October 21, 2024

Joint Statement by Survivor Safety Matters and SAVIS of Halton

Re: Submission on Coercive Control and the use of s.278.1 to subpoena a victim's personal records.

The issue with Section 278.1

Individuals who report a Sexual Assault are subjected to having their personal and confidential records, for which there is a reasonable expectation of privacy, subpoenaed and potentially brought into court and given to the accused. The threat inherent in allowing perpetrators who have a history of **coercive control** the "right" to subpoena their victim's personal and confidential records puts the victim in significant danger. Coercive control feeds on the abuser's ability to obtain intimate knowledge of their victim and s278.1 of the *Criminal Code* yields perfectly to this pattern of assault, threats, humiliation and intimidation.

Background

Section 278.1 of the *Criminal Code* currently allows a person who been charged with sexual assault to apply for access to their victim's private and confidential records, which are *any record that contains personal information for which there is a reasonable expectation of privacy*.

The types of records which can be accessed include:

- Medical
- Psychiatric
- Therapeutic
- Counselling
- Education
- Employment
- Child welfare

- Adoption
- Social services records
- Personal journals and diaries
- Records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature.

Once the accused has received this information, the extent of harm they can cause their victim, long after court has ended, is never-ending. This committee should not underestimate the maliciousness with which the accused can use the private fears of their victims to further torment them. In addition to s278.1 being used as an intimidation tool during the trial; it also provides the means for retaliation against the victim long after the court process has ended.

A victim's personal records may contain information describing their personal journey and innermost thoughts and feelings. Victims of sexual assault need safe peer support networks, authentic connections with safe and trusted people, and safe spaces to disclose their experiences. This helps them work through the harm caused, make sense of what happened and process the confusion associated with having been sexually assaulted.

It is a serious concern that a person's most sensitive information could be brought into court just because they have reported a sexual assault to the police. Nothing contained in counselling records is relevant in determining the fault of the perpetrator and the introduction, or threat of introduction, of these private records only serves to further traumatize victims. This invasion of the victim's privacy through the release of confidential records does not support the proper administration of justice and interferes with their ability to obtain necessary support and report their sexual assault in a safe, fair and equitable manner.

The threat of this violation of privacy is intimidating and, in many cases, is enough to cause victims to discontinue the court process out of fear for their long-term personal safety.

Real-life example

Tanya Couch, co-founder of Survivor Safety Matters, was compelled by the implicit threat in the Section 278.1 applications to obtain 7 years of her private and confidential counselling records, to ask the crown to stay the 3 counts of sexual assault she had been waiting years to go to trial for. These reasons were put into the court record by the crown on Sept 1, 2023, who stated:

> "*It is her request that these charges by stayed and the Crown is in agreement with that, and I understand that these allegations were first reported in 2017, and that this has been a traumatic process for her, and that in particular, the expansive Section 278 application has interfered with her ability to access necessary*

supports, and so I'm directing a stay pursuant to Section 579 of the Criminal Code."[i]

These subpoenas were date ranged "to the present," which meant that Tanya could no longer safely speak to her counsellor or receive support from the Sexual Misconduct Support and Resource Centre (SMSRC).

Tanya was provided with a section 278 lawyer who told her that based on her experience, she thought the judge would likely grant the defence's request for access to her personal information.

To give context, the defence had used the '*threat of going after her counselling records'* for over a year and a half prior to their section 278.1 application being submitted to the court. Tanya found this to be a perpetual witness intimidation and bullying tactic to cause her to drop out of the court process, which was eventually successful.

Section 278.1 of the *Criminal Code* forced Tanya to choose between protecting herself from further violation by the court and the accused or continuing with the court process that she was relying on for justice. Worth noting is that while she was being abused, she felt the accused had been keeping her under surveillance. He had taken extraordinary steps to ensure she could not report the abuse and would not be believed if she did. She knew from her experience of him that it would be dangerous to her if he had any more information about her personal life.

Tanya's personal experience was facilitated by coercive control and abuse of power by the accused. The disclosure of personal records under s.278.1 would give an extension to her torment by her perpetrator, regardless of the outcome of the court proceedings. Her experience is reported by the media here:

Sex charges stayed against former cadet major after defence requests counselling records

Ask

Our organization is hearing that what Tanya experienced is not an isolated incident. Survivors are fearful of their personal records being given over to their abusers. The feedback that we are receiving indicates the following:

1. Victims are asking to have their charges stayed to protect themselves[ii]
2. Section 278.1 requests made 'to present' are cutting off a victim's access to mental health support
3. Victims are being warned by their counsellors that if they talk about their sexual assault, their records could be subpoenaed if their case proceeds to trial; which greatly affects the quality of the treatment available to them.

