SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. D. (W.C.)*, 2020 NSSC 391

Date: 20201210
Docket: CR Ant No. 496032
Registry: Antigonish

Between:

Her Majesty the Queen

v.

W.C.D.

DECISION - *VOIR DIRE* 1 - *IN CAMERA*
Section 278.3 *Criminal Code* Application, Stage One

Publication Ban: *Criminal Code* ss. 486.4 & 486.5 – any information that will identify the Complainant, victim or witness shall not be published in any document or broadcast or transmitted in any way. No end date for the ban stipulated in these sections.

Judge:	The Honourable Justice James L. Chipman
Heard:	December 4, 2020, in Antigonish, Nova Scotia
Written Decision: (Counsel Only)	December 10, 2020
Redacted Decision:	February 4, 2021
Counsel:	Jonathan C. Gavel, Crown Counsel Stanley W. MacDonald, Q.C. and J. Allan F. MacDonald, Defence Counsel Carbo Kwan, Complainant Counsel Kelly E. McMillan and Melanie T. Petrunia, Counsel for [redacted] Sexual Assault Services Association
Counsel Not Appearing:	Lesley M.W. Sawers, Counsel for Nova Scotia Health Authority Sheldon A. Choo, Counsel for Minister of Community Services Ashley McClelland, Counsel for [redacted] Health Services Leisa T. MacIntosh, Counsel for Complainant/Plaintiff

By the Court:

OVERVIEW:

[1] The Applicant, WCD (the "Applicant"), is charged with attempted rape and indecent assault of [redacted] (the "Complainant") pursuant to (now repealed) *Criminal Code* ss. 145 and 159, respectively. It is alleged that the offences occurred between January 1, 1975 and January 1, 1980 in [redacted], Nova Scotia. A five day jury trial is scheduled to commence February 1, 2021.

[2] On December 4, 2020 upon reading the written submissions and hearing oral argument, I granted the Stage One application and ordered that the following records be produced for my review on or before December 11, 2020:

> 1. The manuscript identified as "[redacted]", in the possession of the Public Prosecution Service of Nova Scotia;
>
> 2. Records in the possession of the Minister of Community Services pertaining to [redacted] for the period from January 1, 1975 to January 31, 1980, inclusive;
>
> 3. Counselling records pertaining to [redacted] in the possession or control of the [redacted] for the period from January 1, 1989 to December 31, 1991, inclusive;
>
> 4. Counselling records pertaining to [redacted] in the possession or control of the [redacted];
>
> 5. Counselling records pertaining to [redacted] in the possession or control of the [redacted];

I indicated my written reasons would follow. These are my reasons.

BACKGROUND:

[3] The Applicant made application in accordance with s. 278.3 of the *Criminal Code* for:

- All records and materials in the possession or control of the [redacted], [redacted], Nova Scotia, [redacted], Nova Scotia, and/or MacGillivray Injury

and Insurance Law Inc. ("MacGillivray Law") related to mental health counselling for [redacted];

- All records and materials in possession or control of the Minister of Community Services or Department of Community Services Nova Scotia and/or MacGillivray Law relating to [redacted]' Child Protection file;
- All records and materials in the possession or control of Nova Scotia Public Prosecution Service and/or MacGillivray Law relating to the book/manuscript authored by [redacted] titled, "[redacted]".

[4] Filed on October 30, 2020 with the Notice of Application is the affidavit of one of the Applicant's lawyers, Allan MacDonald. Mr. MacDonald confirms that he attended the January 27, 2020 Preliminary Inquiry and reviewed the Preliminary Inquiry Transcript. Attached to his affidavit Mr. MacDonald provides various excerpts from the Transcript (exhibits A, B, C, D and F) as well as the Complainant's July 6, 2018 police statement (exhibit E). Having reviewed the exhibits in their entirety, I find Mr. MacDonald's affidavit to be accurate and reproduce these paragraphs as background to this decision:

…

8. During the preliminary inquiry, the Complainant stated that she told her social worker, [redacted], that Mr. D was sexually abusing her.

