberty or security of the person which are the only interests protected by section 7, the relevant *Charter* provision.

To determine whether the *Charter* applies to a production dispute, consideration must be given to the government action itself, whom that action affects, and how it affects them. On the facts of the above scenario, the analysis must be made with regard to criminal, civil and administrative proceedings and with regard to the distinct positions of the complainant and the defendant within those contexts. This presents six different situations for analysis:

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<sup>38</sup> *Frenette*, *supra* note 20.

**Application of Section 7 of the *Canadian Charter*  
to the scenario**

	Complainant	Defendant
<b>Criminal Proceedings</b>	Government action present; Privacy affected; Liberty, security implicated; Section 7 applies.	Government action present; Criminal penalties; Liberty, security implicated; Section 7 applies.
<b>Private Proceedings</b>	Government action might be present; Privacy affected; Liberty, security implicated; Section 7 may apply.	Government action unlikely if suit based on common law or Civil Code; Liberty, security not implicated; Section 7 does not apply.
<b>Disciplinary Process</b>	Government action present; Privacy affected; Liberty, security implicated; Section 7 applies.	Government action present; Liberty, security possibly implicated when serious allegations made; Section 7 may apply.

The principle that the protection of the *Canadian Charter* can be invoked only against government action is found in section 32(1).<sup>39</sup> As L'Heureux-Dubé J. expressed in *Young v. Young*, "the *sine qua non* to any application of the *Charter* is the presence of state action, whether by legislation or other means."<sup>40</sup> The point to determine is the range of proceedings in which *judicial* action, in the form of a court order for the production of medical records may be considered *government* action, rendering it subject to the principles of the *Canadian Charter*.

The leading authority on the effect of section 32 is the decision of the Supreme Court in *Dolphin Delivery*.<sup>41</sup> The Court was emphatic that not all forms of judicial ac-

<sup>39</sup> *Supra* note 11, section 32(1) provides: "This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament ...; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province." See also *Constitution Act, 1982*, s. 52(1), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>40</sup> [1993] 4 S.C.R. 3 at 90, 108 D.L.R. (4th) 193 at 251 [hereinafter *Young* cited to S.C.R.] (court order to father not to discuss his religion with his children, in the context of a custody and access dispute).

<sup>41</sup> *R.W.D.S.U. v. Dolphin Delivery*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 [hereinafter *Dolphin Delivery* cited to S.C.R.] (injunction granted to prevent union picketing, in litigation concerning common law tort of inducing a breach of contract).

tion are necessarily government action. Action taken by the executive or legislative branches of government is open to *Charter* review, but some forms of judicial action are exempt. In general, “the *Charter* does not apply to private litigation”<sup>42</sup> and a judicial order made in the course of a private legal dispute does not become government action simply because, in political theory, the judiciary is described as a branch of the government. According to McIntyre J., in disputes between private persons, courts “act as neutral arbiters,”<sup>43</sup> not as government.

There are some situations in which judicial orders are connected sufficiently to some “element of governmental intervention”<sup>44</sup> to make the *Charter* applicable. It will apply to a court order, for instance, if the litigation itself involves some action of the executive branch, whether that action is based on legislative authority or the common law, as here independent government action can be found. The *Charter* will also apply to any judicial order authorised by legislation — even an order made in private litigation — if the empowering legislation itself “specifically”<sup>45</sup> violates the *Charter*; in such a case the empowering legislation may itself be impugned as an action of the legislature to which the *Charter* expressly applies.

In general, however, the *Charter* does not apply to private litigation unless some “element of governmental intervention necessary to make the *Charter* applicable in an otherwise private action”<sup>46</sup> is involved: that is, unless some “direct and precisely-defined connection”<sup>47</sup> can be found between executive or legislative action and the judicial order sought or resisted by the private party. What exactly will be sufficient to constitute that element of governmental intervention has not been fully defined.

Later decisions have added further principles. The *Charter* will apply to any order made by a court for predominantly public purposes; for example, an order made to protect the administration of justice, even if that order is based on common law and not legislative sources, and regardless of whether it was made at the court’s own initiative or at the behest of a private litigant.<sup>48</sup> The crucial factor is the public purpose for which such an order is made.<sup>49</sup> In addition, private citizens may act as agents of the government, making their actions subject to the *Charter*.<sup>50</sup>

The residual class of judicial orders which remain exempt from *Charter* review is therefore rather narrow: that is, orders made for private purposes in private litigation

<sup>42</sup> *Ibid.* at 597, McIntyre J. (“s. 32 ... is conclusive on that issue”).

<sup>43</sup> *Ibid.* at 600.

<sup>44</sup> *Ibid.* at 602.

<sup>45</sup> *Ibid.* at 603.

<sup>46</sup> *Ibid.* at 599.

<sup>47</sup> *Ibid.* at 601.

<sup>48</sup> *B.C.G.E.U. v. British Columbia (A.G.)*, [1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1 (injunction issued, *ex parte* and of the court’s own motion, based upon the inherent jurisdiction to prevent contempt of court, to restrain picketing of the court by union representing court employees).

<sup>49</sup> *Dagenais*, *supra* note 36.

<sup>50</sup> See *e.g.*, *R. v. Dersch*, [1993] 3 S.C.R. 768, 85 C.C.C. (3d) 1 (admissibility of analysis of blood sample taken despite the accused’s specific objection).

and then perhaps only orders made without reliance on a legislative or executive source of authority. The category is restricted, but some judicial orders for the production of medical records may remain in this category.

If the validity of the Supreme Court's government action jurisprudence is accepted, then both a criminal prosecution and a medical disciplinary process involve government action vis-à-vis the complainant and the defendant. A criminal prosecution is initiated by the executive for public purposes and is governed largely by a statutory code. The prosecution is clearly government action on a number of counts, and the right to make full answer and defense is asserted against the prosecution, not the private complainant, allowing *Charter* rights to be asserted by the defendant. This conclusion is elementary. As L'Heureux-Dubé J. declares in *Carosella*: "the *Charter* is engaged by the fact of the prosecution itself. Where the Crown pursues a prosecution which *would* result in an unfair trial, this constitutes state action for the purposes of the *Charter*."<sup>51</sup>

The position is less obvious when a criminal court orders the production of medical records at the request of the defendant. This could be viewed as a dispute between private persons in which the judge acts as a neutral arbiter. The prosecution has not requested disclosure of the complainant's records, nor is she being prosecuted. It is the private defendant that has requested access for his purposes. Where is the connection between government action and a judicial order for disclosure in these circumstances?

It is essential to the conclusions reached in *O'Connor* and *Beharriell* that the *Charter* does apply to such an order made by a criminal court. It is only on this basis that the complainant's constitutional privacy rights could have been asserted and recognised by the Supreme Court in these cases. Presumably, the *Charter* applies because the judicial order is made in the public context of enforcing the criminal law. The order to produce the complainant's records is made at the behest of the defendant, who is not connected to the government, but the order permits the prosecution to continue, for public purposes, and it prevents the entry of a stay. The order protects the defendant's *Charter* rights and coercive remedies exist for its enforcement. The order is also made under statutory authority, although similar orders might be based on the common law. It is possible that the order might have been made at the request of the prosecution. Taken together, these features establish a sufficient governmental nexus for the *Charter* to apply. This is the conclusion reached in *Dagenais*, where McLachlin J. writes: "court orders in the criminal sphere which affect the accused's *Charter* rights or *procedures by which those rights may be vindicated* must themselves conform to the *Charter*."<sup>52</sup> So the order to produce the complainant's records in a criminal case to protect the rights of the defendant could be challenged by the complainant on *Charter* grounds.

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<sup>51</sup> *Supra* note 30 at 119.

<sup>52</sup> *Supra* note 36 at 944 [emphasis added].



Similar reasoning will lead to the identification of government action vis-à-vis both the complainant and the defendant in most administrative proceedings. Medical disciplinary proceedings exist to regulate the conduct of a profession within a statutory scheme. The disciplinary process is initiated by the profession itself or by a statutory delegate, not by a private complainant. The disciplinary tribunal is a creature of statute with no inherent powers; it may not be controlled or funded by the government, but it acts for predominantly public purposes. The tribunal has the power to de-register a physician, preventing further practice, due to the statutory monopoly of registered practitioners under the scheme. These are numerous features of government involvement which affect the defendant. As for the complainant, the order of a disciplinary tribunal for disclosure of her medical records must be considered a procedure through which the rights of the defendant are vindicated in that process. It would not be the order of a neutral arbiter standing between two private parties. The element of government action is again present, as in the criminal sphere.

## 2. The Judicial Order Based on Legislative Sources in Private Proceedings

It is more difficult to locate the element of government action with respect to judicial orders made in private legal proceedings. If the complainant were to initiate a tort action based on the common law there would seem to be no element of government action permitting the defendant to assert the rights of procedural fairness from the *Canadian Charter*. The court would act as a conduit for the complainant's suit against the defendant, and the proceedings may conclude with a judicial order capable of coercive enforcement; but according to *Dolphin Delivery*, the judge acts as a neutral arbiter in the private enforcement of the common law, not as a government actor to which the *Charter* applies. It would seem, therefore, that the defendant could not rely directly on the Constitution as a means of enhancing his informational entitlements in the context of a tort action, although he may rely on common law fairness principles or legislation.

The most difficult of the six situations to resolve is determining when there is a sufficient element of government action to apply the Charter to a court order for the production of records by the plaintiff in private litigation.<sup>53</sup> What if the defendant, in a private tort action, seeks a judicial order for the production of the records and an order for discovery is made based on legislative sources, although the cause of action advanced by the plaintiff lies in the common law? Would legislative authorisation of that judicial order for discovery be a sufficient element of government involvement to render it subject to *Charter* review, even if the empowering provision on which the judge relies is not specifically offensive, but simply authorises the discovery of any relevant evidence? This form of judicial action falls within the interstices of current, murky government action doctrine.

