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Participation as an Expert in Cases Involving the Production of Mental Health Records in Canadian Courts

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In Canada, s. 278 of the *Criminal Code* sets out a two-stage procedure for the disclosure of records to the defence when there is a reasonable expectation of privacy. In this article, we summarize the nature of this legislation and the cases that directly led to its formation. We then review the implications for practice for mental health professionals. The main purpose of this article is to review a relatively new role for forensic mental health professionals: acting as experts in informing the court whether the disclosure is in the interests of justice.

Keywords: *records, confidentiality, privacy*

Legal History of the Use of Records in Court

Confidentiality of records has always been a cornerstone of medical ethics (Canadian Medical Association, 2004). Psychiatry, a discipline that at its core delves into patients' secrets, has been particularly zealous in guarding these secrets. Increasing advocacy and attention to the rights of victims of sexual violence, including *Bill C-49*, has been consistent with this viewpoint. The bill was enacted to restrict sexual history evidence as well as the establishment of rape crisis centres. When *Bill C-49* was passed, there was also increased recognition of and subsequent outrage about the issue of residential schools for Indigenous children. It was in this setting in 1999 that the Canadian Psychiatric Association retained legal counsel to represent Canadian psychiatrists as an intervenor in a case involving the constitutionality of a section of the *Criminal Code* (1985) that was relevant to the release of third-party records of complainants in sexual assault cases.

R. v. O'Connor

In 1991 in British Columbia, Bishop Hubert Patrick O'Connor was charged with two counts of sexual intercourse without consent, three counts of indecent assault, and one count of gross indecency. The adult women complainants were former students at St. Joseph's residential school, where Bishop O'Connor had been principal for more than two decades. The students had later been employees at the school, and the allegations related to the time when they were adult employees. Bishop O'Connor was the third person charged with offences related to this school.

A lengthy preliminary inquiry focused mainly on evidential issues. The proceedings were protracted due to several twists and turns related to the production of the complainants' medical, counselling, and school records (Glancy & Regehr, 2020). The presiding judge eventually ordered a judicial stay of proceedings due to nondisclosure of these records by the Crown.

As described in Glancy and Regehr (2020), this case had great significance due to the political context at the time, which involved not only the Indian residential school system but also the issue of equal rights for women complainants. As a result of the national prominence of these issues, the case eventually worked its way to the Supreme Court of Canada (*R. v. O'Connor*, 1995).

The Court addressed the obligation of the Crown to disclose records already in the Crown's possession, as well as counselling or psychiatric records that might be in the possession of third parties, such as mental health professionals. The Court carefully crafted a two-stage procedure, outlining how records should be produced in a legal setting. The Court was acutely aware that procedure needed to prevent the defence from conducting speculative guesswork through which they might simply attack the credibility of the complainant without any real basis. Therefore, the first step of the procedure requires the defence to make a written application to the trial judge, setting out specific grounds that the records were relevant to the credibility of the complainant, the competence of a witness, or a probative issue. The Supreme Court said the burden should not be too onerous, since this would put the defence in a catch-22 situation, whereby they would have to argue the probative value of the records without having seen them.

In the second stage, the records would be provided to the judge, who would examine the records and weigh the competing principles of the adverse effects on the complainant and their privacy rights against the right of the accused to make a full defence. The judge would be required to address whether the information could be relevant to an issue at trial or the competence of a witness to testify.

In coming to the decision, the Supreme Court listed numerous ways in which information in a third-party record may be relevant in sexual assault cases:

- They may contain information concerning the unfolding of events.
- They may reveal the use of therapy that influences the complainant's memory of the alleged events.
- They may contain information that bears on the complainant's credibility, including factors such as the quality of their perception of events at the time and their memory since (Glancy & Regehr, 2020, p.159).

Another issue that arose around the time of O'Connor was decided in a companion case: *A. (L.L.) v. B. (A.)* (1995). This case introduced the idea that complainants and third-party record holders should have standing to make submissions in the hearing. Therefore, they should have the right to retain counsel and make arguments about the production of the records, including which parts of the record might be irrelevant or even harmful to one of the parties.

