APPLICATIONS FOR THIRD-PARTY RECORDS: THE RELATIONSHIP OF THE *O'CONNOR* PROCEDURE TO OTHER APPLICATION PROCEDURES

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The author presents an in-depth analysis of the application procedure by an accused for the production of records held by third parties developed in R. *v.* O'Connor. *The appropriateness of using the* O'Connor *procedure respecting the various classes of records is explored, especially in light of the* Mills *procedure, the* McClure *procedure and the* Stinchcombe *disclosure rules. This complex and intricate area of the law is examined and conclusions are drawn regarding when the* O'Connor *procedure should be employed by an accused seeking the pretrial production of records in the custody of third parties.*

L'auteur présente une analyse en profondeur de la procédure de demande, faite par un accusé, visant la production de dossiers gardés par des tiers, telle qu'elle a été développée dans l'affaire R. *c.* O'Connor. *On y explore la pertinence d'utiliser la procédure* O'Connor *relativement aux diverses catégories de dossiers, surtout à la lumière des affaires* Mills *et* McClure, *et des règles de divulgation de l'affaire* Stinchcombe. *On y examine ce domaine complexe et délicat du droit et on tire des conclusions relativement au moment où l'accusé devrait recourir à la procédure* O'Connor *pour demander la divulgation de dossiers gardés par des tiers avant le procès.*

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I. INTRODUCTION

In *R.* v. *O'Connor*,[1] the Supreme Court established a procedure whereby accuseds could apply for the production of records held by third parties. The availability of this procedure has been somewhat obscured by the operation of three prominent sets of procedural rules — the *McClure* procedure,[2] the *Mills* procedure,[3] and the *Stinchcombe* disclosure rules.[4] I shall discuss the state of the *O'Connor* procedure through a review of (II) its background; (III) its mechanics; (IV) its appropriateness respecting records bearing no reasonable expectation of privacy; (V) its appropriateness respecting "soft-protected" records; (VI) production procedures for "hard-protected" records; (VII) its relationship to the *Mills* procedure; and (VIII) its relationship to the *Stinchcombe* disclosure rules. I hope to show that the legal terrain surrounding *O'Connor* is rougher than might have been thought. The interactions of *O'Connor* with other production and disclosure doctrines is complex.[5]

II. BACKGROUND TO THE *O'CONNOR* PROCEDURE

Prior to *O'Connor*, accuseds faced a peculiar problem of criminal trial procedure. An accused could subpoena a person to attend as a witness at a preliminary inquiry or trial,

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1 *R.* v. *O'Connor*, [1995] 4 S.C.R. 411, 103 C.C.C. (3d) 1 [hereinafter *O'Connor* cited to C.C.C.]. On the production issue, Lamer C.J.C. and Sopinka J. (in a joint decision) wrote for the majority, Cory, Iacobucci and Major JJ. concurring; Lamer C.J.C. and Sopinka and Major JJ. dissented on the abuse of process issue and on the disposition of the appeal. L'Heureux-Dubé J. wrote for the dissent on the production issue, La Forest and Gonthier JJ. concurring, with McLachlin J. concurring in a separate decision.

2 *R.* v. *McClure*, [2001] 1 S.C.R. 445 [hereinafter *McClure*].

3 The procedure I will refer to as the "*Mills* procedure" is set out in ss. 278.1 to 278.91 of the *Criminal Code*, R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*]. The constitutionality of this procedure was upheld in *R.* v. *Mills*, [1999] 3 S.C.R. 668, 28 C.R. (5th) 207 [hereinafter *Mills* cited to C.R.]. See J. Koshan, "Disclosure and Production in Sexual Violence Cases: Situating *Stinchcombe*," in this issue at 655 [hereinafter "Situating *Stinchcombe*"].

4 *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326 [hereinafter *Stinchcombe*].

5 I shall not discuss the relationship of the *O'Connor* procedure to "lost records" applications. On this point, see *R.* v. *Carosella*, [1997] 1 S.C.R. 80 [hereinafter *Carosella*] and W.N. Renke, "Records Lost, Rights Found: *R.* v. *Carosella*" (1997) 35 Alta. L. Rev. 1083.

and the subpoena could direct the person to "bring with him anything that he has in his possession or under his control relating to the subject-matter of the proceedings."[6] The accused, though, had no procedure by which he or she could compel production of records in the hands of third parties (other than the Crown) prior to a proceeding. For trials heard in provincial court or in superior court without a preliminary inquiry, no procedure was open to accuseds to obtain production of third-party records prior to trial — or, at least, prior to a judge becoming seized of the trial, so that an application might be made to that judge. The inability to obtain access to third-party records impaired accuseds' ability to make full answer and defence and created unfairness, since the Crown has pretrial access to third-party records. Some procedural relief for accuseds was required.

The need for a procedure could not be side-stepped by requiring the Crown or police to obtain and disclose information at the request of the defence. It appears that the Crown and police have no duty to act as investigators for the defence.[7] In any event, use of the Crown or police would generate practical[8] and tactical difficulties based on disclosure of defence lines of inquiry and information, and would result in the loss or diminution of the right to remain silent. Accuseds would also inherit the state's requirement to have reasonable grounds for limiting others' privacy. Accuseds are likely to lack evidence supporting search warrants.[9]

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6 Section 700(1) of the *Criminal Code*; see Form 16. A subpoena compelling attendance to give oral evidence is known as a *subpoena ad testificandum*; a subpoena compelling attendance to bring records or other materials to court (as well as to give oral evidence) is known as a *subpoena duces tecum*.

7 Alberta authority suggests that there is no such obligation: *R.* v. *Brertton* (1996), 189 A.R. 60 (Prov. Ct.) [hereinafter *Brertton*] ("The disclosure rules do not permit the defence to direct the Crown or the investigating officers in the investigation": at para. 15); *R.* v. *Schmidt* (2001), 151 C.C.C. (3d) 74 at para. 19 (B.C. C.A.); C. Sherrin & P. Downes, *The Criminal Lawyer's Guide to Disclosure and Production* (Aurora: Canada Law Book, 2000) 42-43 [hereinafter Sherrin & Downes]. "It is not the function of Crown Counsel to conduct investigations for the defence. Therefore Crown Counsel should not seek additional information solely because defence counsel requests it": British Columbia, Ministry of Attorney General, Criminal Justice Branch, *Crown Counsel Policy Manual Core Policy: Disclosure*, reproduced in Sherrin & Downes, *ibid.*, 139 at 146 [hereinafter *B.C. Crown Counsel Manual*], also reproduced in M.D. Segal, *Disclosure and Production in Criminal Cases*, looseleaf (Toronto: Carswell, 1997) at BC-1 [hereinafter *Disclosure and Production*]; see also Alberta Crown Counsel Guideline No. 35, "Disclosure and Production," ALTA-1 at ALTA-7 [hereinafter "Alberta Disclosure Guideline"].

8 "[F]or the most part, police officers who have carefully and impartially investigated a crime, and formed a belief in the guilt of the accused on reasonable and probable grounds, cannot be expected to then launch a parallel investigation, at the request of the defence, in order to clear the same accused": Ontario, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer, 1993) at 150 (Chair: the Honourable G.A. Martin) [hereinafter *Martin Committee Report*].

9 In theory, an accused or some other person with information favourable to the accused could swear an information to obtain a search warrant. Neither s. 487(1) of the *Criminal Code* nor Form 1 requires the informant to be a peace officer. The warrant, though, must be executed by a peace officer or other public officer. Because the accused would have to work through the police, he or she would face the difficulties identified above. If the accused swore the information supporting the search warrant personally, he or she might face subsequent cross-examination by the Crown.

The need for a procedure could not be side-stepped by compelling the accused to rely on production mechanisms available outside the criminal law. It is true that if an accused has been pursued in the civil courts by a complainant, the accused could obtain some records relating to the complainant through discovery procedures.[10] The accused-defendant may also make an application for third-party records in civil proceedings.[11] Exposure to civil liability could not be the price of production.

An accused might apply for the production of records through access to information legislation, such as Alberta's *Freedom of Information and Protection of Privacy Act*[12] or the federal *Access to Information Act*.[13] Of course, statutes like these could not assist an accused seeking information falling outside their purview. If an access to information statute applied to information sought by an accused, the accused might succeed in obtaining production of records containing "personal information" about him or her. If the actions of the police or members of another public body were at issue, the accused might obtain a copy of relevant policy manual provisions. The accused's attempts to obtain information under access to information legislation may be frustrated, however, by statutory exemptions of records and exceptions to disclosure. In any event, the accused could not be obligated to follow provincially-established procedures for criminal law purposes. Under s. 91(27) of the *Constitution Act, 1867*,[14] Parliament is entitled to make laws respecting "[t]he Criminal Law ... including the Procedure in Criminal Matters." For the purposes of s. 91(27), "Procedure" includes practice and evidential rules.[15] Since procedures for access to records in criminal cases are elements of criminal procedure, jurisdiction for developing these procedures falls to Parliament and to the criminal courts as an expression of federal and constitutional law. Hence, compliance with provincial statutory production rules cannot be a condition for the production of records in criminal cases.[16] Federal privacy legislation poses no bar to special criminal production rules, since it provides for production pursuant to court order.[17]

While there may have been a need for procedural relief for accuseds, that need could not eclipse all others' interests. The procedural relief required by accuseds had to

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10 See, *e.g.*, *A.M.* v. *Ryan*, [1997] 1 S.C.R. 157 [hereinafter *A.M.*].

11 See, *e.g.*, r. 209 of the *Alberta Rules of Court*, Alta. Reg. 338/83 [hereinafter *Alberta Rules of Court*].

12 R.S.A. 2000, c. F-25 [hereinafter *FOIPPA*].

13 R.S.C. 1985, c. A-1.

14 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

15 *Re Belisle and Moreau* (1968), 5 C.R.N.S. 68 (N.B. C.A.); *R.* v. *Marshall*, [1961] S.C.R. 123, 129 C.C.C. 232 [hereinafter *Marshall*].

16 *R.* v. *Kelly* (1994), 31 C.R. (4th) 354 at paras. 20-21 (Ont. Ct. J. (Prov. Div.)) [hereinafter *Kelly*]; *R.* v. *Mandeville* (1992), 79 C.C.C. (3d) 183 at 186 (N.W.T. S.C.) [hereinafter *Mandeville*]; *R.* v. *Morissette* (1993), 79 C.C.C. (3d) 444 at 445 (Ont. C.A.) [hereinafter *Morissette*]. *R.* v. *French*, [1977] O.J. No. 945 (C.A.), online: QL (OJ) is sometimes offered as authority for a requirement to comply with provincial records legislation: see para. 33. The comment is *obiter*, since the records concerned evidence found to be inadmissible, there is no constitutional discussion, and the finding is contrary to *Marshall*, *ibid.*, which is cited as an authority. In any event, *French* contemplates a proto-*O'Connor* approach to production of the records.

17 See the *Privacy Act*, R.S.C. 1985, c. P-21, s. 8(2)(c) [hereinafter *Privacy Act*].

accommodate the interests of not only accuseds but subjects of records and record custodians.[18]

A. INTERESTS OF ACCUSEDS

A "fundamental tenet of our judicial system" is that the innocent not be convicted.[19] Under s. 11(d) of the *Canadian Charter of Rights and Freedoms*,[20] accuseds are presumed to be innocent until proven guilty according to law. To ensure that the innocent are not convicted, the *Charter* extends the legal rights set out in ss. 8 through 14, and, under s. 7, protects accuseds from deprivations of life, liberty, and security of the person, "except in accordance with the principles of fundamental justice." A non-enumerated aspect of "fundamental justice" is the accused's right to make full answer and defence, which has been held by the Supreme Court not to be a "derivative" right but a "component of fundamental justice."[21] To make full answer and defence, an accused must not only be entitled to know the case he or she is to meet, to enter relevant evidence, and to conduct full cross-examination, but also must be entitled to make adequate preparations for election, plea, and trial — to search out the sources of relevant evidence, to develop cross-examination, and, generally, to work toward establishing the foundation for a defence to the charges against him or her. To make these preparations, the accused needs some pretrial access to potential evidence or information that may relate to potential evidence. The accused requires access to — *inter alia* — third-party records. Hence, the Supreme Court has recognized that an accused has constitutional rights to disclosure from the Crown and production from third parties.[22]

B. INTERESTS OF THIRD PARTIES

Third-party interests fall into four main groups. First, third parties share with us all the general "right to be left alone." Third parties have no obligation, absent court order or other legal process, to participate in criminal litigation in any way.

Second, third parties have privacy interests. All persons have rights to privacy supported by the common law, federal and provincial statutes, and ss. 8 and 7 of the *Charter*.[23] We should not pass over privacy rights too quickly or downplay their

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18 In the following I will deal with issues at a high level of abstraction in light of the broad scope of the *O'Connor* rules. For a contextualized approach to applications for third-party records in sexual offence cases, see "Situating *Stinchcombe*," *supra* note 3; M.T. MacCrimmon, "Trial by Ordeal" (1996) 1 Can. Crim. L.R. 31 at 37, 43, 49; and K. Busby, "Third Party Records Cases since *R.* v. *O'Connor*" (2000) 27 Man. L.J. 355.

19 *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321 at 391 [cited to C.C.C.].

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

21 *Mills*, *supra* note 3 at para. 69; *Carosella*, *supra* note 5 at para. 38. In *Stinchcombe*, Sopinka J. wrote that "[t]he right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted": *supra* note 4 at 336.

22 *Carosella*, *supra* note 5 at para. 26.

23 *Mills*, *supra* note 3 at para. 77; *R.* v. *Chan* (2002), 164 C.C.C. (3d) 24 at para. 141 (Alta. Q.B.) [hereinafter *Chan*].

importance. Privacy protection is a significant individual and public concern, and has led to legislation such as *FOIPPA*, the *Privacy Act*, and the *Personal Information Protection and Electronic Documents Act*.[24] We work hard to protect our privacy in many contexts, such as research involving human subjects[25] and our employment relationships.[26] The design of production rules should be sensitive to consequences to privacy: the diminution of privacy for others may result in the diminution of our own privacy. It is in the interest of all individuals — both accuseds and third parties — to maintain ample privacy protections. Unregulated access to third-party records would threaten the "dignity and self-worth of the individual," whose right to privacy is "an essential aspect of his or her liberty in a free and democratic society."[27]

Third, granting accuseds access to third-party records could have undesirable consequences to interests and relationships related to privacy. The relationships between third parties and record custodians could be damaged by disclosure of records. The disclosure of records could result in injury to subjects of the recorded information. The damage caused by disclosure could undermine or discourage the achievement of social goals if persons were deterred from engaging in socially beneficial activities because of fears of disclosure of information.

Fourth, third parties have rights to the equal protection and benefit of the law.[28] Some third parties may be particularly vulnerable to injuries attendant on disclosure. Rules developed for access to third-party records must not expose any group of persons to special harm or risk of harm; the rules should respect persons' equality, protected under s. 15 of the *Charter*, and should not result in discrimination against vulnerable groups.

C. "BALANCING" RIGHTS

If accuseds and third parties have constitutional rights, whose rights are paramount? The *Charter* does not contain an express ranking or priority system for resolving conflicts between rights — or, perhaps more exactly, for resolving conflicting claims about the scope of rights. The Supreme Court has endorsed a "balancing" approach.[29] The principle implicit in balancing is that, in circumstances not permitting the full satisfaction of competing rights claims, the scope of each competing claim should be limited to the degree that is "reasonable" in those circumstances. That is, behind balancing is the unsurprising principle that our rights should be subject to reasonable limits. The Supreme Court has distinguished analyses under s. 1 of the *Charter* from

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24 S.C. 2000, c. 5 [hereinafter *PIPEDA*].

25 *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans*, Section 3, online: Natural Sciences and Engineering Research Council <www.nserc.ca/programs/ethics/english/ethics-e.pdf> (date accessed: 27 August 2002).

26 See W. Renke, "The Enemy Within: Electronic Monitoring in Libraries" (2002), online: Canadian Library Association <www.cla.ca/resources/cla2002/enemy_within.pdf> (date accessed: 27 August 2002).

27 *O'Connor*, *supra* note 1, L'Heureux-Dubé J. at 57; *Mills*, *supra* note 3 at paras. 79, 81.

28 *Mills*, *ibid.* at para. 90.

29 *Ibid.* at paras. 63-67.

balancing; I suggest, though, that balancing involves a sort of double s. 1 analysis: each right is limited by the other. Balancing in the abstract may be difficult. Reasonableness (as usual) must be judged in context.

The third-party records context has some typical features. First, from the standpoint of the accused, the Crown, and the court, an information deficit usually surrounds the records. The records are in a sort of "black box." The exact nature of the records and their contents is unknown. From the accused's perspective, third-party records may be the foundation for a reasonable doubt. These records hold the promise of preventing the conviction of the innocent. At the same time, the records may be utterly irrelevant to the litigation.

Second, regardless of the actual contents of the records, prior to any production, the records do not immediately engage the accused's interests. The records and their information do not form part of the case that the accused must meet. Without being brought into play by an accused, the information and the records would form no part of the criminal litigation. On the assumption that neither the Crown nor the police have seen the records, the state has no unfair advantage based on access to the records. The records could not take the accused by surprise in the course of the litigation.

Third, not only are the contents of the records unknown in any detail, and not only do the records have no immediate role in the litigation, persons have privacy interests which militate against any disclosure of these records.

Against this backdrop, it is tolerably clear that an accused should be compelled to justify limiting others' privacy and drawing *prima facie* irrelevant materials into the litigation. An accused may have a general interest in obtaining access to third-party records as an incident of the right to make full answer and defence; but an accused has no particular interest in obtaining access to any particular third-party records without a showing of entitlement to access.

Against this backdrop, the burden on the accused should not be pitched too low. The accused's showing must entail more than speculation, surmise, guess-work, hunches, or conjecture about the possible contents of the records — more than "mere assertions."[30] Anything, after all, is possible. To say that a record may possibly contain exculpatory information does not advance any argument: the record may contain exculpatory information, but equally it may not. To entitle accuseds to access to records simply on the basis of speculation about their contents ("It is possible that these records state that ...") would be, in effect, to grant accuseds access to the records for no reason at all; it would be, in effect, to deny any weight to third-parties' interests in not disclosing

[30] Compare Côté J.A.'s remarks on the duty of the province to give reasons when departing from a judicial compensation committee recommendation in *Alberta* v. *Alberta Provincial Judges' Association* (1999), 71 Alta. L.R. (3d) 269 at paras. 62, 63 (C.A.): "[A]n unsupported assertion or mere conclusion is not a reason.... 'My reasons are that I think so', is no reason at all.... [I]f there is a duty to give reasons, that duty calls for more than mere conclusions."

records and information; it would be, in effect, to give accuseds on-demand access to third-party records.

Even if an accused surmounts the hurdle of showing that the records sought have some connection to the litigation, the privacy rights and other interests relating to third-party records cannot be forgotten. The accused's showing that the records have some relationship to the litigation only entails that the rights relating to the record must be balanced, before production could be ordered to the accused. In assessing whether production is warranted, the extent to which production of the records supports the accused's right to full answer and defence must be balanced against the extent to which production of the records injures the rights and interests of the third parties.

In the *O'Connor* case, the majority of the Supreme Court worked out a procedural compromise that attempted to give proper weight to the interests of all parties.

III. THE *O'CONNOR* PROCEDURE

A. CONDITIONS FOR THE APPLICATION OF THE *O'CONNOR* PROCEDURE

The *O'Connor* procedure is the "default" procedure for applying for records in the custody of third parties. Some early post-*O'Connor* authority attempted to restrict the ambit of *O'Connor* to applications for medical or therapeutic records.[31] The better view, however, is that the *O'Connor* procedure governs any application for records

(a) that are in the custody of a third party, and
(b) respecting which any individual has a reasonable expectation of privacy,

unless a more specific procedure governs.[32]

B. ELEMENTS OF THE *O'CONNOR* PROCEDURE

An *O'Connor* production application should be made to the trial judge, not a motions judge or a preliminary inquiry justice.[33] The initial application should be made before

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31 *R.* v. *Russell*, [1996] B.C.J. No. 1362 (S.C.), online: QL (BCJ).

