SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Chisholm*, 2020 NSSC 364

Date: 20201210
Docket: CRAT No. 495095
Registry: Antigonish

Between:

HER MAJESTY THE QUEEN

v.

BERNARD HERMAN CHISHOLM

Decision on Section 278 Application

Restriction on Publication: 486.4 and 486.5

Judge:	The Honourable Justice N.M. Scaravelli
Heard:	November 24, 2020, in Antigonish, Nova Scotia
Counsel:	Jonathan Gavel, for the Crown Ellen Burke, for the Accused Carbo Kwan, for the Complainant Sheldon Choo, for the Department of Community Services

By the Court:

[1] The accused is charged with rape (Section 143) and indecent assault (Section 149), allegedly committed between 1 January 1976 and 31 December 1977. By Notice of Application dated 26 June 2020, he applies pursuant to s 278.3 of the *Criminal Code* for disclosure of the following records in respect of the complainant held by third parties:

> - All records, notes, reports, and other information, whether handwritten, typed, audio/video, or in another electronic format, in the possession and control of the Royal Canadian Mounted Police, Public Prosecution Services, Dr. Jamie (or Jayme) MacKay, […] Regional Health Centre, Fort McMurray, Alberta and/or MacGillivray Injury and Insurance Law Inc. ("McGillivray Law") relating to therapeutic and mental health counselling for [the complainant] (Date of Birth […]);
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> - All records, notes, reports, and other information, whether handwritten, typed, audio/video, or in another electronic format, in the possession and control of the Royal Canadian Mounted Police, Public Prosecution Services, the Minister of Community Services/Department of Community Services Nova Scotia and/or MacGillivray Law relating to [the complainant's] (Date of Birth […]) Child Protection file;
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> - All records, notes, reports, and other information, whether handwritten, typed, audio/video, or in another electronic format, in the possession and control of the Royal Canadian Mounted Police, Public Prosecution Services, and/or MacGillivray Law relating to the book/manuscript authored by [the complainant] and titled, "[…]"...

[2] The complainant has consented to portions of her book/manuscript relating to the subject matter of the charges should be produced for inspection by the Court. It was agreed by counsel in the hearing on 24 November 2020 that this is not in issue.

[3] The complainant gave a police statement in July 2018, and testified at the preliminary inquiry in October and November 2019. As reviewed in the affidavit of Kristy Hall, filed on behalf of the Applicant and summarized in the Applicant's brief, the complainant's evidence included the following:

> 1. [The complainant] states that she was placed in foster-care when she was eight years old, and Bill Wesley was her assigned ... social worker. [The complainant] states that she disclosed the incident related to Bernie Chisholm to Bill Wesley when she was 18 years old. Bill Wesley is deceased. [The complainant] confirms that MacGillivray Law has a copy of the records she received from the Department of Community Services.
>
> 2. [The complainant] states that she blocked the alleged assault ... until she was 32 years old. At that point, she started having dreams and decided to seek counseling. She indicates that she was referred by her family doctor, Jamie or Jerry MacKay, to the […] Hospital in Fort McMurray, Alberta for counselling related to sexual abuse and trauma. She acknowledges seeking counselling through her employee assistance program at […] in Fort McMurray, Alberta. She acknowledges having seen approximately six counsellors over a ten year period, and she discussed the allegations related to the Applicant with each counsellor. She states that MacGillivray Law may have some records relating to this counselling...

[4] The Applicant says this material is likely relevant to an issue at trial as it relates to the subject matter of this proceeding and the allegation against the Applicant. More specifically, he says the material is likely relevant to the credibility and reliability of the complainant's evidence about the alleged offence, and that they are necessary to the Applicant's right to make full answer and defence.

