When Equality Calls for Privilege: Sexual Assault and the Disclosure of Mental Health Records in Police Possession in Canada

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1. Introduction

FOR WOMEN WITH mental disabilities who allege sexual assault, privacy is inherently an issue of equality. This is particularly true for women who have had documented encounters with the police. Under the current record disclosure application process, the *Mills* regime, complainants' privacy interests are inadequately addressed, allowing mental health information to be sought by defendants on a discriminatory basis. The Supreme Court of Canada's confirmation in 2014 that police records are subject to *Mills*, and the 2014 release of a comprehensive police inquiry calling for increased police access to mental health information, jeopardise privacy and equality for sexual assault complainants with mental disabilities. A new class or statutory privilege between police and healthcare providers can protect complainants' equality and privacy rights while enabling a fair sexual assault trial.

2. The State of Sexual Assault and Privacy in Canada

It is estimated that in Canada only 0.3% of sexual assaults ever lead to a conviction.[2] In an assessment of attrition rates in sexual assault cases, only 3% of 460,000 sexual assaults from the past year were reported to the police and recorded as a crime. Of those assaults recorded as a crime, only 42% led to charges being

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[2] Holly Johnson, 'Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault' in *Sexual Assault in Canadian Law: Leg Practice and Women's Action* (2012) 613, 632.

laid and only half those charges were prosecuted. Ultimately, only 25% of charges led to conviction.[3] However, the true percentages are impossible to know because it is believed that the vast majority of sexual assaults are never reported to the police.[4] Sexual assault is thought to be severely under-reported because victims often believe their privacy will be violated, that they will be scrutinised publicly, their personal health information will be used against them, and they will not be believed.[5] These beliefs are largely true. Defence counsel attempt to 'depict the sexual assault complainant as the irrational, incredible, and hysterical other of the rational legal subject,'[6] and aggressively pursue access to private documents through record disclosure applications to support an attack on credibility.[7] Privacy is violated through record disclosure processes in which 'boundaries of interiority are breached,' as when bodily integrity is violated in a sexual assault itself.[8] In a review of 48 record disclosure decisions in the first four years under the current third party record disclosure regime, the Department of Justice found that full or partial disclosure, or production of records to the defence, was ordered in 35% of cases; half of which involved records from multiple sources. The three most commonly produced records were counselling, medical, and psychiatric records, all of which attract a high expectation of privacy.[9]

While the violation of privacy in itself is problematic as a disincentive to reporting, it is also believed to be a major hindrance to rightful convictions. In the Department of Justice's case law review it was found that the grounds for seeking the production of complainants' records were based on prohibited myths and stereotypes about sexual assault in every single application.[10] Sexual assault and subsequent privacy concerns are clearly a gendered issue. Statistics Canada found that 92% of victims are female while 99% of perpetrators are male.[11] It is crucial that sexual assault also be recognised as an issue about ability. Women with disabilities are more likely to be sexually assaulted than other women, although the statistics are not conclusive.[12] Moreover, women with mental disabilities are particularly vulnerable to assaults on their credibility or capacity,[13] which

[3] ibid 630–632.

[4] Susan McDonald, Andrea Wobick and Janet Graham, Research and Statistics Division, Department of Justice Canada, *Bill C-46: Records Applications Post-Mills, A Caselaw Review* (2004) 14; Maire Sinha, 'Measuring violence against women: Statistical trends' (2013) 85 Juristat (Statistics Canada) <www.statcan.gc.ca/pub/85-002-x/2013001/article/11766-eng.pdf> accessed 10 April 2015.

[5] McDonald, Wobick and Graham (n 4) 14.

[6] Lise Gotell, 'The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law' (2002) 40 Osgoode Hall LJ 251, 257.

[7] ibid 260.

[8] ibid.

[9] McDonald, Wobick and Graham (n 4) 24.

[10] ibid 40.

[11] Sinha (n 4) 29–30.

[12] McDonald, Wobick and Graham (n 4) 16.

[13] Janine Benedet and Isabel Grant, 'Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues' (2007) 52 McGill LJ 515, 542–546.

exacerbates their disadvantage once they report a sexual assault. The state of sexual assault and privacy in Canada strongly indicates that the privacy of sexual assault victims must be better understood. Once personal records are produced, the complainant's privacy is violated, regardless of whether those records contribute to the accused's defence at trial.[14] Therefore, the effects of third party record disclosure laws on complainants' privacy requires attention.

3. Overview of Record Disclosure in Sexual Assault Cases

A. Police and Crown Requirements to Disclose Relevant Information

The duties of the police and the Crown to disclose information in a criminal context are set out in two decisions of the Supreme Court of Canada: *R v McNeil* and *R v Stinchcombe*. The Supreme Court in *McNeil* ruled that the Crown has a duty to make reasonable inquiries into materials it is aware are in the possession of the police, which would be relevant to the defence or prosecution at trial. It also stipulated that the police have a duty to disclose to the Crown all relevant information pertaining to the investigation of the accused[15] and any other obviously relevant information.[16]

In *R v Stinchcombe* the Supreme Court determined that the Crown has a duty to disclose all relevant information in its possession, also known as the 'fruits of the investigation,' to the defence. This disclosure is subject to the Crown's discretion with respect to the relevance of the information, as well as the Crown's duty to protect privilege such as police-informer privilege.[17] Based on the disclosure made by the Crown, the defence may apply to have records produced. It is important to note, however, that the perpetrator is known to victims in 75% of reported sexual assaults,[18] so the accused is often already aware of records existing about the complainant and may proceed with an application on this basis.[19]

