Court No.24114

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

HUBERT PATRICK O'CONNOR

APPELLANT

AND

HER MAJESTY THE QUEEN

RESPONDENT

AND THE ABORIGINAL WOMEN'S COUNCIL, THE DISABLED WOMEN'S NETWORK OF CANADA, CANADIAN ASSOCIATION OF SEXUAL ASSAULT CENTRES and THE WOMEN'S LEGAL EDUCATION AND ACTION FUND

INTERVENORS

AND CANADIAN MENTAL HEALTH ASSOCIATION

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TABLE OF CONTENTS

				PAGES
PART I	INTRODUCTION			1
PART II	POINTS IN ISSUE			1 - 2
PART III	ARGUMENT			2
	A.	Equality Guarantees Must Be Applied to Disclosure Principles and Practice		2 - 4
		(i)	Disclosure Practices Reinforce Existing Inequality	4 - 8
		(ii)	Disclosure Practices Draw Upon and Perpetuate Discriminatory Rape Myths	8 - 11
	B.	The Disclosure Order Underlying this Appeal		11 - 13
		(i)	The Order's Oppressiveness on its Face	13 - 16
		(ii)	The Order's Oppressiveness in the Larger Legal Context	16 - 19
PART IV	ORDER SOUGHT			20
PART V	TABLE OF AUTHORITIES			21 - 24

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PART I: INTRODUCTION

1. The Intervener Coalition (the "Coalition"), composed of the Aboriginal Women's Council, the Canadian Association of Sexual Assault Centres, the DisAbled Women's Network of Canada and the Women's Legal Education and Action Fund, brings to this appeal extensive expertise in the following areas:

a) sexual violence against women and children;

b) the life circumstances of First Nations women and of women with disabilities;

c) the relationships among inequalities based on sex, race and disability alone or in combination, vulnerability to sexual violence and diminished access to justice; and

d) constitutional law and equality jurisprudence.

2. On the basis of this collective expertise, the Coalition intervenes in this appeal to ensure that the fundamental constitutional equality implications of pre-trial disclosure in criminal cases involving sexual violence are fully recognized and addressed by this Court.

Part II: POINTS IN ISSUE

3. The Coalition takes no position on the correctness of the British Columbia Court of Appeal's doctrinal analysis of the threshold for a stay of proceedings for common law abuse of process or as a remedy for breach of an accused's constitutional rights.

4. The Coalition submits, however, that while it would be open to this court to dismiss the appeal without addressing the disclosure order sought by the defence, ordered by the Associate Chief Justice and ultimately complied with by the Crown in this case, it would not be open to this Court to consider reinstating the stay of proceedings entered at trial without analyzing the constitutional propriety of that disclosure order.

5. The Coalition submits that the ultimate object of an order of a stay of proceedings -- the maintenance of public confidence in the legal and judicial process -- would be undermined by the issuance of a stay which is related in any way to this disclosure order which was found by the B.C. Court of Appeal to have been procedurally and substantively flawed and which, in our submission, violates the constitutional rights of the complainants.

6. The Coalition submits that the constitutional rights of the victims of sexual violence to security of the person without discrimination based on sex, race or disability and to equal protection and benefit of the law cannot be fully recognized or vindicated in this appeal or in criminal law and procedure more generally unless courts take cognizance of the social, historical, political and legal conditions of inequality in which sexual violence occurs; out of which legal principles and legal practices emerge; and under which records sought to be disclosed are generated.

Part III: ARGUMENT

A. Equality Guarantees Must Be Applied to Disclosure Principles and Practice

7. The Coalition submits that the maintenance of public confidence in the integrity of legal and judicial processes requires not only scrupulous protection of the fair trial rights of accused persons but also judicial recognition and censure of:

(a) the degree to which rape myths and sexual and other discriminatory stereotypes presently animate disclosure requests and rationalize disclosure orders;

(b) the degree to which overbroad, unjustifiably invasive and prejudicial disclosure requests and orders are but the latest manifestation of law's lengthy history of discrimination against victims of sexual violence who wish to hold their abusers criminally accountable; and

(c) the degree to which defence counsels' increasingly aggressive and expansive pursuit of complainants' personal records serves by design or effect to counteract initiatives by Parliament and the courts which have attempted to reduce the

operation of discriminatory assumptions, logic and outcomes in sexual offence law.

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8. None of the courts in the record below and no reported case reviewed by the Coalition concerning disclosure of complainants' personal records in sexual offence proceedings explicitly refers to complainants' section 15 Charter rights when addressing disclosure requests.

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9. In the Coalition's submission, evolving contemporary disclosure jurisprudence reflects, exploits and reinforces discriminatory stereotypes about women, children and their sexuality that are little different in their genesis or substance from the evidentiary rules abrogated by Parliament in 1983, and from the rape myths discredited by this Court in R. v. Seaboyer.

Criminal Law Amendment Act, S.C. 1980-81-82-83, c.125

R. v. Seaboyer; R. v. Gayme, [1991] 2 S.C.R. 577

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10. Courts have been applying disclosure law, it is submitted, as if constitutional guarantees protecting accuseds' fair trial rights eclipse the section 7 and 15 rights of complainants. It is submitted, however, that this is not the correct approach: "a hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law".

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Dagenais v. Canadian Broadcasting Corp., unreported decision of the Supreme Court of Canada, December 8, 1994, per Lamer C.J. at para 72

11. Like past evidentiary rules now recognized as discriminatory, evolving contemporary disclosure practices indulge the groundless suspicion that women's and children's reports of sexual violence are uniquely likely to be fabricated, and therefore subject complainants to

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exhaustive and oppressive credibility testing to prove them worthy of the law's protection. In the result, complainants' access to law's protection is conditioned on legally sanctioned access to their private lives and disregard for their dignity and autonomy to a degree unparalleled in other criminal proceedings where credibility is at issue.