The Third Party Records Production Regime

[5] The statutory procedure for third party records under Section 278.1 to 278.91 of the *Criminal Code* is based on the two-stage process required by *R. v. Mills*, [1993] 3 S.C.R. 668. The majority in *Mills* summarized the process:

> 53 ... Like *O'Connor*, Parliament has set up a two-stage process: (1) disclosure to the judge; and (2) production to the accused. At the first stage, the accused must establish that the record sought 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" (s. 278.5(1)). Bill C-46 diverges from *O'Connor* by directing the trial judge to consider the salutary and deleterious effects of production to the court on the accused's right to full answer and defence and the complainant's or witness's right to privacy and equality. A series of factors is listed that the trial judge is directed to take into account in deciding whether the document should be produced to the court (s. 278.5(2))...
>
> 54 If the requirements of this first stage are met, the record will be ordered produced to the trial judge. At the second stage, the judge looks at the record in the absence of the parties (s. 278.6(1)), holds a hearing if necessary (s. 278.6(2)), and determines whether the record should be produced on the basis that it is "likely relevant to an issue at trial or to the competence of a witness to testify" and that its production is "necessary in the interests of justice" (s. 278.7). Again at this stage, the judge must consider the salutary and deleterious effects on the accused's right to make full answer and defence and on the right to privacy and equality of the complainant or witness, and is directed to "take into account" the factors set out at s. 278.5(2): s. 278.7(2). When ordering production, the judge may impose conditions on production: s. 278.7(3).

[6] In summary, the *Criminal Code* sets out a two-stage procedure: at the first stage, the trial judge determines whether to order that the record be produced for review by the judge (s 278.5). At the second stage, the question is whether, and to what extent, the record should be disclosed to the accused (s 278.7).

The First Stage

[7] Section 278.3 permits an accused to apply for production of a record "to the judge before whom the accused is to be, or is being, tried" (s. 278.3(1)). Pursuant to s. 278.3(3), the application must set out the particulars of the record and the name of the person with possession or control of the record (s. 278.3(3)(a)) and the grounds on which the accused claims that the record is likely relevant to an issue at trial or to the competence of a witness to testify (s. 278.3(3)(b)).

[8] Subsection 278.3(4) specifies various "assertions by the accused" that "are not sufficient on their own" to establish likely relevance or a witness's competence to 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;
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> (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.

[9] The judge may order production of the record to the Court for review where the three prerequisites in s. 278.5(1) are met:

> (a) the application was made in accordance with subsections 278.3(2) to (6);
>
> (b) the accused has established that the record is likely relevant to an issue at trial or to the competence of a witness to testify; and
>
> (c) the production of the record is necessary in the interests of justice.

[10] In this case, there appears to be no dispute that the application has been brought in accordance with ss. 278.3(2) to (6). This leaves the questions of likely relevance (the Applicant does not raise testimonial competence) and the interests of justice, pursuant to ss. 278.5(1)(b) and (c).

[11] As Justice Watt notes in his *Manual of Criminal Evidence*, "[m]ere assertions of relevance are not sufficient to meet the likely relevance standard of s. 278.5(1). An Applicant must be able to point to case-specific evidence or information to justify the assertion" (David Watt, *Watt's Manual of Criminal Evidence* (Westlaw online), at §24.03, citing R. v. D.W.L., 2001 NSCA 111.)

Therapeutic and Counselling Records

[12] ***Likely relevance.*** Doherty J.A., speaking for the Court, discussed the application of the "likely relevance" standard to therapeutic records in *R v Batte* (2000), 145 C.C.C. (3d) 449, 2000 CarswellOnt 2113 (Ont. C.A.):

> 72 I would hold that where confidential records are shown to contain statements made by a complainant to a therapist on matters potentially relevant to the complainant's credibility, those records will pass the likely relevance threshold only if there is some basis for concluding that the statements have some potential to provide the accused with some added information not already available to the defence or have some potential impeachment value. To suggest that all statements made by a complainant are likely relevant is to forget the distinction drawn by the majority in *O'Connor*, between relevance for the purposes of determining the Crown's disclosure obligation and relevance for the purposes of determining when confidential records in the possession of third parties should be produced to a judge. [Emphasis added.]
>
> 73 Although I am not testing the trial judge's ruling against the present statutory scheme, that scheme does provide some support for my interpretation of the "likely relevant" standard where the records are said to go to the credibility of the complainant. Section 278.3(4) provides in part:
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> 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 testify:
> . . . . .
> (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;... [Emphasis by Doherty J.A.]

