

International Human Rights Treaties and Canadian Criminal Law Reform: A Gender Analysis

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International Human Rights Treaties and Canadian Criminal Law Reform: A Gender Analysis*

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Introduction

Criminal law and procedure are important indicators of what a society holds to be of value and how a society perceives itself. By outlawing certain activities, society is attempting to control or regulate its citizens' behaviour by restricting the activities that a person may engage in for the protection and betterment of individuals specifically and society more generally. Moreover, the penalties placed on a person for transgressions of those prohibitions are intended to be proportionate to the harm done to society by his¹ illegal activities.

Rules of evidence and procedure are important process safeguards put into law to protect both the person accused of illicit behaviour from the power and resources of the state, and to a much lesser extent, to assist the victims of crimes.

This paper presents the case for ensuring that when laws and rules of evidence and procedure are being devised or revised it is important to carry out a gender analysis of those laws and procedures to ensure that they are fair and appropriate for both men and women. First the paper will discuss what is meant by a gender analysis and mainstreaming. Next, the international human rights treaties that require gender equity in the criminal justice system will be reviewed. And finally, two important illustrations of the impact of a gender analysis on criminal procedure in the Canadian Context will be analyzed. The two areas covered will be: violence against women in relationships and the rules of disclosure in cases of sexual assault. In particular, the paper will highlight recent safeguards that have been incorporated into the Canadian Criminal Justice system to rebalance the rights of women with those of men after a gender analysis had revealed inequities in the operation and practical implementation of the law.

What is Gender Analysis?

Gender Analysis, and following from this, gender mainstreaming are methods of intellectual scrutiny for ensuring that the justice system, laws and procedures in a country work for both men and women. The need to apply a gender analysis arises from the historic and existing imbalance of power between men and women around the world and in all countries.

As Steiner and Alston state:

“According to virtually every indicator of social well-being and status – political participation, legal capacity, access to economic resources and employment, wage

¹ For the purposes of this paper, the masculine pronoun will be used for offender and the feminine pronoun for victim to reflect the reality that although women do commit crimes and men are also victims, in the vast majority of cases, crimes are committed by men and women are the victims of crime.

differentials, levels of education and health-women fare significantly and sometimes dramatically worse than men.”²

In the vast majority, if not all, countries men hold by a considerable margin the most senior positions in the political, governmental and economic spheres. This holds equally true for the organizations within these spheres, and holds true for the justice system. There are many reasons for the large disparity in roles, influence and power that is wielded by men. Historically at least, women were confined to the role of homemaker, mother and helpmate while men were seen as the providers, the hunters and gatherers. This led to societies everywhere defining separate, and usually, unequal roles as between men and women both socially and legally. Men led their lives primarily in the “public” sphere, working outside of the home, whilst women were primarily confined to the “private” sphere of home, family and domesticity. Indeed so deeply rooted were these ideas in English and Canadian Societies that a British Court ruled in 1876 that “Women are persons in matters of pains and penalties, but are not persons in matters of rights and privileges.”³

This ruling was compounded in Canada in 1927, in the so-called Persons Case⁴, where the Supreme Court of Canada ruled that women were not “persons” and therefore could not run for office as senators. From this distance in time, these legal rulings appear absurd and laughable. Yet many inequities in the treatment of women as opposed to men persist although they may take on more subtle forms.

The ensuing decades have brought many changes in the roles of women and men and in the relationships between them. Certainly the social context has changed dramatically in many countries like Canada. However it is a long process. Centuries of male domination and seniority will not, and have not, disappeared overnight. Every society constructs, both consciously and unconsciously, the roles and responsibilities that are assigned to, and must be played out by, men and women. In this assignment, or “social construction”, there are often inequities that continue to persist.

This pattern of inequity holds true of the justice system like many other important institutions in society. However given the central role that the justice system plays in defining the norms of society it is crucial that the justice system continually analyze and scrutinize its laws, procedures and practices to ensure that they are not creating, reinforcing or maintaining inequalities between men and women in society nor in the relationships between men and women. Increasingly, governments and judges are applying a “gender lens” or “gender analysis” as an important part of any process when dealing with the creation and retention of laws and particularly when creating and/or revising laws. Gender analysis, simply put, is the recognition that the roles of men and

² See Henry Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, (Oxford University Press, (2nd Edition, 2002)

³ Quoted in Monique Benoit, *Are Women Persons? The “Persons” Case*, No. 119, *The Archivist*, Library and Archives Canada, accessed at <http://www.collectionscanada.ca/015/002/015002-2100-e.html> on February 21, 2006.

