SUPREME COURT OF NOVA SCOTIA
Citation: R. v. R.R.D.G., 2013 NSSC 371

Date: 20131114
Docket: CRH 412256
Registry: Halifax

Between:

Her Majesty the Queen

v.

R.R.D.G.

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Restriction on publication: 278.9 CCC Publication Ban
Publication Prohibited 278.9 (1) No person shall publish in any document, or broadcast or transmit in any way, any of the following:
(a) the contents of an application made under section 278.3;
(b) any evidence taken, information given or submissions made at a hearing under subsection 278.4(1) or 278.6(2); or
(c) the determination of the judge pursuant to subsection 278.5(1) or 278.7(1) and the reasons provided pursuant to section 278.8, unless the judge, after taking into account the interests of justice and the right to privacy of the person to whom the record relates, orders that the determination may be published.

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

486 CCC Publication Ban

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order.

Judge: The Honourable Justice Peter Rosinski

Heard: November 13, 2013, in Halifax, Nova Scotia

Oral Decision: November 14, 2013

Written Decision: November 20, 2013

Counsel: Perry Borden, on behalf of the Crown
Alex Embree, for the Defendant
Brian Newton, Q.C., for the Complainant/Witness

By the Court:

Introduction

[1] G stands charged with sexual offenses against his stepdaughter JB alleged between January 30, 2005 and January 30, 2008. Her date of birth is December, 1994.

[2] In September 2009 MR, JB's mother read in JB's diary about an incident of oral sex between JB and G her step father. MR immediately confronted JB about her diary entry. JB revealed these allegations to her mother, and upon her mother asking her point blank in the presence of G about her truthfulness, JB initially stated that they were true, but relented and finally said that they were not true. Later JB stated that she relented because G was motioning to her "no" by moving his head side to side and making a slashing motion with his hand across his neck. At the time of the

diary incident JB was 14 years old, and aware that her mother and she were financially dependent on G. JB destroyed her diary after the discovery thereof by her mother. She discontinued writing a diary thereafter. She did not tell her mother until September 21, 2010 about the gestures that G made to her in the September 2009 confrontation; she also reiterated that her allegations were true.

[3] On September 21, 2010 JB revealed these allegations to the police - she provided an initial verbal statement to patrol police officers that day, who referred her allegations to the Major Crime police investigators at Halifax Regional Police [HRP].

[4] On September 28, 2010 JB was videotaped giving a further statement to Detective Constable Kim Robinson of the HRP Sexual Assault team of the Major Crime unit, in the company of Courtney Maloney a representative from the Department of Community Services [DCS].

[5] On November 3, 2010 G was charged with three offenses - contrary to sections 151, 153(a) and 271(1)(a) of the **Criminal Code**.

[6] After 11 court appearances, on February 9, 2012 G elected trial by judge and jury. On February 7, 2013, G was committed to trial in Nova Scotia Supreme Court after a preliminary hearing was held - a transcript thereof is contained as exhibit "C" to the affidavit of Katie Williams sworn August 30, 2013 in support of the motion.

[7] On April 3, 2013 trial dates were set, after re-election to trial by judge alone, in the Nova Scotia Supreme Court. The trial will be heard December 16, 17, 18, 19 and 20, 2013.

The Motion Herein

[8] On September 6, 2013 G filed a Notice of Motion requesting the following relief pursuant to the provisions of section 278.3 of the **Criminal Code** - application for production of record of a complainant or witness that contains personal information:

> [G] moves for an order seeking the following records from the following record holders:

One - Izaak Walton Killam Children's Hospital [IWK] - records and report of JB's attendance with a psychologist at the IWK;

Two - Carol Shirley [Roth Associates] -

A - counsellor Carol Shirley's records relating to JB

B - counsellor Carol Shirley's partial file relating to MR

Three - Department of Community Services [DCS]

A - DCS - Halifax district office - case recordings of investigations regarding JB, IG and NG [the latter two being the biological children of G and MR]

B - DCS - Halifax district office - September 28, 2010 interview with MR.

[9] As noted, the August 30, 2013 sworn affidavit of Katie Williams was the only evidence filed in support of the motion. I did also receive and rely upon undisputed factual representations made by counsel during the hearing.

The Relevant Law

[10] The relevant sections of the **Criminal Code** herein are section 278.1 through section 278.91.