Bill C-46 and Section 278

The O'Connor case received significant criticism and even outrage by parties on both sides of the debate (Glancy & Regehr, 2020). Parliament made it clear that it wanted to encourage the reporting of sexual assault and acknowledged that routine production of records could deter victims from reporting and from seeking treatment. Parliament responded to the academic and legal debates by introducing *Bill C-46*, which led to section 278 of the *Criminal Code* (1985, section updated 1997).

Bill C-46 addressed all relevant records, including those already in the Crown's possession, which had previously been part of routine disclosure. Disclosure of third-party records, including therapeutic records, is determined through an application by the accused for records in which the court weighs the competing rights and interests of an accused, the rights of the complainant, and the rights of the third party to whom the records relate. Third parties, including complainants in cases related to sexual offences, are "strangers" to the prosecution and under no obligation to assist either side by producing their private records. Only material that the police have gathered in the course of their investigation must be disclosed to an accused to allow them to make full answer and defence. The court's analysis of an application for third-party records focuses on striking a balance between the third party's right to privacy and the accused's right to make full answer and defence.

Two related regimes govern applications for third-party records, including therapeuticc records:

1. the O'Connor regime, which generally applies to applications for third-party records and
2. the s. 278 regime for records sought in the context of sexual offences, pursuant to s. 278 of the *Criminal Code*.

The s. 278 regime is stricter than the O'Connor regime, and for good reason. Records related to sexual offences, such as therapeutic records, may contain particularly personal and intimate details about the complainant to a third party. Under this regime, the court is required to take additional public interest considerations specific to sexual offences into account when deciding whether to disclose third-party records. This statutory requirement was upheld in the Supreme Court decision *R. v. Mills* (1999).

Under s. 278, the specific test for production of third-party records differs from the less onerous burden of likely relevance to whether the records are necessary in the interests of justice and meet the goals of encouraging victims to report sexual violence to the police and to obtain treatment following sexual violence. S. 278 also emphasizes that the effect of disclosure on the integrity of the trial process is a factor that should be considered. This introduced the concept of balancing the privacy interests of the victims and the right to full defence of the accused, which is a recurrent thread throughout the legislation.

S. 278 lists several variables that are not in themselves sufficient to require disclosure. These conditions prevent an accused from basing their application on myths and stereotypes about complainants of sexual assault and from making bold statements about the usefulness of private records in sexual offence proceedings (*R. v. McNeil*, 2009, para. 31). This section specifies numerous reasons the defence may not use to obtain disclosure, all of which rely on myths, stereotypes, or represent fishing expeditions without sufficient reason. Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is relevant to an issue at trial or to the competence of a witness to testify:

- The record exists.
- The record relates to medical or psychiatric treatment, therapy, or counselling that the complainant or witness has received or is receiving.
- The record relates to the incident that is the subject matter of the proceedings.
- The record may disclose a prior inconsistent statement of the complainant or witness.
- The record may relate to the credibility of the complainant or witness.
- 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.
- The record may reveal allegations of sexual abuse of the complainant by a person other than the accused.
- The record relates to the sexual activity of the complainant with any person, including the accused.
- The record relates to the presence or absence of a recent complaint.
- The record relates to the complainant's sexual reputation.
- 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 (*Criminal Code*, 1985, s. 278.3[4]).

After having deemed the records necessary in the interests of justice, the trial judge receives and reviews the records in the second stage of the process. At this stage, there may be a hearing. The judge can impose any conditions they see fit on the production of the records. This could include redacting certain portions, removing names, or producing some records and not others. Other measures might include giving a copy, not the originals, to the defence, or ordering that the records remain in a particular place, such as the court or in possession of the police, to be reviewed in that place.

R. v. Mills

Within months of its enactment, *Bill C-46* was subject to a constitutional challenge. In a case before the Alberta courts (*R. v. Mills*, 1999), the judge found that s. 278 infringed on ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* (1982). Once again, the case found its way to the Supreme Court of Canada, which ruled that the relevant sections were constitutional. The Court noted that Parliament has the discretion to be an ally for vulnerable groups, especially in the context of sexual violence cases. Of note is the fact that the Canadian Psychiatric Association was the intervenor in this case and was directly quoted in the decision (Regehr et al., 2000).