Osolin v. The Queen [1993] 4 S.C.R. 595, per L'Heureux Dube J. at 624-5

R. v. K.A.D. [1994] O.J. No. 1837 (Ont. Ct. P.D.)

R. v. Darby, unreported, February 24, 1994, (B.C.Prov. Ct.)

12. A legal system which not only tolerates but, in the name of fair trial rights, presumes the uncreditworthiness of individual members of the disadvantaged groups most targeted for sexual violence, does not reflect, for less promote, "a society in which all are secure in the knowledge they are recognized at law as human beings equally deserving of concern, respect and consideration". Such a system, it is submitted, overtly violates s.15.

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, per McIntyre J. at 171

13. That so inegalitarian a legal system cannot and does not command public confidence in its fairness, decency and integrity is evident in the fact that sexual assault has long been and remains one of the most under-reported of serious crimes.

Canadian Newspapers Co. v. The Queen, [1988] 2 S.C.R. 122 per Lamer C.J. at 131-132

R. v. Seaboyer, supra, per L'Heureux-Dube J. at 649.

(i) Disclosure Practices Reinforce Existing Inequality

14. This Court has described s. 15 as "the broadest of all [Charter] guarantees', one that "applies to and supports all other rights guaranteed by the Charter." Its purpose is "to ensure equality in the formulation and application of the law" and "to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian Society".

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 per McIntyre J. at 171.

R. v. Swain, [1991] 1 S.C.R. 933, per Lamer C.J. at 992.

15. To apply disclosure legal rules and norms as if the conditions of systemic inequality under which they were framed and in which they operate were immaterial to the fairness of legal

processes or to the integrity of the justice system perpetuates systemic inequality in and through law.

16. Studies show that two factors operate in a rapist's selection of a victim: vulnerability and availability. The more disadvantaged, dependent or relatively powerless an individual, the more she or he is vulnerable to sexual exploitation and violation, particularly by individuals she or he knows. Contrary to rape mythology, only a minority of sexual assaults are committed by strangers.

> Ministry of the Solicitor General, Canadian Urban Victimization Survey, "Female Victims of Crime" (Ottawa: 1985) at 2.
>
> Report of the Committee on Sexual Offences Against Children and Youth (The Badgley Report): Sexual Offences Against Children and Youth, Vol.1, (Ottawa: 1984) at 196-98.
>
> Burt, M. "Rape Myths and Acquaintance Rape" in Parrot & Bechhofer, Acquaintance Rape (1991)

17. According to Statistics Canada's national Violence Against Women survey, 39% of all Canadian women have experienced at least one incident of sexual assault since the age of 16, and over half of those had experienced more than one incident. Of the incidents of sexual assault reported to Statistics Canada, only 6% were reported to the police. Fear of the attitudes likely to be shown by the police and the courts toward complainants continues to deter significant numbers of women from reporting.

> Roberts, J. "Criminal Justice Processing of Sexual Assault Cases" Juristat Vol.14, No.7, March, 1994 at 3-6
>
> Final Report of the Canadian Panel on Violence Against Women, Changing the Landscape: Ending Violence -- Achieving Equality (Ottawa: 1993) at 28-29

18. People with disabilities are at least 150% as vulnerable to sexual abuse as individuals of the same age and sex who are not disabled. One recent survey determined that approximately one-third of the abusers reported were disability service providers like personal care attendants,

psychiatrists, residential care staff and special transit staff. Subsequent to their assaults, most disabled people seek counselling, support from current caregivers and medical services.

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> Sobsey, D. "Patterns of Sexual Abuse and Assault" (1991) 9 Sexuality and Disability 243 at 248-9.
>
> Sobsey, D. "Sexual Offences and Disabled Victims: Research and Practical Implications" (1988) 6:4 Vis-a-vis: A National Newsletter on Family Violence, Canadian Council on Social Development at 1

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19. Several studies have determined that between 50% and 80% of women institutionalized for psychiatric disorders have prior histories of sexual abuse.

> Firsten, T.. "An Exploration of the Role of Physical and Sexual Abuse for Psychiatrically Institutionalized Women" (1990) unreported research paper, 1990, available from Ontario Women's Directorate.

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20. It is submitted that disclosure rules or practices which make mental health or medical records routinely accessible in sexual offence proceedings will have disproportionately invasive consequences for women with disabilities whether their disability is exploited by abusers or their disability follows from a prior history of sexual abuse.

> Osolin v. The Queen, supra, per L'Heureux Dube at 622, 631

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21. First Nations women and children are particularly vulnerable to male sexual violence. As many as eight out of ten First Nations women have been sexually abused or assaulted in their lives, usually on more than one occasion. The breakdown of family structures caused by the residential school system as well as the modelling of corporal discipline, has been directly linked with violence against women in aboriginal communities.

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> Ontario Native Women's Association, Breaking Free: A Proposal for Change to Aboriginal Family Violence, (December, 1989)
>
> A.C. Hamilton and C.M.Sinclair, Report of the Aboriginal Justice Inquiry of Manitoba, Vol 1: The Justice System and Aboriginal People (1991) at 478, 481-2

22. Aboriginal women are also highly vulnerable to sexual violence perpetrated by white men steeped in degrading and dehumanizing stereotypes of "Indians":

> The portrayal of the squaw is one of the most degraded, most despised and most dehumanized anywhere in the world. The 'squaw' is the female counterpart to the Indian male 'savage' and as such she has no human face; she is lustful, immoral, unfeeling and dirty. Such grotesque dehumanization has rendered all Native women and girls vulnerable to gross physical, psychological and sexual violence. ...I believe, for example, that Helen Betty Osborne was murdered in 1972 by four young men from The Pas because these youths grew up with twisted notions of 'Indian girls' as 'squaws'. ...Osborne's attempts to fight off these men's sexual advances challenged their racist expectations that an 'Indian squaw' should show subservience...[causing] the whites...to go into a rage and proceed to brutalize the victim.
>
> . . .
>
> It is evident that the men who abducted Osborne believed that young aboriginal women were objects with no human value beyond sexual gratification.