[13] To a similar effect, and likewise speaking for the Court, Doherty J.A. said in *R. v. W.B.*, [2000] O.J. No. 2184:

> 70 The appellant's position with respect to the likely relevance of the records must come down to this. The records contained statements made by D.S.D. that referred to the alleged abuse and to matters affecting her credibility. Anything said by D.S.D. about the abuse or about a matter which could affect her credibility passes the likely relevance threshold, even absent any suggestion that the statements differ from or add anything to the complainant's statement and testimony at the preliminary hearing.
>
> 71 If the likely relevance bar is that low, it serves no purpose where the records relate to counselling or treatment connected to allegations of sexual abuse. It is impossible to imagine that such records would not contain references to the alleged abuse or matters that could affect the credibility of the complainants' allegation of abuse. In my view, the mere fact that a complainant has spoken to a counsellor or doctor about the abuse or matters touching on the abuse does not make a record of those conversations likely relevant to a fact in issue or to a complainant's credibility.
>
> 72 I would hold that where confidential records are shown to contain statements made by a complainant to a therapist on matters potentially relevant to the complainant's credibility, those records will pass the likely relevance threshold only if there is some basis for concluding that the statements have some potential to provide the accused with some added information not already available to the defence or have some potential impeachment value…

[14] It is clear that records relating to the complainant's medical, psychiatric, therapeutic, or counselling interest have a considerable privacy interest. Records of this kind have been described as very private in nature: *R. v. J.R.*, [2019] O.J. No. 2394, 2019 ONSC 2794, at para. 4.

[15] In *R. v. Martin*, 2010 NSSC 199, the accused sought production of therapeutic and counselling records after the complainant testified at the preliminary inquiry that she had discussed the alleged sexual assault in counselling sessions. She had gone

to the police after speaking to a counsellor. Kennedy C.J. ordered production for inspection on the basis of the complainant's evidence at the preliminary:

> [26] When one considers this testimony, it becomes clear that in the interests of justice this Court should review the materials in question particularly to the extent that the information speaks to:
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> 1. the symptomatology and management of the complaint's borderline personality disorder contemporaneous with the event in issue;
>
> 2. the appreciation by the complainant as to her actual participation and willingness to participate in sexual events involving John Martin; and,
>
> 3. the historical accuracy of the complainant's account of her encounter with John Martin on the date of the alleged offence.

[16] In *R. v. Williamson*, [2011] O.J. No. 5271, 2011 ONSC 6859, the complainant had discussed the alleged sexual offences with his psychiatrist. The complainant's credibility was a central issue. He had a criminal record involving dishonesty, had made partial disclosures to various people, and had testified about memory issues caused by his medications, as well as mental health issues. The trial judge held that these factors signaled "high probative value" and were case specific foundations for production.

[17] In *R. v. P.B.*, 2015 ONSC 7220, the complainant brought a complaint to the police at the age of 36, alleging sexual assaults by the accused when she was between the ages of two and 10. She testified at the preliminary that she had experienced dreams and flashbacks about the abuse, then began counselling, which brought up

additional memories. The accused sought production on the ground, *inter alia*, that the counselling process triggered or at least shaped the Complainant's recollection of the alleged abuse, and therefore the records were relevant to the credibility and reliability of her assertions. The trial judge said:

> [21] Significantly for this case, in *Batte* the Court of Appeal ruled that the trial judge should not have viewed the counselling records in issue, in part because there was no evidence that the counselling process either contributed to the complainant's decision to go to the police or that it "played any role in reviving, refreshing, or shaping the memory" of the complainant...
>
> [22] The case law also establishes that while the likely relevance threshold is a significant burden for the accused, it should not be interpreted as "onerous". The threshold is significant to screen out speculative and time-consuming production requests; however, the relevance threshold cannot be an onerous test to meet because accused persons cannot be required to demonstrate the specific use to which they might put information that they have not yet seen...