32 *R.* v. *Hunter* (2000), 268 A.R. 75 at para. 20 (Prov. Ct.) [hereinafter *Hunter*]; *R.* v. *Zhang* (2001), 291 A.R. 248 (Prov. Ct.) [hereinafter *Zhang (No. 1)*]; *R.* v. *Szczerba*, [2002] A.J. No. 915 at para. 4 (Q.B.), online: QL (AJ) [hereinafter *Szczerba*]; *R.* v. *Trang* (2001), 46 C.R. (5th) 274 (Alta. Q.B.) [hereinafter *Trang (No. 1)*]; *R.* v. *S.S.*, [1997] O.J. No. 141 (Ct. J.), appeal dismissed on other grounds, [2001] O.J. No. 3489 (C.A.), online: QL (OR) [hereinafter *S.S.*]; *R.* v. *Razek* (2000), 589 A.P.R. 316 (Nfld. S.C.T.D.) [hereinafter *Razek*]; *R.* v. *B.M.* (1998), 130 C.C.C. (3d) 353 at 375 (Ont. C.A.) [hereinafter *B.M.*]; *R.* v. *Pacquette*, [1998] B.C.J. No. 3111 (S.C.), online: QL (BCJ), ("the matter of importance is privacy and not therapy": para. 16) [hereinafter *Pacquette*]; *B.C. Crown Counsel Manual*, *supra* note 7 at 140.

33 *O'Connor*, *supra* note 1 at 72, 75, 19. See, respecting the *O'Connor* procedure generally, J.A. Epp, "Production of Confidential Records held by a Third Party in Sexual Assault Cases: *R.* v. *O'Connor*" (1997) Ottawa L. Rev. 191 at 194; MacCrimmon, *supra* note 18 at 33; M. Peters, "*Regina* v. *O'Connor*: Third Party Disclosure" (1996) 17:3 Criminal Lawyers' Association Newsletter 16; E. Bennett, "Disclosure of Complainant's Medical and Therapeutic Records" (1996)

the jury is empanelled, along with other pretrial motions.[34] An initially unsuccessful accused may renew the application as the trial progresses and new information emerges.

Ordinarily, to initiate the application, the accused must serve a *subpoena duces tecum* on the record custodian. The accused must also file and serve an application for production on the Crown, the record custodian, and on all persons having privacy interests in the records, supported by an affidavit setting out the grounds for production.[35] *O'Connor* did not specify the notice period. The general civil rule of two clear days' notice could serve as a guideline.[36] Should justice and the circumstances so dictate, the judge may waive the requirement for a written application.[37]

A *voir dire* is not always necessary. In appropriate cases, the application may be decided on the basis of counsels' submissions. If a *voir dire* is held, *viva voce* evidence may be tendered. The *O'Connor* majority did not deal with the issue of whether a complainant or third party is compellable in the application. For the court to compel a potential witness to testify, the party proposing to call the witness must establish that the potential witness is likely to be able to testify to material evidence.[38] In the application, all that would be at issue would be the production of records. If the accused lacks evidence respecting the records sought, the accused would not be in a position to compel the complainant or witness to testify. Even were there sufficient evidence to compel the complainant or witness to testify, he or she could not be examined on the contents of the records, since whether those records are to be produced to the accused is the subject of the production application. He or she could only be examined respecting general matters, such as the existence or the timing of creation of the records.[39]

The application has two stages. The accused bears the burden of proof at each stage.[40]

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1 Can. Crim. L.R. 17 at 22; D. Paciocco & L. Stuesser, *The Law of Evidence*, 3d ed. (Toronto: Irwin Law, 2002) at 212.

34 *Ibid.* at 19.

35 *Ibid.* at 62.

36 *Alberta Rules of Court*, r. 386.

37 *O'Connor*, *supra* note 1 at 18.

38 *R.* v. *Trang*, [2002] A.J. No. 1008 at paras. 379-81, online: QL (AJ) [hereinafter *Trang (No. 3)*].

39 See the *E.B.* case respecting permissible questioning of a complainant or witness in a preliminary inquiry. In *E.B.*, the Ontario Court of Appeal permitted cross-examination at a preliminary inquiry for the purposes of establishing a foundation for a *Mills* application, so long as the cross-examination does not intrude on the personal or private domain of the subject of the record: "questions of a witness at a preliminary inquiry concerning his or her private record are not impermissible *per se*; rather, ... the purpose and reach of each question must be assessed, to evaluate whether the question seeks to elicit information touching upon the 'private or personal domain', or the 'intensely private aspects' of the life or recordings of the author of the record. Assuming that the questions are otherwise relevant, only questions of the latter type would be impermissible": *R.* v. *E.B.* (2002), 162 C.C.C. (3d) 451 at para. 40 (Ont. C.A.); see para. 61 [hereinafter *E.B.*].

40 *O'Connor*, *supra* note 1 at 18.

1. STAGE ONE: "LIKELY RELEVANCE"

At the first stage, the accused must satisfy the judge that the records sought are likely to contain information relevant to the "issues in the case" or the competence of witnesses.[41] The accused's burden on the "likely relevance" issue should not be understood as "onerous." The purpose of this burden is to prevent the accused from engaging in "speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming requests for production."[42] What the accused must establish is a "reasonable possibility" that the records contain relevant information.[43] The notion of "relevance" requires some unpacking:

(a) The relevance requirement entails that the accused must show more than that access to the record would be "useful" to the accused (this, as will be seen in Part VIII below, is the *Stinchcombe* standard of "relevance").
(b) While the accused must show that the records are likely to contain *relevant* information, the accused need not establish that the records are likely to contain *admissible* information. Relevance is a necessary but not sufficient condition for admissibility.
(c) "Relevance" means logical relevance.[44] To be relevant, the information purportedly in the record must tend to make a fact-in-issue more likely or less likely, more probable or less probable.[45] Relevance is determined on the basis of inference and informed common sense. It does not involve the balancing of policy concerns or rights.[46]
(d) Relevance is assessed in relation to facts-in-issue in litigation. Facts may come into issue respecting the following matters:
    (i) the *actus reus* of the offence;
    (ii) the *mens rea* of the offence (whether the accused acted intentionally or was wilfully blind or reckless) or whether the accused violated a penal negligence standard;
    (iii) defences (justifications or excuses);
    (iv) an abuse of process supporting a stay;
    (v) *Charter* violations reflecting on the admissibility of evidence;
    (vi) the credibility of the complainant or another witness (for example, respecting interests, motivations, or prejudices bearing on the accuracy of testimony);
    (vii) the reliability of any evidence (for example, respecting testimonial factors such as the quality of a witness' perception at the time of an offence and his or her memory since); or
    (viii) the testimonial competence of any witness (that is, the capacity of a witness, assessed at the time of testifying, to observe and recall

41 *Ibid.* at 19.
42 *Ibid.* at 20.
43 *Ibid.* at 19.
44 *Ibid.*
45 *R.* v. *Mohan* (1994), 89 C.C.C. (3d) 402 at 411 (S.C.C.).
46 *O'Connor*, *supra* note 1 at para. 147.

events, to communicate evidence, and to understand the duty to tell the truth[47]).

The *O'Connor* majority seemed at one point to suggest that an accused need not rely on evidence to discharge the "likely relevance" onus: "The onus we place on the accused should not be interpreted as an evidential burden requiring evidence and a *voir dire* in every case. It is simply an initial threshold to provide a basis for production which can be satisfied by oral submissions of counsel."[48] The majority, however, were making a point about procedure rather than evidence. The formality of a *voir dire* is not required in every case. In the right circumstances, counsel may point to, rely on, or make submissions about uncontested evidence or evidence already tendered in the proceedings. The majority was not suggesting that accuseds were entitled to rely on mere speculation to satisfy the onus. The majority, it will be recalled, required the application to be supported by an affidavit — which contains evidence. Furthermore, the majority gave some examples of sources of evidence that might assist in discharging the burden:[49]

(a) information received from a third party;[50]
(b) information revealed by the complainant or another witness in the Crown disclosure;
(c) information revealed by the complainant or another witness at the preliminary inquiry;[51] or
(d) information revealed through the examination in chief or cross-examination of Crown witnesses at trial.[52]

The implication of referring to these sources of evidence is that the mere existence of records does not, by itself, justify production. Production must be justified by further evidence.

The *O'Connor* majority indicated that two "presumptions" might assist an accused. A "possibility of materiality" arises if there is a "'reasonably close temporal connection

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47 *R.* v. *Farley* (1995), 99 C.C.C. (3d) 76 at 81 (Ont. C.A.); *R.* v. *Rockey* (1996), 110 C.C.C. (3d) 481 at 493-94 (S.C.C.).

48 *O'Connor*, *supra* note 1 at 18.

49 *Ibid.* at 19, 66.

50 *Ibid.* at 21; see *R.* v. *Ross* (1993) 79 C.C.C. (3d) 253 (N.S. C.A.); *R.* v. *Ross* (1993), 81 C.C.C. (3d) 234 (N.S. C.A.).

51 *Mills*, *supra* note 3 at para. 135, *O'Connor*, *supra* note 1 at para. 146; *R.* v. *J.F.S.*, [1997] O.J. No. 5328 (Prov. Div.), online: QL (ORP); *E.B.*, *supra* note 39. If, however, a preliminary inquiry judge were to restrict defence counsel's efforts to establish a foundation for a third-party records application, no practical remedy would be available, unless the judge's error could be characterized as "jurisdictional": *R.* v. *Al-Amoud* (1992), 10 O.R. (3d) 676 (Gen. Div.); *R.* v. *George* (1991), 69 C.C.C. (3d) 148 (Ont. C.A.).

52 In *R.* v. *T.L.C.* (1998), 238 A.R. 181 (Q.B.) [hereinafter *T.L.C.*], Coutu J. ordered a witness to be examined under oath to provide information to the accused, *before trial*, about the names of counsellors, therapists, or social workers seen by the complainant. If the examination disclosed the existence of records, the accused would then be required to make an *O'Connor* application to determine whether they should be produced.

between' the creation of the records and the date of the alleged commission of the offence"; or, in "historical" cases, if there is a "close temporal connection between the creation of records and the decision to bring charges against the accused."[53] In these circumstances, the claim of likely relevance is not founded on the mere existence of records, but on the peculiar relationship between the timing of the creation of the records and significant incidents: inferences may be drawn from the temporal relationships.

2. STAGE TWO: BALANCING

If an accused fails to establish likely relevance, the application is at an end. If the accused succeeds, the judge compels production of the records to the court to determine whether production to the accused is warranted.

At this second stage, the judge has the records and the third parties are aware of their contents, but the records have not been provided to the accused or Crown. To facilitate argument, the judge might provide a judicial summary of the records to the parties.[54] The judge is to examine the records. In light of their actual contents and the parties' submissions, the judge must balance the salutary and deleterious effects of production, consider whether denying the production "would constitute a reasonable limit on the ability of the accused to make full answer and defence,"[55] and determine whether and to what extent the records should be produced.[56] The *O'Connor* majority ruled that the judge should consider the following factors in the balancing:

(1) the extent to which the record is necessary for the accused to make full answer and defence;
(2) the probative value of the record in question;
(3) the nature and extent of the reasonable expectation of privacy vested in that record;[57]
(4) whether the production of the record would be premised on any discriminatory belief or bias; and
(5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question.[58]

The dissent urged three further considerations:

(6) the extent to which production of records of this nature would frustrate society's interest in encouraging the reporting of sexual offences;
(7) the extent to which production would frustrate society's interest in encouraging the acquisition of treatment by victims; and
(8) the effect on the integrity of the trial process of producing, or failing to produce, the record.[59]

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53 *O'Connor*, *supra* note 1 at 21-22.
54 *Ibid.* at 23.
55 *Ibid.*
56 *Ibid.*
57 See Part IV.B below.
58 *O'Connor*, *supra* note 1 at 23-24, 69.
59 *Ibid.* at 69. As we shall see below, these factors were re-inserted by Parliament into the second stage of the *Mills* procedure.

In the majority's opinion, the first two dissent considerations could be addressed through the imposition of conditions on production.[60] For example, the court might impose a ban on the publication of the record, restrict the persons to whom the record may be disclosed, or restrict the making of copies.[61] According to the majority, the "integrity of the trial process" related to admissibility at trial, not production.

Appeals from *O'Connor* procedure decisions take the following routes: A party to the proceedings must await the end of the trial and appeal. Third parties, such as complainants or record custodians, have different options. If the trial judge was a provincial court judge, third parties may seek a review of the decision through *certiorari* in the superior court. If the trial judge was a superior court judge, third parties may seek leave to appeal directly to the Supreme Court, under s. 40(1) of the *Supreme Court Act*.[62]

IV. *O'CONNOR* AND RECORDS BEARING NO REASONABLE EXPECTATION OF PRIVACY: THE *MCPHERSON* PROCEDURE

O'Connor governs if there is a reasonable expectation of privacy in relation to third-party records. The problem then is whether *O'Connor* governs only if there is a reasonable expectation of privacy. We will consider (A) authorities that suggest that if no person has a reasonable expectation of privacy in relation to a record, *O'Connor* does not apply, and (B) factors relevant to the determination of whether a reasonable expectation of privacy exists.

A. NO PRIVACY, NO *O'CONNOR*

In her *O'Connor* dissent, L'Heureux-Dubé J. stated that "the principles and guidelines outlined herein are equally applicable to *any* record, in the hands of a third party, in which a reasonable expectation of privacy lies."[63] This statement suggested that, absent any reasonable expectation of privacy in relation to a record, *O'Connor* would not apply. The majority decision did not speak directly to this issue. The majority presupposed (as was warranted by the facts of the case) records bearing third-party privacy interests.

Courts on both coasts have held that if complainants provide information to reporters for the purposes of mass-media publication, the complainants have no reasonable expectation of privacy in relation to the reporters' records, and *O'Connor* and *Mills* do not apply.[64]

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60 *Ibid.* at 24.

61 *Ibid.*

62 R.S.C. 1985, c. S-26. *L.L.A.* v. *A.B.*, [1995] 4 S.C.R. 536, 103 C.C.C. (3d) 92 at 104 [hereinafter *L.L.A.* cited to C.C.C.].

63 *O'Connor*, *supra* note 1 at 49.

64 *R.* v. *Hughes (No. 3)*, [1998] B.C.J. No. 1694 at para. 27 (S.C.), online: QL (BCJ), appeal dismissed (2001), 156 C.C.C. (3d) 206 (B.C. C.A.) [hereinafter *Hughes*]; *R.* v. *Regan* (1997) 113 C.C.C. (3d) 237 at para. 34 (N.S. C.A.), leave to appeal refused [1997] S.C.C.A. No. 129, online: QL (SCC) [hereinafter *Regan* (N.S. C.A.)].

In *McPherson*,[65] Veit J. held that if no individual has a reasonable expectation of privacy in relation to records, the *O'Connor* procedure does not apply. In *McPherson*, the accused applied for production of utility records and cable television records. Relying on *Plant*,[66] Veit J. held that no individual had a reasonable expectation of privacy in relation to these records. Hence, she distinguished *O'Connor*.

If *O'Connor* does not govern, we are left with another problem: what procedure should govern? This issue has not been settled. A "modified" *O'Connor* procedure could be adopted — for example, stage one, without stage two, or with only an attenuated stage two.[67] No privacy or privacy-related issues would be considered in the balancing. Likely relevance and the extent to which the record is necessary for the accused to make full answer and defence would be the remaining key issues.

In the *McPherson* case, Veit J. provided a good procedural road map for non-*O'Connor* third-party records applications. With an eye to *O'Connor*, Veit J. was of the view that the court was entitled to craft a process that would ensure trial fairness and protect the accused's right to make full answer and defence.[68] The *McPherson* procedure has the following elements:

(a) The application need not be heard by the trial judge and may be brought before trial.

(b) The accused's application should comply with the application for third-party records procedure in r. 209 of the *Alberta Rules of Court*. Rule 209(1) of the *Alberta Rules of Court* provides as follows:

> On application, the Court may, with or without conditions, direct the production of a record at a date, time and place specified when
>
> (a) the record is in the possession, custody or power of a person who is not a party to the action,
>
> (b) a party to the action has reason to believe that the record is relevant and material, and
>
> (c) the person in possession, custody or power of the record might be compelled to produce it at trial.

Notice must be given to the record holder and the Crown. The motion should comply with the formal requirements of r. 384. Rule 386 should govern the timing of the application. Unless leave is given, "there shall be at least two days between the service of a motion in an action and the day for hearing."

(c) On the return of the application, the record holder is entitled to appear and argue against production.

(d) "The applicant needs only to establish a low level of likely relevance in order to obtain the assistance of the court."[69]

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65 *R.* v. *McPherson* (1996), 183 A.R. 240 (Q.B.) [hereinafter *McPherson*].

66 *R.* v. *Plant*, [1993] 3 S.C.R. 281 [hereinafter *Plant*].

67 *Hughes*, *supra* note 64 at para. 28; *B.M.*, *supra* note 32.

68 *McPherson*, *supra* note 65 at para. 18.

69 *Ibid.* at para. 17.

The *McPherson* or a modified *O'Connor* procedure would apply only if the judge were willing to find that no individual held a reasonable expectation of privacy in relation to the records sought. In any case in which the reasonable expectation of privacy is a live issue, the *O'Connor* procedure is appropriate — unless the circumstances are governed by *McClure*, *Mills*, or *Stinchcombe*. One caution: the *Sutherland* case suggests that if the *Mills* or *O'Connor* procedure has been employed, the accused cannot thereafter claim that the records bear no reasonable expectation of privacy: "By bringing the application under s. 278.3 at trial, the appellant accepted that F.J. had a reasonable expectation of privacy in the records."[70] The election of procedure, in effect, may constitute a "waiver" of an argument. Prudence therefore dictates that the accused should request a preliminary ruling on whether a reasonable expectation of privacy subsists in relation to the records, before bringing an *O'Connor* or *Mills* application. If the judge finds no reasonable expectation of privacy, the accused may proceed without reliance on *O'Connor* or *Mills*. Otherwise, the accused should proceed with an *O'Connor* or *Mills* application.

B. FACTORS RELEVANT TO THE DETERMINATION OF WHETHER A REASONABLE EXPECTATION OF PRIVACY EXISTS IN RELATION TO RECORDS

To determine whether an individual has a "reasonable expectation of privacy" in relation to information contained in a record, the s. 8 jurisprudence around "reasonable expectations of privacy" should be relevant. The "totality of circumstances" must be considered; of particular concern will be the individual's subjective expectations of privacy and the objective reasonableness of those expectations.[71] Some factors that should be considered to determine whether an individual has the requisite reasonable expectation of privacy are as follows:[72]

(a) the circumstances in which the record containing the information was created;
(b) whether the individual was aware that the information was recorded in the record;
(c) the ownership of the record containing the information;[73]
(d) whether the record was abandoned, disposed of, or discarded by the individual;[74]
(e) whether the record or the information contained in the record was transmitted to a record custodian;

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70 *R.* v. *Sutherland* (2001), 156 C.C.C. (3d) 264 at para. 12 (Ont. C.A.).

71 *R.* v. *Edwards*, [1996] 1 S.C.R. 128.

72 These factors are also relevant to balancing under the *O'Connor* and *Mills* procedures, not only on the issue of whether an individual has a reasonable expectation of privacy, but on the issue of the scope or extent of that interest.

73 If the individual owned the record, that would strengthen the privacy claim; the mere fact that a third party owned the record, however, would not entail that the individual would not have an expectation of privacy in the information contained in the record. The legal treatment of the record and the information contained in the record must be distinguished. See *R.* v. *Shearing*, [2002] S.C.J. No. 59 at paras. 91-92, online: QL (SCC) [hereinafter *Shearing*].