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<sup>53</sup> See *Young*, *supra* note 40.

In the scenario under discussion, the proceedings are between private persons and the judicial order is procedural. The order would be authorised by the legislature, though the same kind of order might lie within the pre-existing inherent powers of the court. The empowering provision may not offend the *Canadian Charter* specifically, but through an exercise of judicial discretion, the power would be applied in a way that offends privacy rights.<sup>54</sup>

According to Peter Hogg's reading<sup>55</sup> of *Dolphin Delivery*, the *Canadian Charter* would apply to such a judicial order, because the order, based on a code, is founded on legislative action which is itself subject to the *Charter*. Hogg writes: "[t]he Charter applies to the exercise of statutory authority regardless of whether the actor is part of the government or is controlled by the government. It is the exertion of a power of compulsion granted by statute that causes the Charter to apply."<sup>56</sup> He uses the term "statute", but the same logic would apply to any source of authority with legislative origins. It is to the legislature that the *Charter* applies. In effect, Hogg presents an *ultra vires* form of analysis: the legislature cannot authorise a judge to make an order contrary to the *Charter*, so any order of a judge based on such legislative sources may be challenged on *Charter* grounds as being made without lawful authority, whether or not it involves an exercise of discretion on the part of the judge. The difficulty with this argument is that it produces unprincipled distinctions. Its logic would apply the

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<sup>54</sup> An analogous situation is presented in *Ryan*, *supra* note 1, where the defendant, in the context of private litigation against him for damages for sexual assault, successfully sought a judicial order for the production of the plaintiff's psychiatric records. The order was based upon the B.C. *Supreme Court Rules*, B.C. Reg. 221/90, which were enacted by the B.C. Executive Council pursuant to the *Court Rules Act*, S.B.C. 1989, c. 22 through an Order in Council (O.C. 1039/90, B.C. Gaz. 1990.II.440). McLachlin J., for the majority, considers the application of the *Charter* in these circumstances, but addresses her analysis to the application of the *Charter* to the "common law rule of privilege" (privilege in the records being claimed by the plaintiff) (*ibid.* at 167-72). Whether the *Charter* applies to an order of the court grounded in such an Order in Council is not directly considered by the majority, though perhaps it should have been. McLachlin J. simply concludes:

In view of the purely private nature of the litigation at bar, the *Charter* does not "apply" *per se*. Nevertheless, ensuring that the common law of privilege develops in accordance with "*Charter* values" requires that the existing rules be scrutinised to ensure that they reflect the values the *Charter* enshrines (*ibid.* at 172).

In a similar vein, L'Heureux-Dubé J. (in dissent) declares: "The exercise of a judicial discretion, whether common law or statutory in origin, must comport with the values underlying the *Charter*" (*ibid.* at 184).

Puzzling as this approach seems (it comes so close to collapsing the public/private distinction in Canadian constitutional law as to suggest *Dolphin Delivery* is now an endangered species, or of very limited effect) its implication is, again, that the significance of the *Charter's* application should not be overemphasized in this context. L'Heureux-Dubé J. is still able to conclude that in civil cases involving private parties and the exercise of judicial discretion, "the balancing of values may be somewhat more flexible than in those [cases] involving the state as a party" (*ibid.* at 192).

<sup>55</sup> P.W. Hogg, *Constitutional Law of Canada*, 4th student ed. (Toronto: Carswell, 1996) at 645ff. [hereinafter Hogg].

<sup>56</sup> *Ibid.* at 650.

*Canadian Charter* to every judicial order made under the *Civil Code of Québec*,<sup>57</sup> to every order made under a legislated code of civil procedure, and even to former common law procedural powers which happen to have been codified. This would be the consequence of using the source of the authority for a judicial order as the test of government action.

The principle that every judicial order based on legislative sources is subject to the *Canadian Charter* is not widely accepted in Quebec.<sup>58</sup> It would create unsatisfactory distinctions between the reach of the *Canadian Charter* in Quebec and in the common law provinces, between codified and uncodified judicial powers, and between causes of action based on statute and on the common law. Moreover, given the pervasiveness of legislative action even in the private litigation field, applying the *Charter* to all forms of judicial order based on such sources would subvert the primary principle, stated by the Supreme Court in *Dolphin Delivery*, that litigation between private persons should not be *Charter*-regulated.

Even if the current framework of principles concerning government action is endorsed, some intermediate position should be found to avoid these kinds of difficulties — a position in which some judicial orders based on legislative sources are not considered government action in the context of private litigation due to their legislative authorisation alone. The extent of government involvement might remain the test, as suggested in *Dolphin Delivery*, but the legislative origins of judicial authority would be only one indicator of government involvement, not a sufficient test.<sup>59</sup>

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<sup>57</sup> The C.C.Q. is not a statute, but it is of legislative origins.

<sup>58</sup> See e.g., J.-D. Gagnon, "L'arrêt *Dolphin Delivery*: La porte est-elle ouverte ou fermée?" (1987) 32 McGill L.J. 924.

<sup>59</sup> Hogg recognises that the source of the judicial power cannot be a sufficient test of government action when he states that judicial orders made under the civil law of Quebec are not subject to the *Charter* (Hogg, *supra* note 55 at 658 n.84). This subverts his general thesis because much civil law is of legislative origins. Hogg's suggestion that the *Canadian Charter* does not apply to the C.C.Q. is not fully supportable in any case. He finds support for it in *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634 [hereinafter *Tremblay* cited to S.C.R.], but the matter is not decided there. Tremblay argued that his rights or the rights of his unborn child would be violated if an injunction were not issued to prevent termination of the mother's pregnancy without his consent. The court held that no legal rights of Tremblay or the foetus were implicated. The failure of a court to make an order protecting non-existent legal rights could not constitute government action. Nor did any existing law infringe *Canadian Charter* rights in the manner argued. That is what the Court decides in *Tremblay* (*ibid.* at 571). The relationship between the *Canadian Charter* and the *Civil Code of Lower Canada* was raised by the mother's argument that the injunction granted in the court below, purportedly based on the C.C.L.C., infringed her section 7 rights. That point was never addressed because the court resolved the case another way. It held there was no authority under the C.C.L.C. or the Quebec *Charter* to grant the injunction and no independent source of authority for it in the *Canadian Charter*. Therefore, no conflict between an exercise of authority under the C.C.L.C. and a *Canadian Charter* right was presented for decision. The Supreme Court's government action doctrine appears to support the position that judicial orders under the C.C.Q. should be reviewable under the *Canadian Charter*, if a sufficient element of government involvement exists.

The test of the *Canadian Charter's* application might be the level of government involvement as a whole, and a list of indicators of government involvement could include:

- the extent of legislative involvement in authorising the judicial order;
- the nature of the interests advanced by the order;
- the nature of the underlying cause of action;
- the identity of the litigants and the nature of their aims;
- the extent of government regulation in the field;
- the nature of the remedies available for the order's enforcement;
- any collateral forms of government involvement;
- the existence of other means of vindicating the rights asserted.

Some critical mix of these features, established on a case-by-case basis, would establish the existence of government action for *Charter* purposes in the private litigation field. Applying this approach may result in different conclusions on the *Charter's* application to judicial orders for the production of medical records in various forms of private litigation. For example, in proceedings in the tort of trespass, a judicial order based on a code of civil procedure might not be subject to the *Charter*, even if it does infringe privacy interests. On the other hand, in proceedings concerning the private enforcement of a human rights code — where the allegation is one of a human rights violation by way of sexual harassment and the cause of action is statutory — a different approach may be appropriate.

### 3. Defendants' Interests in Disciplinary Proceedings

For the *Canadian Charter* to apply, the element of government action must be found. For the section 7 guarantee of fundamental justice to apply, that government action must threaten to deprive a person of life, liberty or security. This poses no difficulty with regard to the complainant in the above scenario. The Supreme Court has recognised that privacy interests may be an aspect of liberty or security of the person,<sup>60</sup> which would seem to be threatened by an order for the production of medical records in virtually any form of legal process.

The defendant's life, liberty and security of the person are also clearly threatened by a criminal prosecution, especially by one that may lead to imprisonment. However, the life, liberty and security of the defendant may not be threatened in civil or administrative proceedings in which damages, fines or other economic penalties are the principal remedies. In these contexts, the defendant may be unable to invoke the enhanced procedural protections or informational entitlements that a successful application of section 7 might provide.

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<sup>60</sup> See *infra* note 78 and accompanying text.

Whether section 7 guarantees a floor of procedural fairness to defendants in professional disciplinary proceedings which may affect their right to practise is yet to be resolved.<sup>61</sup> One view is that practice of a profession involves purely economic interests, deliberately excluded from the scope of section 7 whose coverage is limited to personal interests in physical integrity or bodily security. Another view is that liberty should be given a generous reading to embrace the freedom to practise a profession, which is as much a way of life as a source of income.<sup>62</sup> Hogg concludes:

[d]espite some lower court decisions to the contrary, which emphasize the role of work as an instrument of self-fulfilment, the regulation of trades and professions should be regarded as restrictions on economic liberty that are outside the scope of s. 7.<sup>63</sup>

The better view may be that defendants' rights in some kinds of professional disciplinary proceedings are protected by section 7, where the allegations are on the same plane of seriousness as in a criminal prosecution.<sup>64</sup>

The outcome of this analysis of the application of section 7 of the *Canadian Charter* to the position of the complainant and the defendant in this scenario is illustrated in the chart above. It shows the possibility of a constitutional imbalance, whereby the complainant's privacy rights may be protected by the *Canadian Charter* in proceedings in which the defendant's rights to information may not be — in private litigation and disciplinary proceedings.