9. The Complainant alleges that she told [redacted] exactly what was happening in the home. She testified that she told [redacted] during a meeting in his office on [redacted].

10. The Complainant testified that she told [redacted] about all of the alleged sexual acts that form the current charges against Mr. D. She also testified that [redacted] was taking notes on a note pad while she spoke.

11. The Complainant testified that she obtained the Department of Community Services records through a FOIPOP application she filed approximately ten years ago.

12. The Complainant testified that her counsel at MacGillivray Law currently possesses a copy of the Department of Community Services records.

13. The Complainant testified that the Department of Community Services records do not contain reference to any sexual abuse perpetrated on the Complainant by Mr. D.

14. The Complainant also testified that she could not remember if Mr. D's name or initials appeared in the Department of Community Services Records.

…

16. The Complainant wrote a book or manuscript, titled "[redacted]", approximately 13 years ago. The book/manuscript references Mr. D by the initials W.C.

17. The Complainant testified that she turned over a copy of the book/manuscript to the Crown because she referenced it in her statement to police.

18. The Complainant testified that the book/manuscript contains some level of detail pertaining to the Complainant allegedly being sexually abused by Mr. D. The Complainant also testified that she may publish the book/manuscript in the future.

…

20. The Complainant attended counselling sessions in the late 1980's after the death of her daughter. The Complainant testified that her family doctor, [redacted], referred her to a psychologist employed with [redacted] in [redacted] to continue her counselling.

21. The Complainant testified that she mentioned Mr. D's name during counselling sessions at [redacted].

22. The Complainant testified that she signed a release for her [redacted] counselling records for MacGillivray Law.

…

24. The Complainant testified that she took counselling through both the [redacted] in [redacted], Nova Scotia, beginning approximately ten years ago.

25. The Complainant signed separate releases for both her [redacted]. Those records are currently held by counsel for the Complainant At MacGillivray Law.

26. The Complainant testified that she described what allegedly occurred between herself and Mr. D to counsellors at both organizations. She testified that she assumes both sets of records will include reference to Mr. D.

…

29. During her interview with Cst. Ramaglia of the [redacted] RCMP on July 6, 2018, the Complainant alleged that Mr. D forced her to have intercourse with him approximately ten times.

30. During the preliminary inquiry, the Complainant denied ever having been penetrated by Mr. D, saying instead that Mr. D would rub his penis on the outside of her vagina or try to penetrate her. She estimated that this behaviour happened approximately three times.

[5] To the above background I would add additional information obtained from paragraphs 11 and 14 of the Complainant's Notice of Action (civil lawsuit brought by the Complainant, represented by MacGillivray Law against the Province seeking monetary compensation) filed November 15, 2019, where it is alleged:

> 11. The Plaintiff states that beginning in approximately 1976 and continuing until approximately 1979, she was exposed to sexual molestation by her foster brother, W.D. Jr. The abusive sexual acts included, but were not limited to: fondling, including touching her genitals and breasts under her clothing; attempted vaginal intercourse; ejaculation on her body; and anal intercourse. These assaults and rapes occurred on approximately fifty to sixty occasions and continued until she left the foster home at age 18.
>
> 14. In or around 1977, following an incident where the Plaintiff ran away from the foster home, she explained to her long-term social worker [redacted] that she was running away from the home due to the sexual and emotional abuse that was being inflicted upon her. She made a full and detailed disclosure to [redacted] of the sexual abuse that she had been enduring in the foster home, including the names of the people in the foster home who were inflicting the abuse.

LAW:

[6] In *R. v. E.W.*, 2020 NSSC 191 Justice Arnold provided helpful legal references – which I adopt – with respect to a Stage One application at paras 7 – 13:

> 7 The *Criminal Code* sets out a comprehensive process for an accused who wishes to obtain records held by third parties that relate to a Complainant in a criminal prosecution. Section 278.2(1) states:
>
> > 278.2 (1) Except in accordance with sections 278.3 to 278.91, no record relating to a Complainant or a witness shall be produced to an accused in any proceedings in respect of any of the following offences or in any proceedings in respect of two or more offences at least one of which is any of the following offences:
> >
> > (a) an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3; or
> >
> > (b) any offence under this Act, as it read at any time before the day on which this paragraph comes into force, if the conduct alleged involves a violation of the Complainant's sexual integrity and that conduct would be an offence referred to in paragraph (a) if it occurred on or after that day.