B. Access to Records Through Third Party Disclosure Applications

The accused can apply to the court to access records in the hands of third parties. The Supreme Court of Canada originally established requirements for third party record disclosure in the companion decisions of *R v O'Connor* and *A(LL) v B(A)*, which lay an important foundation for the later introduction of a statutory test. The Court set out the primary test for the disclosure of third party records in the

[14] Susan Chapman, Joanna Birenbaum and Janet MacEachen, *Factum of the Intervener: Barbara Schlifer Commemorative Clinic (R v Quesnelle)* (2014) [unpublished] [29]–[30].
[15] *R v McNeil* 2009 SCC 3, [2009] 1 SCR 66 [14] [*McNeil*].
[16] ibid [59].
[17] *R v Stinchcombe* [1991] 3 SCR 326, 1991 CanLII 45 (SCC) [*Stinchcombe*].
[18] Sinha (n 4) 30.
[19] Gotell (n 6) 274.

criminal sexual assault case of *O'Connor*. The test contemplated the relevance of the record and the need for the court to review records before producing them to the accused. The Court justified these components of the test on the basis that third party records are not in possession of the Crown and third parties have no obligation to assist the defence. Therefore, requiring the defence to prove the relevance of the record is a warranted shift in burden.[20] In *A(LL) v B(A)*, a civil sexual assault case, the Court determined that complainants and third party record holders can make submissions at disclosure applications and can appeal decisions to disclose.[21]

The *O'Connor* regime was replaced in 1997 when Parliament passed Bill C-46, which introduced ss. 278.1 to 278.91 of the *Criminal Code*. These sections present a comprehensive test for third party record disclosure in proceedings involving sexual offences ('the s. 278 scheme').[22] Parliament's intention in creating the s. 278 disclosure scheme was to engage in a contextualised analysis of the concerns with overcoming complainants' privacy rights in light of society's interest in reducing sexual violence against women and children.[23] Disclosure applications under s. 278 must follow a two-stage process.

First, the accused must prove that the third party record it seeks is 'likely relevant to an issue at trial or to the competence of a witness to testify' and that 'the production of the record is necessary in the interests of justice.'[24] At the first stage, s. 278.3(4) enumerates grounds that on their own are insufficient to support relevance. These grounds include the record's relation to the complainant's sexual activity and sexual reputation,[25] which are reminiscent of the prohibition of using sexual myths and stereotypes as a basis for defence in s. 276.[26] The list also forbids arguments for relevance based merely on the record's relevance to the credibility of the complainant, the reliability of the complainant's testimony because of the fact that the complainant has received psychiatric attention, and allegations of sexual abuse against persons other than the accused.[27] These latter three prohibited grounds are important when the complainant has mental health issues and has had documented encounters with the police.

If the defence can prove the likely relevance and necessity of production, the judge must then, at the second stage, review the relevant documents and decide whether to produce them to the accused. The judge 'shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer

[20] *R v O'Connor* [1995] 4 SCR 411, 1995 CanLII 51 (SCC) [31] [*O'Connor*].
[21] *A.(L.L.) v B.(A.)* [1995] 4 SCR 536, 1995 CanLII 52 (SCC) [27]–[28].
[22] McDonald, Wobick & Graham (n 4) 3.
[23] Martha Shaffer, 'The Impact of the Charter on the Law of Sexual Assault: Plus Ça Change, Plus C'est La Même Chose' (2012) 57:2d Sup Ct L Rev 337, 343.
[24] *Criminal Code*, RSC 1985, c C-46, s. 278.1.
[25] ibid s. 278.3(4).
[26] ibid s. 276.
[27] ibid s 278.3(4).

and defence and on the right to privacy and equality of the complainant,' and shall take into account the following factors:

> (*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. [28]

Therefore, three *Charter* rights are invoked: the rights to privacy (s. 8) and equality (s. 15) for the complainant, and the right to make a full answer and defence (ss. 7 and 11(d)) for the accused.[29]

The constitutionality of this scheme was challenged in *R v Mills* on the basis that it violated the accused's *Charter* rights. The defence argued that the scheme violated the accused's right to make a full answer and defence, which is protected as a principle of fundamental justice under s. 7 in combination with the right to a fair trial in s. 11(d). The Supreme Court found the scheme to be constitutional because the scheme did not prescribe the extent to which an accused can access information in a trial. The scheme is prescriptive of a process rather than an outcome. As such, in order to be constitutional, the process must adequately account for all *Charter* rights affected.[30] The Court determined that the procedure outlined in s. 278 does indeed account for the rights to a fair trial, privacy, and equality comprehensively.[31] The fact that the scheme may have the effect of precluding disclosure to the accused, and therefore allow the Crown to access what the accused may not, is not itself an injustice, as long as the procedure by which this outcome is reached is a fair one.[32]

[28] ibid s 278.5(2).
[29] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[30] *R v Mills* [1999] 3 SCR 668, 1999 CanLII 637 (SCC) [21]–[22] [*Mills*].
[31] ibid [139]–[144].
[32] ibid [116]. *Mills* was considered to exemplify a legislative-judiciary dialogue in the way it grappled with the differences between Bill C-46 and the *O'Connor* regime. See Frank Iacobucci, 'Reconciling Rights: The Supreme Court of Canada's Approach to Competing Charter Rights' (2012) 20:2d Sup Ct LR 137, 139–140.