⁴ *Edwards v. Canada (Attorney General)* [1928] S.C.R. 276, subsequently overruled by the Privy Council *rev’d* [1929] 1 D.L.R. 98

women are socially constructed and that the differences in the lives and experiences of women from men should be recognized, and to the extent that this construction is deleterious to women's functioning and place in society, then such laws and procedures should be remedied or repealed.

This type of analysis is particularly important with respect to the legal and judicial system. Most legal systems are systems that have been designed by men and not surprisingly, the system is predicated on men's lived experiences and has, for the most part, ignored or discounted the lived experiences of women. Societies are increasingly recognizing the existing deficiencies in laws and procedures when regarded from gendered perspective and changes are being made, albeit slowly.

These changes have been assisted, indeed perhaps legally mandated, by International Human Rights Treaties, commencing with the United Nations Charter in 1945⁵:

“In 1945, the U.N. Charter reaffirmed a faith in fundamental human rights...in the equal rights of men and women, as well as promoted and encouraged respect for human rights and for fundamental freedoms without distinction as to ...sex. The Universal Declaration of Human Rights similarly promoted the dignity and worth of the human person in the equal rights of men and women. It specified sex as being among the impermissible grounds of differentiation and provided an equal protection clause. Despite the fact that the Universal Declaration does not in and of itself have legal effect on all states, it is morally persuasive and considered part of customary international law. Provisions for the equality of the sexes in the enjoyment of rights are provided for both in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.”⁶

More recently, in 1993, *The Convention on the Elimination of All Forms of Discrimination Against Women*⁷ (CEDAW) clearly sets out the responsibility of states, once they have signed on, to adopt legislation and to refrain from discrimination against women and taking “all appropriate” measures to eliminate discrimination. This is a sweeping positive obligation which includes:

“Not only eliminating those measure and laws which are clearly discriminatory between men and women but also eliminating and/or enforcing practices. Moreover they are intended to cover those practices and areas of law which not only intend to discriminate but have the effect of discriminating against women. These measures include, but are not limited to, “legal, administrative and other measures, which include

⁵ *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No.7

⁶ Rangita de Silva de Alwis, *A Guide to Implementing CEDAW in China*, prepared for the Ford Foundation (2003?)

⁷ This Declaration was adopted without a vote in General Assembly Resolution 48/104, 20 December 1993.

temporary special measures of affirmative action, modification of social and cultural patterns of conduct...⁸

Indeed it can be argued that the norms, legal principles and human rights values enshrined in a number of international human rights declarations and treaties, like the Universal Declaration of Human Rights⁹, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights¹⁰ are all elements of customary international law that would therefore even bind states parties who have not signed and ratified them.¹¹

Having set out both the legal and moral imperatives to ensuring equality as between men and women generally and in the justice system in particular, the paper will use two illustrations where a gender analysis has been applied in areas of criminal law and procedure to rebalance inequities in the criminal justice system that existed between men and women in Canada. The two areas discussed below are: Violence Against Women in Relationships and the Rules of Disclosure in Sexual Assault Cases.

Illustration Number 1: The Laws, Procedures and Practices regarding Violence against Women in Relationships: the Case of British Columbia, Canada

One area of law and procedure which has undergone substantial revision because of the application of gender analysis concerns the crimes of domestic violence or, as it is more commonly referred to now in Canada, violence against women in relationships. The terminology was changed based on a gender analysis. “Domestic” violence appears to modify the seriousness of the violence, and clearly delineates the public/private distinction which has been made in society and in legal structures to the detriment of women in a number of spheres graphically illustrated in the case of violence against women in the home.

Violence by men against women with whom they live or are having, or have had, an intimate relationship is one of the most common crimes in Canada and indeed throughout the world.¹² Article 16 of CEDAW specifically requires State Parties to remove discriminatory laws and practices against women. Moreover General Recommendation No. 12 specifically obligates States Parties to protect women against violence of any kind

⁸ See Rangita de Silva de Alwis, *A Guide to Implementing CEDAW in China*, *supra*, p.5

⁹ *Universal Declaration of Human Rights* GA Res. 217 (III), UN GAOR, 3d Sess. Supp. No. 13 UN Doc. A/810 (1948) 71.