Excerpt from written brief of Emma LaRocque to Aboriginal Justice Inquiry, quoted in Vol. 1 at 479.

Aboriginal Justice Inquiry, Vol. 2, The Deaths of Helen Betty Osborne and John Joseph Harper at 52

23. The legal system has too often treated the high incidence of abuse of aboriginal women as reason to discount the injury caused them by sexual assault. Racist stereotyping has also been shown to infiltrate sexual assault proceedings involving aboriginal complainants.

T. Nahanee, "Sexual Assault of Inuit Females: A Comment on 'Cultural Bias'", in J.V.Roberts & R.M. Mohr eds., Confronting Sexual Assault (1994) 192

M. Nightengale, "Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases" (1991) 23 Ottawa Law Review 71.

Aboriginal Justice Inquiry, Vol.2, at 52, 91

24. Comparable findings exist linking the heightened vulnerability of Black women to male sexual violence with racist stereotypes of Black women as promiscuous (hence discreditable), and linking such racist stereotypes to low prosecution and conviction rates of those who sexually abuse or assault Black women.

Crenshaw, K. "Whose Story Is It Anyway?" in Morrison, ed. Race-ing Justice, En-Gendering Power: Essays on Anita Hill, Clarence Thomas and the Construction of Social Reality (1992) 402 at 412-14

Schafran, L. "Writing and Reading about Rape: A Primer" (1993) 66 St. John's L. Rev. 979 at 1004

Torrey, M. "When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions" (1991) 24 U. Calif. Davis L. Rev. 1011 at 1053

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25. Women who are particularly vulnerable to sexual violence are also especially likely to be subject to extensive documentation: the nature of their vulnerabilities and socio-economic disadvantages is such that they are likely to have extensive medical, social service and institutional, immigration or other records. Reinstatement through disclosure practices of extraordinary credibility testing of sexual offence victims will disadvantage through law individuals already disadvantaged in society by subjecting them to invasions of their privacy not suffered by less documented individuals or individuals victimized by non-sexual crimes. Such a result would violate section 15 of the Charter.

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26. A justice system animated by equality principles would recognize that sexual assault law has never worked effectively or equitably for victims of male violence, not least because in our inegalitarian society credibility no less than propensity to perpetrate sexual abuse has always been wedded to power. Accordingly, an equality-respecting justice system would treat individual complainants as individuals not as types. It would view such individuals' history of mental health treatment or of sexual violence not as justification for extra invasive disclosure, but as reason for caution, sensitivity and heightened vigilance about the purpose and effects of records disclosure.

(ii) Disclosure Practices Draw Upon and Perpetuate Discriminatory Rape Myths

27. This Court has recognized that there is a relationship between sexual violence against women and inequality between the sexes. In particular, it has recognized that: sexual assault is a gender-based crime insofar as 99 percent of the offenders are men and 90 percent of the victims are

women; sexual assault is an attack upon human dignity which constitutes a denial of any concept of equality for women; and that in a sexually unequal society, workplace sexual coercion is an abuse of both sexual and economic power used to underscore women's ascribed inferiority to men.

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Conway v. The Queen, [1993] 2 S.C.R. 872 per Le Forest J. at 877

Osolin v. The Queen, [1993] 4 S.C.R. 595 per Cory J. at 669

Janzen v. Platy Enterprises, [1989] 1 S.C.R. 1254 per Dickson C.J. at 1284

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28. Historically, both the common law and the Criminal Code permitted, and even mandated, sexually discriminatory evidentiary practices which were calculated to mislead the jury and which were premised on what this Court has acknowledged are "groundless myths and fantasized stereotypes" about rape and about male and female sexuality.

R. v. Seaboyer, [1991] 2 S.C.R. 577 at per McLaughlin J. 604

Osolin v. The Queen, supra, per Cory J. at 670-71

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29. Most formally discriminatory rules of evidence were eliminated from the Criminal Code in 1983. Additionally, this Court has discredited the most transparently groundless rape myths -- i.e. the myth that a virtuous woman cannot be raped against her will; the myth that lack of resistance indicates willing consent; the prompt hue-and-cry myth that underlay "recent complaint" doctrine; and the myth that sexually active women are more likely to consent to sex with any man and, in any event, are more likely to be liars generally or, at least, to lie about sex.

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Criminal Law Amendment Act, S.C. 1980-81-82, c. 125

R. v. Seaboyer, supra, per McLachlin J. at 604 and 630

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R. v. Mason, [1994] 2 S.C.R. 3

R. v. W.(R.), [1992] 2 S.C.R. 122 per McLachlin at 136

30. No legislated reforms or judicial dicta, however, have yet addressed, far less contradicted, the tenacious, demonstrably groundless and misogynist myth underpinning virtually all these

now-abrogated or discredited evidentiary rules and practices. That foundational myth is that women are uniquely prone to lie about rape and to fabricate rape charges that place innocent men at risk.

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Burt, supra, at 28

Torrey, M. "When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions" (1991) 24 U. of Calif. Davis L.Rev. 1013, esp. at 1027

Galvin, H. "Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade" (1986) 70 Minn. L. Rev. 763 at 792-3

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31. Four hundred years ago, Lord Matthew Hale's asserted that "rape is an accusation easily to be made and hard to prove, and harder to be defended by the party accused, tho' never so innocent."

Hale, Pleas of the Crown, vol. 1, 1678 at *635.

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32. Hale's often-cited claim has governed the legal imagination ever since, notwithstanding its inaccuracy on every point. Rape accusations are, in fact, not easily made: rape remains one of the most under-reported serious crimes. If reported, and if deemed "founded" by the police, and if prosecuted and tried, rape has always been harder to prove than to defend against.

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Julian Roberts and Michelle Grossman, " Changing Definitions of Sexual Assault: An Analysis of Police Statistics" in Roberts & Mohr, eds. Confronting Sexual Assault: A Decade of Legal and Social Change (1991) 57 at 59-60.