74 *R.* v. *Stillman*, [1997] 1 S.C.R. 607.

(f) whether assurances of confidentiality were made by the record custodian;
(g) the security arrangements for the record;
(h) the nature of the record custodian or the relationship between the custodian and the individual (for example, if the relationship was one of physician–patient, psychiatrist–client, or "helping professional"–client);
(i) whether the information has been disclosed to any person other than the custodian, and, if so,
  (i) whether or not the disclosure was intentional;[75]
  (ii) the number of persons to whom the disclosure was made;
  (iii) the nature of the persons or the relationship between the complainant or witness and the persons to whom the information was disclosed; and
  (iv) the purposes of the disclosure;[76]
(j) the nature of the information (for example, information which tends to reveal intimate details of lifestyle and personal choices, as opposed to information about electricity consumption;[77] whether the information relates to regulated activities and the information is subject to administrative inspection).

The mere prospect that records may be disclosed through court process does not entail that a person has no reasonable expectation of privacy in relation to information contained in the records. Virtually any record may be disclosed through court process.[78]

V. *O'CONNOR* AND "SOFT-PROTECTED" RECORDS

An individual may have a reasonable expectation that records will be kept private, even though no privilege attaches to the records. For example, university students would doubtless have reasonable expectations that their universities would keep their academic records private, and they might enforce their expectations through *Freedom of Information and Protection of Privacy* legislation or through actions based on contract or fiduciary duties; but there is no established "university–student" privilege.

In the presence of a reasonable expectation of privacy, but in the absence of a claim of privilege, *O'Connor* certainly has room to operate. What, however, of records in the hands of third parties that bear not only a reasonable expectation of privacy, but support a privilege claim? Furthermore, what of records in the hands of third parties for which a public interest immunity is claimed?[79]

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75 An unintentional disclosure will not, without more, terminate a reasonable expectation of privacy: *Shearing*, *supra* note 73 at para. 92. Reckless disclosure (advertence to possibility of disclosure and persistence in conduct leading to disclosure) could conceivably undermine a privacy claim.

76 For example, if disclosure was for limited purposes: see *R.* v. *Dyment*, [1988] 2 S.C.R. 145, *R.* v. *Colarusso*, [1994] 1 S.C.R. 20.

77 *Plant*, *supra* note 66.

78 *A.M.*, *supra* note 10 at para. 26.

79 "Privilege" attaches to communications between parties to certain relationships. Immunities relate to types of information, contents of records, or records that do not necessarily relate to communications between parties; the immunity claimant resists disclosure or production because

As a starting point, a finding of privilege or public interest immunity should not "trump" all efforts to obtain access to records. Even in the case of solicitor–client privilege, one of the best-protected forms of privilege, records may be disclosed through a third-party records application.[80] Privileges or immunities with lesser protection, then, should not be absolute bars to access through a third-party records application. Given that access to privileged or immunized third-party records should be legally possible, a number of issues remain: Does the *O'Connor* procedure (or any production procedure) apply respecting all, some, or no privileged or "immunized" records? If the *O'Connor* procedure is available respecting at least some of these records, does it apply without any modification? If the *O'Connor* procedure applies respecting at least some of these records but requires modifications, what might those modifications be? I shall argue that an *O'Connor* procedure should apply in applications for records subject to a claim of privilege or immunity, if the privilege or immunity is assessed on a case-by-case basis, but the procedure must be modified to permit judicial consideration of relevant policies protecting the information. To support my contentions, I shall (A) provide a typology of privilege and immunity claims and identify the species of privilege and immunities for which an *O'Connor* procedure is not appropriate; (B) canvass the argument that *O'Connor* should apply respecting the remaining types of records with no modifications, and the response to that argument; and (C) set out a modified *O'Connor* procedure for applications for "soft-protected" third-party records.

A. TYPES OF PRIVILEGE AND IMMUNITIES: THE APPROPRIATENESS OF THE *O'CONNOR* PROCEDURE

Both privileges and public interest immunities have policy foundations. The information covered by a privilege or immunity may be relevant to facts-in-issue in litigation. Ordinarily, admissibility is assessed on an item-by-item examination of potential evidence, with relevance set against exclusionary rules (such as the hearsay, bolstering, or character rules) and the prejudicial effects of the potential evidence. Information covered by a privilege or immunity does not receive this item-by-item treatment. The potential evidence is excluded as a set, without examination of the individual bits of potential evidence, to protect socially important relationships and activities. Protection "flows down" to the covered information from its policy setting.[81]

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of the public interests served by secrecy or privacy: *Carey* v. *Ontario*, [1986] 2 S.C.R. 637 at 653 [hereinafter *Carey*].

[80] *McClure*, *supra* note 2.

[81] "Such communications are excluded not because the evidence is not relevant, but rather because, there are overriding policy reasons to exclude this relevant evidence": *R.* v. *Gruenke*, [1991] 3 S.C.R. 263 at 286 [hereinafter *Gruenke*].

1. PRIVILEGES[82]

Privileges are of two types — "class privilege" and "case-by-case privilege."[83] Both concern confidential communications between participants in "institutionalized," socially stable and socially favoured relationships. The two types of privilege are differentiated by the tests for recognizing privilege and by the "hardness" or degree of resistance to disclosure.

The term "class privilege" applies to confidential communications between parties to specific defined relationships.[84] The communications are presumptively "inadmissible." The party relying on the privilege must establish the facts attracting the privilege. Usually, this burden can be easily discharged by evidence of the relationship and the confidentiality of the communications. The party seeking disclosure bears the burden of overcoming (*prima facie*) privilege. Class privilege provides "hard protection" in the sense that communications are protected from disclosure, in the absence of tightly regulated exceptions. The confidentiality cannot be abridged through judicial discretion, through any procedure involving a balancing of interests (such as the *O'Connor* and *Mills* procedures).[85] At present the common law recognizes two class privileges — informer privilege and solicitor–client privilege. They are founded on the judgment that the preservation of confidentiality for the relationships involved is crucial to the operation of the justice system. "Hard" protection is required to assure confidentiality to persons in these relationships. The sole statutorily-recognized class privilege is "spousal privilege," established by s. 4(3) of the *Canada Evidence Act*.[86]

The term "case-by-case" privilege applies to confidential communications between parties to defined relationships other than relationships to which class privilege applies. These relationships tend to be officially-sanctioned professional "service-provider"–client relationships, and include the physician–patient, psychiatrist–client, religious

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[82] The discussion of privilege and public interest immunity takes place under the shadow of the "gang trials" currently running in Alberta — notably, the *Trang* and *Chan* cases. Crown and defence counsel and the judges involved have been thoroughly working over many aspects of the law of privilege and public interest immunity in the context of Crown disclosure. I do not purport to do justice to the full breadth and wealth of the arguments and decisions in these cases. In the following, I attempt to provide a summary of the current state of the law, with only modest efforts at explication and justification. More detailed treatments of the truly extraordinary "gang trials" must await another forum.

[83] *R.* v. *Trang* (2002), 50 C.R. (5th) 242 at para. 33 (Alta. Q.B.) [hereinafter *Trang (No. 2)*]; *Chan*, *supra* note 23 at para. 51; *McClure*, *supra* note 2 at para. 26; *Gruenke*, *supra* note 81 at 286; and Paciocco & Stuesser, *supra* note 33 at 182.

[84] "At common law, the main condition for a class privilege to be recognized in favour of certain communications is that the category of actors be limited to certain people": *L.L.A.*, *supra* note 62 at para. 70.

[85] *R.* v. *Leipert*, [1997] 1 S.C.R. 281 at paras. 9-14, [hereinafter *Leipert*]; *McClure*, *supra* note 2 at paras. 17, 28, 31. Of course, the judgment that some relationships deserve special protection entails that other relationships — all the other relationships — do not. From the standpoint of other relationships, one might discern a type of judicial devaluation of these relationships. From the standpoint of accuseds, one might discern the courts' willingness to shift a higher quantum of risk of wrongful conviction onto accuseds to protect these special relationships.

[86] R.S.C. 1985, c. C-5 [hereinafter *Canada Evidence Act*].

leader–congregationalist, and journalist–source relationships. The law does not grant parties to such relationships strong assurances of confidentiality. Communications made within these relationships are presumptively "admissible." The privilege provides "soft protection" in the sense that whether or not the communications will be disclosed depends on the judicial assessment of relevant factors on a case-by-case basis. The person seeking to rely on the privilege bears the burden of establishing that the criteria are satisfied in the particular case.[87] The over-arching test judges employ to determine privilege is known as the "Wigmore test."[88] Under this test, for privilege to be recognized in a particular case, the following four criteria must be satisfied:

(a) the communications must have originated in a confidence that they would not be disclosed;
(b) confidentiality must be essential to the full and satisfactory relationship between the parties;
(c) the relationship must be one which in the opinion of the community should be fostered and promoted; and
(d) the injury that would be caused to the relationship by disclosure of the communication would exceed the benefit gained for the litigation by the disclosure of the information.

The last criterion, which requires a cost-benefit analysis, is usually contentious but decisive.

2. PUBLIC INTEREST IMMUNITIES

Like communication privileges, public interest immunities are of two types — those with "hard" protection and those with "soft." Section 39 of the *Canada Evidence Act* establishes "hard protection" for (*inter alia*) cabinet confidences, if a certification is duly made under this section. This section provides as follows:

> (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court ... by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court.... [89]
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> (2) For the purpose of subsection (1), "a confidence of the Queen's Privy Council for Canada" includes ... information contained in
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> (a) a memorandum the purpose of which is to present proposals or recommendations to Council;

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[87] *R.* v. *Zhang*, [2002] A.J. No. 331 at para. 34 (Prov. Ct.), online: QL (AJ) [hereinafter *Zhang (No. 2)*].

[88] See, *e.g.*, *Chan*, *supra* note 23 at para. 48; *McClure*, *supra* note 2 at para. 29; and J. Sopinka, S.N. Lederman, & A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at 724.

[89] Certification does not operate retroactively. Hence, certification will only block production or disclosure of records that have not already been produced: *Babcock* v. *Canada (A.G.)*, [2002] S.C.J. No. 58 at paras. 27, 33, online: QL (SCC) [hereinafter *Babcock*]. See Sopinka, Lederman & Bryant, *ibid.* at 859.

(b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

(c) an agendum of Council or a record recording deliberations or decisions of Council;

(d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record the purpose of which is to brief ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and

(f) draft legislation.

This section establishes "hard protection" because certification under s. 39(1) generally entails that disclosure must be refused, "without examination or hearing of the information by the court." Neither balancing nor consideration of public or private interests is permitted.

Non-s. 39 public interest immunities are of two types. Some public interest immunities are recognized at common law. These include immunities from the requirement to disclose information relating to police investigative techniques[90] and ongoing police investigations,[91] and from the requirement to disclose information if disclosure would likely result in injury to individuals.[92] In provincial jurisdictions that lack the statutory equivalent of s. 39, cabinet confidences remain protected by common law public interest immunity.[93] Public interest immunity may also be claimed under s. 37 of the *Canada Evidence Act*, which provides:

(1) Subject to sections 38 to 38.16, a minister of the Crown in right of Canada or other official may object to the disclosure of information before a court ... by certifying orally or in writing to the court ... that the information should not be disclosed on the grounds of a specified public interest....

(2) If an objection to the disclosure of information is made before a superior court, that court may determine the objection.

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[90] *Trang (No. 2)*, *supra* note 83 at para. 49; *Chan*, *supra* note 23 at para. 127; *R.* v. *Richards* (1997), 115 C.C.C. (3d) 377 (Ont. C.A.) at para. 13 [hereinafter *Richards*]; *Martin Committee Report*, *supra* note 8 at 216. Police internal communications, and police intelligence materials, including databases, are protected, if at all, under this or the following two common law categories, under s. 37 of the *Canada Evidence Act*, or under the Wigmore test: *Trang (No. 2)*, *supra* note 83 at paras. 59, 63; *Chan*, *supra* note 23 at paras. 131-32, and 136; *R.* v. *Garofoli*, [1990] 2 S.C.R. 1421 at 1460, [hereinafter *Garofoli* cited to S.C.R.]. On the issue of investigative privileges, see R.W. Hubbard, P.J. De Freitas & P.M. Brauti, "Informer and Police Investigatory Privilege at the Preliminary Inquiry" (1999) 41 C.L.Q. 68 at 75.

[91] *Trang (No. 2)*, *supra* note 83 at para. 52; *Garofoli*, *supra* note 90. Once investigations are concluded, they are no longer "ongoing," and non-disclosure cannot be justified on this basis: *ibid.*; see *Martin Committee Report*, *supra* note 8 at 147.

[92] *Trang (No. 2)*, *supra* note 83 at para. 54; *Garofoli*, *supra* note 90; and Paciocco & Stuesser, *supra* note 33 at 218.

[93] *Carey*, *supra* note 79; Sopinka, Lederman & Bryant, *supra* note 88 at 861.

> (3) If an objection to the disclosure of information is made before a court, person or body other than a superior court, the objection may be determined, on application, by
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> (a) the Federal Court Trial Division, in the case of a person or body vested with power to compel production by or pursuant to an Act of Parliament if the person or body is not a court established under a law of a province; or
>
> (b) the trial division or trial court of the superior court of the province within which the court, person or body exercises its jurisdiction, in any other case.[94]

Case law has established that s. 37 supplements the common law, and has not replaced it.[95] Section 37 may be relied on as a fall-back immunity argument if a court refuses to recognize a common law privilege or public interest immunity, or it may be relied on directly, without first seeking the application of the common law.[96]

Non-s. 39 public interest immunities, whether supported by common law or s. 37, enjoy only "soft," case-by-case protection. Disclosure may be ordered if, on balance, the interest of the accused in making full answer and defence outweighs the public interest in preserving privacy for information. The balancing concerns the "injuries which would be caused by a possible denial of justice as a result of non-disclosure on the one hand, and on the other, the injury to the public as a result of revelation of government documents that were never intended to be made public."[97]

3. APPROPRIATENESS OF THE *O'CONNOR* PROCEDURE

The *O'Connor* procedure is designed to balance interests. Hence, the *O'Connor* procedure should be a good procedural vehicle for applications for third-party records

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[94] *Supra* note 86. A new and complex set of provisions has been enacted respecting information for which immunity from disclosure or production is sought on the grounds of national security or threats to international relations: *ibid.*, ss. 38-38.16. See Paciocco & Stuesser, *supra* note 33 at 223 and H. Stewart, "Rule of Law or Executive Fiat? Bill C-36 and Public Interest Immunity," in R.L. Daniels, P. Macklem & K. Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 217.

[95] *Richards*, *supra* note 90 at para. 7; *Zhang (No. 2)*, *supra* note 87 at para. 56; *Trang (No. 1)*, *supra* note 32 at para. 34; *Chan*, *supra* note 23 at para. 121. On the level of principle, there is a presumption that legislation does not supplant the common law; "So long as legislation does not entirely duplicate or subsume the common law, so long as the common law rules or remedies have some distinct purpose of their own, the courts are loath to get rid of them": R. Sullivan, *Statutory Interpretation* (Concord: Irwin Law, 1997) at c. 2, B.2 [hereinafter *Statutory Interpretation*]. By way of analogy, consider *R.* v. *Abdi* (1997), 116 C.C.C. (3d) 385 (Ont. C.A.), which is authority for the proposition that the enactment of s. 8 of the *Canada Evidence Act* (relating to handwriting comparisons) did not oust the common law respecting handwriting comparisons. McLachlin C.J.C. did state in the *Babcock* case that "[s]ection 37 relates to all claims for Crown privilege, except Cabinet confidences, or confidences of the Queen's Privy Council": *Babcock*, *supra* note 89 at para. 17. That is as close as this case gets to addressing the issue of the survival of common law public interest immunity under s. 37. I discern nothing in *Babcock* that decisively evaporates common law public interest immunity.

[96] *Richards*, *supra* note 90 at para. 8; *Zhang (No. 2)*, *supra* note 87 at para. 56.

[97] *Trang (No. 2)*, *supra* note 83 at paras. 41, 55; *Trang (No. 1)*, *supra* note 32 at para. 42; see *Chan*, *supra* note 23 at paras. 49, 127; *Babcock*, *supra* note 89 at para. 17; *Carey*, *supra* note 79 at 652-53, 670-71; and Sopinka, Lederman & Bryant, *supra* note 88 at 868.

with "soft" privilege or public interest immunity protection. For the same reason, the *O'Connor* procedure is not an appropriate route for an application for third-party records with "hard" privilege or public interest immunity protection. I shall discuss the procedures appropriate to applications for "hard-protected" records in Part VI. In the remainder of this section, I shall discuss the application of *O'Connor* to "soft-protected" privileges and public interest immunities.

B. *O'CONNOR:* AGAINST AND FOR MODIFICATION

An argument might be advanced that *O'Connor* needs no modification to deal with "soft-protected" privileges and immunities. First, reference could be made to the strong distinction made in *Shearing* between production and admissibility.[98] One might argue that case-by-case privileges should be understood as "evidential privileges" that relate to the admissibility of evidence at trial.[99] They should not be developed, as solicitor–client privilege has been developed, into rules governing pretrial applications. Hence, these privileges should not receive any special treatment in production applications. Second, the *O'Connor* majority excluded public policy factors (in that case, respecting society's interest in encouraging reporting of sexual offences and in victims' acquisition of treatment) from the balancing factors. Public policy factors are precisely what distinguish privilege and immunity claims from mere claims to reasonable expectations of privacy. Third, in the *L.L.A.* case, L'Heureux-Dubé J. considered whether case-by-case privilege should be recognized for private records of sexual assault complainants. She declined to make privilege the foundation of her opinion. Instead, she considered that "[a] better approach to this difficult problem ... lies in the balancing of ... *Charter* rights to privacy and equality of the sexual assault complainant with ... the accused's *Charter* rights to a fair trial and to full answer and defence."[100] Similarly, the *Mills* majority stated that "Wigmore's approach" is not "sufficient" if "state action is implicated, and competing *Charter* rights are at stake."[101] The balancing approach was preferred. Thus, balancing, not privilege, is the best conceptual route for dealing with privacy interests in third-party records.

The response to the "no modification" argument is as follows: Respecting the first point, the admissibility/production distinction should not be exaggerated. Some rules do double duty, applying both at trial and in pretrial applications. Solicitor–client privilege is but an example. I note that, as an argument by analogy, *Stinchcombe* refers generically to "privilege" as a basis for resisting pretrial disclosure,[102] and that case-by-case privileges and non-s. 39 public interest immunities have been relied on as bases for resisting *Stinchcombe* disclosure.[103] Respecting *O'Connor*, it should be recalled that the Supreme Court did not approach the production issue through a consideration of privilege. The Court was dealing only with records bearing a reasonable expectation

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98 *Shearing*, *supra* note 73.

99 See *R.* v. *Card*, [2002] A.J. No. 737 at para. 13 (Q.B.), online: QL (AJ) [hereinafter *Card*].

100 *L.L.A.*, *supra* note 62 at para. 78.

101 *Mills*, *supra* note 3 at para. 84.

102 *Stinchcombe*, *supra* note 4 at 339.

103 See, *e.g.*, *Chan*, *supra* note 23.

of privacy. Hence, the *O'Connor* procedure was developed without specific regard for the additional legal features of privileged records. Respecting the approach of L'Heureux-Dubé J. in *L.L.A.*, two matters must be taken into account. First, she did not endorse a "pure" privilege approach, since "the determination as to whether privilege should be granted in a particular case is based purely on public policy considerations; it does not involve the balancing of the complainant's *Charter* rights ... with those of the accused to make full answer and defence."[104] That is, the traditional case-by-case privilege analysis does not, by itself, leave proper room for the balancing of constitutional rights. Privilege is not enough. Additional principles and another procedure, along the lines of *O'Connor*, are necessary. Second, the abandonment of privilege occasioned no real policy loss for L'Heureux-Dubé J., because of her casting of the balancing factors. The factors excluded by the majority concerned public policy issues; these are the factors necessary to permit privilege and immunity policy issues to be considered in balancing. In other words, L'Heureux-Dubé J. advocated a procedure that was appropriate for cases of "soft-protected" privileges and immunities. Finally, it would seem at least odd to treat records attracting privilege in the same way as records for which there is only a reasonable expectation of privacy. The law has recognized privileged communications and public interest immunities as "worthy of confidentiality," as worthy of protection outside of the production context.[105] If special protection is warranted at trial, why should special protection not be warranted before trial? The reasons that support the recognition of privilege or immunity at trial may apply at the production stage as well: once information is disclosed, whether at or before trial, the damage may be done.