8 Section 278.3(1) requires a production application to be made before the trial judge. The hearing is held *in camera* (s. 278.4). As for records in the possession or control of the accused, s. 278.92(1) states:

> 278.92 (1) Except in accordance with this section, no record relating to a Complainant that is in the possession or control of the accused - and which the accused intends to adduce - shall be admitted in evidence in any proceedings in respect of any of the following offences or in any proceedings in respect of two or more offences at least one of which is any of the following offences:
>
> (a) an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3; or
>
> (b) any offence under this Act, as it read from time to time before the day on which this paragraph comes into force, if the conduct alleged would be an offence referred to in paragraph (a) if it occurred on or after that day.

9 Section 278.3(4) identifies various assertions that do not constitute sufficient grounds on their own for production of third party records:

> (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 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.

10 In setting out the overall test for deciding whether the records should be produced, s. 278.5 states:

> 278.5 (1) The judge may order the person who has possession or control of the record to produce the record or part of the record to the court for review by the judge if, after the hearing referred to in subsection 278.4(1), the judge is satisfied that
>
> (a) the application was made in accordance with subsections 278.3(2) to (6); and
>
> (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.
>
> Factors to be considered
>
> (2) In determining whether to order the production of the record or part of the record for review pursuant to subsection (1), the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy, personal security and equality of the Complainant or witness, as the case may be, and of any other person to whom the record relates. In particular, the judge shall take the following factors into account:
>
> (a) the extent to which the record is necessary for the accused to make a full answer and defence;
>
> (b) the probative value of the record;
>
> (c) the nature and extent of the reasonable expectation of privacy with respect to the record;
>
> (d) whether production of the record is based on a discriminatory belief or bias;
>
> (e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;

(f) society's interest in encouraging the reporting of sexual offences;

(g) society's interest in encouraging the obtaining of treatment by Complainants of sexual offences; and

(h) the effect of the determination on the integrity of the trial process.

11 In *R. v. Mills*, [1999] 2 S.C.R. 668, McLachlin J. (as she then was) and Iacobucci J., for the majority, discussed production of third party records:

> 45 In the context of ordering production of records that are in the hands of third parties, Lamer C.J. and Sopinka J. outlined a two-stage process. At the first stage, the issue is whether the document sought by the accused ought to be produced to the judge; at the second stage, the trial judge must balance the competing interests to decide whether to order production to the accused. At the first stage, the onus is on the accused to establish that the information in question is "likely to be relevant" (para. 19 (emphasis in original)). Unlike in the Crown disclosure context, where relevance is understood to mean "may be useful to the defence", the threshold of likely relevance in this context requires that the presiding judge be satisfied "that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify" (para. 22 (emphasis in original)). This shift in onus and the higher threshold, as compared to when records are in the possession of the Crown, was necessitated by the fact that the information in question is not part of the state's "case to meet", the state has not been given access to it, and third parties are under no obligation to assist the defence.
>
> 46 Lamer C.J. and Sopinka J. held that the threshold of likely relevance at this first stage is not a significant or onerous burden. It is meant to prevent requests for production that are "speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming" (para. 24). Although Lamer C.J. and Sopinka J. disagreed with L'Heureux-Dubé J. that therapeutic records are rarely relevant to the accused, they declined to set out "categories of relevance" (para. 27). [Emphasis in original.]