Richard Andrias, "Rape Myths: A Persistent Problem in Defining and Prosecuting Rape" (1992) Criminal Justice 2 at 3-4

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33. The foundational myth that women have a propensity to fabricate rape charges, in turn, has spawned a host of subsidiary myths purporting to account for women's lies about rape; for instance, that women lie to protect their sexual reputations or out of vindictiveness toward the accused or from sheer maliciousness; that women fantasize they were raped and children fantasize that they were abused or that complainants suffer from sexual delusions.

Burt, supra, at 28-32.

R. v. Seaboyer, per L'Heureux Dube at 651-55

34. Wigmore is still cited as an authority on evidence, notwithstanding the discredited science behind his view that:

> (1) Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the court in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instinct, partly by bad social environment, partly by temporary physiological or emotional condition. One form taken by these complexes is that of contriving false charges of sexual offenses by men.
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> (2) No judge should ever let a sex offence charge go to the jury unless the female complainant's social history and mental makeup, have been examined and testified to by a qualified physician.

Wigmore, J.J., Evidence in Trials at Common Law, vol. 3A, s. 924, Chadbourne Rev. Ed. 1970 at 736-7.

L. Bienen, "A Question of Credibility: John Henry Wigmore's Use of Scientific Authority" (1983) 19 Cal. Western L. Rev. 235.

35. In the 1990s, Wigmore's view that it was necessary for a "female complainant's social history and mental makeup" to be examined by a qualified physician pre-trial has emerged in a new form: defence arguments that a fair trial cannot be held unless the defence has access to the witness's medical, therapeutic or other institutional records. A variation is that a fair trial cannot be held if such records do not or no longer exist.

Spencer, B. "Medical health records of complainants are valuable tool in sexual assault cases" The Lawyer's Weekly, 14:29, December 2, 1994 at 10

B. The Disclosure Order Underlying this Appeal

36. On June 4, 1992, Associate Chief Justice Campbell issued a disclosure order of extraordinary scope and invasiveness requiring:

a) The Crown to produce names, addresses and telephone numbers of therapists, counsellors, psychologists or psychiatrists whom [sic] have treated any of the complainants with respect to allegations of sexual assault or sexual abuse;

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b) The complainants authorize all therapists, counsellors, psychologists and psychiatrists whom [sic] have treated any of them with respect to allegations of sexual assault or sexual abuse, to produce to the Crown copies of their complete file contents and any other related material including all documents, notes, records, reports of tape recordings and videotapes, and the Crown to provide copies of all this material to counsel for the accused forthwith;

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c) The complainants authorize the Crown to obtain all school and employment records while they were in attendance at St. Joseph's Mission School and that the Crown provide those records to counsel for the accused forthwith;

d) The complainants authorize the production of all medical records from the period of time when they were resident at St. Joseph's Mission School as either students or employees.

R. v. O'Connor (No.1) (1994), 29 C.R. (4th) 40 (B.C.C.A.) at 48

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37. This order for pre-trial disclosure required the Crown: (a) to produce records not in its possession; (b) to compel the complainants to consent to disclosure of their personal records; (c) to secure access to records generated by a church-run residential school which was premised on a perception of aboriginal people as less than fully human; and (d) to secure mental health and counselling records relating to any and all allegations by any of the four complainants of sexual assault or sexual abuse, without limit as to time or context.

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38. As emphasized by the Court of Appeal, the order was procedurally flawed by reason that it compelled third party disclosure of confidential records made without notice to the third parties and it established no safeguards protecting the complainants' privacy rights. More importantly, the Court found the order was based on no inquiry into the relevance or materiality of the records sought.

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O'Connor (No.1), supra, at 61-2

39. Submissions in support of access to the Mission School records were minimal. Their general importance was described as "self-evident" by defence counsel, and only the possible relevance of the medical records was sketched. In support of his request for the other records, defence
10 counsel argued:

> [T]he importance of psychiatric and psychological counselling records with respect to accused persons' ability to defend themselves is evident -- self-evident. It is for the purpose of testing the credibility of the complainants, determining issues such as recent complaint, corroboration, contradictory statements, et cetera.

None of these reasons for access to the complainants' medical and therapy records survived
20 scrutiny by the B.C.Court of Appeal.

Appellant's Book of Evidence, Vol. 1, p. 66

R. v. O'Connor (No.1), supra, at 49

R. v. O'Connor (No.2)(1994), 30 C.R. (4th) 55 (B.C.C.A.) at 63-5

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40. It is submitted that in a culture not steeped in rape myths shaped by systemic race and sex inequality, this disclosure order would not have been made:
a) the minimalist rationales offered by the defence for the records sought would have been recognized as inadequate and rooted in discredited or discreditable rape mythology;
b) biases inherent in the records would have been considered;
40 c) the s. 7, 15 and 28 rights of the complainants not only would have been adverted to, but would have been affirmed as an essential component of the conduct of a "fair" trial;
d) the privacy interests of the complainants would have been vindicated before, not after, a court-sanctioned intrusion occurred.

50 (i) The Order's Oppressiveness on its Face

41. As early as 1857, it was government policy to "civilize" and "Christianize" First Nations people to the end that they would abandon their distinctive cultural, social, political and spiritual traditions and assimilate Anglo-Canadian values.

An Act for the Gradual Civilization of the Indian Tribes in the Canadas, S.C., 1857, 20 Victoria, c. 6

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42. For almost 100 years, starting with the 1884 Indian Act, residential schools served as the state's primary vehicle of forced assimilation. Under threat of fine or imprisonment Indian parents residing on reserves were compelled to send their children aged 7 to 16 to schools designated by the Minister. Children absent from school could be taken from their families by truant officers "using as much force as the circumstances require". Children expelled or suspended from school or who failed to attend school regularly were deemed juvenile delinquents within the meaning of relevant juvenile delinquent legislation.