C. *O'CONNOR* MODIFIED

The modified *O'Connor* procedure could follow these steps:[106]

(a) The accused would make an application in accordance with the *O'Connor* procedure.

(b) The accused would making a showing of likely relevance, under the "stage one" rules. Without this showing, there would be no point in considering any other production issue.

(c) If the accused does not show likely relevance, the application ends. If the accused shows likely relevance, the records should be produced to the judge for review. The records would not be produced to the defence at this time. The judge could provide summaries of the records to counsel to assist in framing arguments.[107]

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104 *L.L.A.*, *supra* note 62 at para. 76.

105 *McClure*, *supra* note 2 at para. 26.

106 Sulyma J. has recommended this type of procedure for privilege claims in disclosure cases: *Chan*, *supra* note 23 at para. 89. As in the *O'Connor* procedure, the application should be made before the trial judge, not at a preliminary inquiry: see Hubbard, De Frietas & Brauti, *supra* note 90 at 86.

107 *R.* v. *Brown (Disclosure)*, [1997] O.J. No. 6163 at para. 7 (Ct. J. (Gen. Div.)), online: QL (ORP) [hereinafter *Brown (Disclosure)*].

(d) Persons with an interest in the records would have the opportunity to tender evidence supporting case-by-case privilege or public interest immunity (counsels' submissions may suffice in appropriate cases). Persons advocating privilege should establish the privilege on a balance of probabilities.[108]

(e) If no grounds are established for a finding of privilege or public interest immunity, the application proceeds in accordance with the usual "stage two" rules.

(f) If grounds are established for a finding of privilege or public interest immunity, the accused may take up the "tactical burden," and show that the privilege or immunity either does not attach or has been waived. Waiver must be established on a balance of probabilities.[109] If the accused succeeds in rebutting the privilege or immunity claim, the application proceeds in accordance with the usual "stage two" rules.

(g) If the accused does not succeed in rebutting the privilege or immunity claim (that is, the judge remains of the opinion that it is likely that the materials are privileged), the application proceeds with the "stage two" rules, but the judge is entitled to take into consideration the public policy factors that support the recognition of privilege or immunity in the determination of whether the records should be produced to the accused. The precise factors to be considered would vary with the privilege or immunity claimed. The judge could hear representations from counsel respecting factors appropriate for consideration before embarking on this stage of the application.

(h) In a public interest immunity case, the state would have the option of making a certification under s. 37 of the *Canada Evidence Act*. Balancing would take place under s. 37(2).

VI. *O'CONNOR* AND "HARD-PROTECTED" PRIVILEGE AND IMMUNITIES

An accused may seek access to third-party records that receive "hard" protection, either from s. 39 of the *Canada Evidence Act* or a class privilege. I will describe the procedures the accused might use in an effort to obtain access to "hard-protected" records.

A. THIRD-PARTY RECORDS AND SECTION 39 OF THE *CANADA EVIDENCE ACT*

An accused might seek access to cabinet confidences as a form of third-party records. These sorts of records could have a bearing on prosecutions relating to political protests.[110] It is conceivable that governmental discussions might also be relevant to

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108 See *Trang (No. 3)*, *supra* note 38 at para. 362.

109 *R.* v. *Chan*, [2002] A.J. No. 1019 at paras. 50, 94, online: QL (AJ) [hereinafter *Chan (No. 2)*].

110 One might recall that statements allegedly made by Prime Minister Chrétien were asserted to be relevant by protesters appearing in the public hearing respecting RCMP conduct at the University of British Columbia campus during the November 1997 Asia-Pacific Economic Co-operation Conference. Commissioner Hughes, author of the interim report for the Commission of Public Complaints Against the RCMP, held that there was an insufficient evidential basis to warrant summonsing the Prime Minister to the public inquiry. See "Ruling on Applications to Call Additional Government Witnesses," online: Commission for Public Complaints Against the

prosecutions of persons alleged to have engaged in terrorist acts. If a certification is made under s. 39(1) of the *Canada Evidence Act*, the accused's recourse is extremely limited.

The accused may apply for judicial review of the certification before any body mentioned in s. 39,[111] alleging that the certification was invalid. According to McLachlin J. in *Babcock*, the certification may be challenged on the following bases:

(a) the information purported certified does not fall within s. 39(1); or
(b) the Clerk or minister has improperly exercised his or her discretion: for example, if he or she acted for improper motives.[112]

Furthermore, certification must also be done by a "minister of the Crown" or the "Clerk of the Privy Council," so a certification is only valid if made by one of these persons. The accused cannot argue "waiver" in response to a s. 39 certification. The concept of "waiver" does not apply to records covered by a s. 39 certification.[113]

If the accused succeeds in quashing the certification, the accused is not automatically entitled to production of the records. The judicial review did not concern the relevance of the records or reasons for or against production. The accused would go on to make an *O'Connor* application for the records.

B. THE *MCCLURE* PROCEDURE

An accused may seek third-party records covered by a class privilege. The *O'Connor* procedure is not appropriate. An accused may obtain access to information in records covered by a class privilege through the procedure developed in the *Leipert*[114] and *McClure* cases.[115]

1. RELEVANT PRIVILEGES

A person resisting production must establish the privilege claim on a balance of probabilities. As indicated above, two types of communications have received class privilege status — informers' communications and solicitor–client communications.[116]

R.C.M.P. <www.cpc-cpp.gc.ca/ReportsDoc/ethughesruling.doc.> (date accessed: 27 August 2002). In the course of the inquiry, counsel for the Commission requested the Government of Canada to disclose all government records relevant to the hearing. In (partial) response, two s. 39(1) certificates were filed. An application was made for a declaration that s. 39 was unconstitutional. The Federal Court of Appeal upheld the constitutionality of s. 39: *Singh* v. *Canada (A.G.)*, [2000] 3 F.C. 185 (C.A.), leave to appeal refused [2000] S.C.C.A. No. 92.

111 *Babcock*, *supra* note 89 at para. 43.

112 *Ibid.* at para. 39.

113 *Ibid.* at para. 32.

114 *Leipert*, *supra* note 85.

115 *McClure*, *supra* note 2; see also *R.* v. *Brown* (2002), 50 C.R. (5th) 1 at para. 4 (S.C.C.) [hereinafter *Brown*].

116 While spousal privilege is another class privilege, it has not yet been determined whether this relationship too will receive the protection accorded the other class privileges.

a. Informer Privilege

Informer privilege protects the identity of an informer from disclosure; it applies to information that could be used to identify the informer.[117] The privilege belongs to the state, but cannot be waived without the informer's consent.[118] Typically, an informer has provided information to the police about an alleged crime. Informer privilege may also apply to persons who have provided other information to other state agencies — in particular, child welfare agencies — respecting the alleged misconduct of others.[119]

b. Solicitor–Client Privilege

The general rule is that solicitor–client privilege applies to

(i) communications,
(ii) between solicitor and client,
(iii) exchanged in any consultation for legal advice,
(iv) if the communications were intended to be kept confidential.[120]

The proponent of privilege must establish it on a balance of probabilities.[121]

Battles are currently being fought over whether records prepared in anticipation of litigation and counsels' work product records fall under solicitor–client privilege or case-by-case privilege (and over the relationship of some police records to these heads of privilege). "Anticipation of litigation" privilege applies to records prepared for the dominant purpose of submission to a legal advisor for the advice and use in litigation which has been commenced or is contemplated.[122] "Work product" privilege (insofar as it can be distinguished from the preceding privilege) applies to records of thought processes or considerations of counsel in the preparation of a case, including records such as file notes, memoranda to file, correspondence, legal opinions, and opinions on the weight of evidence, the strength of a case, or trial strategies.[123] In the *Chan* case,

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117 *Leipert*, *supra* note 85 at paras. 9, 18. Technically, informer privilege might better be described as a type of public interest immunity. See Hubbard, De Freitas & Bauti, *supra* note 90; Sopinka, Lederman & Bryant, *supra* note 88 at 882-83.

118 *Ibid.* at para. 15.

119 *Dudley* v. *Doe* (1997), 205 A.R. 376 at para. 26ff (Q.B.); and *R.* v. *Lefebvre*, [1994] B.C.J. No. 2819 at para. 32 (*voir dire*) (Prov. Ct.), online: QL (BCJ).

120 See *R.* v. *Campbell and Shirose*, [1999] 1 S.C.R. 565 at para. 49 [hereinafter *Shirose*]; Paciocco & Stuesser, *supra* note 33 at 186; and Sopinka, Lederman & Bryant, *supra* note 88 at 728.

121 *Trang (No. 3)*, *supra* note 38 at paras. 362-63.

122 *Nova* v. *Guelph Engineering Co.*, [1984] 3 W.W.R. 314 (Alta. C.A.); *Opron Construction Co.* v. *Alberta* (1989), 100 A.R. 58 (C.A.); *Trang (No. 2)*, *supra* note 83 at paras. 65, 83.

123 *Trang (No. 2)*, *ibid.* at para. 67; *Chan*, *supra* note 23 at para. 95; *Martin Committee Report*, *supra* note 8 at 252; *Strass* v. *Goldsack*, [1975] 6 W.W.R. 155 (Alta. C.A.). "Work product privilege" may be understood to be a species of "anticipation of litigation" privilege, since the "work" is done because litigation is "anticipated" or ongoing: see G.C. Hazard & W.W. Hodes, *The Law of Lawyering*, 3d ed., vol. 1 (New York: Aspen Law & Business, 2001) 9.48-9.49; Paciocco & Stuesser, *supra* note 33 at 198; and Sopinka, Lederman & Bryant, *supra* note 88 at 747.

Sulyma J. held that communications between solicitor and client attract class privilege; records meeting only the anticipation of litigation or work product privilege criteria merit only case-by-case privilege protection.[124] In *Trang*, Binder J. held that work product privilege attracts class privilege protection (keeping in mind that investigatory materials gathered for the Crown are subject to *Stinchcombe* disclosure).[125] Without purporting to offer a final view on this issue, I venture to suggest that Binder J.'s approach is correct: It has the virtues of consistency and simplicity. Solicitors' records are kept confidential. There is no need to distinguish various types of records, supporting greater or lesser privilege. There is no need to plumb the scope of the notion of "communications" between solicitor and client (to what extent would protection be granted if all records were in the form of letters to the client?). The rationale for the special protection of solicitor–client privilege is that confidentiality between lawyer and client is essential to the "effective operation of the legal system."[126] The same could be argued respecting information falling within work product privilege. Absent an immunity from disclosure, lawyers' abilities to prepare for litigation would be hobbled; the other litigant and applicants for third-party records would be looking over counsel's shoulder. Counsel might be deterred from recording important points for fear of disclosure, with the result that advocacy might suffer. Furthermore, preparation and reflection are private activities. The prospect of disclosure, intruding on counsel's work, could conceivably impair counsel's creativity, advocacy, and ultimately the quality of justice. In *Card*, Perras J. preferred Sulyma J.'s approach. Justice Perras sought to distinguish the rationale of solicitor–client privilege from that of work product privilege: "[work product privilege] is tied to the litigation process, rather than directly to the administration of justice and access to legal advice."[127] One might respond that the litigation process is part of the administration of justice. Litigating cases is what counsel do; their constitutional function is not discharged by simply listening to clients. If solicitor–client communications warrant special protection to ensure the proper operation of the legal system, that protection should flow through to the ability of counsel to represent clients fully, without hindrance through diminished privacy protection.

2. EXCEPTIONS

The accused may respond to a class privilege claim by taking on the tactical burden of showing that, in the circumstances, the conditions for the recognition of the privilege have not been met. For example, communications may not have been made to a lawyer in his or her legal capacity, or for the purpose of obtaining legal advice. Alternatively, the accused may establish that an exception to privilege applies. For example, in the case of solicitor–client privilege, the accused may establish that the communications were criminal or were made by the client for the purpose of obtaining advice to

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124 *Chan*, *ibid.* at para. 54.

125 *Trang (No. 2)*, *supra* note 83 at para. 83. In the case of records in the custody of the Crown, *Stinchcombe* requires that all "relevant" investigatory information be disclosed to the accused, as will be discussed in Part VIII below. Anticipation of litigation privilege, as I have described it, has virtually no operation for the Crown in criminal contexts.

126 *McClure*, *supra* note 2 at para. 31.

127 *Card*, *supra* note 99 at para. 20.

facilitate the commission of a crime or tort. In such a case, the communication is not privileged, regardless of whether counsel was a knowing or unwitting participant (although it appears that the client must have known or believed that the activity was illegal).[128]

The accused may accept that the communications would have been covered by privilege, but argue that the privilege should not be recognized because it has been "waived." Waiver may be express or inferred from conduct. The general rule is that "[w]aiver must be made knowingly and deliberately. This means that the client must know he or she has a right to solicitor–client privilege and intends to forego that right."[129] Mere accidental or inadvertent physical loss of a record should not count as waiver.[130] Privilege may be lost through waiver if the client who holds the privilege voluntarily discloses the information that had been subject to privilege to third parties who fall outside of a privileged relationship.[131] Waiver may be found if a client intentionally disclosed information (for example, in testimony or an affidavit) that had been subject to privilege, even though the client may not have realized that his or her acts amounted to a waiver of privilege; if, however, disclosure occurs in cross-examination in response to a question, waiver will not be found in the absence of an intention to waive privilege.[132] Waiver will be found if a client puts the subject of the privileged communications into issue in the litigation.[133] Waiver may result in the loss of privilege for all or some communications. If privilege is waived for a particular communication, but this communication is "inextricably intertwined" with other privileged communications (that is, the particular communication is not "severable" from the others), then privilege is lost for all of the linked or interconnected communications.[134]

If the conditions for a finding of privilege are met, no exception to privilege is engaged, and the privilege has not been waived, the privilege must be respected and records must not be disclosed, except in very limited circumstances. The cases have established that class privilege is subject to the "innocence-at-stake" exception. This exception relies on the principle that the innocent should not be convicted.[135]

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128 *Shirose*, *supra* note 120 at para. 55. These circumstances may not, properly speaking, constitute an "exception" to the recognition of privilege; in these circumstances, the conditions for privilege are not made out: the communication is not for legal purposes, but illegal purposes: *ibid.*; Paciocco & Stuesser, *supra* note 33 at 189; Sopinka, Lederman & Bryant, *supra* note 88 at 736.

129 *Chan*, *supra* note 23 at para. 70; *Trang (No. 3)*, *supra* note 38 at para. 370; and Paciocco & Stuesser, *ibid.* at 183.

130 *Royal Bank of Canada* v. *Lee* (1992), Alta. L.R. (3d) 187 (C.A.).

131 *Trang (No. 3)*, *supra* note 38 at paras. 373, 375; *Trang (No. 2)*, *supra* note 83 at para. 113; *Chan*, *supra* note 23 at paras. 68, 71. The courts are prepared to recognize an umbrella "common interest privilege" for parties "sharing a united front against a common foe": Sopinka, Lederman & Bryant, *supra* note 88 at 761.

132 *Trang (No. 3)*, *ibid.* at para. 370; *Chan (No. 2)*, *supra* note 109 at para. 97.

133 *A.M.*, *supra* note 10 at para. 38; see *Trang (No. 3)*, *ibid.* at para. 421; Paciocco & Stuesser, *supra* note 33 at 183. The key consideration appears to be whether recognizing waiver would be "fair": Sopinka, Lederman & Bryant, *supra* note 88 at 758.

134 *A.M.*, *ibid.* at paras. 37, 39; see *Trang (No. 3)*, *ibid.* at para. 370.

135 *McClure*, *supra* note 2 at para. 40.

Privilege should be set aside only in unusual cases, only if "core issues going to the guilt of the accused are involved and there is a genuine risk of wrongful conviction."[136] The exception requires more than a showing that it is likely that the records contain information that is relevant in some way to the case against the accused. The accused must show that access to the records is "necessary" to demonstrate the accused's innocence.

An issue that has not yet been determined by the Supreme Court is whether class privilege is also subject to an "abuse of process" exception. The accused may allege that (regardless of his or her innocence) the proceedings or conviction should be stayed because of state misconduct. As Sulyma J. has noted, an abuse of process claim is not a mere collateral claim, nor even a mere claim of a breach of *Charter* rights. To constitute an abuse of process, the misconduct must be "egregious, vexatious, or oppressive," or must "offend the community's sense of decency and fair play."[137] A stay is warranted only in the "clearest of cases," or as a "last resort," when the accused establishes on a balance of probabilities that two criteria are satisfied:

(a) the prejudice caused through the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
(b) no other remedy is reasonably capable of removing that prejudice.[138]

This abuse of process exception may be available in addition to an "innocence-at-stake" exception to class privilege. Neither *McClure* nor *Brown* expressly or by implication deny its availability.

In British Columbia and Alberta, records subject to class privilege may be disclosed if necessary for an accused to establish "abuse of process" — at least in cases in which the Crown claims privilege.[139] Justice Binder left open the issue of whether the "abuse of process" argument should be available respecting non-Crown third-party records.[140] There seems to be no good reason for denying the availability of this exception for third-party records. An accused may argue abuse of process warranting a stay based on the conduct of third parties, as in the *Carosella* case.[141] An abuse of process is an abuse of process, whether the relevant conduct is the state's or a third party's; an accused is either entitled to a stay or not, whether the injury is caused by the state or a third party.

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136 *Ibid.* at para. 47.

137 *Chan*, *supra* note 23 at para. 87, relying on *R.* v. *Regan* (2002), 161 C.C.C. (3d) 97 at para. 104 (S.C.C.) [hereinafter *Regan* (S.C.C.)]; *Trang (No. 3)*, *supra* note 38 at para. 368.

138 *Chan*, *ibid.* at para. 87; see *Regan* (S.C.C.), *ibid.* at para. 54.

139 *Chan*, *ibid.* at para. 87; *R.* v. *Tonner*, [2001] A.J. No. 60 (Q.B.), online: QL (AJ); *R.* v. *Creswell* (2000), 149 C.C.C. (3d) 286 (B.C. C.A.); *R.* v. *Castro* (2001), 157 C.C.C. (3d) 255 (B.C. C.A.).

140 *Trang (No. 3)*, *supra* note 38 at para. 367.

141 *Carosella*, *supra* note 5; see *Trang (No. 3)*, *ibid.* at para. 412.

3. PROCEDURE

The procedure for applying for production of third-party records covered by class privilege has two parts — a threshold test, and a two-stage inquiry. If the accused is initially unsuccessful in the application, he or she may renew the application as the trial progresses and evidence evolves.[142]

a. Threshold Test

The accused must begin by satisfying a "threshold test." This threshold test itself has two components. First, the accused must establish that the "information" sought is not available from any other source. If information were available from another source, then breaking the privilege would not be necessary; the accused should obtain the information from the other source.

