UNBALANCED BALANCING: BILL C–46, "LIKELY RELEVANCE," AND STAGE-ONE BALANCING

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We know that in the *Mills* case,[1] the Supreme Court upheld the constitutionality of the Bill C–46 provisions, which now constitute sections 278.1 to 278.91 of the *Criminal Code*.[2] We know that the Bill C–46 provisions changed the production rules established in the *O'Connor* case,[3] generally making it more difficult for accuseds to obtain production of records containing personal information concerning complainants and other witnesses or, alternatively, providing better protection for the personal information of complainants and other witnesses. Nearly every aspect of the Bill C–46 provisions has been the subject of learned dispute. I cannot and shall not tackle all the production issues. I shall consider two issues bearing on the first stage of an application for production, the stage of production of records to the court for review by the trial judge. After (I) surveying the statutory background, I will consider (II) whether the "likely relevance" standard sets a reasonable standard for accuseds to meet, and (III) whether the statutory provisions for balancing at the first stage of production are appropriate.

STATUTORY BACKGROUND

The Bill C–46 provisions (A) apply to specified offences, in relation to (B) specified records, in (C) the hands of third parties or the Crown and (D) establish a two-stage procedure for determining whether records may be produced to an accused.

A. Specified Offences

The Bill C–46 provisions only apply in proceedings respecting offences listed in s. 278.2(1). These are all sexual offences. The list includes the sexual assault offences, sexual interference and prostitution offences. In proceedings for non-listed offences, the rules developed in *O'Connor* will continue to apply respecting records in the possession or custody of third parties,[4] and the *Stinchcombe* rules will continue to apply respecting records in the possession or custody of the Crown.[5]

B. Specified Records

The Bill C–46 provisions only apply respecting records falling within the definition of "record" in section 278.1:

> 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

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1 *R.* v. *Mills* (1999), 28 C.R. (5th) 207 (S.C.C.) [hereinafter *Mills*]. McLachlin JJ. and Iacobucci JJ. wrote jointly for the Court; Lamer C.J.C. dissented solely on the issue of the application of the Bill C–46 regime to records in the hands of the Crown.

2 R.S.C. 1985, c. C–46, as amended. Further references to the *Criminal Code* shall be to section numbers only.

3 *R.* v. *O'Connor* (1996), 103 C.C.C. (3d) 1 (S.C.C.) [hereinafter *O'Connor*]. On the production issue, Lamer C.J.C. and Sopinka J. wrote jointly for the 5:4 majority; Cory, Iacobucci, and Major JJ. concurring (the "*O'Connor* majority"). L'Heureux-Dubé J. wrote for the dissenting minority on the production issue, La Forest, Gonthier, and McLachlin JJ. concurring (the "*O'Connor* minority").

4 As under the Bill C–46 regime, *O'Connor* contemplates a two-stage application for the production of records in the possession or control of third parties. At the first stage, the accused is required only to establish that the record sought is likely to contain information relevant to an issue at trial or the testimonial competence of a witness. If the accused is successful, the judge orders production of the record to the court for review. In light of the produced record, the judge then balances the interests of the accused in production and the interests of the complainant in maintaining the privacy of the record, and determines whether to produce the record to the accused (on any conditions required to protect privacy and any social interests connected with the type of record in question).

5 *R.* v. *Stinchcombe* (1992), 68 C.C.C. (3d) 1 (S.C.C.) [hereinafter *Stinchcombe*]: "In that case, it was determined that the Crown has an ethical and constitutional obligation to the defence to disclose all information in its possession or control, unless the information in question is clearly irrelevant or protected by a recognized form of privilege." *O'Connor*, *supra* note 3 at 13, para. 4, per Sopinka J.

> 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.

Records may relate to either a complainant or a witness.[6] For the sake of simplicity, in the remainder of this paper I will refer only to complainants' records.

"Records" include only records in which the complainant has a "reasonable expectation of privacy."[7] "Records" does not include — and this may turn out to be a significant exception — "records made by persons responsible for the investigation or prosecution of the offence." Hence, records made by police officers, including records of interviews with complainants, do not fall within the Bill C–46 regime.

C. In the Hands of Third Parties or the Crown

O'Connor concerned records in the possession or control of third parties. *O'Connor* confirmed that the access of accuseds to records in the hands of the Crown was governed by the *Stinchcombe* rules.[8] The Bill C–46 provisions apply not only to records in the hands of third parties, but also to records in the possession or control of the Crown: the provisions apply "where a record is in the possession or control of any person, including the prosecutor in the proceedings."[9] The Bill C–46 production rules do not apply, however, if the Crown has possession or control of the records but the complainant has "expressly waived the application" of the Bill C–46 regime.[10] We can expect a jurisprudence to develop respecting "informed waiver" by complainants, and can expect offices of the Crown to develop lengthy waiver forms. The Crown does have an obligation to notify an accused of records in its possession or control.[11] I shall not pursue the issues arising from the application of the Bill C–46 production rules to the Crown.[12]

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6 Subsection 278.2(1).
7 *Mills*, *supra* note 1 at 257, para. 99.
8 *O'Connor*, *supra* note 3 at 14, para. 6.
9 Subsection 278.2(2).
10 *Ibid.*
11 Subsection 278.2(3).
12 See the dissent of Lamer C.J.C. in *Mills*, *supra* note 1 at 221, para.1; see also P. Sankoff, "Crown Disclosure After *Mills*: Have the Ground Rules Suddenly Changed?" (2000) 28 C.R. (5th) 285; D. M. Paciocco, "Bill C–46 Should Not Survive Constitutional Challenge" (1996) 3 S.O.L.R. 185.

D. Two-stage Application Procedure

An accused who seeks production of a record must make an application for production before the trial judge.[13] The application must be in writing, and must set out[14]

> (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
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> (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.

The application must be served on the Crown, the record custodian, the complainant, and any other person to whom the record relates. At the time of serving the application, the accused must also serve on the record custodian a subpoena in Form 16.1.[15] The application has two stages.