12 In *R. v. McNeil*, 2009 SCC 3, Charron J., for the court, discussed the test for likely relevance:

> 29 It is important to repeat here, as this Court emphasized in O'Connor, that while the likely relevance threshold is "a significant burden, it should not be interpreted as an onerous burden upon the accused" (para. 24). On the one hand, the likely relevance threshold is "significant" because the court must play a meaningful role in screening applications "to prevent the defence from engaging in 'speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming' requests for production" (*O'Connor*, at para. 24, quoting from *R. v. Chaplin*, [1995] 1 S.C.R. 727, at para. 32). The

> importance of preventing unnecessary applications for production from consuming scarce judicial resources cannot be overstated; however, the undue protraction of criminal proceedings remains a pressing concern, more than a decade after *O'Connor*. On the other hand, the relevance threshold should not, and indeed cannot, be an onerous test to meet because accused persons cannot be required, as a condition to accessing information that may assist in making full answer and defence, "to demonstrate the specific use to which they might put information which they have not even seen" (*O'Connor*, at para. 25, quoting from *R. v. Durette*, [1994] 1 S.C.R. 469, at p. 499).

13 Third party records applications therefore involve a two-stage process. As was noted by Scaravelli J. in *R. v. R.E.W.*, 2009 NSSC 286:

> [3] An application of this nature involves a two-stage process. The trial judge hearing the application may order that the records be produced to the Court if the accused has established that they are likely relevant and that production is necessary in the interest of justice pursuant to Section 278.5(1) of the Code.
>
> [4] In making this determination the Court must consider the salutary and deleterious effects of determination of the accused's right to make full answer and defence, and on the right to privacy and equality of the Complainant to whom the record relates as set out in Section 278.5(2).
>
> [5] In particular, the Judge is required to take into account the extent to which the record is necessary for the accused to make a full answer and defence; the probative value of the record; the nature and extent of the reasonable expectation of privacy with respect to the record; whether production of the record is based on a discriminatory belief or bias; the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates; society's interest in encouraging the reporting of sexual offences; society's interest in encouraging the obtaining of treatment by Complainants of sexual offences; and the effect of the determination on the integrity of the trial process.

STAGE ONE:

[7] As confirmed at the outset of the hearing, the application is in accordance with the *Criminal Code* in respect of the sought after records. The Applicant has complied with the procedural requirements in that the Notice of Application was made in accordance with the statute. Allan MacDonald's affidavit was filed in support along with a brief and authorities. Applicant's counsel also filed on December 2, 2020 a supplemental brief, further police statement excerpt and a copy

of the Complainant's civil lawsuit (referenced at para. 5, *infra*) filed November 15, 2019. On December 4, Applicant's counsel filed an additional letter.

[8] By way of response, the Crown filed their factum and authorities on November 27, 2020. Complainant's counsel filed her brief on December 3, 2020 as did counsel for [redacted] Sexual Assault Services Association (the Sexual Assault Services Association), along with their authorities. Counsel for the other record holders filed correspondence collectively essentially declining to take a position on the application. In the result, the Court heard oral submissions from the parties (counsel appeared in person), Complainant and the Sexual Assault Services Association (counsel appeared via video link).

POSITIONS OF THE PARTIES:

Applicant

[9] The Applicant referred to the relevant *Criminal Code* provisions as well as the seminal Supreme Court of Canada decisions referenced herein. He also relied on *R. v. S.(G.J.)*, 2007 ABQB 757, *R. v. Martin*, 2010 NSSC 199, *R. v. Williamson*, 2011 ONSC 6859, *R. v. J.M.*, 2018 ABQB 937, and *R. v. J.P.*, 2019 ONCJ 808 as analogous examples of Canadian superior courts ordering Stage One production. For example, in *R. v. S. (G.J.)* the accused was charged with a historical sexual assault. The complainant spoke to a mental health worker about "what had happened to (her) as a young girl" prior to going to the police. The court noted that a significant amount of time had passed between the time that the complainant spoke to the mental health worker and when she went to police. There was no evidence of any prior inconsistent statement before the court.

[10] It was ordered that the records be produced for review because they related to the credibility and reliability of the information about the alleged events, and because the records were made years closer to the events in question.

[11] The rationale for ordering Stage One production in the above-referenced cases is behind the Applicant's submission. That is to say, the Applicant says that he has demonstrated through the Complainant's police statement, Preliminary Inquiry testimony and civil law suit that she has provided inconsistent evidence. The Applicant therefor submits that the requested documents are required to further explore these demonstrated inconsistencies.

