PRODUCTION OF CONFIDENTIAL RECORDS HELD BY A THIRD PARTY IN SEXUAL ASSAULT CASES: *R.* V. *O'CONNOR*

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I. INTRODUCTION

Defining the circumstances in which it is appropriate for a criminal court to order production of confidential records held by a third party for its inspection and potential disclosure to the defence is a task which continues to trouble the administration of justice. While the recent judgment of the Supreme Court of Canada in *R.* v. *O'Connor*[1] has settled the common law, pressure generated by interest groups has forced the Minister of Justice to address the issue with Bill C-46.[2]

Sympathy for the victim is appropriate. Justice L'Heureux-Dubé has described the trauma awaiting the victim of a sexual crime who engages the criminal process. The victim must endure

> stigmatization...loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to outcome and sanction. [Victims] must contemplate the threat of disclosing to the very person accused of assaulting them in the first place, and quite possibly in open court, records containing intensely private aspects of their lives, possibly containing thoughts and statements which have never even been shared with the closest of friends or family.[3]

The threat of eventual disclosure of some private matters may cause a victim to choose not to seek treatment, exacerbating the injury.

However, the presumption of innocence, and the section 7 *Charter*[4] right of the accused to present a full answer and defence[5] must not be rendered meaningless. Miscarriages of justice are not acceptable.[6]

The purpose of this article is twofold. First, the writer intends to highlight the *O'Connor* decision and record support for the majority decision therein. Second, the writer intends to canvass the options available to the Minister. These include statutory implementation of the minority opinion — the core of Bill C-46, adding admissibility as a criteria in the majority's threshold test, or pronouncing a new class privilege for therapist-victim communications arising out of sexual assault cases. Each option features a progressive enhancement of the protection for the victims' privacy.

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[1] [1995] 4 S.C.R. 411, 103 C.C.C. (3d) 1 [hereinafter *O'Connor* cited to C.C.C.].

[2] *An Act to Amend the Criminal Code (production of records in sexual offence proceedings)*, 2d Sess., 35th Parl., 1996 (1st reading 12 June 1996) [hereinafter Bill C-46].

[3] *O'Connor, supra* note 1 at 54, following *Mills* v. *The Queen*, [1986] 1 S.C.R. 863 at 920, 26 C.C.C. (3d) 481.

[4] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s. 7. [hereinafter the *Charter*]. Section 7 provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[5] See *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1 [hereinafter *Stinchcombe* cited to C.C.C.].

[6] *O'Connor, supra* note 1 at 17-18, Lamer C.J.

II. *R.* v. *O'CONNOR*

It is alleged that Bishop H.P. O'Connor, while the headmaster of a residential school during the mid-1960s, raped or sexually assaulted four students. In 1992, almost a year after being committed to stand trial, O'Connor applied for, and obtained, an order from the British Columbia Supreme Court requiring disclosure by the Crown of the complainants' entire medical, counselling and school records. The Crown did not possess the files of those who had treated the complainants. The complainants and the custodians of the records did not receive notice of the application.

After initially refusing to produce the confidential records, one psychologist reluctantly produced his records to the Crown, who forwarded them to the newly appointed trial judge. The judge reviewed the records and provided the contents to the defence. A month later, another psychologist produced his records to the Crown with assurances from the court that the records would not be released to the defence before the Crown had the opportunity to argue that the records were protected by privilege. However, only partial argument, focused on relevance, was completed before the impending trial date motivated the judge to order production of the records to the defence. The important question of the victims' privacy interest was lost in a monumental motions melee between the junior prosecutor and defence counsel regarding disclosure of other evidence gathered by the prosecution, a portion of which was to be used in the Crown's case, and all subject to disclosure under the rule in *Stinchcombe*.[7]

At trial, it was revealed that the Crown had not complied with its disclosure obligation, in spite of undertakings and orders. Upon a defence motion, the trial judge delivered a stay of proceedings, reasoning that the Crown's conduct had created an aura of mischief that had pervaded the case, such that allowing the case to proceed would tarnish the integrity of the court.[8] The British Columbia Court of Appeal allowed the Crown's appeal and directed a new trial.[9] The Supreme Court agreed, in a majority decision divided six against three.[10]

Recognizing the need for guidance on the issue of the production and disclosure of confidential material held by third parties, the Court obliged. All members of the Court agreed that under certain circumstances the privacy interest of the complainant in confidential records in the possession of a third party would give way to the greater interest of the accused to present a full answer and defence. The disagreement rested in the factors to be balanced and the process, with the minority placing greater emphasis on the complainant's privacy interest, while the majority emphasized the defendant's right to provide a full answer and defence. On these points the joint decision of Lamer C.J. and Sopinka J., supported by three others, comprised the majority. L'Heureux-Dubé J. wrote the main dissenting judgment.