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Indian Act, S.C. 1884, c. 27, ss. 10 and 74(7)

Indian Act, S.C. 1886, c. 43, s. 138

Indian Act, R.S.C. 1951, c. 29, ss. 113-122

Davin, Report on Industrial and Residential Schools for Indians and Halfbreeds, Ottawa: 14 March 1879, PABC RG 10 Vol. 6001 File 1-1-1, Part 1.

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43. The residential school system was premised on the belief that removing aboriginal children from the "disruptive" influence of their parents and community traditions was the only way to "civilize" aboriginal people. Separated from their families for 9-10 months a year over an eight year period, aboriginal children were not only instructed in "every aspect of European life, from dress and behaviour to religion and language", but taught to devalue their social, political and spiritual traditions.

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Aboriginal Justice Inquiry, Vol. 1, at 62-68, 478, 512-515.

Assembly of First Nations, Breaking the Silence: An Interpretive Study of Residential School Impact and Healing as Illustrated by the Stories of First Nations Individuals, 1994 at 1-16, 167.

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44. Evidence is now emerging that sexual and physical abuse of aboriginal students was widespread in the residential schools.

Breaking the Silence, supra, at 37-62

45. Punished for speaking their language and either abused by persons in positions of trust and power or witness to such abuse, children who attended residential schools developed a number of survival strategies. As a way of coping with the trauma of their experience, some adopted silence and isolation well into adulthood; some ran away only to be forcibly returned. Whichever strategy was adopted, records covering their years of schooling are liable to be misleading: their silence would obscure their trauma or their resistance would brand them delinquents.

Breaking the Silence, supra, at 87, 93

Haig-Brown, C. Resistance & Renewal: Surviving the Indian Residential School, Vancouver: Tillacum Library, 1988) at 88-103

46. The four complainants in this case are aboriginal women who attended St. Joseph's Mission School, a residential school, from age 8 to 16. All four continued to reside at the school as employees after they ceased to be students. The rapes and indecent assaults which are the subject of the charges in this case are alleged to have taken place while they were employees at the school.

Appellant's Book of Evidence, Vol. 1 at 14

47. The accused, now a Bishop of the Roman Catholic Church, was the complainants' priest and principal while they were students at the school and their priest and employer at the time the alleged assaults took place. He does not deny having sexual intercourse with two of the four complainants; he denies the intercourse was non-consensual.

Appellant's Book of Evidence, Vol.1 at 65

R. v. O'Connor (No.1), supra, at 46

48. The relation between the accused and the four complainants was one characterized by multiple inequalities of institutional and social power. Inherent in the teacher/student, employer/employee and priest/penitent relation between the accused and the complainants were a number of power inequalities any one of which standing alone might constitute the kind of sexually exploitable "power dependency" relationship discussed by La Forest, J. in Norberg v.

Wynrib [1992] 2 S.C.R. 224 at 252-6, and any one of which could have counselled silence on the basis of the relative credibility of the powerful and the powerless.

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49. A justice system animated by equality principles would not have allowed records generated by state policies designed to eradicate an entire culture to be canvassed for potential information discreditable to survivors of such policies. Nor would it have authorized virtually unlimited access by the accused to the complainants' entire history of sexual abuse and their attempts to recover therefrom as the purchase price of access to white justice.

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(ii) The Order's Oppressiveness in the Larger Legal Context

50. As L'Heureux Dube, J. predicted in dissent in Osolin, records are now being sought and experts are being called in sexual assault proceedings which defence counsel would not pursue in other criminal proceedings. Some of these records seek to do indirectly what Seaboyer and Parliament prohibit when done directly.

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Osolin v. The Queen, supra, at 624

An Act to Amend the Criminal Code (sexual assault) S.C. 1992, c. 38, s. 276(3)

51. Some defence counsel pursue the strategy of searching out personal records of complainants in sexual violence cases as a way of counteracting sexual assault law reforms.

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Cristin Schmitz, "'Whack' sexual assault complainant at preliminary hearing"
The Lawyers Weekly, May 27, 1988 at 22

R. v. Darby, unreported decision, February 24, 1994, (B.C. Prov. Ct.)

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52. In the last twelve months, virtually every defence request for disclosure of a Crown witness's personal records in a criminal proceeding was a case involving sexual violence. In terms of their violation of complainants' privacy, many of the disclosures sought and obtained significantly exceed that previously achieved through sexual history evidence alone.

Appendix I

53. In R. v. Stinchcombe, this Court ruled that the Crown must make pre-trial disclosure of all materials gathered in the course of its investigation which are relevant to the issues in the case. The Crown's discretion to screen for relevance is limited: '[w]hile the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant."

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R. v. Stinchcombe, [1991] 3 S.C.R. 326 per Sopinka J. at 339

54. Since Stinchcombe, lower courts have interpreted this "not clearly irrelevant" threshold to promote or require disclosure of virtually all materials sought by the defence even where the materials are not in the Crown's possession and/or even where a statutory or other privilege may be claimed for them at trial.

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R. v. Bhaye, unreported decision, September 22, 1994, No. 21198585 P10101 (Alta. P.C. (Crim. Div.))

R. v. Rockey, unreported decision, February 9, 1993, Ont. G.D.

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55. Some courts have held no foundation for materiality need be laid for disclosure:

> it has not been conclusively laid down in the jurisprudence, that there exists any "threshold test" which must be overcome by the defence, demonstrating the likelihood of the existence of material evidence in the records, before access may be gained

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nor any judicial preview be made of requested documents before they are turned over to the defence:

> [such review would] deprive the defence of its inherent right to decide what is or is not of value to its own case. The trial judge does not know what defence might be advanced, so it must be left to the defence to assess and decide what, if anything, among the records, is material to its case.

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R. v. Kelly (1994), 31 C.R. (4th) 354 (Ont.C.J. Prov. Div.) at 356, 360

56. Types of records sought through disclosure in the last twelve months include: abortion records; adoption records; alcohol or drug treatment records, child and family service records; birth control centre records; diaries; employment records; family correspondence; group home records; medical, mental health and therapy records; rape crisis centre records; school records;

victim assistance communications; and a variety of institution or agency records concerning prior sexual abuse complaints.