4. Treatment of Police Records Under the Current Third Party Record Disclosure Regime

The Supreme Court of Canada in *R v Quesnelle* confirmed that police records are subject to the *Mills* regime. In *Quesnelle,* the Ontario Court of Appeal overturned the defendant's sexual assault conviction and ordered a new trial on the basis that a s. 278 application for disclosure of police records, which pertained to investigations unrelated to the crime being prosecuted, was dismissed in err.[33] The Crown appealed to the Supreme Court of Canada, where the conviction was restored. Justice Karakatsanis, writing for a unanimous court, notes that the *Mills* regime 'echo[es] this Court's frequent warnings against relying on myths and stereotypes about sexual assault complainants in assessing the relevance of evidence in the context of sexual assault trials.'[34] She then analyses the definition of 'record' in s. 278.1 of the *Criminal Code* to determine whether the police reports are 'records' subject to the *Mills* regime. The relevant components of the definition read as follows: 'record' means any form of record that contains personal information for which there is a reasonable expectation of privacy, but does not include records made by persons responsible for the investigation or prosecution of the offence.[35] The court held that complainants' police records were indeed subject to *Mills*.

The court undertook a two-part analysis to determine whether police records are captured by the s. 278 scheme, and if so, whether they fall under a statutory exemption. The first issue was whether there is a reasonable expectation of privacy in police records that would bring them within the definition of 'record' in s. 278.1. The jurisprudence on s. 8 of the *Charter* has clearly established that the expectation of privacy must be assessed based on the 'totality of the circumstances' and must not be restricted to only trust-like, confidential, or therapeutic relationships.[36] Police records create high expectations for privacy. They contain 'intimate personal information' that may 'do particularly serious violence to the dignity and self-worth of an affected person' if disclosed.[37] The risk of harm is two-fold: the complainant may be negatively affected by the disclosure of personal information to the accused for personal reasons, and the knowledge of such disclosure is a disincentive for victims to report sexual assaults.[38] The fact that a victim has disclosed assault-

[33] *R v Quesnelle* 2014 SCC 46, [2014] 2 SCR 390 [10] [*Quesnelle*]. First, the Court of Appeal found that complainants have no reasonable expectation of privacy in documents containing information they have given to police. Second, the court found that all police records prepared by the investigating police service are captured in the exemptions to the *Mills* regime specified in s. 278.1 of the *Criminal Code*. Applying the *Stinchcombe* regime instead, the Court of Appeal ordered the disclosure of the third party records and ordered a new trial.-

[34] ibid [17].

[35] *Criminal Code* (n 24) s 278.1.

[36] *Quesnelle* (n 33) [27].

[37] ibid [34].

[38] ibid [34]–[36].

related information to police does not negate their interest in privacy.[39] Therefore, complainants' police records do fall within the meaning of 'record' in s. 278.1. The second issue was whether complainants' police records are exempted from the records subject to *Mills* pursuant to the final words in the definition of 'record.' The use of a definite article in 'the offence' implies only records relating to the prosecuted offence can be exempted.[40] Additionally, the grammatical construction of the French language provision makes clear that the exception is for the records on the current offence themselves, and not the investigating officers making those records.[41] Furthermore, the purpose of s. 278.1 is to exclude only records that are so necessary to produce for a fair criminal trial that their relevance need not be discussed under an application, which does not logically encompass records of different incidents made by the same police service.[42]

In effect, the *Mills* regime must apply to police reports. This decision is certainly a success for complainants' privacy rights because the alternative—the Court of Appeal's approach—was to allow routine disclosure of unrelated occurrence reports to the defence. However, including police reports as records under s. 278.1 is still extremely problematic. Police reports raise a significant risk of discrimination to women with mental disabilities, and the *Mills* regime does not adequately address the right to equality.

5. Discrimination Against Women with Mental Disabilities in Police Record Disclosure

The disclosure of mental health records is fundamentally an issue of equality. Lise Gottell asserts that examining equality rights is essential to providing a full understanding of complainant's privacy interests, but '[t]o embrace a contextualised analysis linking privacy and equality, would deeply unsettle the individuated norms of criminal legal discourse.'[43] This is especially true when dealing with health information of complainants with mental disabilities. The next Parts describe how the issue of equality arises in the context of police interactions with women with mental disabilities and the disclosure of records relating to these interactions.

[39] ibid [37].
[40] ibid [46]–[49].
[41] ibid [50]–[53]. Since the English wording is ambiguous, the meaning conveyed by the French wording must prevail, as per *R v Daoust* 2004 SCC 6, [2004] 1 SCR 217.
[42] ibid [54]–[57].
[43] Lise Gotell, 'When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records' (2006) 43 Alta Law Rev 743 [58].

A. Disadvantage at the Intersection of Gender and Disability

Gender and disability intersect to uniquely disadvantage sexual assault complainants.[44] Women with mental disabilities are not only more likely to suffer sexual assault than other women,[45] but also lead more heavily documented lives and are thus subject to greater privacy invasion in records disclosure processes.[46] Their lives are more heavily documented for various reasons that do not necessarily have any bearing on their credibility or competence to testify. For example, they may access multiple mental health services, rely on government, community, and police assistance, or experience one or more suicidal episodes.