The Chief Justice and Sopinka J. outlined the following two-stage process for this type of defence application. Initially, the defence must file a written motion directed to the trial judge to be served on the custodian of the record, the Crown and the person

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7 *Supra* note 5.

8 (1992), 18 C.R. (4th) 98 (B.C.S.C.).

9 (1994), 29 C.R. (4th) 40, 89 C.C.C. (3d) 109 (B.C.C.A.), aff'd [1991] 3 S.C.R. 326.

10 *Supra* note 5.

whose privacy interest is in issue, often the complainant. Additionally, the custodian and the impugned records must be subpoenaed, and the defence must submit an affidavit in support of the motion. The affidavit must address the primary issue of the first stage, which is whether the impugned document is "likely to be relevant"[11] thereby justifying an examination of the material by the court. This threshold test is not to be construed too strictly, as it is designed only to prevent speculative or frivolous applications.[12] Relevant information is defined, for the purpose of this stage, as information that may be useful to the defence, either directly or indirectly.[13] If the threshold test is satisfied, an order to produce the documents to the judge will follow.

Upon production of the documents to the court, the second stage, the judge is to examine the documents to determine whether, and to what extent, they should be disclosed to the defence. If the judge feels that argument from counsel would assist, she or he is free to provide a summary of the records to counsel so that submissions are efficient, bearing in mind the privacy interest.[14]

In determining whether to order the confidential record to be disclosed to the defence, a higher standard is to be applied. The judge "must be satisfied that there is a reasonable possibility that the information is logically probative to *an issue at trial or the competence of a witness to testify.*"[15]

The question of the admissibility of the produced record is a matter to be determined at a later point in the trial.[16]

The majority held that if satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify, then the judge must balance the public interests — the right of the accused to make full answer and defence against the privacy and security interest of the victim — to finally determine what is to be given to the defence. If the material produced is admissible, privacy interests can be addressed further through publication bans and the removal of spectators.[17]

The following factors are to be considered when striking the balance of public interests in the second stage of the test: (1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record in question; (3) the nature and extent of the reasonable expectation of privacy vested in that record; (4) whether production of the record would be premised upon any discriminatory belief or bias; and (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question.[18] Further, consideration should be given to the societal interest in the reporting of sexual crime,[19] and the relatively simple process by which the Crown can

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[11] *Ibid.* at 18.

[12] *Ibid.* at 20.

[13] *Ibid.* at 19.

[14] *Ibid.* at 23.

[15] *Ibid.* at 19 [emphasis in original].

[16] *Ibid.* at 20, Lamer C.J. and Sopinka J., *ibid.* at 72, L'Heureux-Dubé J.

[17] *R.* v. *Ryan* (1991), 107 N.S.R. (2d) 357, 69 C.C.C. (3d) 226 at 230, as quoted in *supra* note 1 at 24.

[18] *Ibid.* at 23, Lamer C.J. and Sopinka J., quoting *ibid.* at 69, L'Heureux-Dube J.

[19] *Ibid.*at 24.

obtain production of third party records.[20]

Support for the majority's approach is found in some American jurisprudence. Massachusetts State courts have addressed the issue of third party production and disclosure often of late. The Supreme Judicial Court of Massachusetts settled on a process very similar to that set out by the majority in *O'Connor*. One key distinction is found in the second stage of the *in camera* inspection. The Massachusetts court provides counsel, in their capacities as officers of the court, with the relevant records, allowing them a full opportunity to prepare submissions on whether the judge should order production, pursuant to the decision in *Commonwealth* v. *Bishop*.[21] This is justified by the strong statement of the rights of the accused under the State Constitution.[22] Slightly softer wording is found in the federal constitution,[23] which enabled the United States Supreme Court to adopt a more privacy orientated approach when addressing the rights of the accused under that document. That Court, in *Pennsylvania* v. *Ritchie*,[24] in a five to four decision, ruled that counsel are not to be allowed access to the impugned record, though they are entitled to address the judge before the production ruling is made.[25]