Appendix I

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57. One court on reviewing recent disclosure caselaw concluded:

> (1) trial judges are unwilling to become involved in examining records in order to determine if there is any relevant information in them; (2) as a consequence of that... courts disclose either all or nothing of the records; (3) other than the general statement that relevancy must be shown, there is little discussion of the criteria to be applied or the factors to be considered; (4) the interests of the complainant/witness are rarely if ever represented at the hearing of such applications; (5) there is no satisfactorily procedure governing such applications.
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> R. v. K.A.D., unreported decision July 29, 1994 (Ont. C.J. Prov. Div.) para 19

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58. In R. v. Seaboyer, supra, this Court held that evidence of the sexual history of sexual assault complainants, while not relevant per se to the issue of credibility or consent, may, in exceptional cases, be relevant to other issues.

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59. In Osolin v. The Queen, supra, this Court decided that a statement by a sexual assault complainant recorded in psychiatric records admitted at trial for purposes of determining the competency of the complainant to testify could be used in cross-examination to assess her credibility, notwithstanding that defence counsel had sought to follow this line of questioning for purposes clearly rooted in unconstitutionally discriminatory stereotypes.

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60. In light of decisions like these, the Coalition submits that Crowns would screen out information from personal records of complainants at their extreme peril, regardless of how tenuously, if at all, such information is connected with any material issue in the case or of how prejudicial such information is to the constitutional rights of complainants or to the administration of justice.

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61. In Seaboyer this Court recognized the pressing and substantial importance of the four governmental objectives which led to the statutory evidentiary exclusions at issue in that appeal: to eliminate sex discrimination from sexual assault law; to encourage reporting, to eliminate distortions in the fact finding process and to protect complainants' privacy. The Coalition submits that each of these four objectives is being undermined by present disclosure rules and practices.

Seaboyer, supra, at 604-6 and 626

62. Where Crowns, fearful of a stay of proceedings, or courts exercising the broad discretion left them by Seaboyer and Osolin err on the side of overdisclosure, they typically err on the side of inequality.

63. The Coalition submits that guidelines along the lines set out by this Court in Seaboyer or by the B.C. Court of Appeal in O'Connor will never adequately protect complainants' section 7 and 15 rights, even were this Court, for the first time, to direct lower courts explicitly to exercise their discretion in a manner which fully respects those Charter guarantees.

64. It is submitted that the targets of sexual violence will not receive equal justice until the legal system, including the courts, squarely confront the relationship between a society which systematically disadvantages and, then, devalues women and children, and laws which systematically devalue the word of women and children and, then, licence violations of their integrity.

65. The Coalition submits, therefore, that until the devaluation of women and children, their word, and their integrity are addressed instead of reinforced by law, this Court should hold that disclosure of complainants' personal records is so likely to reinstate sexism in the administration of criminal law, to deter reporting, to distort the fact finding process and to violate victims' integrity that affirmation of complainants' constitutional rights, no less than of the integrity of the justice system, requires that no personal records be disclosed in any sexual offence proceeding.

PART IV: ORDER REQUESTED

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I. THE COALITION RESPECTFULLY SUBMITS THAT THE APPEAL SHOULD BE DISMISSED.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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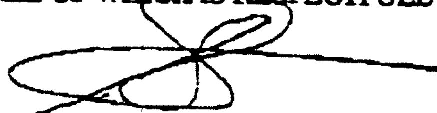

SHARON D MCIVOR

Elizabeth J Shilton per S.M.

ELIZABETH J. SHILTON

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COUNSEL FOR THE COALITION

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PART V: TABLE OF AUTHORITIES

Tab	Description
Cases	
1	R. v. Seaboyer; R v. Gayne [1991] 2 S.C.R. 577
2	Dagenais v. Canadian Broadcasting Corp., unreported decision of the Supreme Court of Canada, December 8, 1994
3	Osolin v. The Queen [1993] 4 S.C.R. 595
4	R. v. K.A.D. [1994] O.J. No. 1837 (Ont. Ct. P.D.)
5	R. v. Darby, unreported, February 24, 1994, (B.C.Prov. Ct.)
6	Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143
7	Canadian Newspapers Co. v. The Queen, [1988] 2 S.C.R. 122
8	R. v. Swain, [1991] 1 S.C.R. 933
9	Conway v. The Queen, [1993] 2 S.C.R. 872
11	Janzen v. Platy Enterprises, [1989] 1 S.C.R. 1254
12	R. v. Mason, [1994] 2 S.C.R. 3
13	R. v. W.(R.), [1992] 2 S.C.R. 122
14	R. v. O'Connor (No.1) (1994), 29 C.R. (4th) 40 (B.C.C.A.)
15	R. v. O'Connor (No.2) (1994), 30 C.R. (4th) 55 (B.C.C.A.)
16	R. v. Darby, unreported decision, February 24, 1994, (B.C. Prov. Ct.)
17	R. v. Stinchcombe, [1991] 3 S.C.R. 326
18	R. v. Bhaye, unreported decision, September 22, 1994, No. 21198585 P10101 (Alta. Prov. Ct. (Crim. Div.))
19	R. v. Rockey, unreported decision, February 9, 1993, (Ont. G.D.)
20	R. v. Kelly (1994), 31 C.R. (4th) 354 (Ont.C.J. Prov. Div.)

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APPENDIX I
Recent cases where the defence sought access to Crown witnesses' records.

This appendix reviews recent[1] criminal cases in which defence counsel sought access to Crown witnesses' records such as diaries, or school, employment, therapy, medical or Child and Family Services files[2]. An extensive searches on QL databases, revealed very few cases[3]—other than sexual offences cases—where such records were sought.