[18] The trial judge emphasized that there is an important difference between memories being disclosed *while* a complainant is undergoing counselling, and, on the other hand, memories emerging *because* of the counselling. The trial judge concluded:

> [28] The third and final exchange, however, is significant. The Complainant first confirms that since she began counselling, "more memories" have come back to her. She is then asked whether counselling helped her come to terms with what happened or with "remembering more things", and responds "yes". Accepting that the question is somewhat ambiguous – coming to terms with what happened is different from remembering it – when coupled with the previous answer it is reasonable to infer that, from her perspective, the counselling process played a role in her memory recovery. Given the wording in *Batte* (evidence that the counselling process played any role in "reviving, refreshing or shaping" the

> complainant's memory), I find this is sufficient to meet the threshold of likely relevance.
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> [29] The relevance of these records is further reinforced, in my view, by the anticipated expert evidence from the Crown regarding memory recall. This case is being tried before a jury, with the attendant risk that the triers of fact may be unduly distracted by scientific theory. Defence counsel's ability to challenge the factual foundation for that evidence is unfairly curtailed if he is denied access to therapeutic records that may have played a role in the memories being recalled.

[19] In *R. v. J.M.*, 2018 ABQB 937, the Applicant sought production of therapeutic records and reports in the possession of the Child, Adolescent and Family Health organization ("CASA"). The complainant was 17 years old, and the alleged offences had occurred when she was between 5 and 11. The trial judge stated that:

> [21] The reliability and credibility of the complainant will be central trial issues. MB's preliminary inquiry evidence concerning disclosure as amplified by her Zebra Centre interviews raises a question about potential influence of the treating therapist upon her recollection. It is significant that MB's first statement to police occurred <u>after</u> divulging allegations to CASA and Zebra Centre staff. Under the circumstances, the credibility and reliability of MB's memory is potentially impacted. [emphasis in original.]

[20] In *R. v. J.R.*, [2019] O.J. No. 2394, 2019 ONSC 2794, the Court ordered production of such documents where there were differences between the complainant's police statement and preliminary inquiry evidence, and where she had attended the relevant therapy sessions in the interim. The Applicant's position was that since the complainant had testified that the therapists had helped her to remember more than she disclosed in her original statement, that the notes are

relevant to the reliability of the complainant's memory. His defence was that any sexual contact which took place was in the context of trying to educate the complainant because she was becoming over sexualized. The trial judge concluded that given the Applicant's stated defence strategy, he was satisfied that the counselling records were likely relevant to an issue at trial.

[21] The Applicant cites *R. v. G.J.S.*, 2007 ABQB 757, [2007] A.J. No. 1508. In that case, the accused was charged with a historical sexual assault. He applied for production of mental health records of the complainant, which, based on the preliminary inquiry evidence, included information provided by the complainant to a mental health worker about what happened to her as a girl. The complainant had testified that "the last time I talked to [Ms. Fisher, the mental health worker] (about the incident) was just before I came here on Thursday" and that "Ms. Fisher was 'someone she confided in before (she) went to the police'". The trial judge said:

> 25 Because this is a case involving an incident that is alleged to have occurred some twenty years ago, and because the complainant provided details of the incident to her counsellor several years or more before going to the police, I conclude that the threshold for likely relevance has been met. This is not a case of stereotypical speculation. Instead, it is a case where prior statements describing the circumstances of the alleged offence exist. Not all such statements will satisfy the threshold requirements, but where statements are made years closer to the events in question than statements which have been made to investigating authorities, it is very difficult to conceive that such statements are not likely relevant to issues of credibility and the reliability of the later statements.
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> 26 These are serious charges. There is clear evidence that there are statements relating to the incidents themselves that pre-date statements given to the police. It

> is necessary in the interests of justice that these factual statements at least be reviewed by me so that I can more accurately balance their relevance, the complainant's privacy interests, and the accused's rights.