## II. Some Features of the Balancing Calculus

Turning from the general form of the analysis, a number of particular aspects of the balancing calculus should be considered. In this section, an attempt is made to determine more precisely the meaning attributed by the courts to the interests weighed in the balance. Next, the requirement of relevance is addressed: that is, the necessity that any information whose production is sought be relevant to some matter in dispute in the litigation. Such a requirement acts as a threshold both to compelled disclosure and to any subsequent admission of the material in evidence. Finally, attention is given to the capacity of a court to minimise intrusions upon privacy by limiting the

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<sup>61</sup> The matter was left open by Iacobucci J. in *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, 84 D.L.R. (4th) 105 [hereinafter cited to S.C.R.], despite his remark that "whether the right to practise [a profession] is embraced by the 'right to life, liberty and security of the person' in s. 7 is an extremely important question, with equally important consequences" (*ibid.* at 881). See the discussion in Evans, *supra* note 34 at 186-99.

<sup>62</sup> See *Wilson v. British Columbia (Medical Services Commission)* (1988), 53 D.L.R. (4th) 171, [1989] 2 W.W.R. 1 (B.C. C.A.); *Harvey v. Law Society of Newfoundland* (1992), 88 D.L.R. (4th) 487, 2 Admin. L.R. 306 (Nfld. S.C. (T.D.)); and *Reference re Ss. 193 and 195(1)(c) Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at 1170, 56 C.C.C. (3d) 65 at 100, where Lamer J. was unwilling to extend section 7 to cover every activity that might affect a person's "sense of identity, self-worth and emotional well-being".

<sup>63</sup> Hogg, *supra* note 55 at 833.

<sup>64</sup> See *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, 45 D.L.R. (4th) 235, in relation to a different *Charter* right.

scope of any disclosure that is ordered and by controlling the extent of the material's circulation, strategies a court will take into account in deciding whether production should be ordered at all.

## A. Confidentiality and Privacy

### 1. The Two Conceptions

It is possible to generate from the leading cases concerning medical records a clearer conception of privacy and confidentiality as legally protected interests. Privacy and confidentiality are usually considered distinct conceptions, though they are easily blurred.<sup>65</sup> Confidentiality is associated with fiduciary and other special relationships which involve an element of reliance or trust on the part of one person (often described as the vulnerable party) in relation to another. The purpose of the duty of confidence is to support the development of such trusting relationships for the social and personal benefits they provide.<sup>66</sup> Where such a confidential relationship exists, information that has been revealed, collected or generated within its course should not be used in a manner adverse to the interests of the vulnerable party without that party's authorization. The usual clinical relationship between a patient and a therapist is a confidential relationship of this kind.

A wide range of material may be covered by a duty of confidence or non-disclosure in these circumstances. Not only may the revelations or communications made by a patient to a therapist be protected, but also independent observations by the therapist. Even information provided to the therapist by third persons outside the relationship may be included, provided the material has been collected in the course of the special relationship with the expectation that it would not be disclosed. In these circumstances, the courts may rely on equitable principles to prohibit the material's unauthorised use.<sup>67</sup>

The right to privacy is said to be an individual interest not dependent on the existence of a special relationship for its genesis, and should be respected even by strangers and especially by the government. Material created without association with any other person may have privacy implications, as is the case with personal diaries or photographs. Therefore, the purpose of protecting privacy is not to promote special relationships; it is to maintain personal dignity, individual integrity, self-respect and autonomy by permitting individuals to maintain some measure of control over intimate material. The focus is on the effects that disclosure may have on a person.

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<sup>65</sup> See D. Gibson, ed., *Aspects of Privacy Law: Essays in Honour of John M. Sharp* (Toronto: Butterworths, 1980).

<sup>66</sup> See F. Gurry, *Breach of Confidence* (Oxford: Clarendon Press, 1984).

<sup>67</sup> *Slavutych v. Baker* (1975), [1976] 1 S.C.R. 254, 55 D.L.R. (3d) 224 [hereinafter cited to S.C.R.] (admissibility in dismissal from employment proceedings of a confidential tenure assessment form completed by the dismissed professor in relation to a colleague).

Within therapeutic relationships, confidential material is revealed which also has privacy implications. In this case, its disclosure to others without authorisation might be restrained either as a breach of privacy or as a breach of confidence. Privacy must often be respected within a confidential relationship, even if a confidential relationship is not necessary to protect privacy; but not all material collected within a confidential relationship has privacy implications, some material, if released, would pose no threat to personal dignity.

In assessing these interests courts are concerned not only with threats to the dignity of the patient whose records are at risk of exposure in the instant case, nor only with relations between that patient and the therapists. They are also concerned with the consequences of ordering disclosure for all those who might seek assistance in the future and with all potential therapeutic relationships: that is, the general effects of acting on a disclosure rule are an important part of the analysis.<sup>68</sup> It may not even be necessary for a person opposing production to establish that the patient whose records are under consideration will be harmed by their disclosure. It may be sufficient to argue that harm may accrue to others in similar circumstances in the future.

The consequences for both patients and therapists are relevant. To the extent that disclosure to outsiders is possible, patients may be less willing to present themselves for treatment, they may be less candid and they may end treatment more readily — difficulties compounded in relation to health conditions which carry a heavy stigma. Therapy may be abandoned if confidential material is released, adversely affecting the patient's health.<sup>69</sup> Clinicians who are aware of the possibilities of forced disclosure may feel obliged to warn patients at the outset, compromising communication between them. Note-taking may be affected, even to the extent that a therapist refuses to keep official records. If a professional is subpoenaed to testify, the expert may be forced to choose between the health needs of a patient and imprisonment for contempt.

The prospect of compelled production may strongly discourage the reporting of offences or the commencement of legitimate proceedings. A complainant, already reluctant to initiate litigation, may be even more hesitant to proceed in the knowledge that her intimacies may be exposed to her abuser, who may then use that information to attack her credibility or to contradict her testimony at the trial.<sup>70</sup>

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<sup>68</sup> See L'Heureux-Dubé J.'s analysis of the values promoted by the religious communications privilege, dissenting in *R. v. Gruenke* [1991] 3 S.C.R. 263 at 297ff., (*sub nom. R. v. Fosty*) 6 W.W.R. 673 at 695ff. [hereinafter *Gruenke* cited to S.C.R.] (extent of privilege attaching to communications between defendant and church pastor and counsellor).

<sup>69</sup> "Once psychiatrist-patient confidentiality is broken and the psychiatrist becomes involved in the patient's external world, the 'frame' of the therapy is broken" (*Ryan, supra* note 1 at 173, McLachlin J.).

<sup>70</sup> See the opinion of L'Heureux-Dubé J. in *R. v. Osolin*, [1993] 4 S.C.R. 595 at 621-22, 109 D.L.R. (4th) 478 at 495-96 [hereinafter *Osolin* cited to S.C.R.] (ability to cross-examine complainant upon her mental health records, when the records were potentially relevant to her credibility as a witness).

L'Heureux-Dubé J. has also pointed to the misuse of psychiatric material to stigmatise witnesses.<sup>71</sup> Myths without empirical foundation may be promoted which mask subtle forms of discrimination, such as myths connecting certain forms of mental disorder with the reliability of testimony. Instead of suggesting that the complainant consented because of the kind of woman she is, a tactic now largely prohibited, the psychiatric record may be used to suggest that she is an unreliable witness because of the kind of disorder she has. Such tactics may impact disproportionately on women, the complainants in sexual assault cases in which access to this kind of material is frequently sought.<sup>72</sup>

This concern about reasoning from particular kinds of myth<sup>73</sup> is shared in *O'Connor* by other members of the Court<sup>74</sup> who are aware that requests for intimate information may be used as a deliberate strategy to seek a stay or the withdrawal of a complaint. Certainly all members of the Court would endorse the view that a complainant "should not be unduly harassed and pilloried to the extent of becoming a victim of an insensitive judicial system."<sup>75</sup>

## 2. Constitutional Protection

The duty of health professionals to maintain the privacy and confidentiality of patient information is both a legal and an ethical duty. Its sources in legislation, private law principles,<sup>76</sup> and the law of evidentiary privilege or professional secrecy<sup>77</sup> are well known. It is the constitutional protection of privacy that is novel.

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<sup>71</sup> *Ibid.* at 621-25.

<sup>72</sup> McLachlin J. states for the majority in *Ryan*: "She is doubly victimized, initially by the sexual assault and later by the price she must pay to claim redress" (*supra* note 1 at 175). See s. 278.5(2)(d) *Criminal Code*, *supra* note 5, per *Criminal Code* amendments, *supra* note 8 (the factors to consider in deciding whether the record should be produced to the court for review to include "whether production ... is based on a discriminatory belief").

<sup>73</sup> See s. 276 *Criminal Code*, *ibid.*

<sup>74</sup> See *O'Connor*, *supra* note 6 at 442-43, Lamer C.J.C. and Sopinka J.; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 83 D.L.R. (4th) 193; *R. v. Crosby*, [1995] 2 S.C.R. 912, 98 C.C.C. (3d) 225.

<sup>75</sup> *Osolin*, *supra* note 70 at 669, Cory J.