(1) Stage One: Production to the Court

At the first stage, the judge — who at this point will not have seen the record — is to determine whether to order the record custodian to produce the record to the court for review by the judge. The hearing is *in camera*. The record custodian, the complainant and any other person to whom the record relates may appear and make submissions, but none are compellable, and no costs may be ordered against them in respect of their participation in a hearing.[16] The judge may order production to the court if the application complied with formal requirements, the accused 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."[17] In section 278.5(2), the *Criminal Code* sets out a list of

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13 Subsections 278.3(1) and (2). The restriction of jurisdiction for production applications to the trial judge raises important practical issues.
14 Subsection 278.3(3). While *O'Connor* had suggested that affidavit evidence is normally required to support the production application (*O'Connor*, *supra* note 3 at 18, para. 20), Bill C–46 does not expressly impose this requirement — although prudence, with an eye to the weight of defence evidence in the application, might incline toward filing an affidavit. The use of affidavit evidence raises the vexing issue of the appropriate affiant (if not the accused, for fear of cross-examination, then who? Not counsel, but a secretary? An articling student? What is the probative value of an affidavit based solely on information and belief?).
15 Subsections 278.3(5) and (6).
16 Subsections 278.4(1), (2), and (3).
17 Subsection 278.5(1).

factors to be considered in determining whether to order production to the court.

The judge must provide reasons for ordering or refusing to order production to the court.[18] For the purposes of the appeal rules, the determination to order production to the court or to refuse to make the order is a question of law.[19]

(2) Stage Two: Production to the Accused

If the judge does order production to the court, the application enters its second stage. The issue at this stage is whether the record or part of the record should be produced to the accused. In making this determination, the judge will have reviewed the record in question.[20] The judge may hold an *in camera* hearing, of the same nature as at the first stage of the application.[21] The very same tests as at the first stage — "likely relevance," "necessary to the interests of justice" — apply at the second stage, and the very same factors considered at the first stage are to be considered at the second stage.[22]

Production of the record to the accused may or may not be ordered. If it is ordered, the judge may impose conditions on production, to protect the interests of justice and the privacy and equality of the complainant.[23] 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."[24]

The judge must provide reasons for ordering or refusing to order production to the accused.[25] For the purposes of the appeal rules, the determination to order production to the accused or to refuse to make the order is a question of law.[26]

[18] Section 278.8.

[19] Section 278.91. The accused would appeal an adverse decision as part of an appeal from trial. The complainant, on the other hand, may appeal directly to the Supreme Court.

[20] Subsection 278.6(1).

[21] Subsections 278.6(2) and (3).

[22] Subsections 278.7(1) and (2).

[23] Subsection 278.7(3).

[24] Subsection 278.7(4). Doubtless some curious situations will emerge with the accused gaining access to a record, while the Crown is denied access. The subsection reinforces the idea that the Crown is not the lawyer for the complainant — that the complainant has or is developing a sort of relative autonomy in criminal proceedings. The complainant's records may turn out to be "none of the Crown's business" (a difficult notion, given that the proceedings are carried by Her Majesty and Her representative, the prosecutor).

[25] Section 278.8.

[26] Section 278.91. See note 19, *supra*.

"Likely Relevance" at Stage One of a Production Application

A crucial part of an accused's application for production is the accused's tendering of "grounds" which "establish" that the record sought is "likely relevant to an issue at trial or to the competence of a witness to testify."[27] The "likely relevance" standard generates three main issues: (A) why should the accused be compelled to meet a "likely relevance" standard? (B) what is the nature of the "likely relevance" test? and (C) what statutory restrictions apply to attempts to establish "likely relevance" and are those restrictions just?

A. The Rationale for "Likely Relevance"

Why should the accused bear a burden of proof in a production application, and why should the accused be compelled to discharge that burden by establishing "likely relevance" — as opposed, say, to showing that the record sought would be "useful to the defence," or some lesser burden?

The "likely relevance" standard was established in *O'Connor*, and, at least as a phrase appropriate to describe the accused's burden, was supported by both the majority and minority. The phrase has been imported into the Bill C–46 regime. The "likely relevance" onus and standard was not challenged in *Mills*.[28] Three main reasons supporting the imposition of the burden and standard of proof on the accused found favour with the *O'Connor* majority:[29]

(i) the information is not part of the state's "case to meet;"

(ii) the state has not been granted access to the material to prepare its case; and

(iii) third parties have no obligation to assist the defence.

Interestingly, while the *O'Connor* majority alluded to privacy rights shortly before listing these factors justifying the burden on the accused, privacy did not enter its list of justifying factors. In contrast, the *O'Connor* minority, while accepting the factors

[27] Subsections 278.3(3) and (4); s. 278.5(1)(b).

[28] *Mills*, *supra* note 1 at 267, para. 128.

[29] *O'Connor*, *supra* note 3 at 18, para. 19.

mentioned by the majority,[30] squarely based the accused's burden on the privacy and equality interests of complainants and others. The minority went so far as to hold that privacy analysis yields a "presumption" against ordering the production of records containing personal information.[31] In the minority's view, casual and easy production should be discouraged because it offends a person's privacy and dignity, and the threat of disclosure of confidential records tends to deter persons from reporting offences and from seeking treatment or assistance.[32] The *Mills* court followed the *O'Connor* minority lead, and linked "likely relevance" to privacy and equality issues: "Where the records to which the accused seeks access are not part of the case to meet ... privacy and equality considerations may require that it be more difficult for accused persons to gain access to therapeutic or other records."[33] Essentially, the *Mills* and *O'Connor* minority view was that accuseds must bear a significant burden in production applications, because accuseds are interfering with or threatening others' privacy and equality rights. The burden on accuseds is a way of balancing accuseds' rights to access with complainants' rights to resist access.

The approach of the *Mills* court to "likely relevance" was entirely consistent with its general approach to the Bill C–46 regime. The *Mills* court recognized three sets of rights at play in criminal trials — accuseds' rights to full answer and defence, the privacy rights of complainants and other witnesses, and the equality rights of women and children.[34] Following *Dagenais*,[35] as had the *O'Connor* minority before it,[36] the *Mills* court eschewed a "hierarchical" approach to the sets of rights, and instead sought "definitions" of the rights that would allow for their harmonious co-existence or coordination, rather than dictate their priorization and subordination.[37] Privacy and equality should underlie "likely relevance" as much as other aspects of Bill C–46.