III. THE OPTIONS

A. *Minority Opinion in O'Connor and Bill C-46*

The privacy interest of victims of sexual crime who have confided in therapists would be protected to a greater degree by the scheme put forward by L'Heureux-Dubé J., on behalf of the minority, in *O'Connor*. That opinion formed the foundation of Bill C-46. It is respectfully submitted that the scheme proposed is complex and unattractive. For example, the scheme proposes a more onerous threshold criterion. The initial stage incorporates the majority's final stage-two relevance test, with the further requirement that the judge balance the relevant interests, before requiring the records to be produced to the court.[26] The interests to be considered, according to the minority, include those raised by the majority in the second stage test, with the addition of an emphasis on privacy.[27] A similar emphasis is evident from the preamble to the Bill and the enumerated considerations in clause 278.6. This formulation of the threshold test will often leave the defendant in the classic 'catch-22' situation of requiring access to the records to meet the onus which must be satisfied before the records are released.[28] It

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[20] *Ibid.*

[21] 617 N.E.2d 990 at 997 (Mass. 1993) [hereinafter *Bishop*]. But see *People* v. *Stanaway* 521 N.W.2d 557 at 562 (Mich. 1994), where the Supreme Court of Michigan has taken a privacy orientated approach.

[22] Mass. Const. Pt.1, art XII.

[23] U.S. Const. amend. VI.

[24] 107 S.Ct. 989 (1987) [hereinafter *Ritchie*].

[25] *Ibid.* at 1003.

[26] *Supra* note 1 at 60-62; *supra* note 2, cl. 278.5(2).

[27] *Supra* note 1 at 67.

[28] *Ibid.* at 20, Lamer C.J. On the English situation, Sir Thomas Bingham, M.R. stated recently, "[u]nder the law as it stands, for which I cannot conceal my distaste, it is for the party applying to adduce the documents to show that the documents, if adduced, are likely to help him,

also tends to unduly inhibit the ability of the accused to make full answer and defence. The discovery of some matters which, though strictly irrelevant, may lead to the discovery of admissible evidence. It is valid to state, as the minority did, that an order to produce to the court a confidential record is an invasion of privacy.[29] However, the transfer of confidential records from one professional to another in this limited situation is justifiable without an in-depth case by case evaluation.

The foregoing concerns are exponentially magnified by the inclusion in Bill C-46 of a list of assertions, raised by the minority,[30] which are deemed insufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify.[31] The assertions include that the record: (a) exists; (b) relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received; (c) relates to the incident supporting the charge; (d) may disclose a prior inconsistent statement of the complainant or witness; (e) may relate to the credibility of the complainant or witness; (f) may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling; or (g) may reveal allegations of sexual abuse of the complainant by a person other than the accused. Professor David Paciocco, one of the counsel for the accused before the Supreme Court of Canada in *O'Connor*, validly concludes that many of the excluded grounds of argument "provide solid bases for concluding that the documents likely contain relevant information."[32]

If the stricter threshold suggested by the minority (and adopted in Bill C-46) is satisfied, the judge is to review the impugned record to determine which portion should be produced to the defence. The second stage test, as written by the minority, requires a determination as to whether the evidence has significant probative value, and a balancing of public interest factors.[33] During this balancing process renewed emphasis is to be placed on the privacy interest in light of the fact that the judge is considering production to the accused.[34] Bill C-46 adopts the basic formulation of the second stage, directing the judge to revisit all factors considered in the first stage.[35]

The formulation of the second stage found in the opinion of the minority and Bill C-46 raises two points. It is submitted that repetition of the balancing process is redundant, though properly situated in stage two. However, in the event that this procedure remains in the Bill, consideration should be given to the provision of a counter-balance to the emphasis on privacy. The rights of the accused should be emphasized during the second stage balancing process. Admittedly, the attempt to balance the emphasis, though valid for academic discussion, tends to make the balancing process more calibrated in theory than possible in fact. However, since the

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a somewhat Gilbertian task in relation to documents he has not seen." *Confidentiality - An Interdisciplinary Issue*, address to the National Council for Family Proceedings in London, March 1996, quoted in "Confidentiality Address" [1996] Fam.Law 315 at 316.

[29] *Supra* note 1 at 67.