Definition of "record"

278.1 For the purposes of sections 278.2 to 278.9, "record" means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

Production of record to accused

278.2 (1) No record relating to a complainant or a witness shall be produced to an accused in any proceedings in respect of

(a) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272 or 273,

(b) an offence under section 144, 145, 149, 156, 245 or 246 of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,

or in any proceedings in respect of two or more offences that include an offence referred to in any of paragraphs (a) to (c), except in accordance with sections 278.3 to 278.91.

(2) Section 278.1, this section and sections 278.3 to 278.91 apply where a record is in the possession or control of any person, including the prosecutor in the proceedings, unless, in the case of a record in the possession or control of the prosecutor, the complainant or witness to whom the record relates has expressly waived the application of those sections.

(3) In the case of a record in respect of which this section applies that is in the possession or control of the prosecutor, the prosecutor shall notify the accused that the record is in the prosecutor's possession but, in doing so, the prosecutor shall not disclose the record's contents.

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.

(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.

(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.

(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.

(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.

(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.

Hearing in camera

278.4 (1) The judge shall hold a hearing in camera to determine whether to order the person who has possession or control of the record to produce it to the court for review by the judge.

(2) The person who has possession or control of the record, the complainant or witness, as the case may be, and any other person to whom the record relates may appear and make submissions at the hearing, but they are not compellable as witnesses at the hearing.

(3) No order for costs may be made against a person referred to in subsection (2) in respect of their participation in the hearing.

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);

(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.

(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 and equality of the complainant or witness, as the case may be, and 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.

278.6 (1) Where the judge has ordered the production of the record or part of the record for review, the judge shall review it in the absence of the parties in order to determine whether the record or part of the record should be produced to the accused.

(2) The judge may hold a hearing in camera if the judge considers that it will assist in making the determination.

(3) Subsections 278.4(2) and (3) apply in the case of a hearing under subsection (2).

Judge may order production of record to accused

278.7 (1) Where the judge is satisfied that the record or part of the record is likely relevant to an issue at trial or to the competence of a witness to testify and its production is necessary in the interests of justice, the judge may order that the record or part of the record that is likely relevant be produced to the accused, subject to any conditions that may be imposed pursuant to subsection (3).

(2) In determining whether to order the production of the record or part of the record to the accused, 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 and equality of the complainant or witness, as the case may be,

and any other person to whom the record relates and, in particular, shall take the factors specified in paragraphs 278.5(2)(a) to (h) into account.

(3) Where the judge orders the production of the record or part of the record to the accused, the judge may impose conditions on the production to protect the interests of justice and, to the greatest extent possible, the privacy and equality interests of the complainant or witness, as the case may be, and any other person to whom the record relates, including, for example, the following conditions:

(a) that the record be edited as directed by the judge;

(b) that a copy of the record, rather than the original, be produced;

(c) that the accused and counsel for the accused not disclose the contents of the record to any other person, except with the approval of the court;

(d) that the record be viewed only at the offices of the court;

(e) that no copies of the record be made or that restrictions be imposed on the number of copies of the record that may be made; and

(f) that information regarding any person named in the record, such as their address, telephone number and place of employment, be severed from the record.

(4) Where the judge orders the production of the record or part of the record to the accused, the judge shall direct that a copy of the record or part of the record be provided to the prosecutor, unless the judge determines that it is not in the interests of justice to do so.

(5) The record or part of the record that is produced to the accused pursuant to an order under subsection (1) shall not be used in any other proceedings.

(6) Where the judge refuses to order the production of the record or part of the record to the accused, the record or part of the record shall, unless a court orders otherwise, be kept in a sealed package by the court until the later of the expiration of the time for any appeal and the completion of any appeal in the proceedings against the accused, whereupon the record or part of the record shall be returned to the person lawfully entitled to possession or control of it.

Reasons for decision

278.8 (1) The judge shall provide reasons for ordering or refusing to order the production of the record or part of the record pursuant to subsection 278.5(1) or 278.7(1).

(2) The reasons referred to in subsection (1) shall be entered in the record of the proceedings or, where the proceedings are not recorded, shall be provided in writing.

Publication Prohibited

278.9 (1) No person shall publish in any document, or broadcast or transmit in any way, any of the following:

(a) the contents of an application made under section 278.3;

(b) any evidence taken, information given or submissions made at a hearing under subsection 278.4(1) or 278.6(2); or

(c) the determination of the judge pursuant to subsection 278.5(1) or 278.7(1) and the reasons provided pursuant to section 278.8, unless the judge, after taking into account the interests of justice and the right to privacy of the person to whom the record relates, orders that the determination may be published.