<sup>76</sup> Duties of non-disclosure are established by various means. The law of torts or obligations: *Furniss v. Fitchett*, [1958] N.Z.L.R. 396 (S.C.); in Quebec, art. 1457 C.C.Q. The law of equity or breach of confidence: *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, 93 D.L.R. (4th) 415. Through privacy codes or other legislation concerning health or mental health records: in Quebec, ss. 5, 9 *Quebec Charter*, *supra* note 4; art. 35 C.C.Q.; *An Act respecting Health Services and Social Services*, R.S.Q. c. S-4.2, s. 19. Under ethical codes having the force of delegated legislation: *Code de déontologie des médecins*, R.R.Q. 1981, c. M-9, r. 4. In addition, ethical obligations may be enforced through legal mechanisms such as disciplinary proceedings: *Duncan v. Medical Practitioners Disciplinary Committee*, [1986] 1 N.Z.L.R. 513 (C.A.).

<sup>77</sup> The class of information covered by usual privilege principles is particularly narrow. It may extend only to communications (and not independent observations or formulations) which occur within a recognised form of special relationship and which are covered by an obligation of confidence: *Trempe v. Dow Chemicals of Canada Ltd.*, [1980] C.A. 571 [hereinafter *Trempe*].



The Supreme Court of Canada has determined that the right to privacy is protected by sections 7 and 8 of the *Canadian Charter*. A limited right to privacy — which was initially seen as the constitutional value behind the ban on unreasonable search and seizure — is now considered an aspect of the liberty or security of the person, secured against deprivation except in accordance with the principles of fundamental justice.<sup>78</sup> In *O'Connor*, the Chief Justice and Sopinka J. concluded that “all individuals have a right to privacy which should be protected as much as is reasonably possible” and “a constitutional right to privacy extends to information contained in many forms of third party records.”<sup>79</sup> Any attempt to demand the production of private records through government action engages the *Canadian Charter's* protection and “s. 7 requires a reasonable system of ‘pre-authorization’ to justify court-sanctioned intrusions into the private records of witnesses in legal proceedings.”<sup>80</sup> In *Dyment*, La Forest J. accepted that “privacy is at the heart of liberty in the modern state”<sup>81</sup> and expressed the view that protecting privacy requires individual control over the purpose and manner of disclosure of personal information at the point of disclosure, not merely through retrospective remedies.<sup>82</sup>

The core concept in the Court's approach is one of “psychological security”<sup>83</sup> or “protect[ion] against psychological trauma.”<sup>84</sup> The flow of reasoning is from the positive protection in the *Canadian Charter* of personal liberty and security, to the constitutional purposes of protecting dignity, integrity and autonomy, to the particular expression of those values through a “reasonable expectation of privacy against governmental encroachments.”<sup>85</sup> The Court is explicit in holding that this derived right is enhanced in medical contexts due to the social significance of the doctor-patient rela-

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<sup>78</sup> In *Rodriguez*, *supra* note 15 at 587, Sopinka J. for the majority, citing Dickson C.J.C. in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 54-57, 44 D.L.R. (4th) 385 at 400-02, states that “security of the person” relates to “one's physical or mental integrity and one's control over these,” to “serious state-imposed psychological stress” and to “emotional integrity”. Determining whether state interference with such interests is “in accordance with the principles of fundamental justice” demands a balancing of the interests of the state and the individual. A balancing of both substantive and procedural concerns is required as the “principles of fundamental justice are concerned with more than process” (*Rodriguez*, *ibid.* at 607, Sopinka J.).

<sup>79</sup> *O'Connor*, *supra* note 6 at 434, a view endorsed by a majority of the Court.

<sup>80</sup> *Ibid.* at 487, L'Heureux-Dubé J., a view endorsed by the majority.

<sup>81</sup> *R. v. Dyment*, [1988] 2 S.C.R. 417 at 427, 55 D.L.R. (4th) 503 at 512 [hereinafter *Dyment* cited to S.C.R.], LaForest J. (doctor taking blood sample at own initiative and passing to the Police for use as evidence of drunk driving).

<sup>82</sup> *Ibid.* at 430; see also *O'Connor*, *supra* note 6 at 486-87, L'Heureux-Dubé J.

<sup>83</sup> *R. v. Morgentaler*, [1988] 2 S.C.R. 30 at 163, 44 D.L.R. (4th) 383 at 484, Wilson J.

<sup>84</sup> *O'Connor*, *supra* note 6 at 483, L'Heureux-Dubé J.; and her dissent in *Ryan*, *supra* note 1 at 199-200.

<sup>85</sup> *Supra* note 81 at 426. In *R. v. Plant*, [1993] 3 S.C.R. 281 at 293, 84 C.C.C. (3d) 203, in the context of section 8, a majority of the Court found:

the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.

tionship, the special vulnerability of the patient and the common need to reveal information of an intimate character. The hospital has been identified as a special area of privacy concern.<sup>86</sup>

In the Court's analysis, the *Canadian Charter's* protection of privacy represents a condensation of the numerous means through which this value is recognised elsewhere in the law.<sup>87</sup> Nevertheless, the value of privacy must be balanced against other fundamental societal concerns.<sup>88</sup>

### 3. Statutory Authority for Disclosure

There is considerable strength to the obligation of non-disclosure imposed on health professionals in both judicial and extra-judicial contexts — by the civil law, statute, and in certain cases, the Constitution. Disclosure of patient information by therapists should usually be authorised by a clear form of statutory authority which itself can withstand constitutional scrutiny. Numerous statutes provide authority or support for access to medical records in judicial or complaint proceedings. Codes of criminal and civil procedure routinely empower adjudicative bodies to summon all relevant witnesses and documents. Statutory inquiries, human rights tribunals and health commissioners may be entitled to access as well. Privacy and health information legislation invariably contemplates release in accordance with the law.

Access without the consent of the subject of the records will not be authorised by a contract or arrangement to which the subject is not a party. In the above scenario, a contract of employment may exist between the defendant and the hospital which appears to guarantee procedural fairness to employees in the processing of any complaint against them. That contractual arrangement cannot authorise access to a patient's records, however, when the complainant, whose consent to access is required, is not a party to the agreement. Nor do the hospital's property rights in the records permit the management to grant access to a clinician not involved in the complainant's treatment. Their property rights are encumbered by the obligation of confidence which can be waived only by the complainant or her agent. Neither will the authority to grant access be provided by a hospital code of employees' or patients' rights,<sup>89</sup> unless perhaps the hospital is expressly empowered by statute to make rules of this kind which may prevail over privacy legislation and the general law.<sup>90</sup>

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<sup>86</sup> *Dyment, ibid.* at 432-34, LaForest J.

<sup>87</sup> *Osolin, supra* note 70 at 613-15, L'Heureux-Dubé J.

<sup>88</sup> *Dyment, supra* note 81 at 428, LaForest J.; L'Heureux-Dubé J. in *O'Connor, supra* note 6 at 485.

<sup>89</sup> See the comments of the Supreme Court in *Frenette, supra* note 20 at 671-73, concerning the ineffectiveness of hospital regulations to control the circumstances in which a patient may waive the right to have confidentiality maintained.

<sup>90</sup> In an analogous context, the Supreme Court of Canada determined that the Canadian Labour Relations Board had no inherent powers to compel the production of documents for the purposes of its proceedings. Unlike a Superior Court, an administrative agency has no inherent authority, legislation alone delineates its powers. The functional requirements of an agency do not generate specific coer-

### B. Full Answer and Defense

The need for litigants to obtain full access to information is a powerful counter-principle which may prevail over a duty of confidence or a right of privacy. This statement requires little explanation. Accurate and reliable fact-finding on the basis of all relevant evidence is a fundamental objective of litigation. Any rule of evidentiary privilege or non-disclosure which prevents relevant material from coming into the hands of the parties or the court "acts as an exception to the truth-finding process."<sup>91</sup> It may conflict with the right of the defendant to make full answer and defense, a right described by the Supreme Court in *Stinchcombe* as "one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted."<sup>92</sup> There will usually be a duty to disclose medical information to the defendant when "the right to make full answer and defence is implicated by information contained in the records."<sup>93</sup> Non-production or exclusion from evidence will be the exception. Lamer C.J.C. refers in *Gruenke* to the "fundamental 'first principle' that all relevant evidence is admissible until proven otherwise,"<sup>94</sup> while L'Heureux-Dubé J. writes that "highly probative and reliable evidence is not excluded from scrutiny without compelling reasons."<sup>95</sup>

Where there is no public policy exception, these principles translate into rules of procedure which permit the defendant to obtain a court order for the production of any relevant information for inspection. This information might later be used either directly or indirectly in litigation: as evidence, to identify potential witnesses, to develop cross-examination, or to attack the competence or credibility of the complainant or any other witness.<sup>96</sup> In default, the proceedings should be stayed.

There are analogous consequences for the disclosure obligations of the Crown in criminal proceedings. It was determined by the majority in *O'Connor* that "information in the possession of the Crown which is clearly relevant and important to the ability of the accused to raise a defence must be disclosed to the accused, regardless of any potential claim of privilege which might arise."<sup>97</sup> Compelled disclosure is necessary to satisfy these defense interests only if the information cannot reasonably be obtained by other means. Those seeking access may be required to satisfy a court that other avenues are not available or have been attempted unsuccessfully. In criminal proceedings, the defendant's information rights are protected by legislation governing criminal procedure and by the inherent powers of courts to ensure fairness

cive powers overriding the general law: *Canadian Pacific Airlines v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, 108 D.L.R. (4th) 1.

<sup>91</sup> *Beharriell*, *supra* note 7 at 559, L'Heureux-Dubé J.

<sup>92</sup> *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 at 336, 68 C.C.C. (3d) 1 at 9, Sopinka J. (extent of Crown obligation to produce the fruits of the police investigation to the accused, including statements made by witnesses and notes of interviews); *Seaboyer*, *supra* note 74; *Carosella*, *supra* note 30.

<sup>93</sup> *O'Connor*, *supra* note 6 at 436, Lamer C.J.C. and Sopinka J.