[30] *Ibid.* at 64-65.

[31] *Supra* note 2, cl.278.3(4).

[32] C. Schmitz, "Records Bill Draws Fire From Defence Bar" *The Lawyers Weekly* (28 June 1996) 18.

[33] *Supra* note 1 at 68-69.

[34] *Ibid.* at 68.

[35] *Supra* note 2 at cls. 278.7 (1)(2).

emphasis on privacy dominates the overall scheme, cognizance of the imbalance and corrective action are necessary.

B. *Admissibility as a Threshold Criteria*

Admissibility is not part of the production or disclosure criteria propounded by the Court in *O'Connor*. This issue is to be determined in the course of the trial.[36] Support for this approach is found in the decision of the United States Supreme Court in *Ritchie*[37] and the recent decision from Massachusetts in *Bishop*.[38] However, the House of Lords have taken the opposite view.[39] The decision of the House of Lords, combined with the unparalleled simplicity by which the implementation of the admissibility criteria can be achieved, ensures that this method of limiting access to confidential documents will be noticed.

Writing for the Court in *ex p. Brooks*, Lord Taylor C.J. quoted with approval[40] the decision of Simon Brown L.J. in *R.* v. *Reading Justices, ex p. Berkshire County Council*.[41] Simon Brown L.J. stated that a confidential document must be shown to be both relevant and admissible before its custodian can be subpoenaed to bring the impugned record before the court. In *Reading Justices*, the accused attempted to subpoena the Director of Social Services with a view to production of confidential child care records. The subpoena was set aside on the basis that the accused failed to demonstrate that the documents were "likely to be material evidence", the key phrase in section 97 of the *Magistrates' Courts Act, 1980*.[42] The phrase "likely to be material evidence" was expansively interpreted to mean both relevant and admissible.

To achieve the same result in Canada, a simple amendment to s. 698 of the *Criminal Code*[43] would suffice, i.e. defining "material evidence" in a manner similar to the English interpretation. A subpoena issued thereafter without the justice being satisfied as to relevance and admissibility would be quashed.[44]

Requiring the defence to demonstrate both materiality and admissibility has created

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[36] *O'Connor*, *supra* note 1 at 20, Lamer C.J. and *ibid* at 72, L'Heureux-Dubé J.

[37] *Supra* note 24.

[38] *Supra* note 21. See generally E.M. Crowley, "*In Camera* Inspections of Privileged Records in Sexual Assault Trials: Balancing Defendant's Rights and State Interests Under Massachusetts's *Bishop* Test" (1995) 50 Am.J.Law & Med. 131.

[39] *R.* v. *Derby Magistrates Court, ex p. Brooks*, [1995] 4 All E.R. 526, [1996] 1 Cr. App. R. 385 (H.L.) [hereinafter *ex p. Brooks* cited to All E.R.].

[40] *Ibid.* at 535.

[41] *R.* V. Reading Justices, ex. P. Berkeshire County Council (1995),[1996] 1 Cr. App. R. 239 at 246 (Q.B.D.) [hereinafter *Reading Justices*].

[42] (UK), 1980, c. 43., s. 97. Similar provisions apply in Crown Court, *Criminal Procedure (Attendance of Witnesses) Act 1965*, (U.K.), 1965, c. 69, s. 2(2).

[43] R.S.C. 1985, c. C-46, s. 698 [hereinafter *Criminal Code*]. Section 698 provides:
(1) Where a person is likely to give material evidence in a proceeding to which this Act applies, a subpoena may be issued in accordance with this Part requiring that person to attend to give evidence.

[44] See *Foley* v. *Gares* (1989), 53 C.C.C. (3d) 82, 74 C.R. (3d) 386 (Sask C.A.).

unjustifiable difficulties in the English context.[45] Many of the same problems would be realized in the Canadian context if the English position is adopted. Therefore this option should be discounted.

A few examples are instructive. Frequently, hearsay evidence is the topic of argument regarding admissibility. The current jurisprudence directs that this issue is to be addressed at trial. Situations may arise where an inadmissible hearsay statement becomes admissible when other circumstances are proven, e.g. child witness intimidation, or concern for his welfare, as in the case of *R.* v. *Khan.*[46] A more recent example is found in *R.* v. *Smith.*[47] Evidence of the victim's mother's telephone conversation with victim immediately prior the victim's murder was ruled admissible to prove the Crown's case. Either scenario may resurface with an additional twist. Consider the possibility of an additional statement, potentially inconsistent, having been made in confidence to a therapist. This evidence would be critical to the defence, and unavailable under an expanded threshold criteria.