The fact that an accused has some knowledge about the content of the privileged records does not entail that the "information" sought to be disclosed is already available to the accused. For the application to get off the ground at all, the accused must have some "information," of whatever quality, about information that is believed to lie within the privilege. If this sort of "information" in the possession of the accused always counted as "information" for the purposes of the threshold test, the accused would always lose: by virtue of having enough information to commence the application, information outside of the privilege would exist, so privilege should not be broken. The "'information' sought" for the purposes of the *McClure* application means information that could be admissible at trial (that is, potential evidence).[143] If a *McClure* application is resisted on the basis that other "information" is available from a non-privileged source, the judge must consider the potential admissibility of this evidence. The judge, it appears, should decide whether the non-privileged "information" is "clearly" inadmissible.[144] A judge should not be quick to find that the non-privileged information would be inadmissible. If the judge concluded that the non-privileged information would be inadmissible, broke the privilege, then subsequently determined that the non-privileged evidence was admissible, privilege would have been lost unnecessarily.[145]

These reflections bear on the timing of a *McClure* application. While the timing does fall within the discretion of the trial judge, if some potentially admissible information from another source does exist, the *voir dire* respecting the admissibility of that evidence should be held before the *McClure* application. Alternatively, the *voir dire* respecting the admissibility of this evidence could be held as part of the *McClure* application. It may be that admissibility cannot be determined until after the close of the Crown's case, or after the accused has called witnesses.

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142 *Brown*, *supra* note 115 at paras. 51, 54.
143 *Ibid.* at paras. 31, 35.
144 *Ibid.* at para. 40.
145 *Ibid.* at para. 44.

Moreover, these reflections bear on the nature of the tests for admissibility when the innocence of the accused is at stake or if abuse of process is alleged. If non-privileged evidence is admissible, then the *McClure* issue is "finessed" — there is no need to break privilege. Justice Arbour, in her minority concurring judgment in *Brown*, made the reasonable suggestion that "[i]n the context of a *McClure* application, the interests of justice will be better served by relaxing other exclusionary rules [that is, rules other than the solicitor–client privilege rules] when innocence is at stake so as to avoid having to infringe on privileged communications between a lawyer and his client."[146]

The second component of the threshold test is that the accused must establish that he or she is not able to raise a reasonable doubt respecting guilt in any way other than by accessing the privileged information. If an accused already has access to non-privileged evidence that would support a reasonable doubt, it could not be said that access to the privileged information is necessary for the accused to avoid conviction. The accused is not entitled to break privilege to support an additional defence. According to *McClure* and *Brown*, the threshold test will not permit an accused to "accumulate" defences, or offer a more "complete" set of defences.[147] Neither does it permit an accused simply to strengthen other available evidence.[148]

If *Chan* is good law, an accused should also be entitled to satisfy the threshold test by establishing that he or she cannot support his or her claim of abuse of process except through access to the privileged information.

Again, these reflections bear on the timing of the *McClure* application. The Supreme Court has indicated that "[i]n the usual case, it would be preferable to delay the *McClure* application until the end of the Crown's case."[149] This will permit the judge to assess whether the accused's innocence is indeed at stake or whether the case discloses evidence supporting a stay. It appears, then, that a *McClure* application could be preceded by or conjoined with an application for a directed verdict (if the directed verdict application is successful, of course, the *McClure* issue becomes moot).

b. Two-Stage Inquiry

An accused who surmounts the threshold test must go on to succeed in a two-stage inquiry. At the first stage, the accused must provide an evidentiary basis for the conclusion (tender some evidence that supports the conclusion) that there exists information in the records in question that *could* raise a reasonable doubt about guilt. While the "totality" of evidence available in the application governs, and the evidence sought should be considered in conjunction with other evidence to determine its importance, generally, the evidence must be relevant to a substantive defence: "when the accused is either challenging credibility or raising collateral matters, it will be

146 *Ibid.* at para. 117.
147 *McClure*, *supra* note 2 at para. 49.
148 *Brown*, *supra* note 115 at para. 68.
149 *Ibid.* at para. 52.

difficult to meet the standards required of stage one."[150] Under *Chan*, the accused is required to provide an evidentiary basis for the conclusion that information exists that could support the abuse of process claim. The accused must point to "some evidence" that at least raises the "reasonable possibility" of innocence-at-stake or abuse of process.

The judge decides whether or not to review the records. If the judge decides to review the records, the inquiry advances to stage two. In a solicitor–client privilege case the judge may, "for his [or her] eyes only," request the lawyer who was party to the communications "to supply an affidavit stating either that the information contained in the files is a complete record of the communications in question or containing all other information necessary to complete the record."[151]

At stage two, the judge should review the records to determine whether there is in fact information that is *likely* to raise a reasonable doubt about the guilt of the accused or likely to support a finding of abuse of process warranting a stay. The "reasonable doubt" or "abuse of process" finding has three aspects. First, with particular reference to the "reasonable doubt" exception, the information (again) must generally be relevant to an element of the offence, or, presumably, to a substantive defence (justification or excuse): "Simply providing evidence that advances ancillary attacks on the Crown's case (*e.g.*, by impugning the credibility of a Crown witness, or by providing evidence that suggests that some Crown evidence was obtained unconstitutionally) will very seldom be sufficient to meet this requirement."[152] Second, examination of the records must show that the evidence may be admissible.[153] Third, the judge must find that the information is "likely" to raise a reasonable doubt or to support a stay as a remedy for an abuse of process.

In his or her review of the records, the judge may find material that satisfies the stage-two test. This may include not only the material expressly sought by the accused, but additional material disclosed through the review.[154] Before ordering production, the judge should extend to the Crown the option of staying proceedings or proceeding.[155] The Crown might desire a stay to avoid the necessity for the disclosure of the information (even third-party information). If the Crown elects to proceed, the judge must order disclosure.[156] Production should be ordered, however, only of that portion of the records necessary to raise the issues in question.[157] Privilege should be protected to the greatest extent possible.

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150 *McClure*, *supra* note 2 at para. 55.
151 *Brown*, *supra* note 115 at para. 65.
152 *Ibid.* at para. 58.
153 *McClure*, *supra* note 2 at para. 60.
154 *Brown*, *supra* note 115 at para. 59.
155 *Chan*, *supra* note 23 at para. 89; *Leipert*, *supra* note 85 at para. 33.
156 *Chan*, *ibid.* at para. 89.
157 *Brown*, *supra* note 115 at para. 77.

Production is made only to the accused, not the Crown. *McClure* did not create a "new method of discovery for the Crown."[158] Whether the Crown learns of the information produced to the accused will depend on whether and how the accused uses the information.

VII. *O'CONNOR* AND THE *MILLS* PROCEDURE

The *Mills* procedure applies to applications for production of third-party records in proceedings concerning certain sexual offences. The relationship between the *O'Connor* procedure and the *Mills* procedure is complex. It will be seen that the *Mills* procedure does not fully occupy the field of production of records even in sexual offence cases. Some small scope remains for other third-party records application procedures in sexual offence cases. I will (A) review the *Mills* procedure, then (B) discuss the circumstances in which other application procedures, including *O'Connor*, may be available.

A. THE *MILLS* PROCEDURE

The main differences between the *O'Connor* procedure and the *Mills* procedure are these:

(a) the *Mills* procedure is more formalized and procedurally rigid than the *O'Connor* procedure;
(b) in s. 278.3(4) of the *Criminal Code*, the *Mills* procedure expressly identifies "mere assertions" that cannot support a finding of likely relevance;
(c) the *Mills* procedure involves balancing before production to the judge, a step rejected by the *O'Connor* majority;
(d) the factors considered in balancing include not only the factors approved by the *O'Connor* majority, but those endorsed by the dissent; and
(e) the *Mills* procedure applies to complainant or witness records in the custody of the Crown — the *O'Connor* majority had (apparently) ruled that the *Stinchcombe* procedure applied to those records.

Generally, the *Mills* procedure extends greater protection to complainant or witness records than the *O'Connor* procedure. From the standpoint of the accused, obtaining access to third-party records through the *Mills* procedure may be more difficult than through the *O'Connor* procedure.[159]

An accused must bring the application for production before the trial judge. The application must be in writing, and must set out

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[158] *Ibid.* at para. 81. Privilege holders are protected by use and derivative use immunity. The communications disclosed through the *McClure* procedure and any evidence derived from those communications "cannot be used in a subsequent case against the privilege holder": *ibid.* at paras. 99-100.

[159] Coughlan has argued that, in light of the Supreme Court's interpretation of the *Mills* provisions, the *Mills* regime actually imposes no greater burdens and extends no greater protection than the *O'Connor* regime: S. Coughlan, "Complainants' Records After *Mills*: Same As It Ever Was" (2000) 33 C.R. (5th) 300.

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

(b) the grounds on which the accused relies to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify.[160]

The application must be served on the Crown, the record custodian, the complainant, and any other person to whom the record relates. The accused must also serve a subpoena in Form 16.1 on the record custodian.[161] The application has two stages.

1. STAGE ONE: PRODUCTION TO THE COURT

At the first stage, the judge determines in an *in camera* hearing whether to order the record custodian to produce the record to the court for review. The record custodian, the complainant, or any other person to whom the record relates have standing, but are neither compellable nor subject to an order for costs.[162] The judge may order production for review if the application was formally compliant, the accused has established that "the record is likely relevant to an issue at trial or to the competence of a witness to testify," and "the production of the record is necessary in the interests of justice."[163] Section 278.3(4) sets out "mere assertions" which, either alone or together, do not establish "likely relevance."[164] Section 278.5(2) sets out a list of factors to be considered in determining whether to order production to the court.

2. STAGE TWO: PRODUCTION TO THE ACCUSED

If the judge does not order production for review, the application is at an end. If the judge does order production, the application moves to its second stage. In an *in camera* hearing, the judge reviews the record in question and determines whether all or part of it should be produced to the accused.[165] The stage-one tests — "likely relevance," "necessary to the interests of justice" — apply at stage two; and the factors considered at stage one are considered at stage two.[166] The "likely relevance" test cannot have precisely the same meaning at this stage as at stage one, though. At stage one, the accused sought production on the basis of the limited information available. At stage two, the judge has the record, and can make a much more informed determination of whether the record is likely to contain relevant information.

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160 *Criminal Code*, ss. 278.3(1), (2) and (3).

161 *Ibid.* at ss. 278.3(5) and (6).

162 *Ibid.* at ss. 278.4(1), (2) and (3).

163 *Ibid.* at s. 278.5(1).

164 An accused may rely on these "assertions," if "there is an evidentiary or informational foundation to suggest that they may be related to likely relevance": *Mills*, *supra* note 3 at para. 120. In such a case, the assertions would not be "mere assertions" but reasons for production. This is to say that, properly interpreted, the "no-mere-assertions" rule does not itself make the production process more onerous for the accused; the rule simply helps ensure that the process is rational. For some elaboration, see W. Renke, "Unbalanced Balancing: Bill C-46, 'Likely Relevance,' and Stage-One Balancing" (2000) 11 Const. Forum 85.

165 *Criminal Code*, ss. 278.6(1), (2) and (3)

166 *Ibid.* at ss. 287.7(1) and (2).

If the judge orders production of the record to the accused, the judge may impose conditions to protect the interests of justice and the privacy and equality of the complainant.[167] The judge shall direct that a copy of the record be provided to the Crown, "unless the judge determines that it is not in the interests of justice to do so."[168]

The judge must provide reasons for ordering or refusing to order production to the court,[169] and for ordering or refusing to order production to the accused.[170] For the purposes of appeal, the determinations to order production to the court, to refuse to make this order, to order production to the accused, or to refuse to make this order are questions of law.[171]

B. *MILLS, O'CONNOR*, OR *MCPHERSON*?

Four factors determine the appropriate procedural vehicle for an application for third-party records in a sexual offence proceeding — the nature of the offence; the nature of the records; the nature of the subject of the records; and whether the complainant or witness has waived the protection of the *Mills* procedure.

1. THE NATURE OF THE OFFENCE: LISTED OFFENCES

Under s. 278.2(1) of the *Criminal Code*, the *Mills* procedure applies in any proceedings in respect of a "Listed Offence":

> (a) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272 or 273,
>
> (b) an offence under section 144, 145, 149, 156, 245 or 246 of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
>
> (c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,
>
> or in any proceedings in respect of two or more offences that include an offence referred to in any of the paragraphs (a) to (c).[172]

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167 *Ibid.* at s. 287.7(3).

168 *Ibid.* at s. 278.7(4).

169 *Ibid.* at s. 278.8.

170 *Ibid.*

171 *Ibid.* at s. 278.91. I should note that there is a fairly extensive literature comparing and contrasting the *Mills* and *O'Connor* regimes, particularly with respect to protections for the interests of complainants and accuseds. I have not engaged with this literature, since my focus is on the technical interplay of the two regimes. See Epp, *supra* note 33 at 196; D.M. Paciocco, "Bill C-46 Should Not Survive Constitutional Challenge" (1996) 3 Sexual Offences L.R. 185; J. van Dieen, "*O'Connor* and Bill C-46: Differences in Approach" (1997) 23 Queen's L.J. 1; and J.L. Hiebert, "Wrestling with Rights: Judges, Parliament and the Making of Social Policy" (1999) 5:3 Policy Options 3 at 19.

172 If proceedings concern a Listed Offence and a non-Listed Offence, it appears that the *Mills* procedure applies: *R.* v. *N.P.*, [2001] O.J. No. 1828 (S. Ct.), online: QL (OJ). The *Mills* procedure also applies to applications for fresh evidence in appeals respecting Listed Offences: *R.* v. *Rodgers*, [2000] O.J. No. 1065 (C.A.), online: QL (OJ).

So long as proceedings do not concern a Listed Offence, and so long as the *McPherson*, *McClure*, or *Stinchcome* doctrines are not engaged, the *O'Connor* procedure — and not the *Mills* procedure — should be used to apply for third-party records, even though the records relate to personal information (for example, of a sexual nature) about a complainant or witness. Section 278.3(1) and the engagement of the *Mills* procedure does not turn simply on the pursuit of a record referred to in s. 278.1.

2. THE NATURE OF THE RECORDS

Section 278.1 defines "record" as follows:

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

The form of the record (*e.g.*, written, audio-visual tape, cassette audio tape, photograph, DVD, CD-ROM, computer memory) is irrelevant — s. 278.1 applies to a record in "any form."

The ownership of records or possessory rights relating to records do not determine the issue of whether the records are covered by s. 278.1. A record may be fully "owned" by a third party, yet still contain information that is "personal information" of a complainant or witness.

Generally, the identity or nature of the record custodian does not affect the application of the *Mills* procedure. The custodian might be a parent, a sexual assault crisis centre, the offices of a health-care professional, or the complainant or witness himself or herself. The *Shearing* case does block the application of the *Mills* procedure if the record custodian is the accused.[173] In this situation, production to the accused is irrelevant, since the accused already has possession of the record.

An issue yet to be determined is whether the *Mills* procedure governs if the record custodian is counsel for a complainant or witness and the records are covered by solicitor–client privilege. *McClure* was a sexual offence case, and the *O'Connor* procedure was judged inappropriate; the special procedure reviewed in Part VI above was approved.[174] Justice Major stated in *McClure* that the *O'Connor* and *Mills* procedures "were created with the sensitivity and unique character of third-party therapeutic records in mind."[175] The Supreme Court may therefore interpret s. 278.1 to exclude records covered by solicitor–client privilege. Using the "*noscitur a sociis*"

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[173] See *Shearing*, *supra* note 73 at para. 97.

[174] *McClure*, *supra* note 2.

[175] *Ibid.* at para. 44.

interpretive principle,[176] the Court could rule that records arising from solicitor–client communications do not fit with the list of records set out in s. 278.1. If these records do not fit, the *McClure* procedure will govern.

The exclusion of one sort of record from s. 278.1 leads to the issue of whether records bearing other sorts of privilege should be excluded from the reach of s. 278.1. Practically, most other records for which privilege might be claimed in the sexual offence context would be medical, therapeutic, or counselling records. These are expressly included as records in s. 278.1. Furthermore, the ss. 278.5(2)(f) and (g) balancing factors have sufficient scope to permit consideration of the public policy factors relevant to case-by-case privilege. The *Mills* procedure accommodates case-by-case privilege.

Generally, the *Mills* procedure applies even though the Crown has come into possession of the records. Under s. 278.2(2), the *Mills* procedure applies "where a record is in the possession or control of any person, including the prosecutor in the proceedings, unless, in the case of a record in the possession or control of the prosecutor, the complainant or witness to whom the record relates has expressly waived the application of [certain provisions of the *Mills* procedure]." The *Mills* procedure therefore carves out an exception to the *Stinchcombe* rules. Barring waiver, the Crown is not permitted to produce the records to the defence. The defence must apply for and be granted an order for production of these records.

While the scope of the term "record" is very broad, the *Mills* procedure has some nuances relevant to its application. The s. 278.1 definition itself indicates that the records must contain "personal information" which bears a "reasonable expectation of privacy." Section 278.2(1) qualifies s. 278.1. For the *Mills* procedure to apply, the record must relate to a complainant or witness. Section 278.1 contains an exemption. For the purposes of the *Mills* procedure, "record" does not include a record made by a person responsible for the investigation or prosecution of the offence. Finally, under s. 278.2(2), a complainant or witness may waive the application of the *Mills* procedure to records in the custody of the Crown. Thus, to count as a "record" under s. 278.1 and for the *Mills* procedure to apply, (a) the record must contain "personal information," (b) there must be a "reasonable expectation of privacy" in relation to the information, (c) the information must be about a complainant or witness, (d) the record must not have been created by a person responsible for the investigation or prosecution of the offence, and (e) the complainant or witness must not have waived the application of the *Mills* procedure.

a. "Personal Information"

The term "personal information" is not defined in the *Criminal Code*. We gain some perspective on the ambit of the term through the list of included records in s. 278.1. The term "personal information" is used in access to information and privacy statutes,

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[176] *Statutory Interpretation*, *supra* note 95 at c. 4, s. C.

such as the federal *Privacy Act*. "Personal information" is defined in s. 3 of the *Privacy Act* as

> information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,
>
> (b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,
>
> (f) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual,
>
> (h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (e), but excluding the name of the other individual where it appears with the views or opinions of the other individual, and
>
> (i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual.[177]

The *Privacy Act* and other privacy legislation would not likely be judged to be *in pari materia* with the *Criminal Code*, so their elucidations would not be simply imported into the criminal context. Nonetheless, their definitions and the jurisprudence around those definitions will likely be found to assist in understanding the ambit of "personal information," since "statutes are presumed to operate together harmoniously and to reflect a consistent view of the subject dealt with."[178] In light of privacy legislation, it is safe to say that, for the purposes of s. 278.1, "personal information" means information (of whatever sort) about an identifiable complainant or witness.

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[177] This approach to "personal information" is consistent with the approach taken in *FOIPPA*, s. 1(n). The definition of "personal information" in *PIPEDA* is more succinct: "'personal information' means information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization": s. 2(1), definition of "personal information."

[178] *Statutory Interpretation*, *supra* note 95, c. 8, s. C. See s. 15(2)(b) of the *Interpretation Act*, R.S.C. 1985, c. I-21 [hereinafter *Interpretation Act*]: "Where an enactment contains an interpretation section or provision, it shall be read and construed ... as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears."

When we think of "personal information," we might have in mind information that the subject of the information communicates to another, whether by delivering a record containing the information or by providing information which is recorded by the record custodian. For information to be classified as personal information, however, it is not necessary for the subject to play any conscious or intentional role in the production of the information or the creation of the record. An individual may be observed or opinions may be formed about that individual unbeknownst to the individual. That information remains information about an identifiable individual, and so is "personal information." An example of this type of personal information would be recorded observations of an institutionalized individual by staff.

Protection of privacy statutes expressly and s. 278.1 implicitly includes third parties' opinions about an identifiable complainant or witness as "personal information." Again, whether or not the subject of the opinion is aware that an opinion exists is irrelevant to the categorization of the opinion as "personal information." For example, medical or psychiatric practitioners may form and record opinions about a complainant or witness; these would be "personal information" relating to the subject, even though the subject did not know that the opinions had been formed.

An accused might attempt to obtain disclosure of a record believed to be a transcription of a statement by the third party that he, not the accused, was the perpetrator of the sexual assault on the complainant. In this case, again, the record would contain "personal information" about the complainant; and, again, the record would count as a "record" for the purposes of s. 278.1. It might be that the complainant had no idea that the third party ever uttered the statement or that any record was made. That fact would be relevant to the issue of whether the complainant had any reasonable expectation of privacy in relation to the record; it would not bar the categorization of the information as "personal information."