Yet, mental health records are often sought under the guise of addressing the complainant's capacity to recount a sexual assault. The information is then used to undermine the complainant's credibility.[47] In other words, third party record disclosure applications are invoked on a discriminatory basis. Women with mental health issues are subject to third party applications based on stereotypes that they are untrustworthy and prone to lying.[48] Applications are 'unavoidably plagued by the stereotypes that women who report sexual assaults are 'crazy' or, where there is in fact a disability, that women with a mental or physical disability are unreliable.'[49] As discussed in Section 3.B, under s. 278.5(2) of the *Criminal Code* the courts are explicitly required to evaluate whether an application for record disclosure is grounded in a discriminatory basis or belief, and weigh this against other factors including the potential impact of the record on the integrity of the trial. As such, the statutory language implicitly recognises that there may be legitimate issues of credibility requiring record disclosure. However, the statutory language also suggests that the legitimacy must stem from information beyond the mere fact of mental disability and the assumption that it is categorically relevant. It

[44] Benedet and Grant (n 13) 519.

[45] McDonald, Wobick and Graham (n 4) 15.

[46] ibid 18–19; Benedet and Grant (n 13) 536.

[47] Benedet and Grant (n 13) 536–537. This is exemplified in the post-*Quesnelle* decision on admissibility of evidence, *R v A.G. and E.K.* 2015 ONSC 923 (CanLII), where the defendants were accused of intoxicating, raping, and abandoning a woman with a developmental disability. The trial judge found that two of the defence theories sought to be supported by the police record evidence essentially amounted to 'slagging of the complainant' and were unacceptable at trial. This is extremely problematic considering the judge on the s. 278 application had ordered the production of all of the complainant's police records relating to prior sexual assaults, in their entirety, to the defence, and yet only limited aspects of three of those records were actually deemed admissible. The admissible information related to prior sexual assault allegations that were 'demonstrably false' or 'recanted' as recorded in police occurrence reports. It is questionable whether the allegations were truly false or recanted since the complainant's developmental disability made her account of events imprecise and inconsistent. While her poor recount of events was heavily criticised at trial, it was not raised when the judge accepted that her 'recanting' of allegations was truthful. The defendants were later acquitted, primarily because of the complainant's unreliable testimony.

[48] ibid 539–540.

[49] Chapman, Birenbaum and MacEachen (n 13) [20].

seems that the court must address the possibility that the basis for record disclosure is a stereotype and no more. Yet, courts tend to ignore the topic of equality rather than actively engaging it in the discussion of privacy rights, as discussed in Section 5.C.

B. Perpetuation of Disadvantage Under the Mental Health Act

Changing policies and legislative provisions over the past 30 years have significantly expanded the police's role in the mental health system.[50] Most significantly, the *Mental Health Act* was introduced in Ontario in 1990 and prescribed a process for communication and collaboration between police and healthcare services. Under the *Mental Health Act*, the police may indicate that a person is in need of psychiatric attention, invoking a process by which that person is admitted to a psychiatric facility to be assessed.[51] This may happen to a woman who later becomes the victim of a sexual assault, and whose police records are sought for their 'relevance' to her credibility and competence, or to a woman who is 'emotionally disturbed'[52] at the time of reporting the sexual assault, in which case her mental state is recorded in the police occurrence report on the assault.

While this legislation is intended to enable a streamlined approach to people with mental illnesses, who pose a risk to themselves or others, it has the effect of empowering police officers to make 'lay diagnoses' of mental states.[53] Information from a mental health apprehension is then preserved in a police occurrence report that is typically accessible by any officer in the jurisdiction for years afterwards.[54] The police officer's decision that a woman is in need of psychiatric assessment, especially at the time of reporting a sexual assault, can undermine her credibility and form the basis of the defence's arguments later at trial. In effect, medically uninformed police impressions put women with mental health issues in the 'impossible position that the more marginalised and abused they are, the less likely they are to be believed in their initial and subsequent reports of sexual assault.'[55]

[50] Uppala Chandrasekera, *Police & Mental Health: A Critical Review of Joint Police/Mental Health Collaborations in Ontario* (Provincial Human Services and Justice Coordinating Committee, 2011) 2.

[51] *Mental Health Act*, RSO 1990, c M.7.

[52] This term is used by police to refer to people in crisis or people with mental disabilities, and includes those who are apprehended under the *Mental Health Act*, according to Frank Iacobucci, *Police Encounters with People in Crisis: An Independent Review Conducted by the Honourable Frank Iacobucci for Chief of Police William Blair, Toronto Police Service* (2014) 48, 73.

[53] Chapman, Birenbaum and MacEachen (n 13) [18]–[19].

[54] Chandrasekera (n 50) 42.

[55] Chapman, Birenbaum and MacEachen (n 14) [25].

C. Undermined Protection from Discrimination: the Mills *Decision*

The Supreme Court of Canada's reasons in *R v Mills* mitigate the impact of equality rights, even though the decision upheld the record disclosure scheme that purports to protect them. Lise Gottell criticises how *Mills* advances a 'highly individualistic and atomistic understanding of complainants' concerns.'[56] *Mills* reduces the list of factors the judge *shall* consider in s. 278.5(2) to a mere checklist of ideas the judge *may* consider.[57] This judicial sleight of hand removes the requirement to contextualise the complainants' concerns and consider the pervasive impact of violating complainants' privacy.[58] Furthermore, the list of grounds that are prohibited as the sole basis for a record application in s. 278.3(4), which are linked to discriminatory myths about sexual assault victims, is softened in *Mills.* The court claims that these grounds are actually permissible in some circumstances; the provision does not supplant the ultimate discretion of the trial judge reviewing the application.[59] Again, this weakens the very privacy and equality protections that the court defends as constitutional. *Mills* effectively presents a 'contest between privacy and fair trial rights, conceived in a zero-sum manner' that 'becomes the only focus of judicial analysis' while equality is relegated to the background.[60]