Another problem that could occur in Canada should a dual criteria threshold be adopted, is demonstrated by *ex.p. Brooks.*[48] Counsel for Mr Brooks, in attempting to obtain a confidential statement for the purpose of cross-examination to impugn witness credibility under sections 4 and 5 of the *Lord Denman's Act,*[49] the equivalent of sections 10 and 11 of the *Canada Evidence Act,*[50] was frustrated by a *circulus inextricabilis.* Entitlement to the statement was contingent on admissibility. Admissibility was contingent on the witness's refusal in cross-examination to admit his prior inconsistent statement. Before challenging the witness on his statement, counsel was required to have the statement in hand.

Further, a threshold criteria consisting of both relevance and admissibility has the collateral effect of barring incidental discovery of the contents of a third party's file. Lord Taylor C.J. was satisfied with this result.[51] Fortunately, the common law of Canada has placed the rights of the accused above the limited privacy infringement envisioned in *O'Connor.*[52]

C. *Class Privilege*

Privacy for victims of sexual assault crimes could be greatly enhanced by the creation of a class ('blanket' or *prima facie*) privilege for communications between

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[45] The *Criminal Procedure and Investigations Act 1996* (UK), 1996, c. 25, primarily addresses prosecution and defence disclosure. It does address, in s. 66, a limited aspect of third party disclosure, which may narrow further the opportunity for third party disclosure in England. However, the impact of the provisions will not be realized until the required court rules are promulgated.

[46] [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92 (child witness too young to testify, so the court allowed the mother's testimony as to what the child reported to her as evidence of the incident).

[47] [1992] 2 S.C.R. 915, 75 C.C.C. (3d) 257.

[48] *Supra* note 39.

[49] *Criminal Procedure Act (An Act for Amending the Law of Evidence and Practice on Criminal Trials), 1865* (U.K.), 1865, 28 & 29 Vic., c. 18.

[50] R.S.C. 1985, c. C-5, ss. 10-11.

[51] *Supra* note 39 at 534.

[52] *Supra* note 1 at 20-21, Lamer C.J.

therapists and victims, including the records of therapeutic sessions. At common law, no such privilege exists, though it is well established for solicitor-client, husband-wife, public interest and settlement communications.[53] The issue of class privilege was not before the Court in *O'Connor*. However it was considered in *R.* v. *Beharriell*,[54] which was decided concurrently with *O'Connor*.

In *Beharriell*, the accused sought the records of a sexual assault counselling centre pertaining to the complainant. The Supreme Court of Canada quashed the order directing the production of the records on the basis that the procedure and substantive law pronounced in *O'Connor* had not been followed. L'Heureux-Dubé J., with La Forest and Gonthier JJ. concurring, took the opportunity to canvass the issue of class privilege and express the view that "recognizing a class privilege in criminal trials for private records relating to sexual assault complainants is not the best way to serve the interests of justice".[55]

Arguments in favour of recognizing a class privilege for therapist-victim communications range from practical to constitutional, all stemming from a desire to protect the victim from further injury.[56] For example, it is recognized that tradition mitigates against assigning an obligation of disclosure to third parties.[57] The proponents of privilege may measure the step from the existence of no disclosure duty to the recognition of a class privilege as being small and safe. Others argue that the failure to recognize a class privilege may have the effect of allowing (indirectly) unwarranted publicity of the victim's prior sexual history, a result deprecated by Parliament.[58] Further, the status quo ensures the perpetuation of stereotypical myths and biases against women and children, the frequent victims of sexual crimes.[59]

The latter point was addressed by the Court in *O'Connor* by directing trial courts to avoid, as a matter of law, any inclination towards prejudicial viewpoints.[60] Addressing this concern by the establishment of a class privilege would be too drastic.

Similarly, it must be acknowledged that a lack of duty to assist can not be equated with an absolute wall, especially when that wall could act as a barrier to the defendant exercising his or her section 7 *Charter* right to make full answer and defence.[61] Information of importance to the defence, which is available only from a third party, must be available to the defence when a reasonable process exists governing its extraction. It is respectfully submitted that such a process exists in *O'Connor*.