Crown

[12] The Crown emphasizes that the onus is on the Applicant to establish that the information sought in the third party records is "likely relevant to an issue at trial or the competence of a witness to testify". The Crown goes on to submit that there are high privacy interests in the types of records being sought on this application. Specifically, the Crown argues as follows at paras. 50, 52 and 55 of their brief:

> 50. With the exception of the manuscript, all of the records being sought suffer from the reliability issues noted by the Supreme Court of Canada at paragraph 136 of *Mills*. While these records may include some recording o the accounts of the acts complained of provided by [redacted], they have not been reviewed for accuracy by [redacted], and presumably were not intended to be verbatim recordings in the first instance. Importantly, the records only provide recordings made by persons *other than [redacted]*. Without information from the creator of the record respecting its accuracy, any suggestion that such records are relevant to [redacted'] memory or credibility is merely speculative; it presumes that the records provide an accurate reproduction of [redacted] account at the time of the creation of the record. However, any discrepancy between the accounts provided in the records and in [redacted] other statements may have more bearing on the accuracy of the note-taker than the credibility of [redacted]. Consequently, there is a risk that the use of such records may tend to distort the fact-finding function of the Court. [emphasis in original]
>
> …
>
> 52. The manuscript "[redacted]" is not a work written specifically about the incidents underlying the offences before the Court. In many ways, it is similar to a diary. It is an autobiographical work, and unsurprisingly, includes a biographical core of personal information. As per *Plant* (as quoted in *Mills* as paragraph 81), a very high privacy interest attaches to this record. That [redacted] has not ruled out publishing this manuscript does nothing to lessen that privacy interest; to the contrary, her decision not to publish the manuscript confirms her desire to maintain privacy with respect to the record.
>
> …
>
> 55. The Department of Community Services records are analogous to Children's Aid Society records. Contrary to the assertions of the Defence, a high degree of privacy interest attaches to such records – not a diminished one.

[13] Accordingly, the Crown submits that the impugned records should be considered to have a high degree of privacy and ought not be produced for the Court's review.

Complainant

[14] The Complainant opposes the application with respect to mental health counselling records on the basis that the Applicant has not satisfied the likely relevance of those records to an issue at trial and that production is necessary in the interests of justice.

[15] The Complainant submits that there is no evidence that the counselling process precipitated or contributed to her decision to go to the police. Furthermore, she submits that there is no evidence that the counselling process played any role in reviving, refreshing or shaping the memories of the Complainant. In *R. v. Batte* (2000), 49 O.R. (ed) 321 (C.A.) the Ontario Court of Appeal addressed this specific position when taken by an applicant:

> [70] 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. 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.

[16] *Batte* goes on to articulate that likely relevance can be met in relation to therapeutic and counselling records when the accused can show some “case specific

evidence or information" to justify the assertion that the records is relevant to an issue at trial.

[17] The Complainant submits when the reasons articulated in *Batte* are applied to the case at bar, the Applicant has not demonstrated the likely relevance of the counselling records.

[18] The Complainant argues that the requested mental health counselling records should be kept confidential. At para. 24 of her brief she states:

> It is submitted that the privacy rights of the Complainant should favour the application to be dismissed when the Defence's application is seeking records that attracts a high degree of privacy for limited probative value.

[19] As for the Department of Community Services records, the Complainant asserts the request for the entire child protection file is unnecessarily broad in scope. Further, it is submitted that the cited portions offer no real difference than the account as provided by the Complainant in her preliminary inquiry testimony.

[20] With respect to the "[redacted]" manuscript, the Complainant concedes likely relevance for her unpublished book that she wrote approximately eleven years ago. In her submissions, the Complainant's lawyer states that the book documents significant events in the Complainant's life including the incident involving the Applicant that forms the allegations before this Court.