¹⁰ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976)

¹¹ Indeed the argument has been extended further to state that these declarations and treaties are such that they are covered by the rule of *jus cogens* at international law whereby the principles they espouse are so fundamental that they are non-derogable, See generally Hilary Charlesworth, Christine Chinkin and Shelley Wright, *Feminist Approaches to International Law*, 85 A.J.I.L 613 (1991)

¹² In recognition of the widespread use of violence against women in the world community, in 1993, the General Assembly of the United Nations issued *the Declaration on the Elimination of Violence against Women*, expressing concern that violence against women is an obstacle to the achievement of equality. This Declaration was adopted without a vote in General Assembly Resolution 48/104, 20 December 1993.

occurring within the family or at the workplace or any other area of social life. To assist in monitoring this recommendation, periodic reports are requested that set out information on the legislation in force to protect women against violence in everyday life including sexual violence, abuses in the home, and sexual harassment at the workplace.

A number of other recommendations also deal with the States Parties obligations to deal with violence against women¹³:

Recommendation 12 also requires states to adopt measures to eradicate violence against women and compile data on the existence of support services for women who are the victims of abuse and statistical data on the incidence of violence.

In 1993, the Committee on the CEDAW adopted General Recommendation 19, entitled Violence against Women, which explicitly states that CEDAW prohibits gender-based violence.

General Recommendation No. 19 reaffirms that State Parties are also responsible for private behaviour if they do not act with due diligence to prevent violence against women or punish acts of violence against women

General Recommendation No. 19 addresses violence against women and emphasizes among others that discrimination under the CEDAW is not restricted to action by or on behalf of Governments (see articles 2 (e), 2 (f) and (5)). For example, under article 2 (e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

...

The Recommendation also suggests that states parties establish support services for victims of family violence, rape, sexual assault and other forms of gender-based violence, including refugees, specially trained health workers, rehabilitation and counseling. Further, recommendations are made to conduct gender-sensitive training of judicial and law enforcement officers and other public officials for the implementation of the CEDAW. Also, it is recommended that measures to overcome family violence should include criminal penalties where necessary and civil remedies in cases of domestic violence.

¹³ This summary is taken from the excellent outline provided by Rangita de Silva de Alwis, *supra*, at p.21

Women in Canada, like the vast majority of countries in the world, are significantly more likely to be the victim of violence at the hands of an existing or former husband or lover than from strangers on the street.¹⁴ Like most countries, the Canadian Criminal Code¹⁵ makes the use of force against a spouse or intimate partner¹⁶, a crime in exactly the same way as the use of force would be against any other individual. There are a variety of offences in the Canadian Criminal Code that can be applied in this area: sections 265 (assault), 269 (unlawfully causing bodily harm), and 267 (Assault with a weapon or causing bodily harm) and 268 (Aggravated assault which is a strictly indictable offence which would be laid in very serious circumstances)

Legally, these provisions apply to all people who commit violent acts in Canadian Society, including violent acts against people with whom the offender is having an intimate relationship. On a strict interpretation of the law, there is equality between both men and women who are the victims of violence. However the practical reality of women's lived experience is that these laws are applied and proceeded with in an unequal manner depending upon whether the violence is committed by a stranger male or a male with whom the women is having, or has had, an intimate relationship.

The difference between a man committing an act of violence against a male stranger walking along the street and committing the very same act of violence against his spouse was that in the latter case the man was rarely charged with an offence. Clearly, the gender analysis reveals unequal treatment of crimes of violence against women in relationships. Having identified that there was gender inequity, not in the laws but in the procedures and implementation of them, the Province of British Columbia, and many other provinces in Canada, changed the procedures for dealing with cases of violence against women in relationships.

Research revealed that part of the challenge arose with respect to how prosecutors and police officers both conceived of, and implemented laws against, violence by men towards another male in the street as opposed to male violence against women with whom they were having a relationship. Most police officers and prosecutors (again the vast majority of whom are men, although this gender imbalance is gradually changing.) was that the former crime was seen as a public crime disturbing notions of non-violence on the street and therefore the offender should be arrested; whereas in the latter case, the violence was viewed as a personal or private dispute with which the police officer or prosecutor should not concern themselves.

¹⁴ Based on a survey of approximately 26,000 Canadians, an estimated 7% of people who were married or living in a common-law relationship experienced some form of violence in the five years prior to the survey. See Data from the 1999 General Social Survey, as reported in : Canada, Canadian Centre for Justice Statistics, Family Violence in Canada: A Statistical Profile (Ottawa: Statistics Canada; Cat. No. 85-224-XPE, 2000): 5 cited in Canada, Department of Justice, Family Violence: A Fact Sheet, accessed at <http://canada.justice.gc.ca/en/ps/fm/familyvifs.html> on February 18, 2006.