4. Counsellors are not taking notes in order to protect their clients, which also affects the quality of documentation and treatment
5. Counsellors and Rape Crisis centres are using their constrained organizational resources to pay lawyers to protect their clients against their records being used in court

It should be noted that all records under subpoena must be brought into court prior to the first hearing.

On paper, section 278.1 looks like it addresses the protection of victim's private records, but the effects of how this law is being abused in court is not seen by the lawmakers.

According to R. v. J.J. - SCC Cases (scc-csc.ca), in particular para 139:

> [1] The criminal trial process can be invasive, humiliating, and degrading for victims of sexual offences, in part because myths and stereotypes continue to haunt the criminal justice system. Historically, trials provided few if any protections for complainants. More often than not, they could expect to have the minutiae of their lives and character unjustifiably scrutinized in an attempt to intimidate and embarrass them, and call their credibility into question — all of which jeopardized the truth-seeking function of the trial. It also undermined the dignity, equality, and privacy of those who had the courage to lay a complaint and undergo the rigors of a public trial.
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> …
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> [139] Taking these factors into account, we conclude that Parliament enacted this regime with a view to (1) protecting the dignity, equality, and privacy interests of complainants; (2) recognizing the prevalence of sexual violence in order to promote society's interest in encouraging victims of sexual offences to come forward and seek treatment; and (3) promoting the truth-seeking function of trials, including by screening out prejudicial myths and stereotypes. Section 278.92 is not overbroad relative to this legislative purpose because it does not go further than is reasonably necessary to achieve these three goals (*Safarzadeh-Markhali*, at para. 50).

Based on our experiences and what we are hearing from other victims, we are asking that data be collected around Section 278.1 to determine the following:

1. How many people are asking for stays of proceedings due to the fear of their records potentially being brought into court and given to their abusers?
2. How many people are trusting that the system is working and are shocked when their records are allowed into court?
3. How expansive are these record requests and are these subpoenas reasonable?

4. How many subpoenas are dated “to the present” and what effect is that having on the victim’s access to supports during the extremely stressful court proceedings?

We firmly believe that the Government of Canada must unconditionally protect the privacy and safety of victims of sexual assault and eliminate the provision in s.278.1 that allows the defence to subpoena these personal sources of support. Even the threat of having a victims’ personal records or private journals brought into court and given to the offender is undeniably harmful to the victim and undermines the proper administration of justice and access for both the offender and complainant to a fair trial.

About Survivor Safety Matters:

Co-founded by Alexa Barkley and Tanya Couch, Survivor Safety Matters is an advocacy group made up of survivors of sexual assault and those who support them. Our organization initiated House of Commons e-4749 petition in early 2024 and are continuing to bring public attention to Section 278.1 of the Canadian *Criminal Code*. We are advocating for change so that the *Criminal Code* no longer adds to the violation victims have already faced by allowing the people charged with their sexual assault to apply for their personal records, which include therapeutic and counselling records, and personal journals, during legal proceedings.

About SAVIS of Halton:

It all started with five women in 1985 wanting to turn around the lives of survivors of sexual violence. Together they started a crisis line, the Halton Rape Crisis Centre. Four years later, their number had grown to 12 volunteers, answering 50 calls a year. Now, the renamed Sexual Assault & Violence Intervention Services of Halton (SAVIS) responds to more than 3000 crisis calls a year, supporting more than 300 clients in our counselling program. As a provider of supportive care for sexual assault survivors, SAVIS of Halton has a vested interest in making sure that the personal records of our clients are protected. Brave survivors who have engaged the justice system deserve an experience which does not amplify their victimization by handing their sensitive personal records over to the person who has abused them.

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[i] Superior Court of Justice, Information No. CR-22-00000476-0000 before the Honourable Justice J. Woollcombe on September 1, 2023 at Brampton, Ontario.

[ii] CBC The House Podcast, Aug 10, 2023, Law Professor Ben Perrin responds to Tanya’s question “why are the courts so indifferent about victim safety” at 38:36 Preparation for an evacuation,–The House – Apple Podcasts