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

Appeal

278.91 For the purposes of sections 675 and 676, a determination to make or refuse to make an order pursuant to subsection 278.5(1) or 278.7(1) is deemed to be a question of law.

[11] At this hearing I have heard not only from defence counsel Mr. Embree, and Senior Crown Attorney Perry Borden, but also from Mr. Brian Newton, Q.C. representing the interests of JB and MR.

[12] As pointed out by Mr Newton, before Parliament enacted sections 278.1 through 278.91, the Supreme Court of Canada had laid out a common law regime to govern such scenarios in **R. v. O'Connor**, [1995] 4 S.C.R. 411.

[13] **O'Connor** remains relevant in relation to cases of applications for the production of records in the hands of third parties (even if there is no reasonable expectation of privacy attached thereto – **McNeil** at paras. 10 - 13), which are neither cases of sexual offences governed by sections 278.3 through 278.91 of the **Criminal Code**, nor cases that involve the production of the disciplinary records and criminal investigation files where the police misconduct in question is either related to the investigation, or the finding of misconduct could reasonably impact on the case against the accused, which the Supreme Court of Canada has considered as falling within the scope of first party disclosure **Stinchcombe** principles - **R. v. McNeil**, [2009] 1 S.C.R. 66. Notably production of disciplinary records and criminal investigation files in the possession of the police that do not fall within the scope of this first party disclosure obligation are governed by the **O'Connor** regime for third-party production.

[14] **McNeil** is the most recent pronouncement from the Supreme Court of Canada regarding the common law regime governing production of third-party records [to which a reasonable expectation of privacy may or may not attach depending on the circumstances]. Given that the statutory regime applicable in this case, arose out of the **O'Connor** case, some of the pronouncements in **O'Connor** still reverberate in **McNeil**.

[15] The Supreme Court of Canada decision in **McNeil** was delivered by Justice Charron who made numerous comments in relation to the common law **O'Connor** "likely relevant" threshold, which inform an examination of the "likely relevant" threshold as contained in section 278.5(1)(b) [the first stage analysis] and 278.7 (1) [the second stage analysis]. Justice Charron stated:

> **5.1 First Stage: Screening for Likely Relevance**
>
> **5.1.1 Burden Is on the Applicant**
>
> 28 The first step in any contested application for production of non-privileged documents in the possession of a third party is for the person seeking production -- in this case the accused -- to satisfy the court that the documents are likely relevant to the proceedings. This threshold burden simply reflects the fact that the context in which third party records are sought is different from the context of first party disclosure. We have already seen that the presumptive duty on Crown counsel to disclose the fruits of the investigation in their possession under Stinchcombe is

premised on the assumptions that the information is relevant and that it will likely comprise the case against the accused. No such assumptions can be made in respect of documents in the hands of a third party who is a stranger to the litigation. The applicant must therefore justify to the court the use of state power to compel their production -- hence the initial onus on the person seeking production to show "likely relevance". In addition, it is important for the effective administration of justice that criminal trials remain focussed on the issues to be tried and that scarce judicial resources not be squandered in "fishing expeditions" for irrelevant evidence. The likely relevance threshold reflects this gate-keeper function.

5.1.2 Burden on Applicant Is Significant but not Onerous

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).

5.1.3 O'Connor Common Law Threshold Is Significantly Different From Mills Statutory Regime

30 It is important to note that the common law likely relevance threshold in *O'Connor* differs significantly from the statutory likely relevance threshold set by Parliament for the production of records containing personal information in sexual assault proceedings under the *Mills* regime (see s. 278.3(4) of the *Criminal Code*). As this Court explained at some length in *Mills*, a range of permissible regimes can meet constitutional standards. It was therefore open to Parliament to craft its own solution to address the particular concerns arising from disclosure of third party records in sexual proceedings. In doing so, Parliament "sought to recognize the prevalence of sexual violence against women and children and its disadvantageous impact on their rights, ... and to reconcile fairness to complainants with the rights of