¹⁵ *Criminal Code*, R.S.C. 1985, c. C-46

¹⁶ The emphasis in the text will be the violence that men perpetrate against women although clearly there are instances of where a woman has exercised force against a man with who she is having/had a relationship. The emphasis here is when the male commits the violent act because that is the subject of this paper but also because the male is far more likely to commit acts of violence.

The idea that a violent crime towards an intimate partner was not a crime and as such should not engage the apparatus of the state went to the very root of inequality and social construction of roles in society. Indeed this is further evidence by Australian empirical research¹⁷ on how police officers viewed the crime and the women victim. Police officers felt that the women may have deserved to be hit, provoked the attack and therefore legitimized the crime. There was also the sense that men are violent creatures by nature and therefore these biological imperatives should not be held against them when they beat their wives. In light of this and other evidence it was clear that if women were to be protected from the social construction placed upon them by society, and empowered to take appropriate measures against the violence they were enduring, the justice system and its procedures needed to change.

Accordingly the roles and procedures of the police officers investigating and of the prosecutors prosecuting these cases had to change. Accordingly regulations and policies were implemented to guide police officers and prosecutors in their responsibilities when called to the scene of the crime, investigating the commission of a crime and collecting evidence and deciding when to lay a charge¹⁸.

In The Province of British Columbia, Canada, investigations of crimes are conducted by the police agencies in the region (the various Municipal Police and the RCMP). In cases of violence against women in relationships, the police will usually be called to the scene of violence by the women who is being assaulted, her children or a concerned neighbour. At this time the police are required to take down any evidence of a crime having been committed: bruises, smashed items, overturned furniture. In addition they solicit and must take down the names of any witnesses: neighbours or shopkeepers, passers-by etc who may have heard shouting and/or the sounds of violence. The latter is particularly important as in many cases the spouse may refuse to testify against a spouse for a variety of reasons (for example fear of retribution, misplaced loyalty, economic dependency, social status or embarrassment)

The Canadian Criminal Code requires that police officers must have “reasonable grounds” to make an arrest¹⁹, which means that mere suspicion of a crime is not sufficient. In addition officers have to consider that an arrest is “in the public interest”. However in cases of violence against women in relationships, police officers exercised their discretion not to charge even where there were “reasonable grounds” based on erroneous notions of the “public/private distinction” on the grounds that “private violence” did not warrant arrest “in the public interest”.

Clearly the impacts of this use of discretion not to charge was inequitable and dangerous to women and in effect, provided impunity for men to use violence against women with

¹⁷ See Jennie Abell and Elizabeth Sheehy, *Criminal Law and Procedure: Proof Defences and Beyond* (Captus Press, 2004)

¹⁸ See Province of British Columbia, Ministry of Attorney General, Policy on the Criminal Justice System Response to Violence Against Women And Children, Part 1, Violence Against Women in Relationships Policy, AG 04097 (Updated: March 2004) and See Province of British Columbia, Crown Counsel Policy Manual, Spousal Assault, No. 56680-00 (Updated May 2003)

¹⁹ *Criminal Code*, R.S.C. 1985, c. C-46, s. 529.

whom they are in relationships. Accordingly, policies and procedures were changed to state that whenever a police officer has reasonable grounds that a crime has been committed, they must make an arrest as to do so is always in the public interest. This is a “no tolerance” policy for violence against women in relationships.

When an accused is arrested, the police do have the authority to release him but will usually detain the accused to allow a prosecutor to decide whether he should be detained or not. In all cases, whether the accused is in custody or not, the police officer has an obligation to type up a Report to Crown Counsel (RCC). Once the prosecutor has received the RCC, s/he is under an obligation to review that RCC on an urgent basis because the accused must be brought before a judge within 24 hours of arrest.

When the prosecutor reviews the report, s/he must apply charge approval guidelines which require the assessment of two factors in determining whether to charge an accused:

1. That there is a substantial likelihood of conviction AND
2. That it is in the public interest to lay a charge

The Attorney-General of British Columbia has decided that in the vast majority²⁰ of cases of violence against women that it is always in the public interest to lay a charge when the first criterion is met. In their consideration of whether there is a “substantial likelihood of conviction”, the prosecutor will consider a number of factors:

- what material evidence is available and admissible
- weight likely to be given by the court to the evidence
- what defences, if any, are likely to succeed

At all times, the prosecutor must carry out a risk assessment of the likelihood of the violence recurring and is given a number of recognized risk factors to investigate, including, a history of violence, previous breach of court orders, escalating violence, recent threats of suicide, substance abuse, recent relationship or employment problems, use of threatened use of weapons and extreme minimization or denial of violent behaviour. Where two or more of these factors are present, the prosecutor should seriously consider laying charges and/or imposing conditions on the release of the offender.