Those who are troubled by the *Mills* case and Bill C–46 can trace their unease to *Dagenais*. Reliance on *Dagenais* effects a significant re-conceptualization of criminal litigation. One might have been forgiven for thinking that in a criminal trial, there is or should be a hierarchical arrangement of rights. One might have thought that in criminal litigation, accuseds' rights to full answer and defence and to be presumed innocent were paramount, subject to limitation only under section 1 of the *Canadian Charter of Rights and Freedoms*. The motivating fear in criminal proceedings has been the threat of the conviction of the innocent. Moreover, in criminal litigation, one might have thought that there is or should be conflict between different interests, and no expectation that all interests can and should be satisfied in procedures, rulings, verdicts or sentences. At least over the stretch of our criminal litigation history moving into the 1990s, the main protagonists in the criminal litigation conflict were the accused on the one side and the Crown on the other. The *Dagenais* approach employed in *Mills* signals that the old hierarchical, conflictual, dualistic (adversarial?) system is becoming outmoded. The interests of complainants and others have become mixed into criminal litigation. Conflict is being replaced by coordination and harmonization.

B. The Nature of "Likely Relevance"

For the judge to order production to the court, the accused must establish that the record is "likely relevant to an issue at trial or the competence of a witness to testify." This test has three aspects: (1) identifying the facts-in-issue to which the record is allegedly "relevant"; (2) establishing the relationship of "relevance" between information contained in the record and the identified fact-in-issue; and (3) demonstrating that it is "likely" that the record contains information that is relevant to the identified fact-in-issue.

(1) Facts-in-issue

The record might contain information relevant to (a) an issue at trial or (b) testimonial competence.

The *Criminal Code* does not define "an issue at trial." "An issue at trial" in a sexual assault case could include the following:

(i) the *actus reus* of the offence (whether the offence took place at all; whether the accused was the perpetrator; whether the contact was "sexual;" whether the complainant consented to the sexual contact; whether any circumstances existed that would vitiate any apparent consent or caused mere submission);

(ii) the *mens rea* of the offence (whether the accused intentionally applied force to the complainant; whether the accused knew that the complainant did not consent; whether the accused believed that the complainant had consented to the contact; whether the accused took reasonable steps to ascertain consent in

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30 *Ibid.* at 64, para. 141.
31 *Ibid.* at 59, para. 128.
32 *Ibid.* at 69–70.
33 *Mills*, *supra* note 1 at 248, para. 71.
34 *Mills*, *supra* note 1 at 247–55.
35 *Dagenais* v. *Canadian Broadcasting Corp.* (1994), 94 C.C.C. (3d) 289 (S.C.C.), Lamer C.J.C.
36 *O'Connor*, *supra* note 3 at 59, para. 129.
37 *Mills*, *supra* note 1 at 245, para. 61.

the circumstances known to the accused at the material time;[38] and whether the accused was wilfully blind or reckless);[39]

(iii) the availability of any defences (in extraordinary circumstances, evidence could conceivably support the availability of the defence of common law duress, for example);[40]

(iv) the existence of circumstances rendering the conviction of the accused an abuse of process or a violation of fundamental justice;

(v) the credibility of the complainant or another witness; or

(vi) the reliability of any evidence.

Testimonial competence concerns the capacity of a witness (including the complainant), determined at the time of giving testimony,

(i) to observe events, including the "ability to differentiate between that which is actually perceived and that which the person may have imagined, been told by others, or otherwise have come to believe;"[41]

(ii) to remember events, including "the ability to distinguish those retained perceptions from information provided to the person from other sources;"[42]

(iii) to communicate his or her evidence, including "the ability to understand questions and to respond to them in an intelligible fashion;"[43] and

(iv) to understand the duty to tell the truth.[44]

Competence is likely to be a production issue only if the complainant is very young[45] or mentally disordered.[46]

(2) Relevance

The accused must establish that the record is "likely *relevant*." Bill C–46 does not establish a new type of inferential relationship — as if mid-way between relevance on the one hand and irrelevance on the other were the newly discovered relation of "likely relevance." The "likely relevant" phrase is best thought of as shorthand for "likely to contain information that is relevant."

"Relevance," in this context, means logical relevance.[47] The record, or more exactly the information it contains, is either relevant to a fact-in-issue or it is not. That is to say that the information either tends to make a fact-in-issue more likely or less likely, more probable or less probable; the information either has probative value or it does not.[48] If it does not, it is irrelevant. If it does, it is relevant. Logical relevance does not bear admixture with other issues, such as the balancing of privacy concerns. In this sense, privacy considerations do not form part of the "likely relevance" analysis, although these are part of the conceptual and justificatory backdrop for the "likely relevance" requirement.[49]

The "relevance" standard sets both a floor and a ceiling. The accused must, at a minimum, be able to establish "likely relevance." This standard is not satisfied by proof that records would merely be useful to the accused. An inferential link must be demonstrated between the likely contents of the record sought and a fact-in-issue. The accused, however, need not go so far as to establish that the record or any information in the record is not only relevant, but admissible as evidence at trial.[50] The "likely relevance" test, by itself, is not concerned with exclusionary rules such as the hearsay rules; neither is this test (by itself) concerned with whether the probative value of likely relevant evidence outweighs any prejudicial effects of

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38 Para. 273.2(b).
39 Para. 273.2(a).
40 *R.* v. *Ruzic* (1998), 128 C.C.C. (3d) 97, 481 (addendum) (Ont. C.A.), Laskin J.A.; heard and reserved by the S.C.C., 13 June 2000.
41 *R.* v. *Farley* (1995), 99 C.C.C. (3d) 76 (Ont. C.A.), Doherty J.A. at 81.
42 *Ibid.*
43 *Ibid.*
44 *Ibid.* at 82, 84; *R.* v. *Rockey* (1996), 110 C.C.C. (3d) 481 (S.C.C.), McLachlin JJ. at 494.

45 If the witness is under age fourteen, a competence hearing must be held: s. 16(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C– 5, as am.
46 Under ss. 16(1) and (5) of the *Canada Evidence Act*, a party challenging the competence of a witness over age fourteen has the burden of satisfying the court that "there is an issue as to the capacity of the proposed witness to testify under an oath or solemn affirmation;" a competence hearing is held only on cause being shown.
47 *O'Connor*, *supra* note 3 at 19, para. 22.
48 *R.* v. *Mohan* (1994), 89 C.C.C. (3d) 402 (S.C.C.), Sopinka J. at 411 [hereinafter *Mohan*].
49 *O'Connor*, *supra* note 3 at 66, para. 147.
50 *Ibid.* at 20, para. 24; at 72, para. 164.

that evidence. Furthermore, to establish "likely relevance," the accused need not go so far as to show that the record or information in it is "material," in the sense of being relevant to some demonstrably important, significant or decisive issue in the litigation.