Implications for Mental Health Professionals

The Supreme Court decision in *R. v. Mills* (1999) has had implications for mental health professionals (Glancy & Regehr, 2020). These include addressing the limits of confidentiality with all clients at the beginning of therapy as part of the informed consent procedure. Another consequence is that certain therapies, such as treatment intended to recover memories of sexual assault, may be subject to scrutiny in court proceedings. It also has implications for how mental health professionals keep records.

Each mental health professional is guided by their own professional body as to how to keep mental health records. They should be aware of the standards set in their profession. Records should be careful, accurate, and free of the personal

Table 1

Key Points Summary About Disclosure of Records

R. v. O'Connor	**Key points**
Scope	Third-party records
Establishment of a two-stage process	Production to the judge
	Disclosure to the defence
Considerations for disclosure	Necessary for the accused to make a full defence
	The probative value of the record balanced against the complainant's reasonable expectation of privacy • Whether disclosure is premised upon any discriminatory assumption or stereotype • Potential prejudice to the complainant's dignity, privacy, or security
Bill C-46	**Key points**
Scope	The two-stage process applies to all records
Considerations for disclosure	Society's interest in encouraging reporting of sexual offences
	Society's interest in encouraging obtaining treatment by complainants of sexual offences
	Effect of the determination on the integrity of the trial process
R. v. Mills	**Key points**
Scope	Includes records already in possession of the Crown
Considerations for disclosure	Must maintain a posture of respect toward Parliament
	Encourage reporting of sexual offences
	Encourage obtaining treatment by complainants of sexual offences
Implications for practice	**Key points**
Addressing confidentiality	Warn about possible limits to confidentiality if the case will be before the courts
	Therapies intended to help recover memories may be questioned by the court
Preparing records	Accurately summarize what the client has said
	Avoid details of the offence
	Do not speculate as to the veracity of statements
Responding to court orders	Do not destroy records
	Contact legal counsel
	Determine organizational policies
	Be aware of the right to be a party to the proceeding
	Inform the client that they can be a party to a hearing regarding record production
	Not a licence to breach confidentiality
Participating as an expert in hearings regarding the production of records	Consider factors that may affect the credibility or reliability of a witness
	Consider the relevance of the information to the court process
	Provide an objective opinion

reflections of mental health professionals. Mental health professionals need to be aware that the records they write are legal documents that could end up in court at a later date. They should also be aware of what to do when they receive a subpoena (Glancy, 2019). In this context, they should be aware that they have a right to be a party in the proceedings and may consider retaining legal counsel. Counsel acting on their behalf may help prevent the release of the record or certain parts of the record that may be deemed not relevant to the proceedings.

Participating as an Expert in a Production Hearing

Legal counsel may retain a mental health professional as an expert about an application for the production of records. Having subpoenaed the guardian of the records, the defence counsel writes an application supporting their argument that third-party records are relevant to the credibility of a complainant or the competence of a witness and are necessary in the interests of justice. The forensic mental health professional may be asked to review police statements, transcripts of preliminary hearings, or other information counsel already has to advise whether there are mental health reasons or diagnoses that may be relevant to these issues. In some cases, incomplete records may be in the defence's possession. For instance, there may be a summary of therapy, but not the complete therapy notes. However, only by obtaining the complete record can it be seen that the therapist used hypnosis, which may be relevant to the defence. The forensic psychiatrist does not argue on the issue of the admissibility of the records. The opinion only relates to whether the production of the records may contain information relevant to the credibility, reliability, and competence of a witness.

Credibility, Reliability, and Competence

The role of the mental health professional is to review these records and comment on whether a person with the characteristics raised in the materials could hypothetically show certain mental health signs and symptoms that would be relevant to the court. In particular, do the signs and symptoms of a mentioned or alluded to syndrome characteristically affect a person's reliability, credibility, or competence as a witness? Credibility may be an issue where a particular syndrome, such as a delusional syndrome, affects the truthfulness of their testimony or their competence as a witness.