Indeed there is ample evidence that privacy is construed narrowly by judges as a direct and individualistic antagonist to the right to make a full answer and defence, thus diminishing the significance of equality rights.[61] For example, a research report published by the Department of Justice found that, out of 39 post-*Mills* decisions on record disclosure applications, 29 cases mentioned the accused's defence rights and 28 cases mentioned the complainant's privacy rights. Only four cases engaged in an analysis of equality rights. Furthermore, the influence of discriminatory beliefs or biases, a factor listed in s. 278.5(2) that directly speaks to equality, was only mentioned in 20% of cases in the review.[62]

D. Further Privacy Issues: Calls for Increased Police Access to Mental Health Information

A likely increase in police involvement with the mental health system has the potential to exacerbate the differential documentation and disbelief of women with mental disabilities. An independent inquiry into the Toronto Police Service's (TPS) encounters with people in crisis, conducted by the Honourable Frank Iacobucci, overwhelmingly advocates for even greater involvement of police in the mental health system. In light of recent trends towards deinstitutionalization and freedom

[56] Gotell (n 43) [27].
[57] ibid [29]; *Mills* (n 30) [134].
[58] Gotell (n 43) [29]–[30].
[59] *Mills* (n 30) [120].
[60] Gotell (n 43) [43].
[61] McDonald, Wobick and Graham (n 4) 31; Benedet and Grant (n 13) 539–540.
[62] McDonald, Wobick and Graham (n 4) 31.

to decline medical attention for people with mental disabilities, many of these people end up encountering police in crisis.[63] Several police services throughout Ontario have developed guidelines and programmes to obtain mental health information, with consent, to better serve people with mental health issues.[64]

The Toronto Police Service report suggests police officers should have greater access to mental health information. The report recommends the development of a protocol 'to allow the TPS access to an individual's mental health information in circumstances that would provide for a more effective response to a person in crisis.'[65] The report continues to list relevant privacy factors that should be addressed in the protocol and contemplates the possibility that police be included in a patient's 'circle of care.'[66] The circle of care consists of health service providers for a particular patient who can share information about that patient freely in order to provide coordinated care effectively.[67] Therefore, if police are included, they could have access to patient information without the patient's consent.

The report anticipates a need for written agreements between police and psychiatric facilities regarding patient rights, including privacy rights.[68] However, even effective privacy protections will nevertheless fail to address the issue of equality. Criticisms of the current record disclosure process suggest that the more health information police can access, the greater the risk will be for complainants with mental disabilities that their police records are sought and used to discredit them at trial.

6. Promoting Privacy and Equality with Police-Healthcare Privilege

Given the failure of s. 278 to do justice to equality, the balancing act in s. 278 applications appears to, at best, precariously protect the privacy of police-documented women with mental disabilities. For these women to have an equal right to privacy while allowing the police to expand their role in the mental health system, their privacy must be protected from the outset by default.

Privilege makes privacy the default. Establishing a privilege over communications between police and psychiatric facilities for the purpose of enhancing the mental health system would better protect these complainants' privacy than relying on the unpredictable application of the *Mills* regime to police records. Pursuant to *Stinchcombe*, privileged communications made known to the Crown are not to be disclosed to the accused, unless their privilege is challenged

[63] Iacobucci (n 52) 83.
[64] Chandrasekera (n 50) 39–41.
[65] Iacobucci (n 52) 111.
[66] ibid.
[67] Chandrasekera (n 50) 42.
[68] Iacobucci (n 52) 104.

and deemed an unfair limit on the right to make a full answer and defence.[69] The effect that privilege has on preventing disclosure is that a s. 278 application would be less likely to be initiated. If it were initiated, the privileged content would at least attract an extremely high expectation of privacy, which would factor into the judge's analysis of the application. Although it is not entirely impregnable, privilege sets the highest threshold possible for overcoming privacy rights.

Privilege is a logical response to the issues of equality and privacy for female complainants with mental disabilities for two reasons. First, discrimination based on myths about gender and disability, leading to violation of privacy rights, is already manifest at the record disclosure stage. Equality and privacy would be more effectively and predictably protected at an earlier stage: from the initial creation and sharing of mental health information by police. Second, equality requires that where complainants are uniquely disadvantaged by their disability and police encounters, these confounding factors must be controlled by putting these complainants on equal footing with all other complainants. Essentially, the defence should have to argue for records' relevance without capitalising on the fact that the complainant has had a mental health-related encounter with police. Requiring the defence to challenge privilege in order to gain access to police records shifts the discussion away from the mere facts of disability and police encounters and towards the realm of real relevance.

There are three broad categories of privilege, two of which may suit police-healthcare correspondence: class privilege and statutory privilege. Class or *prima facie* privilege is the recognition of privilege for an entire category of communications at common law, which includes solicitor-client privilege and informer privilege. Statutory privileges are legislated, such as the statutory religious privilege in the *Quebec Charter of Human Rights and Freedoms*.[70] The third category, case-by-case privilege, recognises privilege on an ad hoc basis at common law.[71] This form of privilege is unpredictable, much like trends in protecting privacy in post-*Mills* record disclosure applications.[72] It is unlikely to be helpful in reducing unnecessary disclosure to the Crown as it can only be established at trial, which has failed to recognise privilege even between therapists and patients or between priests and penitents in some instances.[73]

A police-healthcare privilege would be unique from other recognised privileges in that it would protect communications and exchanges of information between the two named parties for the benefit of third parties—people with mental disabilities. However, it would also provide police and healthcare practitioners the benefit of open and honest communication with the knowledge that they will not harm the