Others will argue that the great value placed on privacy in our society is constitutionally guaranteed by section 7 of the *Charter* or the common law. The

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[53] *R.* v. *Gruenke*, [1991] 3 S.C.R. 263, 67 C.C.C. (3d) 289 at 320 [hereinafter *Gruenke* cited to C.C.C.].

[54] *R.* v. *Beharriell*, [1995] 4 S.C.R. 536. 103 C.C.C. (3d) 92 [hereinafter *Beharriell* cited to C.C.C.].

[55] *Ibid.* at 122.

[56] *Ibid.* at 101-03, 115.

[57] A subpoena *duces tecum* compels the attendance of a third party and his or her records, but it does not include a power to force disclosure. See *O'Connor*, *supra* note 1 at 18, Lamer C.J., and *ibid.* at 50, L'Heureux-Dubé J.

[58] *Criminal Code*, supra note 43, s. 276.

[59] *O'Connor*, *supra* note 1 at 57-58, L'Heureux-Dubé J.

[60] *Ibid.* at 23, Lamer C.J.

[61] *Beharriell*, *supra* note 54 at 120-21, L'Heureux-Dubé J.

Supreme Court has indicated some sympathy for this proposition on previous occasions,[62] and again in *O'Connor*.[63]

Alternatively, it will be argued that the guarantees in section 7 of 'liberty' and 'security of person' support the proposition that the victim has a right to psychological integrity.[64] It appears that the plight of a victim in the criminal justice system destroys that integrity.[65]

Two points defeat these reasoned arguments for the establishment of a class privilege. First, no constitutional right is an absolute; each right must be considered in relation to other rights found in the *Charter*. The *Charter* does not decree a hierarchical approach, and any temptation to adopt that tact must be avoided.[66] As there is no hierarchy of rights, the right of the defendant to put forward full answer and defence must be balanced against the rights of privacy and equality against discrimination. The recognition of a class privilege would undermine the defendant's section 7 rights. The victim's rights can be protected, though in less absolute terms, by the process suggested in *O'Connor*.

Second, in determining whether policy reasons support the establishment of a class privilege for therapist-victim communications, it is prudent to contrast the policy considerations underlying the common law privilege for solicitor-client communications. Those policy reasons were summarized by Lamer C.J. as follows:

> The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor-and-client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication.[67]

Though victim communications are of social importance they cannot be adjudged to be inextricably linked with the justice system.[68] Therefore, any decision to extend a class privilege would face a difficult opposing argument.

IV. CONCLUSION

It is respectfully submitted that *O'Connor* provides appropriate guidance on the question of the production and disclosure of confidential records held by third parties in situations where no class privilege exists. Though pressure for legislative change has

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[62] See *R.* v. *Beare*, [1988] 2 S.C.R. 387 at 412, 45 C.C.C. (3d) 57; *B.(R.)* v. *Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at 369, 122 D.L.R. (4th) 1 (regarding s. 7); *McInerney* v. *MacDonald*, [1992] 2 S.C.R. 138 at 148, 93 D.L.R. (4th) 415; *Hill* v. *Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129 (regarding common law).

[63] *Supra* note 1, para. 17, Lamer C.J., and para. 110, L'Heureux-Dubé J.

[64] *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30 at 171, 37 C.C.C. (3d) 449, (*sub nom. Mortgentaler, Smoling & Scott* v. *The Queen*).

[65] *O'Connor*, *supra* note 1 at 53-54, L'Heureux-Dubé J.

[66] *Dagenais* v. *Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 at 877, 94 C.C.C. (3d) 289; *O'Connor*, *supra* note 1 at 17-18, Lamer C.J. and *ibid.* at 60, L'Heureux-Dubé J.

[67] *Gruenke*, *supra* note 53 at 305.

[68] *Beharriell*, *supra* note 54 at 121, L'Heureux-Dubé J. quoting J. Sopinka, S. N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Buttersworth, 1992) at 649.

been exerted, the options are not attractive. The minority judgment in *O'Connor*, as adapted in Bill C-46, suggests an approach that is cumbersome and impractical. The revision of the threshold criteria to include admissibility would create unjustifiable problems. Further it would inhibit a restricted, but legitimate, collateral discovery opportunity. The recognition of a class privilege would be too extreme and apparently unconstitutional. Therefore, the law as stated by the majority of the Supreme Court of Canada in *O'Connor* should be retained.