Additionally, a mental health professional may be able to shed light on the reliability of a complainant. Reliability is considered when a person would be unlikely to relate the same story on different occasions. For instance, a complainant with an acquired brain injury may have severe memory problems. It is not for the mental health professional to say that this person would make something up or lie. It may be important for the court to know, however, that this person may not be able to accurately relate what happened at a specific time and may give a different story at a later date. Therefore, they may not be a reliable witness.

Diagnoses

Some diagnoses may be relevant to the credibility, reliability, and competence of a witness. For example, a diagnosis of schizophrenia or delusional disorder involving erotomanic delusions about the accused may be important. In a manic phase, a diagnosis of bipolar disorder with symptoms of hypersexuality and disinhibition could also be significant. Borderline personality disorder is another relevant diagnosis.

Research literature shows a relationship between borderline personality disorder and false accusations of sexual assault. False accusations are made for various reasons, although the figure varies due to methodological problems (Gutheil, 1989). However, people with this disorder may have heightened feelings of abandonment and may feel the rage of abandonment at certain times. This scenario often involves somebody whom they have idealized, such as a therapist, caregiver, or partner. They may be manipulative, sometimes threatening to self-harm to get the other person to comply with their wishes or demands. They tend to label people as either "all good" or "all bad" if they perceive a slight or a threat of abandonment. This can result in a dramatic shift in their view of other people, particularly those who are important or close to them. When they feel betrayed or abandoned, they often express inappropriate, intense anger.

People with borderline personality disorder have high rates of previous sexual assault, particularly in childhood. They may perceive the actions of others—for instance, a proper and necessary medical examination—through a sexual lens, resulting in an accusation of sexual assault.

We are not suggesting that every person with borderline personality disorder who makes a sexual assault complaint is fabricating the event. Rather, the court should be aware that there may be alternative explanations for the events before it. Informing the court of these issues may be considered relevant in the interests of justice.

These cases are not published; therefore, we could not discover how frequently each diagnosis is involved in these proceedings. In our experience, the issue of a complainant with a previous diagnosis

of borderline personality disorder is raised in a significant proportion of these cases.

In the early stages of a case, witness statements or testimony may sometimes mention medications that a witness has been taking. A mental health expert may be able to explain to the court the possible diagnoses for which these medications are indicated. It may then be important to describe the nexus between the characteristic symptoms of these possible diagnoses and the person's credibility, reliability, or competence as a witness.

Child Complainant

The assessment of a child or adolescent presents additional challenges that mental health practitioners should consider. The manifestation of mental illness and extent or quality of symptoms in this demographic are prone to dramatic variations between age groups and developmental stages, presenting additional challenges. In assessing these children and adolescents (herein referred to as children for simplicity), a mental health professional may require considerable background information to inform their opinion about a child complainant. Various considerations affect the assessment of a child's reliability, credibility, and competence as a witness.

Disorders and Diagnoses

Disorders of attachment may influence children's perception of others, as well as their interpretation of others' behaviour. A child who has challenges with their attachment may be prone to misinterpreting the behaviours of others, which may affect their reliability and credibility.

Children who experience significant disruptions in the number or consistency of care providers often develop insecure attachment patterns. They may have significant challenges forming relationships with others and may either seek out significant closeness and proximity to strangers or avoid contact with adult care providers altogether. Attachment disorder is when these behaviours lead to significant social disruption.

Two forms of attachment disorders are recognized in the *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, 2013), of which a qualified expert in this area should be aware. Reactive attachment disorder is characterized by a child who consistently does not seek comfort nor assistance from a care provider or other adult and may display inappropriate emotional and social responses to others. Disruptive social engagement disorder is characterized by a child who inexplicably or without regard for safety approaches others, mostly strangers, in an inappropriate manner. Diagnostic criteria for these attachment disorders do not specifically identify deficiencies in credibility or reliability. However, in clinical practice, it is often the case that children with attachment-related disorders exhibit difficulties or challenges with truth telling and can be prone to significant misinterpretation about their relationships with others and others' behaviours.