If a decision to arrest is made crown must:

- address the issue of bail
- if the charge is approved, the crown must ask a justice of the peace to lay an information (the charge)

²⁰ Where the level of violence is small and the prosecutor considers reoffending unlikely, the prosecutor may use her discretion to divert the offender to an “alternative measure” program, an alternative process outside of the court process that will not result in a criminal charge being laid. See *Crown Counsel Policy*, *supra*.

- After the information is sworn, decide whether to argue for detention, or more likely, to seek conditions on release of accused.

Very often in these cases the prosecutor will seek conditions of release including:

- not attend the residence of the complainant
- no contact order
- Occasionally, depending upon the circumstance, children may also be included in these orders although this is more difficult as they may conflict with access orders.

Occasionally, in more serious cases, the prosecutor may also seek a bail supervision order in order to require a supervisor to monitor the accused and to check up on compliance with this order. Prior to making these decisions, the prosecutor will have interviewed the complainant to understand her concerns and wishes and, if deemed appropriate, take these into account when making their decision. Canadian law makes it very clear that it is the decision of the prosecutor not the complainant as to whether the case will go to trial. This may be particularly important in these types of cases as the complainant may be unwilling, or at best, reluctant to be a witness. In these cases, it is essential that the prosecutor build a rapport with the complainant and explain to her the importance of proceeding publicly with a prosecution. It may also be necessary to attempt to find other witnesses or evidence.

In certain circumstances, the prosecutor may apply for a material witness warrant, which would require an unwilling victim to attend the court as a witness. However care has to be taken that to do so does not revictimise the complainant further, for example exposing her to contempt of court charges and potential jail sentence for refusing to testify. At all time, safety considerations should be at the forefront.

These procedures, together with enhanced training for police and prosecutors, have increased significantly the number of charges laid against men for violence against women with whom they are living. Accordingly, applying a gender analysis of the differential impact of police and prosecutors procedures and exercise of discretion in these specific cases has led to many procedural and educational reforms which have promoted more equality in the way violent offences against women are treated.

Illustration Two: Rules for Disclosure of Evidence in Sexual Assault Cases

The second illustration of where gender analysis has contributed to the reform of the law to more equally balance rules as between men and women is in the area of the rules for disclosure in cases of sexual assault²¹.

²¹ This section draws heavily on the analysis of, and materials cited, and in some cases reproduced in, Jennie Abell and Elizabeth Sheehy, *Criminal Law and Procedure: Proof Defences and Beyond* (Captus Press, 2004) at pp 128-135.

An important part of any trial preparation is the gathering of evidence on which the charge rests. In many cases, the police and through them, the crown prosecutor gathers a large amount of information concerning both the accused and victim. The common law rules of evidence disclosure in Canada were laid down in *R v. Stinchcombe*.²² In *Stinchcombe*, the Supreme Court of Canada held that the prosecution must hand over to the defence evidence that they had gathered (in this case a witness statement) that was favourable to the defence even though the prosecution did not intend to call the witness at trial. This ruling was predicated on s.7 of the Canadian Charter of Rights and Freedoms, the right to a fair trial, which encompasses within it, *inter alia*, the right of the accused to make full answer and defence. Therefore the court held that this non-disclosure of evidence was a serious breach of the accused rights, which warranted ordering a new trial. The court's decision is succinctly set out in this extract from Sheehy and Abel:

“The court stated that the crown has a general duty to disclose all material it proposes to use at trial and evidence that may assist the defence even if the accused does not intend to use it. The following additional directions were given in the case: the Crown can refuse to disclose on the grounds of privilege; the Crown can exercise discretion in the timing and manner of disclosure; initial disclosure should take place before the accused has to elect the mode of trial or to plead; and the Crown's discretion is reviewable before the trial judge in a *voir dire*.”²³

This ruling makes a great deal of sense when viewed from the perspective of the accused and for a society's interest in ensuring fair trial processes. However when viewed from the perspective of the victim or victims it has been shown to be too all-encompassing. This is particularly true in cases of sexual assault cases. The *Stinchcombe*²⁴ ruling had a very deleterious impact on the victims and potential victims of sexual assault. As a result of the ruling in *Stinchcombe*, courts subsequently quashed convictions or stayed proceedings where rape crisis centres had lost or mislaid records of alleged victims. Moreover, the *Stinchcombe* rule became a weapon with which the defence could further victimize an alleged rape victim by requesting counseling and other personal health information. Again a gender analysis of this issue reveals the disadvantage of this ruling to women, and the advantage of it for men. Viewed from perspective of a sexual assault victim, predominantly women, this rule had the effect of making it more difficult for women to report a sexual assault to the police without disclosing personal medical and mental health records that may have little, if anything, to do with the trial.