<sup>94</sup> *Gruenke*, *supra* note 68 at 288.

<sup>95</sup> *Ibid.* at 296.

<sup>96</sup> See e.g., *Carosella*, *supra* note 30 at 108-10, Sopinka J.

<sup>97</sup> *O'Connor*, *supra* note 6 at 431, Lamer C.J.C. and Sopinka J.

in trials. In addition, “*Stinchcombe* set out the general principle that an accused’s ability to access information necessary to make full answer and defence is now constitutionally protected under s. 7 of the *Canadian Charter of Rights and Freedoms*.”<sup>98</sup>

The defendant’s rights in private proceedings are covered by the law of civil procedure and in disciplinary proceedings by the relevant legislation, supplemented if necessary by principles of administrative fairness. Pre-trial discovery on both sides has long been a feature of civil procedure to eliminate any element of surprise and to specify the issues to be contested at the trial. The guarantee of a fair hearing in section 23 of the Quebec *Charter* may further elevate duties of disclosure to the defense in that province.

### C. The Meaning of Relevance

It is relevance and not admissibility that is the key to the production of medical records. Material may be compelled which is later found inadmissible, and the applicant for production need not show that a document would be admissible to justify its disclosure. Information which would be found inadmissible may lead the defense to material that may be legitimately presented in evidence. For example, a therapist’s notes of a conversation with the spouse of the complainant may be hearsay in that form, but an alerted defendant may call the spouse to give direct testimony.<sup>99</sup> Prior to trial, the issues may be poorly defined in any case and the question of admissibility premature.

The meaning of relevance is not fixed. The context determines how relevant the material must be, and to what it must relate. The Crown’s duty of disclosure in criminal cases is particularly onerous. This means material of less direct relevance may have to be disclosed by the Crown than is the case for disclosure by private litigants or third parties. The distinction is one of degree. In the context of Crown disclosure, the Supreme Court decided in *Stinchcombe* that the test of relevance is one of potential usefulness in making a full answer to the allegations made, in terms of assisting the case for the defense or damaging the prosecution.<sup>100</sup> The onus rests on the prosecution to justify non-disclosure of information in its possession.

Information in records may be useful in a way that does not require its admission. It may be relevant for cross-examination or for the identification of witnesses. Whether material is actually used or presented for admission is a matter for the defense, whose strategic decisions will be pre-empted if all access is denied.

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<sup>98</sup> *Ibid.* at 433.

<sup>99</sup> *Ibid.* at 437-38, Lamer C.J.C. and Sopinka J., citing *R. v. Preston*, [1993] 4 All E.R. 638 at 664 (H.L.), Lord Mustill.

<sup>100</sup> *Stinchcombe*, *supra* note 92; see also *R. v. Egger*, [1993] 2 S.C.R. 451, 103 D.L.R. (4th) 678 (availability to defendant of blood samples and analysis to be used as evidence of drunk driving); *Carosella*, *supra* note 30; L. Colton, “*R. v. Stinchcombe*: Defining Disclosure” (1995) 40 McGill L.J. 525; L. Stuesser, “General Principles Concerning Disclosure” (1996) 1 Can. Crim. L.R. 1.

Relevance is defined differently when the information is in the hands of third parties, who are not in the same position as the Crown.<sup>101</sup> According to the Supreme Court, third parties may only be ordered to produce material that is likely to be used for evidential purposes, not merely strategic or tactical ones. The test is one of probative value.<sup>102</sup> The private litigant is likely to fall in an intermediate position between the Crown and third parties. Private plaintiffs do not act as agents of the government, but they are under obligations to permit discovery which would not apply to mere witnesses. A prosecuting authority before a disciplinary tribunal and the tribunal itself, as public bodies, seem analogous to the Crown.

Generally, any patient-related medical information may be considered relevant where it relates to:<sup>103</sup>

- an element of the case against the defendant, such as “the unfolding of events underlying the criminal complaint”<sup>104</sup> and consent to physical contact;<sup>105</sup>
- the competence, credibility or reliability of a witness’ testimony;<sup>106</sup>
- the quality of a witness’ perception and the influence of medication;<sup>107</sup>
- the process through which a witness recovered his or her memory of events and the use of therapy in that process;<sup>108</sup>
- the cause and the assessment of damage suffered by the victim.<sup>109</sup>

<sup>101</sup> For the reasons, see *O’Connor*, *supra* note 6 at 436-37.

<sup>102</sup> *Ibid.* at 437.

<sup>103</sup> *R. v. Marquard*, [1993] 4 S.C.R. 223, 108 D.L.R. (4th) 47 (expert evidence of physicians concerning competency, credibility and memory of a child witness); *R. v. Lavallee*, [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97; *O’Connor*, *supra* note 6 at 439-41. No doubt there is a heightened probability the defense will seek to admit psychiatric information for such purposes when the complainant is, at the time of the relevant events, under treatment in a hospital.

<sup>104</sup> *O’Connor*, *ibid.* at 441; *Carosella*, *supra* note 30.

<sup>105</sup> *Toohey v. Metropolitan Police Commissioner*, [1965] 1 All E.R. 506 (H.L.); *Marquard*, *supra* note 103; *R. v. Hawke* (1975), 7 O.R. (2d) 145 (C.A.), 22 C.C.C. (2d) 19; *R. v. French* (1977), 37 C.C.C. (2d) 201 (Ont. C.A.), *aff’d* (*sub nom. French v. R.*) [1980] 1 S.C.R. 158, 98 D.L.R. (3d) 385.

<sup>106</sup> *Marquard*, *ibid.*; *Carosella*, *supra* note 30; *Lowery v. R.* (1973), [1974] A.C. 85 (P.C.); *R. v. Norman* (1993), 16 O.R. (3d) 295 (C.A.), 87 C.C.C. (3d) 153 [hereinafter *Norman*]; *R. v. R.(L)* (1995), 127 D.L.R. (4th) 170, 100 C.C.C. (3d) 329 (Ont. C.A.). In *Toohey*, the House of Lords said psychiatric evidence may be relevant because “[t]he witness may, through his mental trouble, derive a fanciful or untrue picture from events while they are actually occurring, or he may have a fanciful or untrue recollection of them which distorts his evidence at the time when he is giving it” (*ibid.* at 511, Lord Pearce). On warning a jury of the potential unreliability of a mentally disordered witness, see also *R. v. Spencer and Smails* (1986), [1987] A.C. 128 (H.L.); *R. v. Harawira*, [1989] 2 N.Z.L.R. 714 (C.A.). On competency, Baron Alderson wrote in 1851 that the question is whether the potential witness is “*non compos mentis quoad hoc*, or *non compos mentis* altogether” (*R. v. Hill* (1851), 169 E.R. 495 at 497 (C.A.), 2 Den. 254 at 259).

<sup>107</sup> *R. v. R.(L)*, *ibid.*; *R. v. Ross* (1993), 119 N.S.R. (2d) 177 (S.C. (A.D.)); *R. v. Ross* (1993), 121 N.S.R. (2d) 242 (C.A.).

<sup>108</sup> *Norman*, *supra* note 106.

To give a number of recent examples, in *R. v. Mandeville* the complainant in a sexual assault case had been under hospital treatment for alcoholism. Clinical observations in her records might establish that she suffered from Korsakoff's psychosis, a psychiatric syndrome associated with memory deficiency and confabulation.<sup>109</sup> The court ordered the hospital to produce the records to the defense. In *R. v. R.(L.)*, both the defendant and the two complainants were under in-patient treatment for depression, one patient being accused of aiding the others' suicide attempts. The complainants' psychiatric records were found admissible as they might "bear on the victims' credibility, including testimonial factors such as the quality of their perception of events at the time of the offence, and their memory since."<sup>110</sup>

*R. v. Ross* is a case in which the absence of psychiatric evidence concerning reliability may have produced a serious injustice. After the defendant had been convicted on a charge of sexual assault and imprisoned, the complainant's psychiatrist, who had treated her for eight years and had read of the trial in the press, approached the prosecution. He informed counsel that the complainant's early experiences — perhaps including witnessing incidents of sexual assault as a child — may have led her to misconstrue the lawful advances of the accused. This evidence would have corroborated the defendant's account. The psychiatrist "saw a possibility that the complainant's testimony could really be wrong even though she believed it to be true."<sup>111</sup> A new trial was ordered at which the psychiatrist could testify. *Ross* also highlights the incomparability of the interests in the balance. Is it really possible to "weigh" the effects on a young student of what may have been his wrongful conviction and imprisonment against the intrusion on the complainant's privacy which will flow from her psychiatrist's testimony at the trial? A court can choose between these interests. It chose, rightly in this case, informed fact-finding.

L'Heureux-Dubé J. is also correct to warn in *Osolin* of the dangers of accepting too readily psychiatric challenges to the credibility of complainants in sexual assault cases.<sup>112</sup> Victims must be free to seek assistance without it counting against the veracity of a complaint and without their records being subject to "fishing expeditions". The court must stand between the parties, filtering out requests for information that is not sufficiently relevant, while ordering production when access is necessary and it would be unfair to refuse examination by the defense. The criterion of relevance and the production process are the necessary means of separating legitimate requests from fishing expeditions and conjecture.<sup>113</sup> But the court must not insist that the defense provide a detailed justification for the disclosure of records whose contents are as yet

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<sup>109</sup> *Ryan*, *supra* note 1.

<sup>110</sup> *R. v. Mandeville* (1993), [1994] N.W.T.R. 126 (S.C.), 21 C.R. (4th) 272 [hereinafter cited to N.W.T.R.].

<sup>111</sup> *R. v. R.(L.)*, *supra* note 106 at 180.