[22] The trial judge found likely relevance on the ground that the credibility and reliability of the complainant would be issues at trial. To the extent that *G.J.S.* stands for the proposition that any statement made by a complainant to a counsellor about a historical incident prior to going to the police will meet the likely relevance standard, I think this is inconsistent with the statutory requirements and with the caselaw. With respect, it is not clear what "case specific" information was available in *G.J.S.* beyond the fact that the complainant had spoken to a mental health worker about the alleged event.

[23] The Applicant says the therapeutic records are likely relevant to the complainant's credibility and reliability. He further submits that this issue is amplified by the significant passage of time since the alleged assault. Further, there is a possibility that the complainant may have made statements to her various counsellors that were inconsistent with the statements made to police and to the Court.

[24] There is clearly evidence that the complainant discussed the alleged assault with therapists and counsellors. When asked on cross-examination at the preliminary inquiry, "[d]id you block the incident or the alleged assault regarding Bernie

Chisholm until you were 32 years old?", the complainant said, "I blocked it and then I started having nightmares ... so that's when I sought counselling". There are several statements in her evidence to this effect, all suggesting that she sought counselling when she began having nightmares. On cross-examination she said she had started having nightmares and "it was all coming back..." She testified that she first consulted her family doctor in Fort McMurray, Dr. Jamie MacKay, who referred her for counselling to [….] Hospital. She said she had seen multiple counsellors, and, when asked if they took notes, she said "I would assume they did". The Applicant has therefore pointed to various statements indicating that the complainant discussed the alleged assault with various counsellors.

[25] As the Court said in *Batte*, "the mere fact that a complainant has spoken to a counsellor or doctor about the abuse or matters touching on the abuse does not make a record of those conversations likely relevant to a fact in issue or to a complainant's credibility" (para. 71). Such records will only be likely relevant "if there is some basis for concluding that the statements have some potential to provide the accused with some added information not already available to the defence or have some potential impeachment value" (para. 72). The Court added:

> [76] The requirement that an accused be able to show that the statements contained in the record have some potential to provide added information to the accused or some potential to impeach the credibility of the complainant is not an onerous one.

> For example, in this case, the appellant had the initial statement given to the police by D.S.D. before she commenced therapy. He also had a transcript of her lengthy examination-in-chief and cross-examination at the preliminary inquiry taken after she commenced therapy. Had counsel shown material differences between the initial statement and the preliminary inquiry testimony, these differences coupled with the fact that the complainant spoke to a therapist about these matters between the giving of the statement and giving any evidence at the preliminary inquiry may have established that statements she made to the therapist touching on matters relevant to her credibility had potential impeachment value and were, therefore, likely relevant. Similarly, had the appellant been able to produce evidence suggesting a connection between the evidence given by the complainant at the preliminary inquiry and the sessions with her therapist, this would also have established potential impeachment value.
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> [77] It will not, however, suffice to demonstrate no more than that the record contained a statement referable to a subject matter which would be relevant to the complainant's credibility. The mere fact that a witness has said something in the past about a subject matter on which the witness may properly be cross-examined at trial does not give that prior statement any relevance. It gains relevance only if it is admissible in its own right or has some impeachment value. In my view, the mere fact that a complainant said something about a matter which could be the subject of cross-examination at trial, does not raise a reasonable possibility that the complainant's statement will have some probative value in the assessment of her credibility. [Emphasis added.]