(3) Likelihood

For both the *O'Connor* majority and the *Mills* court, the burden on the accused in a production application must be interpreted in light of the fundamental principle that the innocent not be convicted. This principle entails — as section 7 of the *Charter* would have it — that accuseds have the right not to be deprived of life, liberty or security of the person, except in accordance with the principles of fundamental justice. Fundamental justice requires that accuseds have the right and ability to make full answer and defence, which in turn requires that accuseds have access to information necessary for their defence.[51] The burden imposed on accuseds in production applications cannot be so difficult to satisfy that they will be denied full answer and defence, leading to the conviction of the innocent.

The *O'Connor* majority viewed the "likely relevance" burden as being significant, but not "onerous."[52] The burden could not be onerous, since it is only to establish "likely" relevance. Furthermore, at this stage the accused has not seen the record in question. The "catch-22" arises. If the standard were set too high, the accused would lack the information requisite to establish relevance, but because the accused cannot obtain production, the accused cannot get that information.[53] The *O'Connor* majority held that the accused had to do more than simply show that production would be useful for the defence, but the main purpose of the "likely relevance" test was to screen out "speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming" production applications.[54] The majority settled on this equivalent expression for the "likely relevance" test: "the presiding judge must be satisfied that there is a reasonable possibility that the information is logically probative to *an issue at trial or the competence of a witness to testify*."[55] The *O'Connor* minority felt that the majority expected too little of accuseds. The minority described the accused's burden as "significant," without the majority's "but not onerous" qualification.[56]

Under Bill C–46, the accused's task is to "establish" that the record is "likely" to contain relevant information. The language suggests that the burden imposed is tougher than the burden recognized by the *O'Connor* majority. The term "establish" suggests that the accused's burden is to be discharged on the balance of probabilities,[57] and that the burden would not be established by making out only reasonable possibilities. What the accused must show is that it is "probable" or "more likely than not" that the record sought contains information relevant to a fact-in-issue. A sort of double probability is at work: the accused must show that it is probably true that the record probably contains relevant information. Because the standard is one of likelihood only, the accused need not show that it is certain or even highly probable that the record contains relevant evidence. Because the burden is on the balance of probabilities, the accused need not show that his or her estimate of the probability of the presence of relevant information is itself certain.

C. Statutory Constraints on Establishing "Likely Relevance"

The accused must set out the "grounds" on which he or she relies to establish the likelihood that a record contains relevant information. Accuseds' "likely relevance" arguments are governed by one of the most controversial provisions of Bill C–46, section 278.3(4), which has as its marginal note or title, "[i]nsufficient grounds:"

> Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify:
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> (a) that the record exists;
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> (b) that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;
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> (c) that the record relates to the incident that is the subject-matter of the proceedings;

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[51] *Ibid.* at 17, para. 15; *Mills*, *supra* note 1 at 247, para. 70.
[52] *O'Connor*, *supra* note 3 at 20, para. 24.
[53] *Ibid.* at 20–21, para. 25.
[54] *Ibid.* at 19, para. 22; at 20, para. 24.
[55] *Ibid.* at 19, para. 22.
[56] *Ibid.* at 64, para. 142.
[57] *R.* v. *Whyte* (1988), 42 C.C.C. (3d) 97 (S.C.C.), Dickson C.J.C., as he then was, at 108.

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

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

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

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

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

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

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

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

Subsection 278.3(4) should not be interpreted too weakly or too strongly. Properly interpreted, it does not impose undue limitations on the already difficult job of establishing "likely relevance."

(1) Excessively Weak Interpretation: "Assertions"

One interpretation of the term "assertion" is that it denotes only a submission, claim, allegation, statement, declaration or argument about inferences — without any evidential foundation. An "assertion" is just an hypothesis offered by counsel. If, however, evidence exists that supports the claim made, then the claim is not merely an "assertion" but a description of a conclusion to be drawn or an inference to be made from the evidence. On this approach, if evidence supports one or some of the matters referred to in sections 278.3(4)(a)-(k), then submissions based on that evidence cannot be mere "assertions," and can serve to establish likely relevance. Some support for this approach may be drawn from the *Mills* case. The majority writes that sections 278.3(4)(a)-(k) do not "entirely prevent an accused from relying on the factors listed, but simply prevents reliance on *bare 'assertions'* of the listed matters, where there is no other evidence and they 'stand on their own;'"[58] and "[t]he purpose and wording of section 278.3 does not prevent an accused from relying on the assertions set out in subsection 278.3(4) where there is an *evidentiary or informational foundation to suggest that they may be related to likely relevance*... The section requires only that the accused be able *to point to case specific evidence or information* to show that the record in issue is likely relevant to an issue at trial or the competence of a witness to testify ..."[59] If this approach were correct, then, for example, an affidavit could be tendered in the application for production which sets out evidence supporting the claims that a record exists, it relates to psychiatric treatment, and it relates to the incident that is the subject-matter of the proceedings; since the application is based on an affidavit, and therefore is based on more than simply "assertions" of the relevant matters, this could be an adequate foundation for a finding of "likely relevance." The easy way around section 278.3(4) would be to file an affidavit.

This interpretation cannot be correct. The term "assertion" doubtless is synonymous with the terms "submission," "claim," "allegation," "statement," "declaration" or "argument about inferences." The subsection presupposes, however, that the assertions it lists do have some evidential foundation. The subsection concerns arguments about inferences based on evidence, not arguments about inferences based on no evidence. Suppose that an accused were to argue for production on the basis that a record exists, but the accused could point to no evidence supporting the existence of the record. A judge would not need section 278.3(4) to find the accused's argument inadequate. A mere claim by counsel is not evidence. A mere claim by counsel raises no probabilities. A mere claim by counsel could not support an inference of "likely relevance."

Subsection 278.3(4) is not about "no evidence," but about "insufficient evidence." It screens out inferences that have a very low probative value, as compared with the prejudicial effects of production of complainants' personal information. The listed assertions "are not sufficient on their own" to establish likely relevance. It cannot be denied that, for example, the fact that psychiatric records respecting a complainant exist provides some evidence in support of the claim that the records contain relevant information

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[58] *Mills*, *supra* note 1 at 264, para. 118.
[59] *Ibid.*, para. 120 [emphasis added].