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I. List of Cases Reviewed

1. *Re D.* (1994) 49 R.F.L. (3) 414 (B.C.P.C.)
2. *R. v. Barbosa* (24 August 1994) No. CRIM NJ(P) 4314/94 (Ont. Ct. J. (Gen. Div.))
3. *R. v. Bhaye* (22 September 1994) No. 21198585 P10101 (Alta. P. C. (Crim. Div.))
4. *R. v. Comilang* (9 March 1994) Nos. 923198, 926658, 203/94 (Ont. Ct. J. (Gen. Div.))

20

5. *R. v. Darby* (24 February 1994) New Westminster Res. No. 35588 (B.C.P.C.)
6. *R. v. Darroch* (11 January 1994) (Ont. Ct. J. (Prov. Div.)) (See also: *R. v. Darroch* (May, 1994) and *R. v. Darroch* (1994) 17 O.R. (3) 481 (Ont. Ct. J. (Prov. Div.).
7. *R. v. Fletcher* (20 December 1993) Kamloops Reg. No. 42528 (B.C.S.C.)
8. *R. v. Johansson* (9 December 1993) Vanc. Reg. No. CC931499 (B.C.S.C.)
9. *R. v. K.(A.D.)* (29 July 1994) Brockville (Ont. Ct. J. (Prov. Div.))
10. *R. v. Kennedy* (26 May 1994) Action # 93/00885 (Ont Ct. J. (Gen. Div.))

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11. *R. v. Kliman* (29 November 1993) Vanc. Reg. No. CC930630 (B.C.S.C.) (On appeal to the B.C.C.A.)
12. *R. v. L.E. and E.E.* (12 November 1993) Nos. 612624, C12625, C14451, C16448 (Ont. C.A.)
13. *R. v. Lefebvre* (28 March 1994) Quesnel Reg. No. 16072KC (B.C. Prov. Ct.)
14. *R. v. M.A.S.* (12 April 1994) Action No. 7831/93 (Ont. Ct. J. (Gen. Div.))
15. *R. v. M.K.* (1994), 30 C.R. (4) 94 (Ont. Ct. J. (Gen. Div.)
16. *R. v. M.(R.)* (10 March 1994) File No. 10199 (B.C.Yt.Ct.)

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17. *R. v. Mandeville* (1993), 21 C.R. (4) 272 (N.W.T.S.C.)
18. *R. v. Olscamp* (3 June 1994) Action No. 92-12158 (Ont. Ct. J. (Gen. Div.))
19. *R. v. O'Connor* (1994) 29 C.R. (4) 40, additional reasons 30 C.R. (4) at 55
20. *R. v. Ross* (2 June 1994) C.R. No. 12391 (N.S.S.C.)
21. *R. v. Spurgeon* (1994) 148 A.R. 73 (Q.B.)
22. *R. v. Thurlow* (September 1994) No. 3504 (Ont. Ct. J. (Gen. Div.))
23. *R. v. VanTassell* (20 July 1994) Action S.Y. No. 3498 (N.S.S.C.)

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24. *R. v. W.(D.D.)* (21 November 1994) Victoria Reg. No. 74632 (B.C.S.C.)
25. *R. v. W.(G.L.) [Weagle]* (1994), 128 N.S.R. (2) 254 (N.S.S.C.)
26. *R. v. W.(J.) [Wismayer]* (25 March 1994) No. 2235/93 (Ont. Gen. Div.)
27. *R.v. Wong* (8 November 1994) Victoria Reg. No. 72075 (B.C.S.C.)

II. Other cases[4]

1. *R. v. D.E.E. and W.J.E.* (20 March 1994) (Ont. Ct. J.) (Gen. Div.). Even though relevancy was unclear, the Crown was ordered to assist in obtaining production of therapy and hospital records, police reports, and child welfare files. None of the records were Crown's possession and, with the exception of some therapy records, they were in a foreign jurisdiction.
2. *R. v. Sator* (14 April 1994) (Ont. Ct. J. (Gen. Div.). Sexual assault centre records were found to be privileged and were not ordered to be produced.
3. *R. v. Mundy* (10 April 1994 (Cosgrove, J.). Production of Child and Family Services files ordered.

Note: The cases noted above are cited in *R. v. K.(A.D.)*

4. *R. v. Wiseman and Beausejour* (31 October 1994) (Ont. Gen. Ct. per Kerr, J.). The defense sought access to the files from two sexual assault crisis centres. They wanted to attack the complainant's credibility and hope to find inconsistent statements in the centres' files. The files were ordered to be produced to a judge for review.
5. *R. v. Carosella* (24(?) November 1994 per Ouellette, J. (Windsor)). A sexual assault crisis centre had been ordered to produce a complainant's records. The files had been shredded by the centre and were therefore not available. Charges against the accused were ordered stayed.

III. Reasons[5] given by defence counsel for access to the complainant's[6] records

1. Reasons not stated in decision
   a. *R. v. Olscamp*: order to compel complainant and mother to submit to an examination by a psychologist.
   b. *R. v. W.(D.D.)*: medical, health and school records sought.
   c. *R. v. Lefebvre*: Child and Family Service files.
   d. *R. v. Johansson*: Young Offenders record, psychiatric, psychological and mental health files.
   e. *R. v. Spurgeon*: pre-sentencing report, information collected by the military police on the complainant's friends, therapy and medical records.
   f. *R. v. Comilang*: hospital and therapy records.
   g. *R. v. Ross*: medical and therapy records, tape recordings of conversations between the complainant and reporters.
   h. *R. v. O'Connor* (therapy records, school and employment records, some medical records).

2. **Reliability (defence allegation that the complainant is suffering from a disease or disorder of the mind)**
   a. *Re D.*: Child and Family Services records; reliability questioned without any foundation.
   b. *R. v. Mandeville*: hospital and medical records, addiction services records; reliability questioned on the basis of the complainant's substance abuse history.
   c. *R. v. Barbosa*: school and Child and Family Service records; reliability questioned on the basis that a C.F.S. file existed.
   d. *R. v. W.(G.L.)*: medical and psychiatric records: reliability questioned without any foundation.
   e. *R. v. M.(R.)*: sexual abuse treatment records; reliability questioned because the complainants were quite young and they were in therapy already.
   f. *R. v. Ross*: additional medical and therapy records sought.