[26] The Applicant does not point to any indication in the preliminary inquiry transcript that the counselling process precipitated or contributed to the complainant's decision to go to the police, and no evidence that the counselling process played any role in reviving, refreshing, or shaping the complainant's memory. While the complainant used the word "blocked", the Applicant has not suggested that the evidence indicates that she did not remember the incident and that the memory was "unlocked" through therapy so that she remembered it. Her evidence was that she was prompted to go to counselling because she was having

nightmares and flashbacks. At one point she said "[i]t was always there. It was always in front of me. I just didn't know how to deal with it." She also stated that the nightmares did not begin when she was 32, but only got worse. It is also worth noting that, in the immediate context of her cross-examination, the word "block" was in fact put to her by counsel. She had used the same word in her police statement, but the significance appears consistent with that in her preliminary inquiry evidence.

[27] In short, there is no evidence suggesting any of the factors that typically support a finding of likely relevance of records of this kind exist here. There is no suggestion that the counselling had direct effect on shaping her memories, or prompting her to go to the police (see, e.g. *P.B.*, *J.M.*, and *J.R.*); no suggestion that memory or mental health issues may have an unusual effect on the complainant's credibility or reliability (see, e.g., *Martin* and *Williamson*); and no suggestion that the records may help challenge Crown expert evidence (as in *P.B.*). The likely relevance of the record is asserted simply on the basis that it exists, and that substantial time has passed since the alleged event. This is not sufficient to establish likely relevance.

Child Protection Records

[28] The Applicant notes that child protection agencies have independent legal obligations to investigate allegations of child abuse, and says there is a diminished privacy interest in such records. In her preliminary inquiry evidence, the complainant stated that she had been placed in foster care at the age of eight, and identified her social worker as Bill Wesley. She said she had disclosed the incident to Mr. Wesley when she was 18 years old. In her police statement, she indicated that Mr. Wesley was deceased.

[29] The Applicant cites *R. v. N.R.H.*, [2008] N.S.J. No. 321, 2008 NSPC 38, where the accused, who was the complainant's grandfather, had in his possession a psychological assessment, relating to one such investigation undertaken in 1998. At that time, it was alleged that the brother of S.M.M.-S.'s estranged husband had committed a sexual assault on S.L. He also had access to a video-taped statement that was taken in November 2006. In that statement, S.L. referred to reports having been made to the CAS, by her mother, regarding interference or alleged sexual assault by a former boyfriend. With respect to likely relevance, Campbell Prov. Ct. J. (as he then was) found that the accused was not simply relying on the bare assertions listed in s. 278.3(4). Rather, the psychological assessment report in the accused's possession provided specific grounds for finding likely relevance:

> 27 The report comments on the sexualized behaviours of the child and concludes that she was not well adjusted at that point in time. It goes on to state that there would be concerns about making any specific conclusion regarding sexual abuse and especially relative to naming an alleged perpetrator.
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> 28 While the report relates to a time some years before the incidents forming the subject matter of these charges are alleged to have taken place, it does deal specifically with the same kind of allegation and deals specifically with factors bearing on whether the allegations could at that time be substantiated. Rather than being a matter of speculation, the accused in this case has had access to a report which indicates that it is likely that the CAS files are relevant with respect at least to the 1998 investigation.
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> 29 At page 36 of the report, it is noted that the CAS had confirmed that the Agency had been contacted on more than one occasion by S.M.M.-S. After reviewing the information, the CAS was noted as having concluded that there was not sufficient information to warrant an investigation. The report states that Arden White, the CAS case worker, noted that Ms. M.-S. had taken the child to the CAS before taking her to the doctor.
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> 30 That June 5, 1998 Psychological Assessment of Custody and Access Report clearly indicates that the issue of sexual abuse had been raised at that time. It further makes it clear that the matter was referred to the CAS. The reasons why the CAS would have chosen at that time not to investigate the matter further could be important to the case for the accused. It is not a matter of speculation, but of credibly based probability.
>
> 31 One complaint is referenced in the report. Another complaint to the CAS is referenced in the videotaped statement of S.L. In light of the earlier allegation, which is likely to contain relevant material, another similar allegation, against another individual is also likely to give rise to a file that has relevant material.