The scope of "personal information" is extremely broad. It is highly unlikely that an accused would seek any information relating to a complainant or a witness that would not be classified as "personal information."[179] It is therefore highly unlikely that an accused would ever be in a position to argue that the *Mills* procedure is inappropriate because the records sought are not records containing "personal information."

b. No "Reasonable Expectation of Privacy"

To count as a "record," a record must not only contain personal information; the record must contain "personal information for which there is a reasonable expectation

[179] Information in a record may relate to an individual, without being "personal information." This would be information that has been "anonymized" or information about a number of persons that has been aggregated; in either case, the information could not be determined to be about an identifiable individual. Statistical or actuarial information are examples of information that may be "about" an individual (he or she is in the relevant cohort), without being about an identifiable individual. While "non-personal" information may be extremely important in some contexts, it is not likely to be of much significance to the defence of a Listed Offence.

of privacy."[180] The reasonable expectation of privacy concerns the information ("personal information *for which* there is a reasonable expectation of privacy") rather than the record that contains the information. The "reasonable expectation of privacy" language creates three difficulties. First, s. 278.1 does not specify the subject of the expectation of privacy: whose expectation of privacy is relevant? Second, is the reasonable expectation of privacy qualification redundant — if information is personal information, does the subject of the information always have a reasonable expectation of privacy? Third, if some personal information is not accompanied by a reasonable expectation of privacy, how, procedurally, would the issue of the lack of the reasonable expectation of privacy be sorted out?

The "reasonable expectation of privacy" may be held by the complainant, a witness, or any other third party. A record might contain personal information about a relatively large number of individuals (for example, a record concerning group therapy). These persons would all receive notice of the application under s. 278.3(5).[181] A custodian could also have a reasonable expectation of privacy: the custodian may have collected and retained the information with the expectation that it would not be disclosed and have compelling reasons for resisting disclosure.

The phrase "reasonable expectation of privacy" is not redundant.[182] One may concede immediately that for a large number of cases, the presence of personal information in a record is correlated with a reasonable expectation of privacy in relation to that information. Nonetheless, information may be about an identifiable individual, without that individual having a reasonable expectation that the information would be kept private. For example, the record may contain information transcribed from a meeting at which both the accused and the complainant were present.[183] As indicated above, courts have found that complainants who gave information to reporters for the purposes of mass media publication do not have reasonable expectations of privacy in relation to the reporters' records.[184] Some individuals have installed video cameras in their homes and have broadcast highly personal information over the Internet. A court would likely find that these individuals did not retain a reasonable expectation of privacy respecting records containing these publications.

Were it abundantly clear that no individual had a reasonable expectation of privacy in relation to records sought, and the judge were prepared to make this preliminary

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180 "[I]f a record does not contain information regarding which there is a reasonable expectation of privacy, then it is not subject to the ... [*Mills*] provisions governing production": *Mills*, *supra* note 3 at para. 78, see also at para. 99.

181 Under *Criminal Code* s. 278.3(6), the judge may order that the application be served on any person to whom the judge considers the record to relate.

182 As a matter of statutory construction, "[i]t is presumed that every feature of a legislative text has been deliberately chosen and has a particular role to play in the legislative design. The legislature does not include unnecessary or meaningless language in its statutes.... This is what is meant when it is said that the legislature 'does not speak in vain'": *Statutory Interpretation*, *supra* note 95 at c. 4, 56.

183 *R.* v. *B.P.* (2000), 149 C.C.C. (3d) 91 at para. 8 (Ont. C.A.).

184 *Hughes*, *supra* note 64; *Regan* (N.S. C.A.), *supra* note 64.

ruling, then the modified *O'Connor* or *McPherson* procedures would be appropriate. Otherwise, if records may or may not support a reasonable expectation of privacy in relation to personal information, the *Mills* procedure should be employed. This procedure will allow all interested parties to offer evidence and argument on the privacy issues. If a record falls within any of the classes listed in s. 278.1, the courts will probably recognize a "presumption" of reasonable expectation of privacy, so that complainants and witnesses will not bear the burden on this issue. Instead, the burden will lie on the defence to show that what appears to be a private record is not. In theory, a judge could find in the course of proceedings that the complainant or witness had no reasonable expectation of privacy in the records; and, in theory, this would mean that the *Mills* procedure was inappropriate. The result, however, would likely be the production of the record; and if production were obtained through the *Mills* procedure it would surely have been obtained through the *O'Connor* or *McPherson* procedures, so the procedural vehicle was immaterial.

c. Subject of the Records

Under s. 278.2(1), "[n]o record relating to a complaint or witness shall be produced to an accused" in respect of a Listed Offence, "except in accordance with sections 278.3 to 278.91." The term "relate" shall doubtless be interpreted broadly, to include any record that contains information about, pertaining to, in relation to, concerning, regarding or respecting a complainant or witness. This "large and liberal" construction would ensure the attainment of the objects of the *Mills* procedure, and so accords with s. 12 of the *Interpretation Act*. The bulk of the Preamble to Bill C-46, through which the *Mills* procedure was enacted, deals with victims of sexual offences and those who provide service and assistance to sexual offence complainants, so records relating to these persons certainly should receive the protection of the *Mills* procedure.[185] The Preamble does go farther and in its last paragraph refers to "personal information regarding any person," the production of which may breach the person's right to privacy and equality. Large and liberal construction of the *Mills* procedure extends its protection to witnesses other than those who provide service and assistance to sexual offence complainants.

On the one hand, through the reference to "witnesses," this section gives the *Mills* procedure substantial scope. Because the *Mills* procedure applies respecting records relating to witnesses, and not only complainants, this procedure would apply to applications for records containing personal information relating to expert witnesses, police/investigator witnesses, observation witnesses, parents or others called to provide hearsay admissible under the principled exception to the hearsay rule, parents or others called to provide admissible prior consistent statements, or third parties called to allege acts admissible under the similar fact rules, among others. The *Mills* procedure makes no distinction between the various types of witnesses who may be called in the course of Listed Offence proceedings.

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[185] Under s. 13 of the *Interpretation Act*, "[t]he preamble of an enactment shall be read as part of the enactment intended to assist in explaining its purport and object."

On the other hand, s. 278.2(1) does limit the application of the *Mills* procedure to records concerning complainants and witnesses. Hence, even in Listed Offence proceedings, if a record does not relate to a complainant or witness, the *Mills* procedure does not apply. For example, in an "identity" case, an application might be made for records relating to an alleged third-party perpetrator. The records might contain information bearing on the opportunity of the third party to have committed the offence (for example, respecting his presence at a nearby location shortly before the attack). Moreover, since the *Mills* procedure contains distinct provisions relating to accuseds, complainants, and witnesses, and since s. 278.2(1) does not refer to records relating to accuseds, in the case of jointly-tried accuseds, the *Mills* procedure would not govern an application by one accused for production of records relating to a co-accused, at least if that co-accused is not a witness in the proceedings.

It is true that ss. 278.3(5) and (6) require an accused to serve notice of an application on any person to whom, to the knowledge of the accused, the record relates. This provision merely brings into play the interests of non-witness third parties in applications respecting records relating to a complainant or witness. This provision does not expand s. 278.2(1) to apply the *Mills* procedure to applications for records relating to a complaint or a witness or "any other person."

One caution is that if a record were to contain information that "relates" both to a non-witness third party and the complainant or a witness, the link to the complainant or witness would attract the definition of "record" and therefore the application of the *Mills* procedure. Thus, if an accused were to attempt to obtain disclosure of a record believed to be a transcription of a statement by a complainant that the third party, not the accused, was the perpetrator of a sexual assault, the mere fact that the record related to the third party would not exempt the record from the *Mills* procedure. Because the record would concern the sexual activity of the complainant, it would contain "personal information" about the complainant, and would fall under the s. 278.1 definition.

Thus, if the record sought does not contain information about the complainant or a witness, the *Mills* procedure should not be followed. If the third party or co-accused had a reasonable expectation of privacy respecting the information in the records sought, then the *O'Connor* procedure would be appropriate; if the records were covered by solicitor–client privilege, then *McClure* would govern; if there were no reasonable expectation of privacy, the modified *O'Connor* or *McPherson* procedure should be employed.

d. Records Made by Persons Responsible for the Investigation or Prosecution of the Offence

Section 278.1 contains an explicit exemption: "records" does not include "records made by persons responsible for the investigation or prosecution of the offence." Hence, records made by, for example, investigating police officers, would not count as "records" for the purposes of the *Mills* procedure. Access to these records would be obtained through the *Stinchcombe* procedure, discussed in Part VIII below.

Records about a complainant or witness made by, for example, investigating officers must be distinguished from records not made by investigating officers but transmitted to the police or Crown. Under s. 278.2(2) these records are governed by the *Mills* procedure, unless the complainant or witness has waived the *Mills* procedure protections.

e. Waiver

Section 278.2(2) provides that the *Mills* procedure applies to a record in the custody or control of the Crown, "unless, in the case of a record in the possession or control of the prosecutor, the complainant or witness to whom the record relates has expressly waived the application of those sections." Waiver will be established only if the complainant or witness had been adequately apprised of his or her procedural rights, and if he or she voluntarily surrendered those rights, whether expressly or by implication from conduct. If the record relates only to the complainant or witness that has waived *Mills* protection, the record would be disclosed to the accused in accordance with *Stinchcombe*.

Records may contain personal information about other individuals. They may have reasonable expectations of privacy respecting that information, and they may not have waived any procedural protections or even have voluntarily provided the record to the Crown. One reading of s. 278.2(2) is that the complainant or witness is entitled to decide the availability of the *Mills* procedure for all individuals that the records concern. If the complainant or witness decides to waive his or her rights, *Mills* does not apply, and *Stinchcombe* does. On another reading, the complainant or witness may waive only his or her own rights, not those of others that the record concerns. The record could be edited or severed, so that only those elements of the record relating to the complainant or the witness are produced (if severance is possible). Alternatively, the accused could make an *O'Connor* application to secure production of the elements of the record concerning the non-complainants or witnesses.

VIII. *STINCHCOMBE*, DISCLOSURE, AND *O'CONNOR*

The accused may be spared from making an *O'Connor* application if records are in the possession or control of the Crown and are subject to disclosure under the *Stinchcombe* rules. I shall review (A) the general Crown disclosure rules, (B) procedures for review of the Crown's performance of its disclosure obligations, and (C) third-party records issues in disclosure. We shall see that *O'Connor*, *Mills*, *McClure*, or *McPherson* applications may be necessary, despite the Crown's broad disclosure obligations, if records are outside the Crown's "possession or control," or even if records are in the Crown's possession or control but a third party has not waived his or her privacy interests in relation to the records.[186]

[186] I shall not review the rules governing applications for relief based on non-disclosure.

A. THE CROWN'S DISCLOSURE OBLIGATIONS

The general Crown disclosure rules are as follows:[187] Disclosure is the accused's constitutional right. The Crown is obligated to produce to the defence all "relevant" non-privileged information in its possession or control, whether or not the Crown intends to introduce the information as evidence, and whether or not the information is exculpatory or inculpatory.[188] Initial disclosure should be made before the accused is called on to elect or plead. The obligation is ongoing; as additional information comes into the Crown's possession or control, it must be disclosed. The Crown, however, has discretion respecting the manner and timing of disclosure to protect persons' safety or to protect a continuing investigation.[189]

In terms of the standard of "relevance," the Crown should not withhold information "if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege."[190] According to Sopinka J., information is relevant "[i]f the information is of some use [to the defence] ... and the determination as to whether it is sufficiently useful to put into evidence should be made by the defence and not the prosecutor."[191] Information is relevant if it could be used in meeting the case for the Crown, advancing a defence, or otherwise making a decision affecting the conduct of the defence.[192]

While the disclosure obligation lies primarily on prosecutors, the Crown may rely on other agencies, particularly the police, to make determinations of relevance. The Crown, however, has a duty to take reasonable steps to obtain information from the police.[193]

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187 *Stinchcombe*, *supra* note 4; *R.* v. *Dixon*, [1998] 1 S.C.R. 244 at para. 20 [hereinafter *Dixon*]; *Disclosure and Production*, *supra* note 7 at 1-6ff. See G. Luther, "The Frayed and Tarnished Silver Thread: *Stinchcombe* and the Role of Crown Counsel in Alberta" in this issue at 567 [hereinafter "Silver Thread"]; J.K. Phillips, "The Rest of the Story of *Regina* v. *Stinchcombe*: A Case Study in Disclosure Issues," in this issue at 539 [hereinafter "The Rest of the Story"]; L. Stuesser, "General Principles Concerning Disclosure" (1996) 1 Can. Crim. L.R. 1 at 2; and "Alberta Disclosure Guideline," *supra* note 7.

188 See *R.* v. *Stinchcombe (No. 2)*, [1995] 1 S.C.R. 754 at para. 2; *O'Connor*, *supra* note 1 at para. 4; *R.* v. *Chaplin*, [1995] 1 S.C.R. 727, 96 C.C.C. (3d) 225 at para. 21 [hereinafter *Chaplin* cited to C.C.C.]; *Martin Committee Report*, *supra* note 8 at 26, 145, 146ff.

189 *Martin Committee Report*, *ibid.* at 147; "Alberta Disclosure Guideline," *supra* note 7 at ALTA-11. The Crown is not entitled to delay disclosure for purely "tactical" reasons: *Dix* v. *Canada*, [2002] A.J. No. 784 at para. 521, online: QL (AJ). If the Crown prefers a direct indictment, there is a "heightened need" for early and full disclosure: see *Trang (No. 3)*, *supra* note 38 at para. 433.

190 *Stinchcombe*, *supra* note 4 at para. 22; *R.* v. *Egger*, [1993] 2 S.C.R. 451 at 446-67, Sopinka J. [hereinafter *Egger*]. Phillips suggests that this test, which relies on the Crown's assessment of potential usefulness, is inherently flawed, and encourages insufficient disclosure: see "The Rest of the Story," *supra* note 187. Furthermore, Luther and Phillips argue that adversarial pressures affecting Crowns tend to cause them to underestimate the scope of usefulness, again leading to insufficient disclosure: *ibid.*; "Silver Thread," *supra* note 187.

191 *Stinchcombe*, *ibid.* at 345-46.

192 *Dixon*, *supra* note 187 at para. 22; *R.* v. *Babinski* (1999), 135 C.C.C. (3d) 1 at 16 (Ont. C.A.).

193 *Trang (No. 3)*, *supra* note 38 at paras. 393, 464, 483.

Defence counsel have an obligation to pursue disclosure diligently, and to bring failures to disclose to the early attention of the court. The failure to discharge this duty may limit an accused's remedies.[194]

B. PROCEDURES FOR THE REVIEW OF THE CROWN'S PERFORMANCE OF THE DISCLOSURE OBLIGATION

The Crown makes initial determinations of relevance, privilege, and possession or control. If the accused is dissatisfied with the Crown's performance of its obligations and the issues cannot be worked out informally, the accused must initiate the judicial review of disclosure.[195] Justice Sopinka was of the view that most disputes would be resolved without the need for a judge's intervention. Otherwise, the application may require "not only submissions but the inspection of statements and other documents and indeed, in some cases, *viva voce* evidence. A *voir dire* will frequently be the appropriate procedure in which to deal with these matters."[196] The onus of justifying non-disclosure is borne by the Crown.[197]

Disclosure disputes may arise in two contexts:

(1) the defence urges disclosure of identified material and the Crown concedes that the material exists; or
(2) the defence urges disclosure of material but the Crown denies that the material exists.[198]

1. EXISTING MATERIAL: DISPUTE OVER REQUIREMENT TO DISCLOSE

The accused must overcome the practical hurdle of gaining sufficient knowledge about information that has not been disclosed to be able bring an application seeking its disclosure. One source of information could be an inventory of material provided by the Crown to the accused, describing not only material the Crown has produced, but material the Crown objects to produce.[199] The Crown may justify its failure to disclose by establishing that the information is "irrelevant," privileged, or beyond its possession or control. The Crown may support its exercise of discretion by making submissions, requesting that the judge inspect the records, or calling evidence.[200]

Material may be "facially" irrelevant (for example, if the Crown has provided an inventory, and the material in issue appears to relate solely to investigations or charges other than those faced by the accused). To press its point, the accused must take on the

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194 *Ibid.* at para. 395; *R.* v. *L.A.T.* (1993), 84 C.C.C. (3d) 90 at 94 (Ont. C.A.) [hereinafter *L.A.T.*].
195 This review may be initiated by Notice of Motion: *Chan*, *supra* note 23 at para. 4.
196 *Stinchcombe*, *supra* note 4 at para. 23.
197 *Chan*, *supra* note 23 at paras. 25, 37.
198 *Chaplin*, *supra* note 188 at para. 23.
199 *R.* v. *C.E.S.* (1996), 143 Sask. R. 161 at para. 45 (Q.B.) [hereinafter *C.E.S.*]; *R.* v. *Laporte* (1993), 84 C.C.C. (3d) 343 (Sask. C.A.).
200 *Chan*, *supra* note 23 at para. 8.

tactical burden of providing a basis for the conclusion that the material is relevant.[201] The ultimate burden of justifying non-disclosure on the basis of irrelevance remains on the Crown.

The Crown bears the onus of establishing that relevant material is privileged, to be discharged on the balance of probabilities.[202] If the Crown fails to establish that the material is privileged, it must be disclosed. If the Crown establishes a foundation for a finding that the material is privileged, the accused has a tactical burden of showing that

(a) the elements of the privilege are not satisfied;
(b) an exception to privilege is engaged; or
(c) if privilege subsisted, it was waived.

If the accused could not rebut privilege and the privilege claimed were a class privilege, the accused would be required to bring a *McClure* application. It should be noted that solicitor–client privilege may apply to communications between Crown counsel or Department of Justice/Ministry of the Attorney General counsel (whether federal or provincial) and their clients (in particular, the police) that otherwise meet the conditions for the recognition of the privilege.[203]

If the Crown claimed case-by-case privilege or a non-s. 39 public interest immunity, the accused could seek disclosure on the basis that his or her need for the information to support full answer and defence outweighs the public interests served by non-disclosure.[204] The Crown should have the burden, to be discharged on the balance of probabilities, of establishing a lack of possession or control of relevant non-privileged material.

2. MATERIALS THAT MAY OR MAY NOT EXIST

The accused's practical difficulties are even more acute in the second type of case. The accused must surmount the hurdle of gaining sufficient knowledge about information that is not acknowledged to exist to be able bring an application seeking its disclosure. The accused must establish a basis sufficient to permit the judge to conclude that:

(a) the material exists, and
(b) the material is "relevant."

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201 *Ibid.* at paras. 25, 35 and 40.

202 *Ibid.* at para. 89. In the case of material to which Crown "work product privilege" may apply, the critical distinction is between "information" which the Crown must disclose, and opinion or legal reflection, which need not be disclosed. See *R.* v. *Bernardo*, [1994] O.J. No. 1718 at para. 19 (Gen. Div.), online: QL (ORP); Stuesser, *supra* note 187 at 3; and "Alberta Disclosure Guideline," *supra* note 7 at ALTA-6.

203 *Trang (No. 3)*, *supra* note 38 at para. 361.

204 *Chan*, *supra* note 23 at para. 102.

This "basis" may be made out through reliance on evidence or, in some cases, the submissions of counsel without the necessity of a *voir dire*. If the defence establishes this basis, the Crown must justify the refusal to disclose.[205]

C. THIRD-PARTY ISSUES IN DISCLOSURE

The *Stinchcombe* rules interact with the third-party records application procedures in two ways. First, if the Crown establishes that materials are not in its "possession or control," the accused must bring an application for production for those records. Second, even if the materials are in the Crown's possession or control, the Crown may not be entitled to produce those materials, unless the accused succeeds in a *Mills* application or an *O'Connor*-like application.