> the accused" (*Mills*, at para. 59). The following differences between the two regimes are particularly noteworthy.
>
> 31 First, the likely relevance standard adopted by Parliament under the *Mills* regime is tailored to counter speculative myths, stereotypes and generalized assumptions about sexual assault victims and about the usefulness of private records in sexual assault proceedings. Such generalized views need not be countered at large in respect of all third party records that fall outside the *Mills* regime. The general common law threshold of likely relevance under *O'Connor* is intended rather to screen applications to ensure the proper use of state authority in compelling production of third party records and to establish the appropriateness of the application so as to avoid squandering scarce judicial resources.
>
> 32 Second, while the *Mills* regime retains the two-stage framework set out in *O'Connor*, it differs significantly in that much of the balancing of the competing interests is effected at the first stage in determining whether production should be made to the court for inspection. This reflects Parliament's assumption that a reasonable expectation of privacy exists in the types of records targeted by the statutory regime: see *R. v. Clifford* (2002), 163 C.C.C. (3d) 3 (Ont. C.A.), at paras. 48-49. An equivalent presumption of privacy does not attach in respect of all third party records that fall outside the *Mills* regime. Hence, any balancing of competing interests is reserved for the second stage of the *O'Connor* regime, when the documents can be inspected by the court to better ascertain the nature of the privacy interest, if any. Because of these significant differences, it is important not to transpose the *Mills* regime into the *O'Connor* production hearing in respect of documents to which the statutory dispositions do not apply.

[16] As Justice Charron observed, there are significant differences between the **O'Connor** regime and the **R. v. Mills**, [1999] 3 S.C.R. 668 regime reflected in section 278.3 to 278.91 of the **Criminal Code**, yet the reasoning in **O'Connor** is still referenced even in relation to the statutory regime in sections 278.3 to 278.91. Although the **O'Connor** decision was superseded by the enactment of sections 278.1 to 278.91, the Majority's comments on the meaning of "likely relevance" are still meaningful. They stated at paragraph 22:

> In the disclosure context the meaning of "relevance" is expressed in terms of whether the information may be useful to the defense… **In the context of production, the test of relevance should be higher; the presiding judge must be satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify**. When we speak of relevance to "an issue at trial", we are referring not only to evidence that may be **probative to the material issues in the case [i.e. the unfolding of events] but also**

> **to evidence relating to the credibility of witnesses and to the reliability of other evidence in the case**… [Citations omitted]
>
> **[my emphasis]**

[17] Subsequent to the enactment of sections 278.1 through 278.91 of the **Criminal Code**, the Supreme Court of Canada specifically considered that legislative framework in **R. v. Mills**, [1999] 3 S.C.R. 668, (1999) 139 C.C.C. (3d) 321. At paragraph 118 Justices McLachlin and Iacobucci stated:

> [Section 278.3] does not entirely prevent an accused from relying on the factors listed, but simply prevents reliance on bare "assertions" of the listed matters, where there is no other evidence and they stand "on their own".
>
> The purpose and wording of section 278.3 does not prevent an accused from relying on the assertions set out in section 278.3 (4) where there is an evidentiary or informational foundation to suggest that they may be related to likely relevance. [An exception is "recent complaint" which has been abolished by the jurisprudence and cannot be relied on in any event, quite apart from the section]. **The section requires only that the accused be able to point to case specific evidence or information to show that the record in issue is likely relevant to an issue at trial or the competence of a witness to testify**.
>
> **[my emphasis]**

[18] In **Mills** at paras 124, 126 and 136 the Supreme Court observed that the continuity of the Court's comments on the "likely relevant" standard from their earlier **O'Connor** decision carried through to the statutory regime:

> 124 **Both the majority and minority of this Court in *O'Connor* held that records must be produced to the judge for inspection if the accused can demonstrate that the information is "likely to be relevant":** *O'Connor, supra*, at para. 19, per Lamer C.J. and Sopinka J., and at para. 138, per L'Heureux-Dubé J. **The Court defined the standard of likely relevance as "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)). Although the majority recognized that complainants have a constitutional right to privacy (at para. 17), it held that no balancing of rights should be undertaken at the first stage (at para. 24). This conclusion was premised on the finding that: (1) to require the accused to meet more than the likely relevance stage would be to "put the accused in the difficult situation of having to make submissions to the judge without precisely knowing what

is contained in the records" (para. 25); and (2) there is not enough information before a trial judge at this initial stage of production for an informed balancing procedure to take place (at para. 21). To this end, the majority held that the analysis should be confined to determining "likely relevance" and "whether the right to make full answer and defence is implicated by information contained in the records" (para. 21). In contrast, the minority held that once the accused meets the "likely relevance" threshold, he must then satisfy the judge that the salutary effects of ordering the documents produced to the court for inspection outweigh the deleterious effects of such production, having regard to the accused's right to make full answer and defence, and the effect of such production on the privacy and equality rights of the subject of the records (at para. 150). L'Heureux-Dubé J. found that a sufficient evidentiary basis could be established at this stage through Crown disclosure, defence witnesses, the cross-examination of Crown witnesses at both the preliminary inquiry and the trial and, on some occasions, expert evidence (at para. 146).