[69] *Stinchcombe* (n 17).
[70] *R v Gruenke* [1991] 3 SCR 263, 1991 CanLII 40 (SCC) [*Gruenke*]; *A.(L.L.) v B.(A.)* (n 21) [37]–[39].
[71] *A.(L.L.) v B.(A.)* (n 21) [39].
[72] McDonald, Wobick & Graham (n 4) 31.
[73] *Gruenke* (n 70).

people they seek to help by sharing their health information. Police officers may be more reluctant to take note of and access mental health information if they find their records are being aggressively pursued to discredit sexual assault complainants and defend the perpetrators their colleagues have arrested. Likewise, healthcare practitioners may be reluctant to share more mental health information with the police if they find that the information negatively impacts their patients when they are the victim of crime. Privilege would protect from these harms to enable the police and healthcare practitioners to fulfil their responsibilities to people with mental disabilities confidently. This concept is somewhat analogous to the solicitor-client privilege in that the communication is protected because the lawyer needs full disclosure from the client in order to serve the client's legal interests as best as possible. Here, the police and healthcare professionals need substantial disclosure from each other to best address mental health needs.

It is important to note that the s. 278 scheme already presumes records pertaining to sexual offences cannot be disclosed to the defence.[74] Privilege does not change that. Privilege instead has the effect of limiting the police's disclosure and production of any mental health information in its possession to the Crown, from whom its existence would have to be disclosed to the defence pursuant to *Stinchcombe*. Even if privileged communications become the subject of a s. 278 application, the privacy and equality interests will be much more powerful in relation to the accused's right to a full answer and defence.

A. Establishing Class Privilege

The possibility of establishing a new class privilege for private records relating to sexual assault complainants was contemplated and ultimately rejected in *A.(L.L.) v B.(A.)*. The minority judgment, delivered by Justice L'Heureux-Dubé, provides a comprehensive framework for deciding when a class privilege is appropriate. It also sets a precedent for finding that private records of complainants—in that case, arising from the therapist-patient relationship—could meet at least some of the criteria for establishing such a privilege. While weighing the benefits and disadvantages of recognising a class privilege, Justice L'Heurex-Dubé highlighted four principles governing when a class privilege can be established at common law: (1) the privileged relationship must be inextricably linked to the justice system; (2) the privilege must be justified by compelling policy rationales similar to those that support the solicitor-client privilege; (3) the privilege must be ascribed to a narrowly defined class; and (4) granting privilege must not infringe the truth-seeking process

[74] *Criminal Code* (n 24) s 278.2(1).

at trial.[75] While the prospective therapist-patient privilege failed to satisfy the third and fourth principles, police-healthcare privilege could satisfy all four principles.

1. Inextricable Link Between Police-Healthcare Relationship and the Justice System

In *A.(L.L.) v B.(A.)*, Justice L'Heureux-Dubé drew upon the Supreme Court's reasons in *R v Gruenke,* which provided that new class privileges should be inextricably linked to the justice system.[76] She found that there was an inextricable link between the therapist-patient relationship and the integrity of the criminal justice system because complainants' awareness that their personal health information could be disclosed would logically deter them from seeking treatment and contribute to under-reporting of assaults.[77] The Supreme Court had already recognised that 'chronic under-reporting of sexual assault cases undermines the effectiveness of the criminal justice system.'[78] Similarly, the fear of having mental health information disclosed to the defence can also deter women with disabilities from engaging with police in the first place, and deter health professionals and police from engaging frankly with each other, as discussed at the beginning of Section 5.

Furthermore, the police-healthcare exchange of mental health information affects the administration of criminal justice at the prosecution stage. *Quesnelle*'s affirmation that the s. 278 scheme applies to mental health records in police possession supports the conclusion that the police-healthcare relationship is connected to trials and pretrial disclosure. As discussed in Section 4, the prosecution of sexual assaults is greatly undermined by disproportionate access to complainants' mental health information in a system where reporting and prosecution of sexual assaults are already woefully low. Given the recommendations of the Toronto Police Service inquiry report, police are likely to encounter even more mental health information, incidentally putting more personal health information at greater risk of being exposed to the defence. The discussion of therapy records in *A.(L.L.)* and the inclusion of police records under the s. 278 scheme together support a finding that the police-healthcare relationship is inextricably linked to the justice system.

2. Compelling Policy Reasons for Class Privilege

Justice L'Heureux-Dubé also drew upon *Gruenke* to conclude that a class privilege should have compelling policy reasons, similar to the solicitor-client privilege.[79] The inextricable link to the justice system described above provided a strong policy

[75] *A.(L.L.) v B.(A.)* (n 21).
[76] ibid [39].
[77] ibid [56]–[60].
[78] ibid [58].
[79] ibid [39].

basis for therapist-patient privilege in *A.(L.L.)* because the privilege would help protect the integrity of the criminal justice system. Pursuant to the discussion above, the same rationale should apply to the police-healthcare privilege. Another policy reason for recognizing privilege in *A.(L.L.)* was that the expectation of confidentiality in the therapist-patient relationship allowed for a 'free flow of discussion which is crucial to the victim's recovery,' which society has an interest in fostering.[80] A similar argument applies to police-healthcare interactions; society has an interest in facilitating communication between these parties to better address the mental health needs of those who come into contact with police.[81]

In addition, a crucial policy argument for a police-healthcare privilege is that improving the protection of complainants' privacy during record disclosure processes is part and parcel of protecting their equality rights. In *A.(L.L.)*, Justice L'Heureux-Dubé acknowledged that the common law principles governing privilege must be consistent with the constitutional values enshrined in the *Charter*.[82] In the context of sexual assault, these values include the complainant's privacy and equality interests. The s. 278 scheme explicitly intends to engage with the *Charter* rights to privacy, equality, and a fair trial. However, as discussed in Section 4, the application of the scheme under *Mills* has resulted in insufficient consideration of equality for women with disabilities. As a result, the policy reasons for a new class privilege can be grounded specifically in the *Charter* equality values.