1. POSSESSION OR CONTROL

I will discuss (a) the concepts of "possession" and "control," (b) the problem of the divisibility or indivisibility of the Crown, (c) the structure of the jurisprudence relating to possession and control, and (d) the special problem of the disclosure of police disciplinary records.

a. Concepts: "Possession" and "Control"

Remarkably, the cases do not give us a thorough, authoritative explication of the key disclosure concepts of "possession" or "control." We can take "possession" to mean the "personal possession," "physical possession," or custody of materials by the offices of the Crown prosecutor.

An important consideration is that the Crown is obligated to disclose *information* in its possession or control. The disclosure obligation does not concern only records or physical evidence. Hence, if information has been passed to the Crown or if the Crown has gained information (for example, through the personal investigations of a prosecutor), that information must be disclosed to the accused, even if the Crown does not possess a record that independently confirms or sets out the information.

"Control" in the disclosure context must entail that the Crown has the right to possession of the material, without the requirement of taking any further formal step or without the need to rely on any legal process. The material is available "on request." We would not say that a record was in a person's control if, to obtain possession of the record, the person would have to make an application under access to information legislation, apply for a court order directing that possession be granted, or apply for a search warrant authorizing seizure of the record. "Control" should be premised on legal right, and not on the practical ability to obtain records, which may vary from prosecutor to prosecutor. On this approach, material in the hands of governmental contractors or consultants would be found to be within the Crown's control, if pursuant to the

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[205] *Ibid.* at paras. 25, 30-33; *R.* v. *Biscette* (1995), 99 C.C.C. (3d) 326 at para. 8 (Alta. C.A.), aff'd [1996] 3 S.C.R. 599. See Stuesser, *supra* note 187 at 5.

governing contract the Crown should be entitled to the relevant information or records in question. If a person has a legal duty to disclose information to the Crown (which need not be coupled with a legal right of the Crown to demand that information), that information is in the control of the Crown.

Behind the "possession or control" limitation on the Crown's disclosure obligations seems to be a recognition of the diversity of functions of the modern state. The state is not a monolithic apparatus. Different organs of the state engage in different activities, for different purposes, for different ends. State organs not engaged in the investigation of offences are "strangers" to investigatory and prosecutorial agencies; they should be permitted to get on with their work, without the distraction of participating in prosecutions, unless good reasons are provided to compel them to disclose information.

b. Divisibility of the Crown

If, for disclosure purposes, the Crown were regarded as "indivisible," then records in the custody of all federal or provincial or federal and provincial governmental departments and agencies, in all organizations that were part of the "apparatus of government,"[206] would be subject to disclosure. Prosecutors would be required to check all governmental agencies to determine whether disclosure obligations were satisfied. With one exception, the courts have not interpreted "Her Majesty" to be indivisible for disclosure purposes. Instead of relying on the abstract notion of "indivisibility," the courts have looked to evidence of the functional relationships between the agency and the Crown or the actual passage of information between the agency and the Crown.

The exception concerns the police. Practically, if investigation information relating to the charges against the accused is in the possession of the police, the accused is entitled to disclosure of that information, whether a prosecutor has been apprised of the existence of that information or not.[207] Put another way, if the Crown fails to disclose or delays disclosure of investigation information relating to the charges against the accused in the possession of the police, depending on the effects of the failure or tardiness, the accused will have a remedy.[208] One line of authority imposes the *Stinchcombe* duty on both prosecutors and police, as elements of the Crown.[209] This approach relies on the indivisibility of the Crown and police, at least with respect to investigatory information.

An alternative principled explanation is available. Another line of authority proposes that the *Stinchcombe* disclosure obligation attaches to prosecutors only. Prosecutors

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206 See *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229; *Eldridge* v. *British Columbia*, [1997] 3 S.C.R. 624.

207 *Egger*, *supra* note 190.

208 *Martin Committee Report*, *supra* note 8 at 199.

209 *R.* v. *L.X.F.* (1995), 173 A.R. 321 at paras. 26, 36 (Q.B.) [hereinafter *L.X.F.*]; *Trang (No. 3)*, *supra* note 38 at para. 393; *R.* v. *Antinello* (1995), 97 C.C.C. (3d) 126 at 134 (Alta. C.A.). See T.M. Brucker, "Disclosure and the Role of Police in the Criminal Justice System" (1993) 35 C.L.Q. 57 at 58, 74.

alone are obligated to disclose to the accused. The police have no obligation to disclose directly to the accused. Prosecutors are obligated, though, to make reasonable inquiries with the police to obtain investigation information. Despite this obligation, prosecutors have no authority over the police. A prosecutor cannot, by virtue of his or her office, compel the police to disclose information to him or her.[210] What makes the disclosure system work is that police officers have independent professional and statutory obligations to disclose investigation information to the prosecution.[211] Failure to disclose information could amount to disciplinable conduct. For example, under s. 5(1)(h) of Alberta's *Police Service Regulation*,[212] a police officer shall not engage in any action that constitutes "neglect of duty." Under s. 5(2)(h) of the *Police Service Regulation*, "neglect of duty" includes

> (v) failing to report a matter that it is his duty to report;
>
> (vi) failing to report anything that he knows concerning a criminal or other charge;
>
> (vii) failing to disclose any evidence that he, or any other person to his knowledge, can give for or against any prisoner or defendant.

This second approach does not rely on the indivisibility of the Crown, but on the distinct roles of prosecutors and police. Precisely because the Crown is divided, with the state function of investigation being given to the police and the state function of prosecution being given to Crown prosecutors, the police must bear their own obligation to assist the prosecution.

As a matter of principle, the second approach is preferable. The *Stinchcombe* obligation should be understood as primarily a prosecutorial obligation. Even in the case of investigation, prosecutors and police should not be identified. It is worth reflecting on the divisibility of prosecutors and police because it resurfaces in the area of the disclosure of disciplinary records, which will be considered below.

Certainly prosecutors and police must have strong practical links. Their work must be co-ordinated. Without the police, prosecutors would and could have little to do. The police perform the investigations that lead to the laying of most charges. The police provide investigatory materials to the prosecutors which serve as evidence at trial. The police are often key witnesses. The police rely on prosecutors to obtain convictions in sufficient number to validate their work and ensure that criminal penalties have some deterrent value; for similar reasons, they rely on prosecutors to argue for effective sentences. The police rely on prosecutors to argue for interpretations and developments of law that will promote public safety and their ability to do their job — the police

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210 *R.* v. *Spurgeon* (1994), 148 A.R. 73 at para. 8 (Q.B.) [hereinafter *Spurgeon*].

211 *L.A.T.*, *supra* note 194 at 94; *R.* v. *W.J.V.* (1992), 72 C.C.C. (3d) 97 at 109 (Nfld. C.A.); *Martin Committee Report*, *supra* note 8 at 167-68, 199; *Zhang (No. 2)*, *supra* note 87 at para. 22; *R.* v. *J.C.*, [1998] O.J. No. 3899 at para. 18 (Ct. J. (Prov. Div.)), online: QL (OJ) [hereinafter *J.C.*]; *Ontario Ministry of the Attorney General Crown Policy Manual, Police — Relationship with Crown Counsel, Policy P-1*, reprinted in Sherrin & Downes, *supra* note 7 at 165 [hereinafter *Ontario Crown Policy Manual*].

212 Alta. Reg. 356/90 [hereinafter the *Police Service Regulation*], made under the *Police Act*, R.S.A. 2000, c. P-17, s. 61 [hereinafter *Police Act*].

(absent intervention) have no direct voice in legal argument in court. The police are, for the most part, perfectly capable of understanding and applying the law in the performance of their duties. Nonetheless, the legal complexity of some investigations, particularly concerning criminal organizations, requires that the police obtain legal advice from prosecutors. In some highly complex investigations, the co-operative/consultative relationship of police and prosecutors is institutionalized through their participation in joint task forces.[213] But despite these links, principle and authority prevent any simple identification of prosecutors and police.

On the level of principle, from the standpoint of prosecutors, the crucial consideration distinguishing prosecutors from the police is the quasi-judicial, public role of prosecutors. In *Stinchcombe*, Sopinka J. quoted the following famous passage from the decision of Rand J. in *Boucher*:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.[214]

Prosecutors have a "public" role. They therefore cannot be counsel for the police, any more than they can be counsel for complainants or for particular witnesses. They are counsel for "the public," for the community — which, one might add, includes the accused. Prosecutors should be distinguished from the police by the scope of the interests that prosecutors should consider in carrying out their duties. Prosecutors should be "above the fray." The police, though, are precisely "in the fray." Too intimate a relationship with the police would impair the objectivity and detachment that prosecutors require to consider the multiple interests that should bear on their decisions.

Prosecutors have important areas of discretionary authority that should be exercised without undue influence by any set of interests. Prosecutors supervise the carriage of charges in court; even in jurisdictions in which prosecutors play no or only a marginal role in the laying of charges, prosecutors retain the right to stay charges laid by any person, including a police officer. If charges concern "hybrid" offences, prosecutors decide whether the charges proceed summarily or by indictment. Prosecutors decide what information is disclosed to the accused, and may request from the police further information in police possession for disclosure. Prosecutors decide what evidence to tender in court, and decide the forms of questioning and submissions. Prosecutors

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213 *Trang (No. 2)*, *supra* note 83; see "Silver Thread," *supra* note 187 respecting problems that arise in these close relationships.

214 *Boucher* v. *The Queen*, [1955] S.C.R. 16 at 23-24. See "Silver Thread," *supra* note 187 and the authorities referred to therein.

decide whether to appeal, the grounds for appeal, and the arguments for appeal. In all of these instances, prosecutors may make decisions not favoured by the police.

Moreover, we should not think that prosecutors must be *tabulae rasa* on which multiple interests may be laid. Prosecutors are lawyers, with specialized training, experience, and expertise, that makes them a profession within the legal profession. Prosecutors require independence so that they are able to exercise the professionalism that is properly their own. They must be able to bring their own expertise and judgment to bear in conducting their work. They should not simply reflect the professions of others.

Finally, prosecutors are officers of the court. Their primary duties must be to the administration of justice and the rule of law. Their profession requires their basic commitment to these abstractions and principles. One might say, relying on "Packer's model,"[215] that prosecutors must embrace "due process" rather than "crime control" — and we might expect police officers to have perhaps more significant commitments to "crime control." One might say that prosecutors should be "Platonists": they should be concerned with the particular insofar as it reflects the general, as it reflects principle. We might expect police officers to have more definite and entrenched commitments to particular circumstances and to the legal consequences that they believe should follow from these particulars. Prosecutors, one might say, should be concerned with achieving *justice* in this case, as much as justice *in this case*. For all these reasons, prosecutors require institutional and practical independence from the police to carry out their proper functions.

We should not think that principle moves only in one direction, pulling prosecutors away from the police. Principle also dictates that the police be independent of prosecutors. The police must decide what to investigate, whom to investigate, and how to investigate. The police have the power to engage in highly intrusive activities that may severely limit persons' liberties. Practically, the police bear the responsibility of deciding when matters should be processed as criminal charges. The police have discretion to exercise in the performance of their duties. While legally their discretion may appear to be more circumscribed than prosecutors', practically it is extremely significant. For example, the police may decide not to charge at all. That decision is often far more important to a suspect than decisions made by a prosecutor after criminal proceedings have been commenced. The police should not be subject to direction from other organizations in lawfully carrying out their duties.

The police, like prosecutors, are professionals. The police have experience and expertise in investigation that lies outside the expertise of prosecutors. Prosecutors may provide legal guidance to police investigations. Otherwise, prosecutors, as prosecutors, are not in a position to direct the police.

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[215] H.L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968), c. 8.

The police, like prosecutors, are committed to the rule of law; they are sworn to uphold the law.[216] To ensure that they carry out their own commitments free from undue influence, the police must be independent of the inclinations, motivations, and interests of other persons, including prosecutors. Prosecutors may have their own favoured targets; they should not be entitled to dictate the choice of target for the police. Policing should not be politicized. Furthermore, unlike prosecutors, the police may be expected to have strong engagement with the details and the experiences of particular alleged offences. Prosecutors get to the facts second-hand, as one set of facts among many that must be litigated in a day, a week, or a career. Prosecutors work primarily with rules as they apply to particular cases. The police work primarily with particular cases, as they fit within or express general rules. If prosecutors should be "Platonists," the police should be "Aristotelians." For all these reasons, the police require institutional and practical independence from prosecutors to carry out their proper functions. The police and prosecutors should not be regarded as indivisible, even around issues of the investigation of crime.

On the level of authority, we find some confirmation for the mutual independence of police and prosecutors, even respecting investigations. According to Binnie J. in *Shirose*, "[a] police officer investigating a crime is not acting as a government functionary or as an agent of anybody. He or she occupies a public office initially defined by the common law and subsequently set out in various statutes."[217] Indeed, if prosecutors and police were not independent, it could not have been found — as it was in *Shirose* — that the doctrine of solicitor–client privilege attached to communications between them. Without independence, there could be no "client" as distinct from "solicitor," and *vice versa.*

c. The Structure of Possession or Control

The cases support the following propositions:

(i) The Crown is obligated to disclose investigatory information in the possession or control of the investigating police service(s),[218] even if
   (A) the police service is responsible to a different level of government (that is, the prosecutors are provincially appointed, but the police are federally-constituted; or the prosecutors are federally appointed, but the police are responsible to a provincial or municipal agency),[219] or

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216 See Schedule 3 to the *Police Act* ("Oath of Allegiance and Office").

217 *Shirose*, *supra* note 120 at para. 27. See also M. Code, "Crown Counsel's Responsibilities When Advising the Police at the Pre-Charge Stage" (1998) 40 C.L.Q. 326 at 336; Brucker, *supra* note 209 at 64, 72.

218 *J.C.*, *supra* note 211 at para. 23: "If the Crown chooses to prosecute in such a way that involves other federal or municipal police forces for the proof of allegations in support of character evidence, then it is incumbent upon the Crown to take special care to ensure that distant jurisdictions cooperate with full and complete disclosure."

219 *Ibid.*; *Spurgeon*, *supra* note 210 at para. 8.

(B) the police service has not disclosed the information to the Crown.[220]

(ii) The Crown is obligated to disclose information in the possession or control of any other governmental (or private[221]) agency that was engaged in the investigation of the offence or the circumstances of the offence. This includes, in particular, child welfare or social services agencies.[222]

(iii) The Crown is obligated to disclose relevant information received from any other agency, even though that agency was not engaged in the investigation of the offence or the circumstances of the offence.[223] (In this type of case, the *information* is in the possession of the Crown, even if records containing the information are not.)

(iv) The Crown is obligated to disclose that a non-investigatory governmental agency has relevant information, even though the Crown does not have details of that information, if the Crown has been advised that the information exists. Since the detailed information is not in the possession or control of the Crown, it is not obligated to disclose the information itself; the accused may make a third-party records application to acquire the information.[224]

(v) The Crown may be obligated (is obligated in some provinces) to make reasonable inquiries with non-investigatory governmental agencies to determine whether they possess relevant information and to disclose whether these agencies have information.[225]

(vi) The Crown is not otherwise obligated to disclose information (non-investigatory information) in the possession of governmental agencies.[226]

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220 *Egger*, *supra* note 190; *R.* v. *Gingras* (1992), 71 C.C.C. (3d) 53 at 58-59 (Alta. C.A.) [hereinafter *Gingras*]: "For the sake of argument (without deciding), we suppose that might extend to matters which the police have uncovered and have not revealed to the prosecutor." See also *R.* v. *Lee*, [1994] B.C.J. No. 1590 at para. 9 (Prov. Ct.), online: QL (BCJ) [hereinafter *Lee*]; *R.* v. *S.E.S.* (1992), 100 Sask. R. 110 at 120 (C.A.); *R.* v. *Fudge*, [1999] O.J. No. 3121 at para. 6 (S. Ct.), online: QL (OJ) [hereinafter *Fudge*]; *Martin Committee Report*, *supra* note 8 at 198 (although this obligation is described as "more questionable"); and "Alberta Disclosure Guideline," *supra* note 7 at ALTA-6.

221 See *R.* v. *AGAT Laboratories*, [1997] A.J. No. 639 (Prov. Ct.), online: QL (AJ).

222 *Szczerba*, *supra* note 32 at para. 22; *R.* v. *D.D.W.* (1997), 114 C.C.C. (3d) 506 at para. 88 (B.C. C.A.) (dissenting, but for the majority on this point), aff'd [1998] 2 S.C.R. 681 [hereinafter *D.D.W.*]; and "Alberta Disclosure Guideline," *supra* note 7 at ALTA-8.

223 *C.E.S.*, *supra* note 199 at paras. 37, 39; *D.D.W.*, *ibid.* at para. 88. In *Razek*, Dunn J. held that "[i]nformation coming to the attention of the Crown relating to documents of another Crown department which may be relevant to the prosecution and defence, surely [places] upon the Crown a duty to seek out such documents and to disclose same to the defence": *Razek*, *supra* note 32 at para. 20 and "Alberta Disclosure Guideline," *ibid.*

224 *S.S.*, *supra* note 32 at para. 11.

225 *R.* v. *Arsenault* (1994), 93 C.C.C. (3d) 111 at 117 (N.B. C.A.).

226 *L.X.F.*, *supra* note 209 at para. 26; *Gringras*, *supra* note 220; *Spurgeon*, *supra* note 210 at para. 13; *Brertton*, *supra* note 7; *R.* v. *Teskey* (1994), 156 A.R. 72 at 74 (Q.B.); *S.S.*, *supra* note 32; *Re Heeming*, [1996] B.C.J. No. 1933 (S.C.), online: QL (BCJ); *Mandeville*, *supra* note 16; *D.D.W.*, *supra* note 222 at paras. 80-86; *Martin Committee Report*, *supra* note 8 at 256; *Ontario Crown Policy Manual*, *supra* note 211 at 163 (item 18); and "Alberta Disclosure Guideline." *supra* note 7 at ALTA-2.

d. Police Disciplinary Records

Police disciplinary records include records of decisions by, for example, independent public complaint agencies, independent disciplinary review bodies, internal investigation records, or internal discipline records. These records could be useful to accuseds in a variety of contexts. If a defence revolved around an alleged excessive use of force by an officer, records could show that the officer had used excessive force in other circumstances. The records could lead to admissible evidence showing that the officer acted in accordance with his or her disposition on the occasion in question.[227] Records might provide information tending to support an accused's contention that an officer had "planted" drugs on him or her. Records might show that a particular unit or squad had gone "rogue," and had become more concerned with cleaning up the streets than with legal technicalities. If records existed that reflected poorly on the credibility of an officer with a significant role in the proceedings, the records could provide grist for cross-examination relating to credibility.[228] Thus, police disciplinary records could potentially be relevant to the innocence of an accused.

The potential relevance of these records should not be exaggerated. These records would not count as "criminal records" for the purposes of cross-examination and proof under s. 12 of the *Canada Evidence Act*. Counsel's ability to pursue issues connected with discipline would be constrained by the collateral facts rules. Discipline, moreover, may relate to a host of issues completely unconnected with the case against an accused — it may relate to, for example, insubordination, tardiness, or dress-code violations.[229] The mere fact that an officer connected with the case against the accused has a disciplinary record tells us nothing by itself. Furthermore, potential usefulness alone does not entail that the Crown should be obligated to disclose the information. It would be equally useful to accuseds charged with sexual offences to have disciplinary records relating to psychiatrists or child care workers who intervened before charges were laid; information might be revealed of discipline for excessive advocacy or for the use of improper therapeutic techniques.

If, however, a disciplinary record is relevant, the accused should have a constitutional right to access that record. The issue is whether the accused finds this right under *Stinchcombe* or *O'Connor*. The advantage of *Stinchcombe* to an accused is clear: the Crown would be required to inform the accused of disciplinary matters otherwise wholly unknown to the accused, which the accused would never be in a position to obtain through *O'Connor*, lacking any basis for a showing of "likely relevance." I shall argue that we should avoid a false dichotomy. Aside from cases in which *Stinchcombe* directly governs, neither *Stinchcombe* nor *O'Connor* should, without modification, be

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227 See *R.* v. *McMillan* (1975), 23 C.C.C. (2d) 160 (Ont. C.A.); *R.* v. *Scopelliti* (1981), 63 C.C.C. (2d) 481 (Ont. C.A.); *R.* v. *Watson* (1996), 108 C.C.C. (3d) 310 (Ont. C.A.).