<sup>112</sup> (1993), 121 N.S.R. (2d) 242 at 243 (C.A.).

<sup>113</sup> *Osolin*, *supra* note 70 at 623-25.

<sup>114</sup> *R. v. Chaplin*, [1995] 1 S.C.R. 727 at 746, 96 C.C.C. (3d) 225 at 237, Sopinka J. (The Crown has no duty to disclose evidence to the defendant where the Crown has established the evidence is beyond the control of the prosecution, is clearly irrelevant or privileged, or where the existence of the material has not been sufficiently established by the defendant).

unknown. As the majority in *O'Connor* identified, the problem for the defendant who has not yet had access to the detailed data a medical record might provide, is how to get beyond assertion and speculation concerning the potential usefulness of the records to evidence. Requiring evidence to justify disclosure to the defense in these circumstances may act as a prohibition on disclosure, contrary to the principles of fundamental justice.<sup>115</sup>

Viewed in this light, the constitutionality of the recent amendments to the *Criminal Code* is doubtful. Section 278.3(4) attempts to limit the range of assertions that may be "sufficient on their own to establish the record is likely relevant."<sup>116</sup> For instance, an assertion that "the record relates to medical or psychiatric treatment, therapy or counselling that the complainant ... has received" is declared to be insufficient for this purpose. This provision may be contrary to the principles of fundamental justice if it has the effect of placing an unrealistic burden on the defendant.<sup>117</sup>

#### D. Limiting the Extent of Disclosure

When the compelled production of medical records is considered, the weight accorded to the complainant's confidentiality or privacy concerns will be influenced by the extent of disclosure contemplated. The order may relate only to limited parts of a record and a restricted set of people may be granted access.<sup>118</sup> In many cases, judges have pointed to such conditions as a reason to discount privacy objections. This may easily swing the balance in favour of production.<sup>119</sup>

The information in the record must be classified and considered separately. Information found irrelevant or privileged may be sealed to prevent its inspection, while the remainder is exposed.<sup>120</sup> Inspection by the defense may be permitted only in the presence of a judge or registrar with copying prohibited. Initially, access may be

<sup>115</sup> See *Carosella*, *supra* note 30 at 100, 135-38.

<sup>116</sup> *Supra* note 5, per the *Criminal Code* Amendments, *supra* note 8.

<sup>117</sup> This was one of the reasons for striking down Bill C-46 advanced by the Alberta Court of Queen's Bench in an early constitutional challenge. Belzil J. declared the Bill unconstitutional because it "creates a legislative regime which is presumptive against disclosure even though the Supreme Court of Canada majority in *O'Connor* stated that such records are often relevant in criminal proceedings" (*R. v. Mills*, [1997] A.J. No. 891 (Q.L.) at para. 83). *Mills* was followed in Ontario in *R. v. Lee*, [1997] O.J. No. 3795 (Q.L.) (Gen. Div.). No final resolution of this issue seems likely before it arrives, again, before the Supreme Court of Canada. See also D. Paciocco, "Bill C-46 Should Not Survive Constitutional Challenge" (1997) 3 *Sexual Offences L.R.* 185.

<sup>118</sup> For the conditions which may be placed on disclosure in criminal proceedings, see ss. 278.7(3), (6) *Criminal Code*, *supra* note 5, per the *Criminal Code* Amendments, *supra* note 8.

<sup>119</sup> See *R. v. Ryan* (1991), 107 N.S.R. (2d) 357 at 360 (C.A.), 69 C.C.C. (3d) 226 at 230, approved by Lamer C.J.C. and Sopinka J. for the majority in *O'Connor*, *supra* note 6 at 443; L'Heureux-Dubé J. in *O'Connor*, *ibid.* at 506-07. Where the contest concerns the admissibility in a criminal trial of the oral testimony of a witness, which may be privileged, the witness may be heard initially "within the sanctuary of a voir dire;" *i.e.*, by the judge and counsel, *in camera* and in the absence of the jury. The testimony will be heard by the jury only if the claim of privilege is dismissed.

<sup>120</sup> In *Ryan*, *supra* note 1 at 18, McLachlin J. describes this as a situation of "partial privilege".

granted to defense counsel only for the purposes of informing legal argument, which will take place in chambers or beyond the public gaze. If access to the defendant is not then granted, counsel may be prohibited from discussing the material with their client. In certain circumstances, as in administrative proceedings, providing the defendant with an account of the substance may suffice, with original documents withheld.<sup>121</sup>

When access is granted, courts have further discretionary means to limit permissible uses of the material and its circulation. Some legal proceedings are conducted in private with the participants bound to confidence.<sup>122</sup> In cases heard in public — such as criminal trials — the court may be authorised to clear spectators from the court to prevent the diffusion of confidential information,<sup>123</sup> and may prohibit reporting in the media of private material or any means of identifying the complainant. The defense may be permitted to use the material for limited purposes only. For example, in *Mandeville*, the court directed that “the defence be restricted from reproducing or releasing this material except for the purpose of instructing its expert witnesses” and that the “material not be disclosed to the accused except for the necessary solicitor-client communications.”<sup>124</sup> In *R. v. Ross* it was determined that any order for production should be “as restrictive as possible.”<sup>125</sup> Initial examination of the complainant’s psychiatrist and the file was to take place *in camera* before a chambers judge, a restrictive publication ban was imposed, and an order was made that at the conclusion of the proceedings “all material relating to the examination, including transcripts, affidavits or other documentation be sealed up by the court.”<sup>126</sup> McLachlin J. states in *M. v. Ryan* that: “Disclosure of a limited number of documents, editing by the court to remove non-essential material, and the imposition of conditions on who may see and copy the documents are techniques which may be used to ensure the highest degree of confidentiality and the least damage to the protected relationship, while guarding against the injustice of cloaking the truth.”<sup>127</sup>

The nature of the relationship between the parties should still be considered when deciding whether privacy concerns should be discounted due to the limited nature of disclosure contemplated. Confidential material may be used in legal proceedings without unnecessary exposure beyond the confines of the forum. However, for the complainant it may be disclosure to the defendant, her alleged abuser and the person

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<sup>121</sup> *Masters v. Ontario* (1994), 18 O.R. (3d) 551 (Div. Ct.), 115 D.L.R. (4th) 319 (defendant entitled to be provided with summary only of investigators’ interviews with complainants of sexual harassment, in the context of dismissal from discretionary employment by the Crown in right of Ontario).

<sup>122</sup> See the comments concerning *in camera* hearings in the course of a statutory inquiry in *Canada (Solicitor-General) v. Royal Commission (Health Records)*, [1981] 2 S.C.R. 494, 128 D.L.R. (3d) 193.

<sup>123</sup> A proposition approved by the majority of the Supreme Court of Canada in *O’Connor*, *supra* note 6 at 442-43.

<sup>124</sup> *Supra* note 110 at 130; and see the conditions imposed in the context of civil proceedings in *Ryan*, *supra* note 1 at 166-67.

<sup>125</sup> *Ross* (1991), 119 N.S.R. (2d) 177 at 180 (S.C.(A.D.)).

<sup>126</sup> *Ibid.*

<sup>127</sup> *Supra* note 1 at 177.



to whom production is most likely to be granted, that is most resented and feared. Limiting wider circulation may do nothing to alleviate that concern.

### III. Privilege and Professional Secrecy

The discussion so far has been concerned mainly with the production of medical records as a matter of pre-trial procedure and with the balancing of interests that dominates that decision. Now more attention must be given to the admissibility in evidence of confidential medical information at the trial or hearing itself.

When medical information is tendered in evidence, whether in oral or documentary form, the issue is not whether the material should be produced to the defendant. The concern is no longer the limits of discovery or pre-trial access to information on the part of the defense, which is usually thought of as a matter of procedure; the issue at the trial is whether the material may be put before the court itself (including any jury), and whether it may be relied upon in the reasoning of the court. This is usually thought of as a matter of evidence. Can the material be presented and used by the court or should it be found privileged and therefore inadmissible in order to uphold an obligation of confidence or of professional secrecy, or to respect a right to privacy?

To resolve both the procedural and the evidential issues the balancing calculus is employed, but at different moments and in different contexts, so the outcome may not be the same. It is possible that an application by the defense for pre-trial production of the complainant's records will be granted, yet the records will still be excluded at the trial.

This section considers in greater depth the common law of evidentiary privilege and the law of professional secrecy in Quebec which govern the decision concerning the admissibility of medical information. Two outstanding problems receive attention: the law concerning the compelled oral testimony of a physician in Quebec, and the uncertain relationship between the production and admission decisions. In particular, there is an analysis of whether some arguments which might support the existence of an evidentiary privilege, precluding the admission of the medical records at a trial, might be undermined by the earlier breach of confidence involved in compelled pre-trial production of the records to the defense.

#### A. Confidentiality and Privilege under the Common Law

Under traditional common law principles, medical confidences enjoy absolutely no special protection from the law of privilege. The rules of privilege, which apply only to legal proceedings, are distinct from other principles which may impose ethical or civil obligations of confidence on health professionals prohibiting the release of patient information in non-judicial circumstances.<sup>128</sup> The result is that a professional

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<sup>128</sup> See J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 623-771.

may be under an obligation to maintain patients' confidences in extra-judicial contexts, but this would not prevent a judge from compelling their testimony in court.