— that claim is rendered more probable than if those records did not exist at all. Similarly, the facts that psychiatric records exist, that they concern the incident in question, and that they were created shortly before a complaint was made make it more likely that the records contain relevant information, than if the records merely existed or than if no records existed at all. But the *Mills* court did not say that the paragraph (a)-(k) matters were irrelevant. What the court and section 278.3(4) forbid is reliance on the listed factors as a foundation for a finding of "likely relevance," if there is "no *other* evidence and they stand 'on their own.'"[60] The "assertions" have some probative value — but just not enough to warrant a finding that it is likely that the record in question is likely to contain relevant information. The assertions may be combined with other evidence — so that the assertions do not "stand on their own" — to establish likely relevance.

(2) Excessively Strong Interpretation: Insufficient Evidence

The argument was made in *Mills* that section 278.3(4) hamstrings accuseds in production applications, since it prevents accuseds from relying on important, relevant evidence. How could an accused ever establish "likely relevance," if the accused could not rely on the facts that (for example) a record exists, the record relates to the incident that is the subject-matter of the proceedings, or the record contains a statement inconsistent with the testimony of the complainant?[61] Subsection 278.3(4) does not prevent reliance on such matters. It provides that the listed assertions (arguments about inferences) are "not sufficient on their own" to establish "likely relevance." The Supreme Court expressly confirmed that accuseds are entitled to rely on the assertions in production applications, with the qualification that the assertions are not, on their own, an adequate foundation for production: sections 278.3(4)(a) - (k) do not "entirely prevent an accused from relying on the factors listed, but simply prevents reliance on *bare 'assertions'* of the listed matters, where there is no other evidence and they stand 'on their own;'"[62] and "[t]he purpose and wording of section 278.3 does not prevent an accused from relying on the assertions set out in subsection 278.3(4) where there is an evidentiary or informational foundation to suggest that they may be related to likely relevance."[63]

(3) The *Mills* Majority Interpretation

The *Mills* court provided direction to accuseds seeking production to the court in light of section 278.3(4). In addition to evidence of the matters referred to in section 278.3(4), the accused must be able "to point to case specific evidence or information" to show likely relevance; in the language of some US cases, a "factual predicate" is required.[64] One might approach the court's directive in this way: On the one hand, counsel knows (for example) that a psychiatric record respecting the complainant exists. On the other hand, counsel wants to show that the record contains information that is relevant to the complainant's credibility. What counsel needs is a sort of evidential "bridge," some evidence that goes beyond the mere general characteristics of the record, that shows that the record contains (or is likely to contain) particular, specific contents that are relevant to the particular, specific identified facts-in-issue.

(4) The Probative Value of the Listed Insufficient Grounds

One might question the accuracy of Parliament's estimates of the lack of probative value of the listed insufficient grounds. The insufficient grounds provisions have been subjected to vigorous attacks.[65] These attacks have been based on the excessively strong interpretation of these provisions. The insufficient grounds provisions must be approached literally and abstractly (a-contextually). Once circumstance and context begin to be filled in, once the evidential "bridge" or the "factual predicate" are established, these provisions lose their exclusionary effect, since the insufficient inferences are no longer the sole basis for argument. Given this approach, Parliament's estimates of the probative value of the "insufficient grounds" are right:

> re (a) "the record exists:" If the mere existence of a record warranted production, then the "likely relevance" test would be superfluous. Production to the judge would, in effect, simply be directed for all records in the possession or control of the complainant or record custodian.
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> re (b) "medical or psychiatric treatment:" The mere fact that the accused is receiving psychiatric treatment (for example) generates few legitimate inferences about the contents of psychiatric records. It would be improper to

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60 *Ibid.*, para. 118 [emphasis added].
61 *Ibid.* at 263, para. 117.
62 *Ibid.*, para. 118.
63 *Ibid.*, para. 120.
64 *Ibid.* See P. DerOhannesian, *Sexual Assault Trials*, Vol. 1, 2nd ed. (Charlottesville, Virginia: Lexis Law Publishing, 1998) 17.
65 See, for example, Paciocco, *supra* note 12 at 187–88.

assume a likelihood that psychiatrists will somehow tamper with or skew the memories of complainants, or that they will otherwise behave in an unprofessional and unscientific way, leading to the production of tainted evidence. If, however, the complaint arose in a "recovered memory" context, and if there were evidence that the memory had been elicited through improper therapeutic techniques, then there could be a solid basis for production of the therapeutic records.[66]

re (c) "relates to the incident:" The mere fact that the complainant has talked about the incident in question generates few inferences about whether what was said has any bearing on the litigation. The prior consistent statement and hearsay rules indicate the law's usual disinterest in out-of-court statements. It should not be simply assumed that just because a complainant talked about the incident that either she made statements inconsistent with her testimony, or that the other party to the conversation improperly influenced the complainant. Paciocco, I should note, adopted a contrary position, correctly pointing out that in *Stinchcombe* prior statements by proposed witnesses are considered relevant and should be disclosed by the Crown.[67] All prior statements by a witness are relevant (even if not admissible). In response, we should keep in mind that section 278.3(4) does not describe the "insufficient grounds" as "irrelevant" — the subsection is concerned with lack of probative value, and that the notion of "relevance" for production purposes is not the same as the notion of "relevance" for *Stinchcombe* disclosure purposes.

re (d), (e), (f) and (g) "may" assertions: The key term in these four paragraphs is "may." If the accused established that it is likely that a record *does* disclose a prior inconsistent statement, or *does* undermine the credibility of a complainant, then "likely relevance" warranting production to the court could be established.[68] If the accused had evidence that the complainant has displayed a pattern of behaviour, whereby she made false accusations against persons who frustrated and angered her (and the accused did at least this); if the accused had evidence that the complainant's cognitive abilities were impaired by mental disorder; or if accused had evidence that the complainant for other reasons had problems with her memory, perception or recollection; and if the records sought would contain further information about these matters, then an adequate basis would have been established for production of those records.[69] If, however, the accused can only speculate about the contents of a record, if the accused cannot point to evidence raising a likelihood that the record does contain information bearing on the complainant's credibility, then the accused has not established "likely relevance." These paragraphs prevent reliance on possibilities or guesses (a record "may" contain anything).

re (g) and (h) "sexual history evidence:" If a record contains sexual history evidence respecting a complainant, the evidence may well be relevant to the identity of the perpetrator (the evidence could tend to show that a person other than the accused committed the offence, and that the complainant has confused the accused with another person); or to the presence or perceived presence of consent (the evidence could tend to show an ongoing consensual relationship between the complainant and the accused). The mere fact that a record contains information about the prior sexual abuse of a complainant by some third party, however, does not establish any evidential link with the particular charges against an accused. A complainant is not automatically tainted as a witness because she had been abused at some earlier time. From abuse there is no automatic inference to fabrication or inaccurate evidence. Similarly, the mere fact that a record contains information about the prior relationship between the complainant and the accused does not, by itself, establish any evidential link with the particular charges against the accused. The accused and the complainant, for example, may have had one instance of consensual sexual contact many years before the alleged events. The presence of consent at the earlier time is not evidence of consent at a later time. Very generally, evidence of a complainant's prior sexual

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66 *O'Connor*, *supra* note 3 at 23, para. 29; *R.* v. *W.G.* [2000] N.J. No. 86 (S.C.T.D.), Adams J. [hereinafter *W.G.*]; *R.* v. *P.E.*, [2000] O.J. No. 574 (C.A.) *per curiam* at para. 16.