228 "There may be other matters reflecting on the credibility of Crown witnesses which should be disclosed, for example, a conviction in prior disciplinary proceedings against a Crown witness reflecting on the honesty of the witness": *Martin Committee Report*, *supra* note 8 at 248.

229 For a list of types of misconduct see, *e.g.*, s. 5(1) of the *Police Service Regulation*.

applicable to police disciplinary records. Instead, a *Stinchcombe* plus *O'Connor* procedure should govern.

One opposing view may be dismissed fairly quickly. It might be argued that *O'Connor* should always apply to applications for production for police disciplinary records, since the position of accuseds in relation to these records is the same as their position in relation to other records in the custody of third parties. The records are not in possession or control of the Crown, the records are not part of the case to meet, and the records raise no issue of surprise of the accused in the litigation. If medical and therapeutic records warrant the *O'Connor* regime, there is no reason for denying the application of that regime to police disciplinary records. This argument begs the question. While it is true that disciplinary records (usually) are not in the possession of the Crown, the issue is whether the Crown *should* be judged to have possession or control of these records.

The analysis of the appropriate legal regime for access to police disciplinary records should be consistent with the functional approach to Crown possession or control issues. Two factors are particularly important — the nature of the record holder and the nature of the records.

i. Nature of the Record Holder

Police disciplinary records may have been turned over to the Attorney General or Minister of Justice. Criminal or other charges against the police officers may have been contemplated. Under Alberta legislation, the Law Enforcement Review Board is entitled to refer matters arising in the course of disciplinary complaints to the Minister of Justice;[230] a Chief of Police is also entitled to refer disciplinary matters to the Minister of Justice.[231] If materials have been forwarded to the Minister of Justice, the records would be in the possession of the Crown. Hence, in a straightforward application of *Stinchcombe*, those records or information relating to those records should be disclosed to the accused (in the absence of grounds to refuse disclosure on the basis of irrelevance or privilege).[232]

If the Crown otherwise learns that a police officer connected with the case has been disciplined, if the disciplinary charges are relevant to the assessment of the evidence in the case or to the credibility of the officer as a witness, no privilege attaches, and no other third party's privacy interests are implicated, then the Crown must disclose this information to the defence. This situation would be analogous to a situation in which the Crown has received information about an investigation from an independent government office.

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230 *Police Act*, s. 17(2).

231 *Ibid.*, s. 45(2).

232 *R.* v. *Scaduto*, [1999] O.J. No. 1906 at para. 20, online: QL (ORP), 63 C.R.R. (2d) 155 (S.C.), [hereinafter *Scaduto* cited to O.J.]; *R.* v. *Altunamaz*, [1999] O.J. No. 2262 at para. 47 (S. Ct.), online: QL (OJ) [hereinafter *Altunamaz*].

In contrast, if disciplinary records are in the custody of organizations independent of the police and the Crown (for example, public complaint commissions or law enforcement review boards), the records are not in the possession or control of the Crown, and should no more be subject to *Stinchcombe* than records in the custody of other independent governmental agencies. Neither prosecutors nor the police have the right to possession of those records. Furthermore, these organizations are not merely distinct from the Crown, in the manner of government departments falling under the responsibility of Ministers other than the Attorney General or Minister of Justice. These organizations have substantial independence from any legislature or executive. The stronger their independence, the weaker the argument for *Stinchcombe* disclosure.[233]

A more difficult problem arises if disciplinary records (for example, generated by a public complaints commission) come into the hands of a Chief of Police. One might argue that the Chief is responsible to the Attorney General or Minister of Justice;[234] possession by the Chief is possession by the Crown. General responsibility for policing, however, may not be vested in the Attorney General or Minister of Justice, but (as in Alberta) in the Solicitor General, a different Minister.[235] Moreover, properly speaking, a Chief of Police is directly responsible to neither Minister, but to his or her police commission.[236] In the context of complaints and discipline, the Chief acts in his or her capacity as the administrator of a police service.[237] This capacity is distinct from the Chief's capacity in relation to criminal investigations by members of the police service. Hence, it should not be concluded that merely because a Chief of Police possesses a disciplinary record, it is therefore in the possession or control of the Crown. It may or may not properly fall within the Crown's control; that depends on the nature of the record, rather than on the nature of the record holder.

ii. Nature of the Record

If records are, either formally or in effect, investigatory records, these records should be turned over to the Crown for disclosure. If records arise from an investigation or

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233 *Scaduto*, *ibid.* at paras. 8, 20; *Altunamaz*, *ibid.* at 37. The records of such entities, however, may be accessed through a *FOIPPA* application. The *FOIPPA* route to disclosure is probably preferable to the *Stinchcombe* route.

234 Section 2(2) of the *Police Act* provides that "[n]otwithstanding anything in this Act, all police services and peace officers shall act under the direction of the Minister of Justice and Attorney General in respect of matters concerning the administration of justice and the enforcement of those laws that the Government of Alberta is required to enforce."

235 In Alberta, aside from s. 2(2), the *Police Act* is the responsibility of the Solicitor General. See s. 2(1) of the *Police Act*, and s. 22(1)(d) of the *Designation and Transfer of Responsibility Regulation*, Alta. Reg. 44/2001, under the *Government Organization Act*, R.S.A. 2000, c. G-10, s. 16.

236 See, *e.g.*, the *Police Act*, ss. 28(1) and 31(1). Rooke J. correctly interpreted the responsibility of the Chief in *Szczerba*, *supra* note 32 at para. 47.

237 *Altunamaz*, *supra* note 232 at paras. 43, 44; *Johnson* v. *McKay* (1999), 187 Sask. R. 294 at 301 (Q.B.) [hereinafter *McKay*].

from reporting relating to the very circumstances of the alleged offence by the accused, these are "investigatory records" and should be disclosed.[238]

If the accused was the complainant or was a witness in disciplinary proceedings and the disciplinary charges arose out of the same circumstances as led to the charges against the accused, and the records contain no personal information about any individual other than the accused and the disciplined officer, then *Stinchcombe* should apply and the records should be disclosed.[239] (In circumstances like these, the accused would be in a good position to succeed in an *O'Connor* application in any event.)

If records contain personal information about third parties, their interests must be taken into account in the disclosure process. Third parties could include police officers and civilians (for example, individuals who lodged complaints) unconnected with the investigation. As will be discussed in section 2 below, unless third parties have consented or waived their rights, their personal information cannot be simply disclosed. The personal information about the third parties may be severed from the records; if severed records are adequate for the accused's purposes, nothing more need be done. If the accused requires this personal information, it appears that a further application, along *O'Connor* lines, must be made.

The real problem concerns disciplinary records in the custody of the police containing information relevant to the charges against the accused, but relating to incidents in which the accused had no involvement, and which have not been brought to the attention of the Crown. Must the accused somehow find out about these records and apply for their production, or should these records be disclosed to the accused? The weight of authority supports the view that the accused is entitled to production of these records, if at all, through *O'Connor*.[240] The issue is whether the weight of authority is misplaced.

Two points militate against the attachment of the *Stinchcombe* disclosure obligation to police discipline records. *Stinchcombe* applies to the "fruits of investigation" of the accused. The disciplinary records under consideration, however, are not records of the investigation of the accused. Neither are they "investigatory" records. The disciplinary records with which we are concerned were created in relation to entirely separate circumstances from the accused's. In this sense, the records could not be said to be

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238 *R.* v. *Tomlinson* (1998), 16 C.R. (5th) 333 at paras. 8, 63 (Ont. (Prov. Div.)) [hereinafter *Tomlinson*]; *R.* v. *Gruener*, [1997] O.J. No. 1589 (Prov. Div.), online: QL (ORP); *R.* v. *Thibeault*, [1997] B.C.J. No. 3080 (Prov. Ct.), online: QL (BCJ) [hereinafter *Thibeault*]; *R.* v. *Gratton*, [1987] O.J. No. 1984 (Prov. Ct.), online: QL (ORP); *R.* v. *Callaghan*, [1993] O.J. No. 2013 (Prov. Div.), online: QL (ORP). "Use of force" reports have therefore been ordered disclosed.

239 *R.* v. *Delong* (1989), 47 C.C.C. (3d) 402 at 420 (Ont. C.A.); *Tomlinson*, *ibid.*; *Thibeault*, *ibid.*

240 The recent Alberta case of *Szczerba* is a good library of the applicable cases, although the case concerns the slightly different issue of whether *O'Connor* applies to an application for wiretap information relating to a third party in connection with an investigation unrelated to the investigation against the accused. Rooke J. found that *O'Connor*, not *Stinchcombe*, was the appropriate procedure: *Szczerba*, *supra* note 32; *Altunamaz*, *supra* note 232 at para. 43; *O'Connor*, *supra* note 1 at para. 126. See D. Derstine, "Access to Police Records: Inside the Belly of the Beast" (1999) 20:3 Criminal Lawyers' Association Newsletter 20.

"fruits of the investigation" of the accused.[241] The records were not created for the purpose of investigation of the offences against the accused, but for other purposes and at other times. Hence, the argument runs, since these records are not "fruits of the investigation" they do not fall within the scope of the disclosure obligation.

The argument that disciplinary records are not investigatory records, however, begs the question. One might concede that the disciplinary records were not, in their inception, "fruits of the investigation." That fact does not advance the argument. An accused's criminal record for other offences may relate to circumstances entirely distinct from the charges faced by the accused. The Crown, though, has an obligation to disclose the accused's own criminal record. The issue is whether records *should* be brought into the investigation, and be made investigatory records. Should the police consider their own disciplinary records as a source of evidence relating to the offence? This leads to the second point advanced against disclosure of police disciplinary records. They are not "investigatory."

Disciplinary records reflect structures and issues foreign to criminal investigations. Their proper context is the administrative independence that police services must have from the Crown. I argued above that prosecutors and police should not be identified, even in relation to investigations. One might go on to argue that the police, as an organization, should have even stronger independence from prosecutors in relation to matters of internal discipline. Internal discipline is a component of personnel management or labour relations. Discipline stems from management's right to control its operations and staff, as mediated through collective agreements, legislation, and regulations. Disciplinary processes and sanctions respond to interests, pressures, and concerns different than those motivating criminal investigations. For example, in a unionized environment, part of the purpose of the disciplinary process is to maintain the relationship between the accused officer/employee and the employer. Not all discipline is termination. Most is not. The process will also be concerned (at a more or less express level) with preserving morale and the working relationships with other officers (the interests of other officers might be signified, for example, through a union representative who assists the accused officer). Internal discipline requires privacy. Part of the essence of internal disciplinary proceedings is that they are internal. These proceedings shy away from the publicity that attends judicial proceedings. In part, this assists the preservation of working relationships, which publicity and attendant consequences might impair; in part, this protects the decision-makers, who are answerable not (or not directly) to the public, but to the police service itself; and in part, this protects the interests of third parties who participate in proceedings.[242]

The force of all these observations may be conceded. Disciplinary records are not created as "investigatory records." The police should have independence in their internal governance. Once again, though, we must avoid begging the question. The facts and legal realities of police independence from prosecutors and police disciplinary

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241 *Scaduto*, *supra* note 232; *McKay*, *supra* note 237 at para. 22; *Altunamaz*, *supra* note 232 at para. 42.

242 *McKay*, *supra* note 237 at para. 22; *Spence* v. *Spencer* (1987), 65 Sask. R. 313 at para. 2 (Q.B.).

authority do not answer the question of whether, in carrying out the duty to investigate offences, the police should look to their own disciplinary records. The duty we are considering is, fundamentally, the duty of the police (whether that duty is independent of the duty imposed by *Stinchcombe* on the Crown or an extension of that duty).

I suggest that the determinative fact and legal reality is that our police services, unlike all other government agencies and unlike any private agency, are intimately bound up with investigation of criminal offences. They are not the agents of the Crown. Their role is more primary and important than that. The police, with prosecutors, share the governmental function of "executing" or administering the criminal law, of ensuring that allegations of violations of the criminal law are pursued, processed, and resolved. The police are our government's primary investigative mechanism. The Crown's possession of investigatory material is secondary; it is derived from police investigative efforts. While other governmental agencies may rightly claim that their disciplinary processes lie outside the scope of the disclosure obligation, the police are too deeply implicated in criminal investigations to claim the same status.

The police are obligated to investigate and report findings to the Crown. But part of what a police service must be taken to know are facts about its own members. Not all members of a service, to be sure, would be aware of the disciplinary records of their colleagues. Not all members of a service, though, would necessarily be aware of all other information the service is required to disclose. The police service as an institution has information about the disciplinary records of its members. If a member of a police service has been disciplined for a matter relating to the elements of an offence, an accused's defence, or the credibility of that member as a witness, that is information which should be brought into play in disclosure. Could it be otherwise? Suppose that a member of a police service has a bad disciplinary record, relevant to charges against an accused. Should we allow a presumptively innocent individual to be punished, because the police failed to disclose this information? I suspect that our intuitions would be that it is better that disciplinary information be disclosed, than that the innocent be wrongly convicted.

If I am right that the police have duties to disclose information about disciplinary records, it follows that this information lies in the "control" of the Crown. Put another way, the Crown should ensure that the police provide information about the disciplinary records of officers connected with an investigation.

I do not suggest that disciplinary records should be simply disclosed along with more typical investigatory information. Disciplinary records have features distinguishing them from typical fruits of investigation — this is why the issues surrounding their disclosure are so difficult. On the one hand, disciplinary records were created for purposes other than the criminal investigation, and support other interests, and the interests of other persons. On the other hand, information about these records is in the possession of the chief governmental investigatory agent, so it cannot be ignored. Disciplinary records have a hybrid character, with both private and public aspects. The procedure relating to the disclosure or production, then, should have a hybrid character. The following

procedure, I suggest, is appropriate to the disclosure or production of police disciplinary records:

(a) The primary obligation for securing information about disciplinary records lies with the police service. Practical issues must be worked out. Not all members of a service have or should have access to disciplinary records. An officer with sufficient seniority and authority should collect this information. Care should be taken only to secure disciplinary findings (which would result in consequences ranging upwards in severity from a reprimand)[243] and not simply performance expectations or counselling records.[244] Information about the records should not be disclosed within the police service; the officer collecting the information should preserve the confidentiality of the information. Disciplinary records are not necessarily permanent. If the record has been purged,[245] time, cost, and limited resources dictate that no disclosure responsibility remains.

(b) The disciplinary information should be provided to the Crown. The Crown has the discretion to sort out irrelevant from relevant information. Disciplinary infractions that concern entirely irrelevant activities need not be disclosed in any form.

(c) The Crown should advise the defence that disciplinary records exist. The Crown should provide a sufficient description of the information so that the accused is in a position to make representations respecting the records. The Crown should not disclose the contents of the records.

(d) The accused is entitled to bring an application for the disclosure of the records. In this application, the *O'Connor* rules should be followed, in recognition of the interests attaching to the records.

(e) The police service that provided the records and any individuals to whom the records relate should have standing in this application (without being compellable).

(f) The accused would have the initial burden of showing that it is likely that the records contain relevant information. If the accused fails to do so, the application is at an end. If the accused is successful, the records are produced to the judge for review. The judge might provide judicial summaries of the records to the accused.

(g) The accused and other parties could then make submissions about whether, on balance, the records should be produced to the accused. The judge could take into account the interests of the police service and the interests of individuals in making this determination.

(h) If the accused is not successful, the application is at an end, subject to renewal in light of new evidence. If the accused succeeds, the records should be produced, on appropriate conditions.

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243 See *Police Service Regulation*, s. 17.

244 *Ibid.*, s. 6.

245 *Ibid.*, s. 22.

This procedure, in my view, accommodates the duties of the state, the rights of the accused, and the interests of third parties.

2. THIRD-PARTY INTERESTS

Information or records may have been delivered to the Crown, and reside in its possession; but individuals with reasonable expectations of privacy in relation to the information may not have consented to production to the Crown. A record custodian, for example, may have transmitted the information or record to the Crown without the knowledge or consent of the subject of the records. Information provided by the police to the Crown may concern not only the accused, but other individuals who are neither co-accuseds nor charged with any offence. These might include complainants or witnesses whose names or evidence appear in disciplinary records. The rules that apply in these circumstances depend on whether the accused has been charged with a Listed Offence.

a. *Criminal Code*, ss. 278.2(2) and (3)

Under s. 278.2(2) of the *Criminal Code*, if an accused has been charged with a Listed Offence and a record relates a complainant or witness, the *Mills* procedure applies, even though the record has been provided to the Crown — unless complainant or witness has "expressly waived" the *Mills* procedure protections. The Crown cannot disclose the record's contents to the accused. The accused must apply for production of the record.

b. Third-Party Interests in Non-Sexual Offence Cases

In cases not governed by the *Mills* procedure, a parallel system is developing. If a third party has a reasonable expectation of privacy in a record in the possession or control of the Crown, cases are now indicating that the Crown cannot disclose the information unless the third party voluntarily disclosed the information to the Crown (waived his or her rights), or the accused satisfies a balancing test justifying disclosure of the information to the accused.[246]

The foundation for this emerging jurisprudence is the decision of McLachlin and Iacobucci JJ. in *Mills*. In commenting on *O'Connor* as it commented on *Stinchcombe*, McLachlin and Iacobucci JJ. argued that the assumption behind the Crown's duty to disclose therapeutic records in its possession was that the records had been "freely and voluntarily surrendered by the complainant or witness."[247] If records have not been freely and voluntarily surrendered, the Crown's disclosure obligation is not engaged. This gloss on *Stinchcombe* saved the constitutionality of s. 278.2(2). It also entails that in cases outside of the *Mills* procedure, Crown disclosure of records bearing a reasonable expectation of privacy is only required if the privacy holder has voluntarily

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[246] *Chan*, *supra* note 23 at para. 141; *Trang (No. 2)*, *supra* note 83 at paras. 100-102; and "Alberta Disclosure Guideline," *supra* note 7 at ALTA-8, and Appendix B ("Waiver").

[247] *Mills*, *supra* note 3 at para. 106.

surrendered the records or waived his or her rights. If *Stinchcombe* does not apply, the accused is left to an *O'Connor* application.

IX. CONCLUSION

What, after all this, have we learned? The *O'Connor* procedure should be employed by an accused seeking the pretrial production of records in the custody of third parties, unless:

(a) there is no reasonable expectation of privacy in relation to the records, in which case the *McPherson* procedure or a modified *O'Connor* procedure (*sans* privacy balancing) should be employed;
(b) the records are protected by class privilege or a non-s. 39 public interest immunity, in which case a modified *O'Connor* procedure should be employed, that duly recognizes the policy reasons for the privilege or immunity;
(c) the records are protected by a certification under s. 39 of the *Canada Evidence Act*, which may be set aside by judicial review only in limited circumstances — only then could an *O'Connor* application advance;
(d) the records are protected by a class privilege (particularly informer privilege or solicitor–client privilege), in which case the *McClure* procedure should be followed;
(e) the accused is charged with a Listed Offence, the records relate to a complainant or witness, the records satisfy the definition of "record" in s. 278.1 of the *Criminal Code*, and the complainant or witness has not waived the statutory protections, in which case the *Mills* procedure should be employed;
(f) the records are in the "possession or control" of the Crown, in which case the *Stinchcombe* disclosure rules apply (keeping in mind that governmental custody should not be equated with possession or control by the Crown); or
(g) the records are police disciplinary records, in which case the Crown should disclose the existence of relevant evidence (as required by *Stinchcombe*), allowing the accused to apply for the production of the records (as provided in *O'Connor*).

O'Connor remains viable doctrine, and its uses are many, but we should not underestimate the difficulty of the issues surrounding its availability.