Children who experience significant disruption in their care, particularly those raised in foster care or who have been moved between various homes, are more prone to developing attachment-related disorders. These children may be more likely to have experienced abuse, including sexual abuse, which further impacts their propensity toward the development of insecure attachment and personality traits.

Borderline personality disorder is one example of a condition in adults that may affect a mental health practitioner's assessment. Given that personality disorders are not diagnosed in children, past experiences of abuse accompanied by behavioural challenges, such as self-harm, may be considered when identifying personality traits in a child that may impact their reliability and credibility.

Another prominent consideration when assessing a child complainant involves the presence or absence of externalizing behaviours. Such externalizing behaviours involve oppositionality, aggressive and hostile behaviours directed toward others, as well as rule-breaking behaviours. Two of the most prominent externalizing disorders in children are oppositional defiance disorder (ODD) and conduct disorder (CD). ODD is characterized by significant disobedience and defiance directed toward adults or authority figures. The degree of oppositionality in ODD is far greater than would be expected for most children and involves significant impairment in the child's functioning and dynamics with others at home and at school. CD involves significant rule-breaking behaviour and can be characterized by antisocial tendencies. Both of these externalizing disorders can be associated with significant difficulties in truth telling and can impact a child's reliability and credibility.

The degree of impulsivity a child experiences can also impact their credibility and reliability. Children

may not fully appreciate the implications of their claims or behaviours. When they experience heightened or disordered levels of impulsivity, their credibility and reliability may be significantly affected.

Attention deficit hyperactivity disorder (ADHD) is often characterized by significant impulsivity and poor decision-making skills. Children with ADHD may not be able to weigh the potential ramifications of their behaviours or statements in an organized and coherent manner. As such, the assessing mental health professional may consider this diagnostic entity in informing their opinions.

Psychotropic Medications

Mental health professionals may be advised of various psychotropic medications that a child is prescribed. Off-label use of psychiatric medications is common and prevalent in the treatment of childhood psychiatric conditions. For instance, antipsychotic medications in low doses are often prescribed to treat ODD and CD, though these medications were not initially intended for this use. Given the relative lack of available child psychiatrists across health-care settings, the treatment of such disorders is often relegated to pediatricians and family doctors. This may increase the potential for off-label use of various medications, and it may be difficult to identify specific assessments or bodies of literature that support the use of certain medications in children.

Lawyers may retain an expert if it comes to their attention that the child has been prescribed certain psychotropic medications. The psychiatrist may be able to explain the reasons for and any possible side effects of these medications. They may also speak to how the medications may be relevant to the reliability, credibility, and competence of a child as a witness.

The evaluation of a child complainant thus involves a nuanced approach with multiple considerations. The presence of psychiatric diagnoses in a child—particularly those related to attachment, externalizing, and impulse-related disorders—plays a specific role in forming an opinion about a child's credibility and reliability. There is often the need to obtain more information about a child's development to fully inform one's opinion of a child's developmental level and the presence of underlying developmental conditions.

Issues that Lawyers Want Experts to Assess

Mental health professionals most often become involved in third-party record proceedings either as holders of therapeutic records relating to a third party, which can include the complainant or witness in the proceeding, or as expert witnesses called by either side to establish why the records are relevant.

Therapeutic records are sought to establish the credibility and reliability of witnesses or because they relate to a material issue, such as how events happened. Credibility is about the honesty of a witness. A motive to fabricate, inconsistent statements, or hostility may be relevant to the assessment of credibility. Reliability is about the accuracy of a witnesses' account and can involve assessing the impact of any memory issues or reasons why a witness may have difficulty accurately observing or communicating incidents (Paciocco & Stuesser, 2015).