67 Paciocco, *supra* note 12 at 187; *Stinchcombe*, *supra* note 5.

68 *W.G.*, *supra* note 66; *R.* v. *Osolin* (1993), 86 C.C.C. (3d) 481 (S.C.C.), Cory J. at 526.

69 *O'Connor*, *supra* note 3 at 23, para. 29; DerOhannesian, *supra* note 64, 19.

activity does not, by itself, support inferences that the complainant is "more likely to have consented to the sexual activity that forms the subject matter of the charge," or "is less worthy of belief."[70]

re (i) "recent complainant:" The "recent complaint" doctrine has been "abrogated."[71] The *Mills* court commented that "'recent complaint' has been abolished by the jurisprudence and cannot be relied on in any event."[72] This comment is not quite right. The "abrogation" does not entail that evidence bearing on the timing of the complainant's first report of the alleged offence can never be pursued or is never admissible. The accused is entitled to exploit the lack of recent complaint, and an adverse inference may be drawn on the basis of an absence of recent complaint; but if the accused opens this door, the Crown is entitled to tender recent complaint evidence to rebut the inferences sought to be drawn by the accused.[73] Again, however, the mere fact of delayed complaint may have little probative value. Delay itself does not generate automatic inferences adverse to the complainant – that the events did not take place, that the complainant is fabricating, that some third party unduly influenced the complainant or tainted the complainant's memories: "The importance to the complainant's credibility of his or her failure to make a timely complaint will vary from case to case" and shall be dependent upon the jury's assessment of that failure.[74]

re (j) "sexual reputation:" Evidence of a complainant's sexual reputation has no probative value: "evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant."[75] If an accused can only show that a record contains information about the complainant's sexual reputation, that information would have no legitimate use at trial, so obtaining production of it would be of no practical use for the defence.

re (k) timing of creation of record: This is probably the most difficult of the "assertion restrictions." The *O'Connor* majority had held that "[t]here is a possibility of materiality where there is a 'reasonably close temporal connection between' the creation of the records and the date of the alleged commission of the offence ... or in cases of historical events, as in this case, a close temporal connection between the creation of the records and the decision to bring charges against the accused."[76] The reasoning in these cases is similar to that concerning "recent complaint." The mere fact of timing may or may not be significant. If a relatively restricted time frame is involved, so that (for example) the alleged event in question, the creation of the record, and the making of the complaint all took place within a matter of days, then the fact that the record was made close in time to the complaint or that it was made close in time to the event raises few inferences. If, in contrast, the case is one involving a significant delay in reporting (if it is an "historical" case), then the creation of a record shortly before the report becomes more significant. If a record were made shortly after an event was alleged to have taken place and, again, there was a significant delay in reporting, the record could take on special significance. Approached in this way, understanding paragraph (k) as speaking to sheer timing without contextual significance, paragraph (k) is consistent with the *O'Connor* majority's view of the "materiality" of timing.

(5) Sources of Evidence

The requisite case-specific information may be derived from Crown disclosure, witness interviews (e.g., with members of the complainant's family or with neighbours),[77] evidence given in chief or in cross-examination in the preliminary inquiry,[78] defence

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70 Paragraphs 276(1)(a) and (b).

71 Section 275.

72 *Mills*, *supra* note 1 at 264, para. 120.

73 *R.* v. *J.E.F.* (1993), 85 C.C.C. (3d) 457 (Ont. C.A.), Finlayson J.A. at 469; *R.* v. *T.E.M.* (1996), 110 C.C.C. (3d) 179 (Alta. C.A.), Kerans J.A. at 183; *R.* v. *Henrich* (1996), 108 C.C.C. (3d) 97 (Ont. C.A.), Osborne J.A. at 102.

74 *R.* v. *P.S.M.* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), Doherty J.A. at 409.

75 Section 277; *R.* v. *Seaboyer* (1991), 66 C.C.C. (3d) 321 (S.C.C.), McLachlin J. at 392.

76 *O'Connor*, *supra* note at 21–22, para. 26.

77 The practical and ethical difficulties that could attend such interviews must be kept in mind – care would have to be taken by defence counsel to avoid any appearances of impropriety and to avoid the risk of being called as a witness.

78 One difficulty is that sexual assault is a Crown election offence, with a maximum penalty available on summary conviction proceedings of eighteen months imprisonment. The Crown may elect to go by way of summary conviction, depriving an accused of a preliminary inquiry, and still leave the accused facing a potentially significant penalty. Another difficulty is that the preliminary inquiry judge may seek to restrict cross-

counsel's knowledge of any of the persons involved (e.g., a notorious psychotherapist), voluntary disclosure by a medical professional,[79] evidence given in chief or in cross-examination at trial, or expert witnesses who have reviewed the evidence. I will not comment further on the sources of foundational evidence or on the practicalities of obtaining this evidence.

BALANCING AT STAGE ONE

If an accused does succeed in establishing "likely relevance," that does not mean that the accused has been successful on the first stage of the application. The accused faces further hurdles. Under section 278.5(1) the judge must be satisfied not only that the accused has established that the record is likely relevant to an issue at trial or the testimonial competence of a witness, but that "the production of the record is necessary in the interests of justice." In connection with this analysis, under section 278.5(2),

> the judge shall consider the salutary and deleterious effects of the determination [to produce a record to the court] on the accused's right to make full answer and defence and on the right to privacy and equality of the complainant .... In particular, the judge shall take the following factors into account:
>
> (a) the extent to which the record is necessary for the accused to make a full answer and defence;
> (b) the probative value of the record;
> (c) the nature and extent of the reasonable expectation of privacy with respect to the record;
> (d) whether production of the record is based on a discriminatory belief or bias;
> (e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
> (f) society's interest in encouraging the reporting of sexual offences;
> (g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
> (h) the effect of the determination on the integrity of the trial process.