The clash of ideals between defending the rights of the accused (predominantly men) to a fair trial process and the right to privacy for the victim of sexual assault (predominantly women) came to a head in the renowned case of *R. v O'Connor*²⁵. The issue in this case was whether a prosecutor, who had refused to disclose the medical records of an

²² [1991] 3 S.C.R. 326

²³ Abel and Sheehy, *Criminal Law and Procedure: Proof Defences and Beyond* (Captus Press, 2004) at p.129

²⁴ *supra*,

²⁵ [1995] 4 S.C.R. 411

Aboriginal woman, an alleged rape victim, had a right to do so. The Aboriginal Women's Council (AWC), a non-governmental advocacy group for Aboriginal Women in Canada, was granted intervener status at the Supreme Court of Canada. The AWC argued before the supreme court that requiring such records to be handed over to the defence, resulted in a re-victimising of the victim and failed to take into account the radicalized and gendered social context in which these cases occur, failing in effect to apply a gender and race lens to the operation and practical effect of the rules regarding disclosure. Mandating such broad disclosure would permit the defence to demand any personal and intimate records regarding the life of his victim, which could have the effect of intimidating and potentially humiliating her.

The Supreme Court, in a split 5-4 decision, rejected the powerful intervention of the AWC and instead actually widened the application of *Stinchcombe* to cover all therapeutic records but provided a new more deliberative process for the disclosure of such evidence.

In essence, the majority ruling in the case, laid out the following rules for disclosure of medical and other records of the alleged victim of sexual assault:²⁶

1. All evidence and records in the possession of the prosecution (and their agents the police) must be disclosed to the defence unless they are "clearly irrelevant". The disclosure rule in *Stinchcombe* in effect, was held to override any claim to privacy or equality that the alleged victim might claim under sections 7 and 15 of the Charter.
2. If the records are held by a third party, for example a doctor, therapist or rape crisis or women's shelter, the accused must apply for these records by swearing an affidavit and requesting production. Notice of the requirement for production must be given to the third party. The third party will then be subpoenaed to bring the records to court. At this point, the presiding judge will decide whether the records are "likely relevant". Likely relevant has been interpreted to mean, "may assist the defence".

Despite the insertion of providing judicial scrutiny, these criteria had the effect of enabling defence counsel to go on fishing expeditions. Furthermore, although the court allowed the third party, who had created and held the records, standing to contest the disclosure, up to and including the Supreme Court of Canada, the court clearly laid out that there is no privilege attached to such counseling records. In the United States, the Supreme Court of that nation has taken a different view and ruled that psychiatrists and social workers have the absolute right to refuse to disclose confidential counseling information to any court.²⁷

The *O'Connor* decision was severely criticized by academics and others concerned about the potential chill this ruling would bring about for women who have been sexually

²⁶ This is paraphrased from the excellent discussion of *R v. O'Connor*, supra, in Abell and Sheehy, supra at p.129

²⁷ See *Jaffe v. Redmond*, 116 S.Ct. 1923 (1990) discussed in Abel and Sheehy, supra, at p. 132.

assaulted. Critics recognized that the ruling would make it even more difficult for women to bring forward allegations of sexual assault if they were aware that defence counsel could simply go on a fishing expedition for sensitive, personal, private information about them even though it was not of substantial relevance to the case. And the critics concerns were borne out in practice.

Defence counsel subsequently asked for production of records, inter alia, regarding a women's divorce, birth control, school records and even their diaries.²⁸ More disturbingly perhaps was the effect that the request for such disclosure had on the alleged victims. Many women were unwilling and/or emotionally unable to expose every detail of their personal lives. As a consequence, women were documented as refusing to be witnesses after disclosure applications were made, while others withdrew from valuable and much-needed therapy to protect themselves from future disclosure of the records that would be created. In some cases where there were no clinical notes or records to be disclosed, defence counsel attempted to have them created by requesting psychiatric and medical evaluations.