The Sexual Assault Services Association

[21] The Sexual Assault Services Association opposes the application submitting that the Applicant has not met his burden to establish the likely relevance of any therapeutic records in the possession of the Sexual Assault Services Association, or that production of such records would be in the interests of justice. In particular, they say that to permit review of the Sexual Assault Services Association's records would undermine Parliament's objective of encouraging survivors of sexualized violence to seek necessary treatment.

[22] The Sexual Assault Services Association submits that the application is a "fishing expedition" which does not meet the threshold requirements for production of their records. In particular, they argue that the evidence offered in support of the application does not establish the "likely relevance" of the records in order to satisfy the first stage of the *Mills* test.

[23] In the alternative, the Sexual Assault Services Association submits that if the Court finds that the threshold of "likely relevance" has been established, it is not in the interest of justice to order production of the records. The Sexual Assault Services Association submits that the Court ought to discourage defence counsel from making broad scope demands for records against organizations which provide services to survivors of sexual assault in Nova Scotia, as such applications are likely to disrupt essential therapeutic relationships and deter survivors from seeking treatment.

[24] Even if the Court finds that the requested records are likely relevant to an issue at trial, the Sexual Assault Services Association says they should not be produced. In this regard, the Sexual Assault Services Association submits that an order for production of its records risks undermining the trust inherent in its therapeutic relationships and would deter survivors of sexualized violence from seeking necessary treatment, contrary to the purposes of ss. 278.1-278.91 of the *Criminal Code*.

ANALYSIS:

[25] Returning to Justice Arnold's decision in *R. v. E.W.*, he carefully reviewed the Stage One evidentiary requirement as set out by the Ontario and Nova Scotia Courts of Appeal at paras. 19 – 21:

> 19 In *R. v. Batte* (2000), 145 C.C.C. (3d) 449, [2000] O.J. No. 2184 (Ont. C.A.), the court explained the evidentiary requirement on an applicant to be successful at Stage One:
>
> > 68 There was no evidence that the records had any direct relevance to the question of whether the appellant committed the acts alleged against him. By that I mean, there was no evidence that anything in the records would be admissible as a free-standing piece of evidence going to the question of whether the abuse occurred. The potential relevance or evidentiary value of the records rested in their potential to refresh the memory of D.S.D. or impeach her credibility. Clearly, Ms. Neumin's impressions of the "subtext" of the conversations and her interpretation of what D.S.D. said or meant had no relevance.
> >
> > 69 There was also no evidence that the counselling process precipitated or contributed to D.S.D.'s decision to go to the police. The evidence was to the contrary. D.S.D. went to the police and gave them a statement some five months before she began counselling. Furthermore, there is no evidence that the counselling process played any role in reviving, refreshing or shaping the memory of D.S.D. Finally, there is no evidence that D.S.D. suffered from any emotional or mental problem which could have any impact on her

> reliability or veracity, and the nature of the allegations themselves did not suggest any such problems.
>
> 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. 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.

20 Similarly, in *R. v. D.W.L.*, 2001 NSCA 111, dealing with an application for the production and review of a Complainant's diary, the court said:

> 23 It is clear from s. 278.5(1) of the Code that the judge may order that the diaries be produced to the court for review if the judge is satisfied that the diaries are "likely relevant" to an issue at trial or to the competence of a witness to testify. The onus is on the applicant to establish likely relevance.
>
> 24 Further, an assertion that the diaries exist, and an assertion as to what those diaries may disclose, are not sufficient on their own to establish that the diaries are likely relevant to an issue at trial or to the competence of a witness to testify.

21 In adopting the reasoning in *Batte*, Flinn J.A. said:

> 26 This test was followed by the Ontario Court of Appeal in *R. v. Batte*, [2000], 49 O.R. (3d) 321. While the case fell to be decided on common-law principles (because the matter was heard by the Motions Court before the enactment of s. 278 of the Code) Justice Doherty noted that the applicable law in respect of likely relevance had not changed. Writing for the unanimous court, Justice Doherty said at para. 75:
>
> The determination of likely relevance under the common law scheme requires the same approach. The mere assertion that a record is relevant to credibility is not enough. An accused must point to some "case specific evidence or information" to justify that assertion. In my view, an accused must be able to point to something in the record adduced on the motion that suggests that the records contain information which is not already available to the defence or has potential impeachment value.