We will consider three aspects of section 278.5(2) – (A) the differences between the Bill C–46 approach and the *O'Connor* approach; (B) arguments in favour of the section 278.5(2) balancing; and (C) arguments against the section 278.5(2) balancing.

A. Balancing at Stage One: *O'Connor* v. *Bill C–46*

The *O'Connor* majority denied that balancing should take place in the stage-one production to the court inquiry. At this stage, "likely relevance" is a sufficient burden to assign to the accused.[80] That burden being satisfied, the judge is warranted in compelling production of the record to the court, so that the record may be reviewed. The balancing of the complainant's privacy interests would be considered at the second stage, after review of the record, when determining whether to produce the records to the accused. The Bill C–46 approach runs contrary to the *O'Connor* majority approach, and instead follows the approach of the *O'Connor* minority which advocated balancing at the first stage.

A further difference between the *O'Connor* majority and the Bill C–46 approaches concerns the factors considered in balancing. The factors relevant to the balancing permitted by the *O'Connor* majority at the second stage of the application did include the factors referred to in the current paragraphs 278.5(2)(a) to (f). The *O'Connor* majority allowed that the factors referred to in paragraphs (f) and (g) could be considered in the balancing (the social interests in encouraging the reporting of sexual offences and in the obtaining of treatment by complainants), although it did not accord these factors much weight.[81] The *O'Connor* majority expressly excluded the factor referred to in paragraph (h) from the balancing ("the effect of the determination on the integrity of the trial process"), on the ground that this factor was best taken into account when the admissibility of evidence (including record evidence) is being determined.[82] The *O'Connor* minority, in contrast, permitted all of factors (a) to (h) to be considered in the balancing. Bill C–46 adopted the minority approach.

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examination on issues foundational for a production of records application, since this application is, technically, irrelevant to the preliminary inquiry proceedings. Practice and case law does support the accused's entitlement to obtain foundational evidence at the preliminary inquiry: see, e.g., *R.* v. *J.F.S.*, [1997] O.J. No. 5328 (Prov. Div.); *R.* v. *Bell*, [1997] O.J. No. 3508 (Prov. Div.). If, however, a preliminary inquiry judge were to restrict defence counsel's efforts, there would be no practical remedy, unless the judge's error could be characterized as a jurisdictional error: *R.* v. *Al-Amoud* (1992), 10 O.R. (3d) 676 (Gen. Div.), Then J.; *R.* v. *George* (1991), 69 C.C.C. (3d) 148 (Ont. C.A.), Carthy J.A.

79 *R.* v. *Ross* (1993), 79 C.C.C. (3d) 253 (N.S.C.A.).

80 *O'Connor*, *supra* note 3 at 19, para. 21.

81 The societal interests were not paramount considerations: *Ibid.* at 24, para. 33.

82 *Ibid.*, para. 32.

B. In Favour of Balancing at Stage One

The main justification for balancing at stage one is that an order for production to the court limits, reduces or interferes with a complainant's privacy interests.[83] It is a form of State-ordered search for and seizure of personal information. Production to a judge violates privacy and threatens other social interests, as does production to an accused. Presumably production to a court (or the threat of such production) causes less damage to privacy and other interests than production to an accused. The quantity of damage is an empirical matter. Neither the *O'Connor* minority nor *Mills* court referred to any empirical research on the impact (if any) of production to a court as opposed to production to an accused — although I understand that evidence relating to this matter was tendered by the Crown in the *Mills* case. We shall assume, however, that even if production to a court causes less damage to privacy and other interests than production to an accused, the degree of damage caused is still significant.

If privacy is damaged and other interests are threatened by production to a judge, then complainants and others should be protected, so that records are produced only when "necessary in the interests of justice." A record should not be produced when the "salutary" effects of production (the contribution of the record to the fact-finding mission of the trial and to the defence of the accused) is less than the "deleterious" effects of production (on the complainant and others). In the case of the admissibility of evidence, even if an accused can show that prospective evidence has some probative value, the trier of law may exclude the evidence if its prejudicial effect substantially exceeds its probative value.[84] By analogy, even if an accused can show that a record is likely to contain some relevant information, the trier of law should be able to deny production, if the prejudicial effects of production exceed the proven value of the record for the litigation. In the case of the admissibility of evidence, prejudice is assessed according to factors which include the following: the degree to which the evidence tends to support unfair or inadmissible inferences (e.g., respecting the character of an accused or a complainant), whether the evidence would engender an undue emotional reaction in the trier of fact, whether the evidence would be given undue weight by the trier of fact, whether the evidence would confuse the issues and mislead the trier of fact, and whether admitting the evidence would create delay or waste time.[85] In the case of production, the damage caused by unnecessary production would affect the complainant, other persons, and the trial process. The complainant would be damaged by the unnecessary violation of her privacy interests (her security of the person and equality interests could also be argued to be damaged). Others' interests would be impaired, because the risk of unnecessary production could deter them either from seeking the assistance of records custodians or from reporting sexual offences. The trial process is impaired by producing unnecessary records, since time and resources must be spent by the judge in reviewing the records, and by the judge, counsel and the parties in connection with the hearing at the second stage of the application for production to the accused. Thus, the factors to be considered for first stage balancing under section 278.5(2) are just those that we would expect, given the *O'Connor* minority perspective.

A further analogy can be drawn to the search-and-seizure process (after all, an order for production, even to the court, is a form of search and seizure). Under section 8 of the *Charter*, a constitutional requirement for a legal rule authorizing search and seizure is that it extend "discretion" to the judicial officer empowered to issue a warrant.[86] This discretion should permit a judge to decline to authorize a search and seizure, if that result accords with the judge's assessment of the balancing of the interests supporting and opposing the search and seizure; and should permit the judge to impose conditions on the search and seizure.[87] The balancing provisions at the first stage of production merely give statutory expression (and thereby make more definite and certain) the discretion that a judge should have in deciding whether to compel production, even to himself or herself. If the stage-one balancing were eliminated, either the judge would consider similar sorts of balancing considerations in any event (without the benefit of statutory guidance), or the discretion of the judge would be impaired. The stage-one balancing, it might be argued, keeps the position of a complainant facing production analogous to the position of an accused facing search and seizure.