[30] The Applicant submits that the complainant's disclosure when she was 18 years old was substantially closer in time to the alleged incident than her 2018 police statement, the 2019 preliminary, or the scheduled trial. According to the Applicant, such a statement would be relevant, as would any information concerning an investigation into the allegations.

[31] The complainant maintains that the request for production of her child protection file is unnecessarily broad. Her evidence at the preliminary was that she entered foster care at the age of eight, and that she did not spend her entire time in foster care in the home in which she encountered the Applicant. She submits that parts of the file that pre-date the alleged events involving the Applicant – when she was 14 or 15 years old – are not likely relevant. Further, she says, portions of the file dealing with the time between the alleged assault and her disclosure of it to a social worker when she was 18 likewise have no likely relevance.

[32] In my view there is no equivalent contextualizing evidence in this case that would give the child protection file likely relevance beyond the fact that it exists. Moreover, in her preliminary inquiry evidence the complainant maintained, having reviewed the records, that no reference to the incident appears there. That being the case, it is difficult to see how likely relevance would be established.

Interests of Justice

[33] The prerequisite of likely relevance has not been established in respect of therapeutic records and community protection records. On this basis, the application for production of these records fails. In any event, I am not convinced the Applicant

has established that the production for inspection of these records is necessary in the interests of justice considering the factors set out in Section 278.5(2).

[34] The complainant argues that the therapeutic records have limited probative value, which is outweighed for the potential for prejudice to her personal dignity and privacy. Further, ordering the records produced for inspection would negatively impact society's interest in encouraging reporting of sexual offences. These interests would be particularly impacted if production could be ordered on the sole basis that she had discussed the alleged incident with several counsellors. The Applicant has made little specific argument on this branch of the analysis but appears to take the position generally that records will be probative of the complainant's credibility and reliability and are necessary or important to the Applicant's right to make full answer and defence. Given the high expectation of privacy connected to records of this kind, the Applicant fails to establish that production for inspection is necessary in the interests of justice.

[35] In terms of the child protection records, the Applicant argues in a general way that there is a reduced expectation of privacy in child protection records. While it may be the case that the expectation of privacy does not rise to the level of therapeutic and counselling records, as the Crown points out, the expectation of

privacy nevertheless remains high. This point was made in *R. v. Medwid*, [2008] O.J. No. 4614 (Ont. Sup. Ct. J.):

> 21 In particular, with respect to records held by the Children's Aid Society, both the Crown and counsel for Mr. D.C.M. stressed that the court should take careful consideration of the reality that applications involving CAS records tend to place an already marginalized group at a further disadvantage by making them the subject of additional scrutiny based solely on the fact that their lives have been documented by reason of their involvement with social agencies. As well, therapeutic records developed in the course of contact with social agencies hold a particular privacy interest because they are characterized by an inherent assumption of confidentiality and trust, such that revealing the records bears the risk of impairing the dignity of the subject person.

[36] The evidence and submissions provide little basis on which to assess the probative value of the child protection records. The only evidence on the point is the complainant's evidence that the records make no reference to her alleged disclosure to the social worker. As such, it is difficult to see how an assessment of the interests of justice would require the displacement of the complainant's expectation of privacy in the record.

Affidavit of Documents

[37] At the hearing, the Applicant made an additional request for production for inspection of an affidavit of documents prepared by MacGillivray Law relating to a civil action brought by the complainant against the Province. This particular record was not referenced in the Notice of Application served on MacGillivray Law. Based

on the Notice that was served, MacGillivray Law elected not to appear at the hearing. Clearly this request does not form part of the application before the Court. In any event, there was no clear indication of what documents might be included in the affidavit. As such, it is unclear where the specific requirements of likely relevance would be found. This request is essentially a fishing expedition.

[38] As a result, the Application for Third Party Records relating to Community Services child protection records and therapy and counselling records is dismissed. Based on the consent of the complainant, the portions of her book/manuscript relating to the subject matter of the charges shall be produced for inspection by the Court.

Scaravelli, J.