I have considered the above principles in arriving at my Stage One decision.

[26] The allegations against the Applicant are historical; they relate to events that took place over thirty-five years ago. The case at bar features similar circumstances as those in *S.(G.J.)* and the other cases cited by the Applicant. Accordingly, I am of the view that key trial issues will be the credibility of the Complainant and the reliability of her evidence.

[27] In my view, all of the records at issue are relevant because they presumably contain descriptions of the alleged events that were created long before the Complainant's statement to police, her testimony at the preliminary inquiry or what has been pleaded in her statement of claim. For example:

(a) The Department of Community Services records would have been created contemporaneously by the Complainant's case worker, [redacted], as information was relayed to him by the Complainant. The Complainant testified that she told [redacted] about the alleged sexual contact in January of 1980. She also confirmed that she told [redacted] "everything that happened" between Mr. D and herself (affidavit of Allan MacDonald, paras 7-14).

(b) The therapeutic records stem from counselling sessions the Complainant undertook from approximately 1981 to 1983 in [redacted], Alberta and from approximately 2009 to 2019 in [redacted], Nova Scotia. The Complainant allegedly sought counselling because she was experiencing anxiety from the alleged sexual abuse that she underwent as a youth. The Complainant also acknowledged

mentioning Mr. D during some of these counselling sessions (affidavit of Allan MacDonald, paras. 19-22, 23-26).

(c) The Complainant wrote the "[redacted]" book approximately thirteen years ago. The book makes specific reference to "W.C.", which the Complainant testified was an acronym she used to refer to Mr. D because "you're not allowed to write a book and give names" (affidavit of Allan MacDonald, paras. 15-18). Importantly, the Crown and Complainant have conceded that the book is at least likely relevant and therefore should pass the first hurdle of the *Mills* framework.

(d) The credibility of the Complainant and the reliability of her evidence in a "he-said she-said" sexual assault trial is a predominant concern; especially so where the allegations are historical and stem from events which happened over thirty-five years ago. In this case, the Complainant is said to be the only Crown witness with direct evidence of the alleged events and thus her credibility and the reliability of her evidence are major trial issues. It follows that records that contradict her claims are directly relevant to triable issues.

[28] Having reviewed the exhibits attached to Mr. MacDonald's affidavit, there are inconsistencies between the statements of the Complainant during her police interview and her subsequent testimony at the preliminary inquiry. These may very well have a direct impact on the Complainant's credibility and the reliability of her evidence.

[29] The Complainant is the only Crown witness who alleges first-hand knowledge of the events. As such, the reliability of her evidence and her credibility as a witness will be live issues at trial. Accordingly, I am of the view that the records at issue are logically probative to these issues and pass the "likely relevance" threshold outlined in *Mills.*

[30] In the result, I am of the view that all of the requested records are highly probative due to the nature of the information contained in and missing from those records and thus production of the records is necessary to allow the Applicant to make full answer and defence to these charges.

[31] I would add that the fact that the Complainant has commenced a civil lawsuit and requested that the same records be provided to her civil lawyer (and possibly civil defence counsel) is another factor which leads me to my conclusion to order Stage One production. Having said this, I do not believe it is necessary to order

MacGillivray Law to produce the records as this would be redundant. Rather, I am of the view that the primary record holders must provide what the Applicant has asked for.

[32] I have determined that the threshold set out in s. 278.5 has been met by the Applicant in relation to Stage One, in that he has established that the requested records are likely relevant to an issue at trial and that production of the records is necessary in the interests of justice.

[33] I have also considered the salutary and deleterious effects of the determination on the Applicant's right to make full answer and defence and on the right to privacy, personal security and equality of the Complainant and any other person to whom the record relates. In particular, I considered the applicable factors as directed by s. 278.5(2).

CONCLUSION:

[34] On balance, I conclude that the effect on the accused's right to make full answer and defence, and the potential probative value of the records, weigh particularly strongly in favour of review by the Court. I conclude that I should review the requested records.

Chipman, J.