3. Narrow Class of Actors to Whom Privilege Applies

A.(L.L.) v B.(A.) stressed that class privilege must apply to a category of actors that is limited to specific classes.[83] To this end, Justice L'Heureux-Dubé took issue with the fact that therapeutic relationships cannot be ascribed to a definite class of professionals. Victims of sexual assault may consult with medical professionals as well as unregulated counsellors, community contacts, and friends.[84] On the contrary, privilege between the police and the healthcare system is easily restricted to two types of people: police officers and their medical contacts at psychiatric facilities. The *Mental Health Act* designates and defines the relevant parties in the event of mental health apprehension and could be relied upon to clearly define the scope of the class with respect to health practitioners.[85] The police are already

[80] ibid [56].
[81] Iacobucci (n 52) 111.
[82] *A.(L.L.) v B.(A.)* (n 21) [63].
[83] ibid [70].
[84] ibid [71].
[85] *Mental Health Act* (n 51) s 1.

accepted as a sufficiently narrow class in the context of another privilege, the police-informer privilege.[86]

4. Preserving the Proper Administration of Justice

Despite a history of privileges having to yield in favour of disclosure when a defendant's innocence was in question,[87] recent criticisms of sexual assault law have seriously challenged notions of what information is really necessary for the accused to make a full answer and defence.[88] As Justice L'Heureux-Dubé foresaw in *O'Connor*, it is becoming an accepted view that restricting discriminatory use of complainants' records 'will enhance rather than detract from the fairness of such trials.'[89] Opportunities to 'slag' the complainant covertly based on sexual stereotypes are not necessary in the interests of justice; they are, in fact, forbidden.[90] In *Quesnelle*, the court asserts that not only is it fair for the Crown and police to possess some documents the defence cannot access,[91] but the right to a fair trial is not 'a right to pursue every conceivable tactic to be used in defending oneself against criminal prosecution. The right to a full answer and defence is not without limit.'[92]

Restricting access to communications between the police and healthcare practitioners would not hinder the truth-seeking process because it would prevent discriminatory disclosure, while still allowing opportunity for rightful, relevant disclosure. Essentially, the only unique information that would be entirely protected by privilege and inaccessible elsewhere would be the communications between a police officer and a health professional that are not so formal as to form part of an official report, such as comments, updates and advice on dealing with the mental health challenges of particular individuals. This is not information that was procured in relation to the sexual assault to which the individual is victim. This kind of information would be informal and impressionistic, and would vary greatly in reliability, much like the content of police occurrence reports.[93] Therefore, like highly subjective therapeutic records, this information should generally be treated as having little probative value.[94] To clarify, the police-healthcare privilege would only operate to extent of coordination for purpose of protecting individual and community safety with respect to mental health challenges. Such correspondence would have the primary purpose of serving people in crisis in the community

[86] *R v Scott* [1990] 3 SCR 979, 1990 CanLII 27 (SCC).
[87] *A.(L.L.) v B.(A.)* (n 21) [41].
[88] This was discussed at length in *Mills* and mentioned in *Quesnelle.*
[89] *O'Connor* (n 20) [129].
[90] *Criminal Code* (n 24) s 278.3(4).
[91] *Mills* (n 30) [111].
[92] *Quesnelle* (n 33) [64].
[93] Peter Carmichael Keen, '*Gebrekirstos*: Fallout from *Quesnelle*' (2013), 4 CR (7th) 56, 60–61.
[94] *Mills* (n 30) [136].

as effectively as possible. The privilege would not operate where police are communicating with healthcare professionals for the purpose of investigating an offence. Where there is a genuine issue of credibility or competence to testify, *official* police records and medical records may be sought and disclosed from the police and psychiatric facilities, respectively. This would justifiably exclude informal notes or additional shared information that is not worthy of inclusion in a formal report. Furthermore, given that the privilege would exist between the police and the healthcare institution, if such a privilege were to impede the course of an investigation in any way that would cause injustice, the privilege could be waived by the parties. Therefore, the ability to access relevant records would be maintained.

B. Establishing Statutory Privilege

A privilege for police-healthcare interactions may be better established by statute than at common law. Although the minority decision in *A.(L.L.)* recognised that a new class privilege could be established in theory, Justice L'Heureux-Dubé was hesitant about recognising any new class privilege at common law because this was not a favoured method of protecting privacy; neither historically under Canadian law nor in other commonwealth jurisdictions.[95] Ontario's *Personal Health Information Protection Act (PHIPA)*, the *Police Services Act*, and the *Mental Health Act* present opportunities to further delineate the exchange of mental health information and prescribe measures of privacy protection in a statutory context.

1. Support for Police and Healthcare Confidentiality in Current Legislation

PHIPA already strongly favours confidentiality between healthcare providers and patients; privacy protection of health information is one of its primary functions.[96] *PHIPA* prescribes that health information may be disclosed for the purpose of planning and managing the health system to a prescribed entity with approved privacy and confidentiality measures in place,[97] which might include the police. This function may be expanded for the purpose of managing the mental health system with increased police involvement, pursuant to the TPS report recommendations.