In the civil law tradition, inherited in part by Quebec, principles of evidence and civil obligation are not distinct, but are submerged in a broader conception of professional secrecy. When confidential information is covered by professional secrecy there is both a general obligation of non-disclosure on the part of the professional and the material is barred from admission in legal proceedings.<sup>129</sup> Not even the patient can waive this secrecy. Breach of it has even been considered a crime.<sup>130</sup>

Neither the common nor the civil law position is now maintained in its pure form. The common law has been modified in some jurisdictions by the creation of statutory privileges governing confidential physician-patient communications, and by a judicial discretion to grant a privileged status to patient information on a case-by-case basis. Under this discretionary approach, information is not found privileged simply because it is ordinarily covered by a duty of confidence in extra-judicial circumstances, nor does a class privilege attach to patient information as a whole. Rather, confidential communications within special relationships may be considered privileged on a case-by-case basis.<sup>131</sup>

This was resolved with regard to third party therapeutic records in *Beharriell*.<sup>132</sup> Such records may be privileged and may be excluded from admission when the Wigmore criteria apply.<sup>133</sup> In relation to the balancing test in the fourth element of the Wigmore test, the onus is on the party advocating exclusion of confidential information to satisfy the judge that the balance of interests favours exclusion.

In the Court's opinion in *Beharriell*, extending a class privilege to counselling records would create too great an impediment to "the truth-finding process of our adversarial trial procedure"<sup>134</sup> and to the accused's right to make full answer and defense. The criterion of relevance, the balancing of interests and the production procedure established a sufficient level of protection. The class approach had not been widely supported in other common law jurisdictions. The decision has confirmed that the Wigmore criteria constitute the general framework in Canada for the common law privilege analysis in respect of confidential material.<sup>135</sup> This approach, which was

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<sup>129</sup> This approach is criticised by Y.-M. Morissette & D.W. Shuman, "Le secret professionnel au Québec: une hydre à trente-neuf têtes rôde dans le droit de la preuve" (1984) 25 C. de D. 501.

<sup>130</sup> *Archambault*, *supra* note 22.

<sup>131</sup> On the distinction between class and case-by-case privileges, see *Gruenke*, *supra* note 68 at 286, Lamer C.J.C. The nub of the distinction is a shifting of the onus of proof.

<sup>132</sup> *Supra* note 7.

<sup>133</sup> The full criteria are: "(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 correct disposal of litigation" (Wigmore, *supra* note 25 at 527, para. 2285) [emphasis in original].

<sup>134</sup> *Supra* note 7 at 575, L'Heureux-Dubé J. (approved by all on this point).

<sup>135</sup> See *Gruenke*, *supra* note 68 at 289-90, Lamer C.J.C.

originally developed in the administrative context in *Slavutych v. Baker*,<sup>136</sup> is applied in both criminal and civil proceedings.<sup>137</sup>

### B. Professional Secrecy in Quebec

The civil law tradition has also been modified. The core provision in Quebec is now section 9 of the Quebec *Charter*.<sup>138</sup> This applies to physicians and numerous other health professions:<sup>139</sup>

Every person has a right to non-disclosure of confidential information.

No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by express provision of law.

The tribunal must, *ex officio*, ensure that professional secrecy is respected.

This provision may appear to affirm a single conception of professional secrecy, subject to exceptions, but its interpretation has established that different principles of professional secrecy apply in judicial and extra-judicial contexts, similar to the common law. The distinction between civil obligations in extra-judicial contexts and rules of evidence also exists in Quebec.

Section 9 affirms the obligation to maintain professional secrecy in extra-judicial contexts, but the obligation is flexible: it may be waived by the patient or by express provision of law. The conception of professional secrecy applied in judicial contexts is even more relaxed.<sup>140</sup> The range of material that may be excluded from admission on the ground of professional secrecy is particularly narrow,<sup>141</sup> and secrecy may be abrogated by express provision of law.<sup>142</sup> Even a procedural power to summon docu-

<sup>136</sup> *Supra* note 67.

<sup>137</sup> *Ryan*, *supra* note 1; *M. v. Martinson* (1993), 81 B.C.L.R. (2d) 184 (S.C.). See also the new position in the United States, where the U.S. Supreme Court recently recognised a powerful form of psychotherapist-patient privilege under federal law in *Jaffee v. Redmond*, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996). The majority of the S.C.C. in *Ryan*, *ibid.* at 177, preferred the dissenting approach of Scalia J.

<sup>138</sup> *Supra* note 4.

<sup>139</sup> See generally L. Ducharme, *L'administration de la preuve*, 2d ed. (Montreal: Wilson & Lafleur, 1995) at 72ff., para. 209ff. [hereinafter Ducharme].

<sup>140</sup> In neither context may professional secrecy be waived at the discretion of the physician, as section 9 imposes an obligation to maintain it unless it is waived by the patient or contradicted by express provision of law. It also imposes a duty on the court or tribunal itself to enforce the obligation.

<sup>141</sup> *E.g.*, only "communications" within professional relationships: *Trempe*, *supra* note 77; *Cordeau v. Cordeau*, [1984] R.D.J. 201 (Que. C.A.); and Ducharme, *supra* note 139 at 81ff., para. 237ff.

<sup>142</sup> See *e.g.* section 19 of *An Act Respecting Health Services and Social Services*, *supra* note 20, which permits disclosure of a user's health record to outsiders "with the authorization of the user ... on the order of a court or a coroner" and section 7 of *An Act Respecting Health Services and Social Services for Cree Native Persons*, R.S.Q. c. S-5, where disclosure is allowed "with the express or implied consent of the beneficiary, or on order of a court, or the coroner."

ments on the part of a court or a tribunal may be sufficient to dispel professional secrecy if the balance of interests favours disclosure.<sup>143</sup> It may also be waived by the patient even with respect to information to be collected in the future.<sup>144</sup> That the Quebec position resembles the common law in these respects was affirmed by the Supreme Court of Canada in *Frenette*.<sup>145</sup>

### 1. *Frenette v. Metropolitan Life Insurance*

In these Quebec proceedings, an insurance company sought production of the medical records of an insured man when, after his decease, his relatives brought an action against the company to recover under his life insurance policy. The company had refused to pay, saying that the likely cause of death was either suicide or the ingestion of unprescribed drugs, causes which were expressly excluded from coverage under the policy. The insured man was found dead in a river, apparently drowned, but the precise cause of death could not be established. On the night of his disappearance, he had been treated in the emergency ward of a Montreal hospital, possibly after an overdose, and there was a previous history of similar treatment at the hospital. The insurance company sought access to all the man's medical records held by the hospital, a third party, to assist the company in its defense. The Supreme Court of Canada, overruling the lower courts of Quebec, ordered the complete records produced.

Writing for a unanimous court, L'Heureux-Dubé J. concluded that, although the right to professional secrecy has a quasi-constitutional status in Quebec, the legislature has chosen a relativist, not an absolutist, approach to its protection.<sup>146</sup> Therefore, a restrictive approach to professional secrecy is justified in judicial contexts where it has the effect of an evidentiary privilege.<sup>147</sup> Disclosure of the records to the insurance company could be justified on both grounds contemplated by section 9: with the consent of the insured and through a court order authorised by an express provision of law.

An expansive view is taken of the circumstances in which professional secrecy may be waived by the patient. It can be waived at the time a contract of insurance is signed, even in respect of future medical consultations. Waiver may also be implied, when the health of the patient is put directly in issue in litigation or where the records are relevant to liability.<sup>148</sup> Such a waiver is "deemed to have been made" at the time of the contract's formation.<sup>149</sup> Here, the insured's consent was in the form of an explicit waiver of confidentiality in the signed contract of insurance. His agreement to permit

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<sup>143</sup> *Archambault*, *supra* note 22 at 185-86.

<sup>144</sup> *Frenette*, *supra* note 20.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.* at 673-74.

<sup>147</sup> *Ibid.* at 675-76.

<sup>148</sup> However, a person would not be considered to put their health directly in issue simply by making a complaint or commencing legal proceedings, even if their competence or credibility is likely to be challenged.

<sup>149</sup> See *Frenette*, *supra* note 20 at 681-85.

access to records for the purpose of loss analysis expressly authorised disclosure to the company.

In any case, L'Heureux-Dubé J. noted that a court order for production was authorised by the *Code of Civil Procedure* of Quebec, which permitted the compelled production of all documents relevant to civil litigation, including medical records in the hands of third parties.<sup>150</sup> The court had a discretion to compel production in the interests of justice, even in the absence of a waiver. The court should exercise this discretion "according to the degree of relevance and importance of the information sought relative to the issue between the parties,"<sup>151</sup> and should "weigh the interests in conflict."<sup>152</sup> As Frenette's records might provide the best evidence concerning a central issue in the litigation, the cause of death, the information should be disclosed.

The approach strongly resembles that adopted in the criminal context in *Osolin* and *O'Connor*.<sup>153</sup> The reasoning is cast in the common law mould<sup>154</sup> and its effect is to apply different principles to professional secrecy in judicial and non-judicial contexts.<sup>155</sup> There is no reference to the history of the civil law conception of professional secrecy, although this would explain the restrictive approach to the doctrine of waiver adopted by Baudouin J.A. in the Court of Appeal. In Baudouin's view, for a waiver to be effective it must be "clear, express and limited."<sup>156</sup> In addition, although the court possessed a discretion to order production, this was constrained by the privacy and secrecy guarantees of the Quebec *Charter*. The Supreme Court did not agree. In its view the Quebec *Charter's* guarantees did not limit the court's discretion to order the production of medical records because section 9 itself refers to release being authorised by "express provision of law" and the powers of the court to order discovery were provisions of this kind. Similarities between Quebec law and the common law are repeatedly emphasized by the Court in its unanimous judgment. Therefore, *Frenette* confirms that Quebec law permits the compelled production of the complainant's medical records to the defendant when the balance of interests favours the defense.

## 2. Compelling the Oral Testimony of a Physician in Quebec

The reasoning in *Frenette* might also permit a Quebec court to compel a physician to give oral testimony through the power of a court to summon relevant wit-

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<sup>150</sup> See arts. 20, 400, 402 C.C.P.