The impact of *O'Connor* was exacerbated by the Supreme Court of Canada decision in *R. v. Carosella*²⁹, where the court in another 5:4 split decision held that the appropriate action to take where records had been mislaid or shredded by third parties, was to stay (or dismiss) the action. In *Carosella*, the Sexual Assault Crisis Centre of Windsor had, as a matter of policy shredded its records months before the records were subpoenaed. The policy to shred the documents was implemented to protect client privacy. The majority held that the accused was entitled to the records in order to provide full answer and defence. Given that they could not be reproduced the only available remedy was to stay the action. This decision was reached even though the accused did not prove that he was actually prejudiced by the lack of disclosure.

The majority decision relied on:

The presence of either one of the following two factors justifies the exercise of discretion in favour of a stay: no alternative remedy would cure the prejudice to the accused's ability to make full answer and defence, and irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued. The presence of the first factor cannot be denied. With respect to the second, the complete absence of any remedy to redress or mitigate the consequences of a deliberate destruction of material in order to deprive the court and the accused of relevant evidence would damage the image of the administration of justice. Confidence in the system would be undermined if the court condoned conduct designed to defeat the processes of the court by an

²⁸ Karen Busby, "Discriminatory Uses of Personal Records I Sexual Violence Cases' (1997) 9 C.J.W.L. 178 cited in Abell and Sheehy, supra, at p.133

²⁹ [1997] 1 S.C.R. 80.

*agency that receives public money and whose actions are scrutinized by the provincial government.*³⁰

It is interesting to contrast the strong dissent of four Supreme Court justices (including the only two women justices on the court at that time) based in part on:

*While the production of every relevant piece of evidence might be an ideal goal from the accused's point of view, it is inaccurate to elevate this objective to a right, the non-performance of which leads instantaneously to an unfair trial. Where evidence is unavailable, the accused must demonstrate that a fair trial, and not a perfect one, cannot be had as a result of the loss. He must establish a real likelihood of prejudice to his defence; it is not enough to speculate that there is the potential for harm*³¹.

The net effect of these majority decisions was to increase the number of disclosure orders, lengthen the time of trials, increase delays and provide more grounds for stays of actions.

Clearly taking a gendered look at these cases and the disclosure procedures that evolved is warranted. The vast majority of victims of sexual assault are women and the vast majority of offenders committing sexual assault are men. Looking at the differential impact that these rules have on men and women is informative. The rules are justified as being essential to ensuring a fair trial process for an accused in accordance with the *Canadian Charter and Rights and Freedoms*. However, allowing the defence to go on sweeping expeditions for personal information, that may have little relevance to the case, is extremely prejudicial to women and specifically to those women who have been sexually assaulted. These decisions affect all women because any records that are developed by therapists, doctors, psychiatrists and others at any time during a women's life may be required to be produced if that woman is subsequently the victim of a sexual assault. And to the extent that the documents are mislaid or cannot be produced, the lack of disclosure may result in the case being stayed.

Moreover, the societal impacts of further dissuading already reluctant women to disclose that they have been the victim of a sexually assault could be grave. Men who sexually assault women may continue to do so if they are not apprehended and convicted. Women will feel less safe and society will suffer as a consequence but the disproportionate burden of that suffering will be borne by women.

Clearly the justice system must ensure that an accused is given a fair trial. However those procedures developed to ensure this must also take into account the fundamental objective of having a justice system which has substantive and procedural rules that also enshrine effective implementation of international human rights obligations; effective judicial protection; and prompt, effective and safe access to justice for victims of crime.

³⁰ Ibid, majority, headnote,

³¹ Per the minority dissent, headnote, p.1.

It has also been noted that the vast majority of broad disclosure orders sought are primarily, indeed nearly exclusively, with respect to the alleged victims of sexual assault. Defence counsel has not requested disclosure orders for other important witnesses to trials to impugn their credibility or stability. For example, police officers are often critical witnesses; but defence counsel has not sought disclosure of their personal medical records³².

As a consequence of academic critiques, activists lobbying and general public concern about whether the courts had found the appropriate balance for disclosure rules in cases of sexual assault, the Canadian Government held legislative committee hearings and broad consultations for two years. Following these consultation the Canadian Government enacted laws to more clearly balance the rights and interests of the accused and the privacy, safety and personal concerns of the alleged victim.

In 1997, An Act to amend the Criminal Code (production of records in criminal proceedings)³³ was passed into law. The law enacted ss. 278.1-278.91, the substance of which is set out in s.278.3 (1) set out below:

PART VIII: OFFENCES AGAINST THE PERSON AND REPUTATION

Assaults

Application for
production

278.3 (1) An accused who seeks production of a record referred to in subsection 278.2(1) must make an application to the judge before whom the accused is to be, or is being, tried.

No application in
other proceedings

(2) For greater certainty, an application under subsection (1) may not be made to a judge or justice presiding at any other proceedings, including a preliminary inquiry.