Therapeutic records can also be relevant to an argument that the allegation was fabricated recently or was previously reported in a therapeutic context. These arguments often arise in historical sexual offence allegations. For example, an accused may be able to show that a disclosure of a sexual offence to a therapist either did not happen, happened at a different time, or related to a different accused. In such cases, the therapeutic records may be relevant to the complainant's credibility and reliability, and the material issue of whether the accused perpetrated the event. To succeed on such an application, an accused would have to present some evidence to support that belief. Mere speculation about the therapeutic records will not suffice.

Defence counsel seeking records will have already developed their own theory of the case and outlined how the therapeutic records relate to identified issues. The notice of application should offer some guidance to a record holder about the relevance of the records, which will be heavily case-specific.

Defence counsel may also call a mental health professional who is not the record holder as a defence expert witness in a third-party records hearing to establish how the records believed to exist are likely relevant. For example, a mental health professional could provide evidence such as the expected symptoms of certain psychiatric diagnoses, the effect of a combination of psychiatric conditions, or the effects and side effects of medication.

Preparing the Expert

To prepare a mental health professional to provide evidence at a hearing, defence counsel may provide them with documents from the police investigation, such as a synopsis (the police summary of the allegations), police occurrence reports, witness statements, or transcripts of prior proceedings that led to the belief that relevant therapeutic records exist. They may also provide other evidence to this effect, including text messages, old letters or emails (including those between the accused and the witness), school records, or other police reports that refer to previous mental health treatment of the witness. Defence counsel should explain their theory of the case and ask the mental health professional to review all the documents to formulate their opinion about the psychiatric issues raised by the evidence.

Argument That Flows From Expert Evidence

Based on the expert evidence, counsel can then argue why the records are relevant to a material issue, the credibility or reliability of a witness, or the reliability of other evidence. The evidence of a mental health professional can help establish the facts needed to justify the relevance of the records being sought.

The diagnosis of a witness as having a psychiatric condition is not enough to meet the threshold of likely relevance. Under the s. 278 regime, counsel must establish how that psychiatric condition and its manifestation relate to an issue at trial with sufficient precision and probity to overcome the strong privacy interest a witness has in their therapeutic records. The expert mental health evidence can be helpful in establishing the specific facts needed in each case to overcome the presumption of privacy in therapeutic records.

Under s. 278, an accused must provide other evidence that supports their belief that the records sought are relevant to the facts of the case and overcome the numerous impermissible assumptions outlined in the Code.

For example, an accused's general assertion that therapeutic records exist showing that a sexual assault complainant generally suffered from depression or that, in therapy, they disclosed a significant hostility toward the accused would not meet the required threshold.

Instead, an accused must be precise in targeting therapeutic records, given their high privacy value and the strict statutory regime that guards such records against disclosure. For example, consider a sexual assault case where the complainant advises police that she suffers from a psychiatric disorder, but she was taking her medication at the time of the incident and when she spoke to police. An accused will want to establish with some other evidence that the complainant's therapeutic records are likely to show that the complainant was in fact noncompliant with her medication at those times. The evidence of a psychiatric expert can assist in explaining the significance of medication noncompliance in the case, thereby strengthening the argument for the relevance of the therapeutic records.

Conclusions

As in every case, the expert should give an honest and objective opinion to the retaining party. Generally speaking, the psychiatric diagnosis comes from statements made by various participants to either the police or the court in a preliminary inquiry, for instance. The expert does not make a diagnosis but describes to the court the characteristic signs and symptoms of a diagnosis that may inform the court's decision.

At some stage of the proceedings, it may be possible for a mental health professional to conduct a formal forensic mental health evaluation of the complainant to come to a diagnosis. The mental health professional should consider providing a caveat, stating that they have been unable to interview the complainant at this stage but would be prepared to do so should the complainant be made available to them. However, in the initial stages, the issue is the production of mental health records.

After production of the records, the expert may be asked to review the records and formulate an opinion about how the records may be relevant to questions of reliability, which may be helpful to an issue at trial. When acting as a forensic mental health professional, the ethical obligation is to truth telling and respect for persons rather than strictly to the patient (Canadian Academy of Psychiatry and the Law, 2018).

Conflict of Interest: none

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