3. **To challenge credibility**
   a. **general or unspecified challenge**
      i) *R. v. Darroch*: psychiatric and hospital records.
      ii) *R. v. K.(A.D.)*: therapy records.
      iii) *R. v. M.K.*: birth control clinic records, school records, Child and Family Service records, hospital and therapy records.
      iv) *R. v. L.E. and E.E.*: Children's Aid Society records.
      v) *R. v. M.A.S.*: Children's Aid Society records.
      vi) *R. v. Barbosa*: school and Child and Family Services records.
      vii) *R. v. W.(G.L.)*: medical and psychiatric records.
      viii) *R. v. VanTassell*: Crown file on charges against the complainant in an unrelated criminal matter.
      ix) *R. v. Ross*: taped conversations of complainant with reporters.

   b. **prior inconsistent statement**
      i) *Re D.*: Child and Family Service records.
      ii) *R. v. Fletcher*: sexual assault centre records.
      iii) *R. v. Thurlow*: sexual assault centre records.
      iv) *R. v. M.K.*: birth control clinic records, school records, Child and Family Service records, hospital and therapy records.
      v) *R. v. W.(G.L.)*: medical and psychiatric records.
      vi) *R. v. M.(R.)*: sexual abuse treatment records.

   c. **memories recovered in therapy**
      i) *R. v. Kliman*: diaries and medical records.
      ii) *R. v. Kennedy*: group therapy records.
      iii) *R. v. Wong*: therapy records.

d. past sexual history

i) *R. v. W.(D.D.)*: brother-sister incest alleged; adoption records in order to disprove accused's paternity.
ii) *R. v. Darby*: medical records and Child and Family Services records.
iii) *R. v. Bhaye*: medical and psychotherapy records for "medical history involving psychiatric care for hysterical reactions in connection with sexual activity".
10 iv) *R. v. M.K.*: birth control clinic records.

e. past sexual abuse

i) *R. v. Kliman*: diaries and therapy records.
ii) *R. v. M.(R.)*: sexual abuse treatment records.
iii) *R. v. Darby*: medical records and Child and Family Services records.
iv) *R. v. Bhaye*: medical and psychotherapy records for "medical history
20 involving psychiatric care for hysterical reactions in connection with sexual activity".
v) *R. v. Barbosa*: school and Child and Family Services records.

f. bad character

i) *R. v. Darby*: medical and Child and Family Services records.

g. motive to fabricate

30 i) *R. v. M.K.*: school records, birth control clinic records, hospital and therapy records, Child and Family Service records.
ii) *R. v. W.(J.)*: Children's Aid Society records, personal diaries.
iii) *R. v. Thurlow*: sexual assault centre records–on any *animus* the centre's workers may have shown towards the accused.
iv) *R. v. VanTassell*: psychological records.

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IV. Nature of Orders made

1. Access denied

a. Relevancy not established

i) *R. v. Darroch*
ii) *R. v. Ross* (some records had been previously released)

50 b. Crown made disclosure before motion dealt with

i) *R. v. Johansson*: psychiatrist's name had been disclosed prior to the motion, files not ordered to be produced at this time.
ii) *R. v. Bhaye*
iii) *R. v. Mandeville*: some records released before the motion was heard.

c. Not in Crown's possession or control/ Lack of notice to record holder/ Access prohibited by statute
- i) *R. v. Lefebvre*
- ii) *R. v. W.(J.)*
- iii) *Re D.*
- iv) *R. v. Johanson*: Young Offenders record.

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d. Against public policy
- i) *R. v. W.(D.D.)*
- ii) *R. v. Olscamp*

2. Access allowed

a. Ordered produced without restrictions on use by defence counsel
- i) *R. v. Spurgeon*
- ii) *R. v. Kennedy*
- iii) *R. v. Thurlow*
- iv) *R. v. O'Connor*

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b. Ordered disclosed to a judge who would determine if any materials should be released:
- i) *R. v. Kliman*: diaries reviewed and not ordered to be produced, some therapy records ordered produced.
- ii) *R. v. Mandeville*: addictions services records found by the judge after review to be too subjective and therefore not released, further hospital records ordered produced.
- iii) *R. v. Barbosa*: some documents ordered released.
- iv) *R. v. K.(A.D.)*: after review, some therapy records ordered produced.
- v) *R. v. M.K.*
- vi) *R. v. M.(R.)*: after review, complete therapy file ordered to be disclosed.
- vii) *R. v. VanTassell*: judicial review found nothing relevant.
- viii) *R. v. W.(J.)*: diaries reviewed, not ordered disclosed.

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c. Committal quashed for non-disclosure
- i) *R. v. Comilang*

d. Issue should be determined by trial judge
- i) *R. v. Fletcher*: motions judge found that he lacked jurisdiction to order production of files not in the Crown's possession but he rejected that they were privileged or irrelevant.
- ii) *R. v. M.A.S.*
- iii) *R. v. W.(G.L.)*: motions judge expressed scepticism about relevance but found that he lacked jurisdiction to order production.

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iv) *R. v. Darby*: defence already had some medical and Child and Family Service files, ordered that it was for the trial judge to determine if any more should be produced.

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1. All but one of the cases (*Mandeville*) analyzed are from the last year (November, 1993-November, 1994). Only cases in which reasons for decision have been issued and only the information in the reasons are analyzed.

2. Not included in this analysis are cases where defence sought access to statements from law enforcement officials, taped interviews with children made for use as evidence, or medical records from attendances immediately after a sexual assault for forensic purposes.

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3. The non-sexual assault cases during this time period involved defence obtaining access to a witness' criminal record or to school or Child and Family Services files in child assault cases.

4. The full text of the cases under this heading have not been located for reviewing. Therefore information on these cases is noted here but it is not included in the rest of the analysis.

5. More than one reason for access to the records may have been given by the defence.

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6. Unless otherwise noted.

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