Form and content
of application

(3) An application must be made in writing and set out

- (a) particulars identifying the record that the accused seeks to have produced and the name of the person who has possession or control of the record; and
- (b) the grounds on which the accused relies to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify.

Insufficient grounds

(4) Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to

³² This insight is gained from Michelle Landsberg, "Two Cases Stark Proof of Gender Bias" (The Toronto Star, (23 February, 1997, at 2) cited in Abell and Sheehy, supra.

³³ S.C.1997, c.30

testify:

- (a) that the record exists;
- (b) that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;
- (c) that the record relates to the incident that is the subject-matter of the proceedings;
- (d) that the record may disclose a prior inconsistent statement of the complainant or witness;
- (e) that the record may relate to the credibility of the complainant or witness;
- (f) that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;
- (g) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;
- (h) that the record relates to the sexual activity of the complainant with any person, including the accused;
- (i) that the record relates to the presence or absence of a recent complaint;
- (j) that the record relates to the complainant's sexual reputation; or
- (k) that the record was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused.

Service of
application and
subpoena

(5) The accused shall serve the application on the prosecutor, on the person who has possession or control of the record, on the complainant or witness, as the case may be, and on any other person to whom, to the knowledge of the accused, the record relates, at least seven days before the hearing referred to in subsection 278.4(1) or any shorter interval that the judge may allow in the interests of justice. The accused shall also serve a subpoena issued under Part XXII in Form 16.1 on the person who has possession or control of the record at the same time as the application is served.

Service on other
persons

(6) The judge may at any time order that the application be served on any person to whom the judge considers the record

may relate.

1997, c. 30, s. 1.

This legislative scheme, which covers disclosure rules exclusively in cases of sexual assault were challenge as being unconstitutional but withstood that challenge in *R v. Mills*³⁴.

In reaching its very lengthy decision in *Mills*, the court made the following reasoning:

Per L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.: To challenge the constitutionality of the impugned legislation, the accused need not prove that the legislation would probably violate his right to make full answer and defence. It is sufficient that he establish that the legislation is unconstitutional in its general effect

...

In adopting Bill C-46, Parliament sought to recognize the prevalence of sexual violence against women and children and its disadvantageous impact on their rights, to encourage the reporting of incidents of sexual violence, to recognize the impact of the production of personal information on the efficacy of treatment, and to reconcile fairness to complainants with the rights of the accused. Parliament may also be understood to be recognizing "horizontal" equality concerns, where women's inequality results from the acts of other individuals and groups rather than the state.

At issue in the present case is whether the procedure established in Bill C-46 violates the principles of fundamental justice. Two principles of fundamental justice seem to conflict: the right to full answer and defence and the right to privacy. Neither right may be defined in such a way as to negate the other and both sets of rights are informed by the equality rights at play in this context. No single principle is absolute and capable of trumping the others; they must all be defined in light of competing claims. A contextual approach to the interpretation of rights should be adopted as they often inform, and are informed by, other rights at issue in the circumstances. It is important, however, to distinguish between balancing the principles of fundamental justice under s. 7 and balancing interests under s. 1 of the *Charter*. The issue under s. 7 is the delineation of the boundaries of the rights in question whereas under s. 1 the question is whether the violation of these boundaries may be justified. In this context, the right to make full

³⁴, *R v. Mills*, [1999] 3 S.C.R., 668.

answer and defence, the right to privacy, and the right to equality must be defined.

Conclusion

This paper has set out the importance of applying a gender analysis to the criminal justice system, its laws, procedures and its practical application. Utilising the example of two important areas in criminal law, Violence against Women in relationships and Sexual Assault, this paper has demonstrated the impact and effect that carrying out a gender analysis had in Canada on the lives of all citizens, male and female.

Indeed International Human Rights Treaties may well legally mandate such a gender analysis by State Parties, and perhaps even by those States that have not signed due to the application of customary law.

The systemic and systematic gender bias of the justice system will not disappear overnight but careful scrutiny and application of a gender analysis to all aspects of the legal system, its laws and procedures will have an important impact and ensure that all rights of citizens are protected and that substantive equality is achieved.

The conclusion taken from this paper should not be that the laws, procedures and Policies relating to violent and sexual offences against women are perfected either in form or execution. There is undoubtedly a long road to travel before the scourge of violence against women in relationships and sexual assault becomes a rarity in our society. However a gender analysis is assisting in moving towards that destination, and as a famous proverb in China states, a journey of a thousand miles starts by taking the first step.