The *Police Services Act* and Ontario Regulation 265/98 also emphasize confidentiality.[98] Disclosure is generally restricted to information about individuals who are being investigated for, have been charged with, or found guilty of an

[95] *A.(L.L.) v B.(A.)* (n 21) [42]–[52].
[96] *Personal Health Information Protection Act*, 2004, SO 2004, c 3, Sch A, s 1(a).
[97] ibid s 45.
[98] *Police Services Act*, RSO 1990, c P.15, s 41(1.1); *Disclosure of Personal Information*, O Reg 265/98.

offence;[99] and is permitted only where it is required for the protection of the public, for the administration of justice, or by law.[100] For agencies not engaged in the former two purposes, such as a hospital, disclosure is made in accordance with a memorandum of understanding between the chief of police and the agency.[101]

The *Mental Health Act* prescribes a more direct relationship between police and hospitals when an individual is apprehended. However, the *Mental Health Act* only limitedly addresses privacy of personal health information, and only from the perspective of the psychiatric facility at that.[102] In any case, the *Mental Health Act* provides a statutory starting point for the privacy mechanisms between police and healthcare facilities to be delineated further.

2. Defending Statutory Privilege Against Charter Challenges

As a statutory creation, the privilege would be subject to *Charter* challenges. Firstly, it would likely see opposition on the basis of encroaching on ss. 7 and 11(d), as the s. 278 scheme did in *Mills*. These arguments would be disposed of on the basis that the privileged information would not actually contribute to a fair trial, and information that might contribute would be available from the police or healthcare facility outside of their privileged communications, as discussed in Section 6.A.4.

The second basis might be that a statutory privilege for personal health information of those who have encounters with police, and not others, is discriminatory. Equality rights are infringed where the legislation's purpose is discriminatory or where it has adverse effects based on an enumerated or analogous ground under s.15 of the *Charter*.[103] It may be argued that provisions creating a privilege for mental health information in possession of police is discriminatory based on mental disability, interpreted broadly to include those who are considered 'emotionally disturbed' in police reports, regardless of the existence or permanence of any medical diagnosis. The privilege might be interpreted as bestowing benefits upon people with mental disability who encounter police, compared to people who encounter police who do not have a mental disability and are not afforded this level of privacy protection.[104]

[99] *Disclosure of Personal Information* (n 97) s 5(1).

[100] ibid s 5(2).

[101] ibid s 5(3).

[102] *Mental Health Act* (n 51) s 35.

[103] *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 1989 CanLII 2 (SCC); *Withler v Canada (Attorney General)* 2011 SCC 12, [2011] 1 SCR 396.

[104] Interestingly, the police-healthcare privilege would be characterised as a historically more advantaged group, i.e. people without mental disabilities, claiming discriminatory treatment in comparison to a historically disadvantaged group. A similar argument was made in *R v Kapp* 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*], where non-aboriginal fishermen claimed that their s. 15 rights were infringed by legislation that granted aboriginal fishermen the exclusive right to fish one day per year. In that case, the discrimination was characterised as an ameliorative programme under s. 15(2) of the *Charter*.

This argument would be resolved by characterizing the privilege as an ameliorative programme under s. 15(2).[105] The Supreme Court in *Lovelace v Ontario* confirmed that s. 15(2) is an interpretive aid to s. 15(1). Section 15(2) signifies that 'any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups' is not a form of discrimination within the meaning of s. 15(1), so it does not infringe equality rights.[106] To prove the impugned legislation is an ameliorative programme, the government must show that it has an ameliorative purpose for an identifiable group defined by enumerated or analogous grounds from s. 15.[107] For a police-healthcare privilege, there is clearly an identifiable group: people with mental disabilities who encounter police. An argument for an ameliorative purpose can be based generally on the importance of privilege in promoting a more effective role for police in the mental health system, or it can be based specifically on the failures of the s. 278 application procedure to protect the equality and privacy of women with mental disabilities who have police records.

The court in *R v Kapp* suggests that laws with the purpose of restriction or punishment should not fall under s. 15(2), despite s. 15(2) having been used to uphold criminal laws in lower courts.[108] It is the genuine legislative goal rather than the legislation's actual effects that bring a programme within the scope of s. 15(2).[109] Therefore, the fact that a privilege could indirectly make conviction more likely by removing opportunities to take advantage of mental disability in record disclosure applications, which are not permitted to begin with, is not a constitutional problem; the goal to promote privacy, equality, and a fair trial still fits the meaning of s. 15(2).

7. Conclusion

Equality rights are far from achieving equal status in the *Mills* record disclosure regime. In the context of mental health information in possession of police, sexual myths persist and privacy protection is unpredictable. As long as privacy is presented as a personal right in an adversarial clash with the pursuit of truth, the interests of complainants with mental health issues will likely continue to falter while the role of police in the mental health system expands. A class or statutory privilege, protecting police correspondence with healthcare facilities, would facilitate the creation of a more effective mental health system. It offers an opportunity to bolster equality rights in record disclosure while encouraging a trial that is fair for all persons pursuing justice in sexual assault cases, and by

[105] *Charter* (n 29) s 15(2).
[106] *Lovelace v Ontario* 2000 SCC 37, [2000] 1 SCR 950 [100]–[106].
[107] *Kapp* (n 103) [51]–[55].
[108] ibid [53]–[54].
[109] ibid [46].

all standards of the Canadian criminal law. Just as the record disclosure regime in *O'Connor* transformed into the current *Mills* regime, *Quesnelle*'s affirmation that police records are subject to s. 278 may need to be transformed into a more robust framework for addressing mental health information in possession of police, one that will heighten privacy, equality, and the fairness of proceedings concurrently.