C. Against Balancing at Stage One

The balancing before production to the judge contemplated by section 278.5 is not appropriate, for three reasons:

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[83] *Ibid.* at 62, para. 151.

[84] *Seaboyer*, *supra* note 75 at 390.

[85] *Ibid.*; *Mohan*, *supra* note 48 at 411.

[86] *Baron* v. *Canada* (1993), 78 C.C.C. (3d) 510 (S.C.C.), Sopinka J. at 523.

[87] *Ibid.* at 524, 526.

(1) Double-weighting

The main reason for the inappropriateness of the section 278.5(2) balancing at the first stage of the application for production is that it gives double weight to factors favouring the interests of the complainants and persons other than the accused.

To get to the point where the *Criminal Code* directs the first-stage balancing, the accused must already have established that the record is likely to contain relevant information. The accused's case cannot have been based on any of the "insufficient grounds" set out in section 278.3(4). The reason the accused bears the "likely relevance" onus is precisely because the interests of the complainant and others are at stake. It is to prevent the accused from obtaining unnecessary production that the "likely relevance" burden is imposed on the accused. That is, the interests of complainants and others (referred to in sections 278.5(c), (e), (f) and (g)) have already been taken into account in setting the "likely relevance" burden. Those interests should not be taken into account a second time, after the accused has succeeded in establishing "likely relevance" but before the accused and the judge have seen the record. After the record is produced to the court for review, then balancing may be done, on the basis of the actual contents of the record.

The accused's satisfaction of the "likely relevance" standard assuages the concern that unnecessary production would impair the integrity of the trial process (section 278.5(2)(h)). The accused must establish his or her case respecting the "likely relevance" of the record. Only those records for which "likely relevance" has been established would require review by the judge. The "likely relevance" test screens out unmeritorious, unnecessary record access claims.

Many of the paragraphs in section 278.3(4) screen out arguments for production based on "discriminatory beliefs or biases" (section 278.5(2)(c)). If the "likely relevance" test has been passed, then the accused cannot relied on improper inferences.

These considerations are also relevant to the search-and-seizure analogy argument. Balancing is already built into the case the accused must establish to warrant production to the judge. Furthermore, it should be noted that, unlike the statutory situation in *Baron*, section 278.5(1) does not compel a judge to order production: the judge "may" do so — the subsection preserves judicial discretion. It is true that section 278.5 does not (unlike section 278.7) expressly provide for conditions to be attached to the production to the judge, but that is because conditions are not necessary. The disclosure is already the least possible (to the judge alone).

(2) Insufficient Weighting

By establishing "likely relevance," the accused has demonstrated that his or her rights to make full answer and defence are implicated by the information contained in the records.[88] As has been seen, an accused must make out a fairly substantial case to establish "likely relevance." What would it mean if a judge could disregard the showing made by the accused, without even looking at the record in question to verify whether the record does contain relevant information?

If an accused has shown that his or her full answer and defence rights have been implicated, the accused has shown that if those rights are ignored or dismissed, the accused is at risk of being wrongfully convicted. That risk is being set against the risk to a complainant that her records may be unnecessarily produced to a judge. To dismiss the accused's claim is to conclude that the risk of wrongful conviction is less serious than the risk of unnecessary production. Without in any way minimizing the seriousness of the unnecessary production of records, it would seem that the risk of wrongful conviction is a more serious, a weightier risk — particularly for a stigmatic offence such as sexual assault. To even permit balancing at this stage is, in effect, to underestimate the jeopardy faced by accuseds.

(3) Inconsistent Speculation

The section 278.5(2) balancing factors create a double standard with respect to "speculation." An accused should not obtain access to a complainant's records on the basis of mere claims and speculation — that is to say, on the basis of mere allegations about records that the accused has never seen. The accused overcomes the charge of speculation only if he or she can establish, on the basis of evidence, that a record is likely to contain relevant information.

There is no parallel onus, one might note, in relation to the establishing of the factors arrayed against the accused. While the term "record" is stated to apply to records for which "there is a reasonable expectation of privacy," no procedural rule is created allocating a burden to the complainant or anyone else to establish this reasonable expectation of privacy.[89] No burden is allocated to any person to establish the extent of the complainant's expectation of privacy in a record — although complainants would not have equal expectations of privacy in all of the forms of records

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[88] *O'Connor*, *supra* note 3 at 19, para. 21.
[89] Section 278.1.

referred to in section 278.1 (including psychiatric records, educational records, employment records and social services records). No burden is allocated to any person to establish the extent of the harm that would be caused by production to the court, or to establish the degree to which others will be deterred from seeking treatment or reporting offences.

If the judge considers factors such as those referred to in paragraphs 278.5(2)(c), (e), (f) and (g), the judge is speculating. Speculation could be used to deny production to the court. The accused cannot succeed by speculation, but the accused may be defeated by speculation.

One might, with the *Mills* court, point out that there is evidence on which these issues can be established before the judge, namely the evidence tendered by the accused in his or her application. Of particular relevance is the nature of the records in question and any evidence concerning the manner in which the records were created, since from these matters inferences concerning the complainant's expectation of privacy can be drawn.[90] The Crown, the record custodian and the complainant are all available to make any necessary arguments. Here again, though, is an inconsistency. The accused cannot establish "likely relevance" just by referring to the general nature of the records. Yet a judge is entitled to find a reasonable expectation of privacy just by referring to the general nature of the records. The accused must establish case-specific grounds for his or her "likely relevance" claim. The judge is entitled to consider the interests not only of the complainant, but of others, not even party to the litigation, who may be deterred from seeking treatment or deterred from reporting offences. The accused's burden is not symmetrical with the case he or she must meet.

CONCLUSIONS

To return to where I began: Do the "likely relevance" rules set a reasonable standard for accuseds to meet? They do. Are the balancing rules in section 278.5 appropriate at the stage of production to the judge? They are not. The satisfaction of the "likely relevance" test should suffice to permit judges to compel the production of records to the court for review. Are the rules likely to change any time soon? They are not. Until the rules do change, the job of judges and defence counsel — and Crowns — must be to ensure that the Bill C–46 regime is interpreted in a manner that does not foreclose meritorious production and lead to wrongful conviction.❑

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[90] *Mills, supra* note 1 at 270, para. 136.