<sup>151</sup> *Frenette*, *supra* note 20 at 685.

<sup>152</sup> *Ibid.* at 678.

<sup>153</sup> See *ibid.* at 685 and the discussion of balancing at 666.

<sup>154</sup> Lord Denning is quoted by L'Heureux-Dubé J., *ibid.* at 666, to emphasize the priority accorded to disclosure in legal proceedings of all material facts "to find out the truth and do justice according to law" — the central plank of the common law tradition; citing *Jones v. National Coal Board*, [1957] 2 Q.B. 55 at 63 (C.A.).

<sup>155</sup> See *Frenette*, *ibid.* at 675-77.

<sup>156</sup> *Métropolitaine (La), Cie d'Assurance-Vie v. Frenette* (1989), [1990] R.J.Q. 62 at 67 (C.A.): "claire, précise et limitée."

nesses.<sup>157</sup> If a physician's record of a consultation can be compelled, then why not the physician? *Frenette* does not decide this matter directly as the case did not concern oral evidence. It is not even clear that the insured man's records would have revealed communications made to a physician at the hospital which would ordinarily be covered by professional secrecy. Nevertheless, the full record of his treatment was compelled.

To determine whether the oral evidence of a physician may be compelled, the relationship between section 9 of the Quebec *Charter* and section 42 of the province's *Medical Act* must be settled.<sup>158</sup> Section 42 provides: "No physician may be compelled to declare what has been revealed to him in his professional character." This would seem to preclude a court order that a doctor testify concerning matters covered by professional secrecy. However, section 9 provides that physicians cannot ("ne peuvent") disclose matters covered by professional secrecy, unless this is authorised by express provision of law. This suggests that an express power to summon all witnesses would permit a court to subpoena a physician to testify. The proviso to section 9 may prevail over the apparent prohibition in section 42.

The two provisions and the decision in *Frenette* might be reconciled if section 9 is read to establish a permissive rule only in this context: a physician *may* breach professional secrecy by giving oral testimony when it is authorised by an express provision of law, but cannot be *compelled* to do so.<sup>159</sup> This position may sit more comfortably within the traditions of the civil law.

But where would that leave the rights of defendants who are unable to compel medical evidence essential to their defense? What if there had been no records in *Frenette*, or inadequate records, and the insurers wished to call a physician from the emergency department to give oral evidence? Why should the form in which the evidence is to be presented make such a vital difference?

Section 23 of the Quebec *Charter* might be critical at this point in the argument since it would prevail over section 42 in case of conflict. It guarantees a right to a full and equal, public and fair hearing, and the procedures this demands may be similar to the procedures required for compliance with the principles of fundamental justice under section 7 of the *Canadian Charter*. Section 23 may guarantee to the defendant a

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<sup>157</sup> It is said in *Frenette*, *supra* note 20 at 677: "The duties pertaining to and the principles governing the confidentiality of hospitals are analogous to professional secrecy between physician and patient."

<sup>158</sup> *Supra* note 20. The author is not aware of a case in Quebec law in which a court has compelled a physician to testify in the face of section 42. However, a civil court enjoys a more powerful authority to order the medical examination of a litigant than is usual in common law jurisdictions, where consent is crucial: see art. 339 C.C.P. This power may be used instead, though it could not resolve a case like *Frenette*, where the person concerned was dead.

<sup>159</sup> It might even be argued that a physician could not be *compelled* to testify when professional secrecy is waived by the patient. That would be a significant departure from the common law, and it would be contrary to the view, implicit in section 9, that rights to privacy and professional secrecy are personal rights of the patient: see Ducharme, *supra* note 139 at 97ff., para. 285ff.

right of access to all information necessary to make a full defense, even information in the mind of a physician.

The approach to Quebec law taken by the Supreme Court in *Frenette* certainly suggests that this line of argument would receive a sympathetic hearing at the highest level. Indeed, the expansive and unanimous approach of the Supreme Court of Canada suggests that the fundamental principles governing both privilege and the production of confidential medical information are the same, and that they apply in civil, criminal and administrative proceedings, in Canadian common and civil law jurisdictions alike.<sup>160</sup>

### C. *Privilege and Privacy after Production*

Further analysis is required of the difficult relationship between the production and admission decisions. They are not the same decision, but how does one affect the other? The courts are usually careful to distinguish between an order for the production of confidential material and its admissibility at a hearing. Documents do not become admissible evidence simply because a court has ordered them produced to another party. The material may still be found irrelevant, or hearsay, and may therefore be excluded.<sup>161</sup> However, an order for production to the defendant may preclude any later objection by the complainant to admission of the same material on the usual privilege grounds.

Privilege principles currently apply to confidential communications within special relationships. Such material may be excluded by a court on a discretionary case-by-case basis. What if confidentiality has already been breached? The production of a document to another party upon the order of a court would seem to preclude any later claim that that material should still be excluded on the ground of privilege because the material has ceased to be confidential in relation to the party to whom the court has ordered it disclosed. The courts have sometimes relied on equitable principles to exclude previously confidential material (which has been disclosed to another party) when its admission would reward an unauthorised breach of confidence.<sup>162</sup> However, equitable principles would not apply where the material has been disclosed upon the order of a court for the very purposes of the proceedings. When that material is later tendered in evidence no unauthorised breach of confidence has occurred to which equitable principles could apply.

This does not mean that a remedy of exclusion in these circumstances is foreclosed. *Canadian Charter*-based privacy rights might still enter the equation.<sup>163</sup> Pri-

<sup>160</sup> A similar conclusion was reached in 1987 by Shuman & Weiner, *supra* note 3 at 64.

<sup>161</sup> Though some medical records may also be covered by an exception to hearsay principles: see *Ares v. Venner*, [1970] S.C.R. 608, 14 D.L.R. (3d) 4; and Rozovsky & Rozovsky, *supra* note 10 at 53-68.

<sup>162</sup> See *Slavutych*, *supra* note 67.

<sup>163</sup> See the approach of L'Heureux-Dubé J. in dissent in *Ryan*, *supra* note 1 at 198: "where a plaintiff is unsuccessful in her privilege claim [based on confidentiality] she may still suffer a serious incursion upon her privacy."

vacy and confidentiality are different concepts and confidentiality is not a precondition of the protection of privacy. Therefore, it may be possible to assert privacy rights even when confidentiality of the record has been fundamentally breached by compelled production. Personal interests in privacy are not dispelled by disclosure of intimate information. They are of a continuing nature and may not be extinguished by the production decision. As a result, a different ground for exclusion might still be advanced: the existence of a privacy privilege with a constitutional basis.<sup>164</sup>

The common law of privilege may itself expand to accommodate privacy rights. It was said in *Gruenke* that the Wigmore criteria are not "carved in stone",<sup>165</sup> and McLachlin J. recently declared that "the common law permits privilege in new situations where reason, experience and application of the principles that underlie the traditional privileges so dictate."<sup>166</sup> Further criteria could be added to protect privacy on a case-by-case basis, leading to exclusion of evidence which has privacy implications but which does not concern a confidential communication within a special relationship.

Sections 7 and 24 of the *Canadian Charter* might also be invoked to support exclusion of evidence where it is necessary to defend privacy rights. Claims might be made that material in medical records should be excluded to protect privacy, even when that material would not ordinarily be covered by the law of privilege or the material is already in the hands of the other party. In the end it does not matter whether the term "privilege" is used. What is important is the possibility that the material which was subject to compelled production might still be excluded from presentation in evidence. It could be excluded when its admission would involve an interference with privacy not justified by the need to protect some other overriding value.

## Conclusion

A conclusion will be drawn by returning to the situation presented by the above example of the patient who has made a complaint of sexual assault against a hospital clinician. Whether disclosure of the patient's psychiatric record will be required in the course of determining her complaint will depend on the nature of the proceedings; the relevance of the information to the dispute; and the balancing of confidentiality and privacy against fairness concerns. The patient should be advised that the need for fairness may require that the defendant and his lawyers have the opportunity to view otherwise confidential material in her record, and that they may then use it to attack her credibility at a hearing.<sup>167</sup> The complainant should be informed that even if she does not consent to the production of her record, it may still be ordered by a court or

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<sup>164</sup> This would require a rebalancing of the complainant's privacy rights against the interests of the defendant at the time the material was tendered in evidence. If the material was then excluded from direct admission any remaining uses of the material by the defense would have to be determined.

<sup>165</sup> *Supra* note 68 at 290, Lamer C.J.C.

<sup>166</sup> *Ryan, supra* note 1 at 170-71.

<sup>167</sup> The point is made by the majority in *O'Connor* that there is "an onus upon the Crown to inform the complainant of the potential for disclosure" (*supra* note 6 at 430, Lamer C.J.C. and Sopinka J.).



her complaint may be permanently stalled. This advice need not be given in a manner that is intimidating or in a fashion designed to discourage the complaint proceeding.<sup>168</sup> The complainant should be informed that various factors moderate the effect of disclosure, such as the mediating role of the judge and the imposition of conditions. Access may be granted only to a limited class of people who may be under an obligation not to disclose the material beyond the confines of their forum and there may be a restraint on publishing identifying particulars. The patient is entitled to be represented, to be heard and to have her privacy concerns properly evaluated. Although this may not allay the patient's legitimate fears, it is better that she should make the decision to proceed with the complaint properly advised: absolute confidentiality is unlikely to be maintained, and private information can be used in legal proceedings without its unnecessary exposure to the world.

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<sup>168</sup> In *Ryan*, *supra* note 1 at 167, McLachlin J. writes, in a slightly different context: "A plaintiff should not be 'scared away' from suing by fear of disclosure."