....

126 **Section 278.5(1) requires** the accused at the stage of production to a judge to demonstrate not only **that the information is "likely relevant"** but, in addition, that the production of the record "is necessary in the interests of justice". **The first requirement takes up the unanimous view in *O'Connor* that the accused,** to get production to the judge, **must show that the record is "likely relevant". The additional requirement that production to the judge be "necessary in the interests of justice" encompasses (but is not confined to) the concern of the minority in *O'Connor*** that even where likely relevance is shown, there should be room for the court to consider the rights and interests of all those affected by disclosure before documents are ordered disclosed to the court.

....

136 **The nature of the records in question will also often provide the trial judge with an important informational foundation.** For example, with respect to the privacy interest in records, **the expectation of privacy in adoption or counselling records may be very different from that in school attendance records** (see *R. v. J.S.P.*, B.C.S.C., Vancouver Registry Nos. CC970130 & CC960237, May 15, 1997). Similarly, a consideration of the probative value of records can often be informed by the nature and purposes of a record, as well as the record taking practices used to create it. As noted above, **many submissions were made regarding the different levels of reliability of certain records. Counselling or therapeutic records, for example, can be highly subjective documents which attempt merely to record an individual's emotions and psychological state. Often such records have not been checked for accuracy by the subject of the records, nor have they been recorded verbatim.** All of these factors may help a

> trial judge when considering the probative value of a record being sought by an accused.
>
> **[my emphasis]**

[19] Our Court of Appeal has held that the "likely relevance" of a record such as a complainant's diary which might contain material relevant to a complainant's suggested animus against an accused is too speculative because it "falls far short of establishing likely relevance to an issue at this trial or to the competence of a witness to testify" - **R. v. DWL**, 2001 NSCA. 111, (2001), 156 C.C.C. (3d) 152 at paragraphs 24 and 32.

[20] Justice Casey Hill in **R. v. DM** (2000), 37 C.R. (5th) 80, [2000] O.J. No. 3114 (Q.L.) (Ont. S.C.) noted at paragraph 37:

> The initial stage, whether production should be ordered to the court for review, calls for the trial judge to apply a likely relevant standard. While the burden is not to be overly onerous, at the same time, the requirement is not to be reduced to an altogether standardless process. **Relevance is contextual, a case specific application of logic and experience to determine whether the evidence assists in proving a fact in issue. Whether or not the evidence in question has some tendency to make the proposition for which it is advanced more likely than were the evidence absent, requires the court to assess an evidentiary or informational foundation grounded in the circumstances of the case at hand.**
>
> **[my emphasis]**

[21] At para. 131 in **Mills** the Supreme Court noted in relation to whether production of a record is "necessary in the interests of justice," that:

> ... Where the privacy right in a record is strong and the record is of low probative value or relates to a peripheral issue, the judge might decide that non-disclosure will not prejudice the accused's right to full answer and defence and dismiss the application for production.

[22] The Court also elaborated in relation to the conflicting **Charter of Rights** protected principles: privacy and equality versus full answer and defence. Their comments are instructive and found at paras 91 - 94 inclusive:

91 In addition, an appreciation of the equality dimensions of records production in cases concerning sexual violence highlights the need to balance privacy and full answer and defence in a manner that fully respects the privacy interests of complainants. McLachlin J. made this clear in *M. (A.) v. Ryan*, *supra*, at para. 30, while discussing the interests at stake in determining whether counselling records were privileged or should be produced in a civil action for damages allegedly caused by sexual assault:

> A rule of privilege which fails to protect confidential doctor/patient communications in the context of an action arising out of sexual assault perpetuates the disadvantage felt by victims of sexual assault, often women. The intimate nature of sexual assault heightens the privacy concerns of the victim and may increase, if automatic disclosure is the rule, the difficulty of obtaining redress for the wrong. The victim of a sexual assault is thus placed in a disadvantaged position as compared with the victim of a different wrong. The result may be that the victim of sexual assault does not obtain the equal benefit of the law to which s. 15 of the Charter entitles her. She is doubly victimized, initially by the sexual assault and later by the price she must pay to claim redress -- redress which in some cases may be part of her program of therapy.

92 When the boundary between privacy and full answer and defence is not properly delineated, the equality of individuals whose lives are heavily documented is also affected, as these individuals have more records that will be subject to wrongful scrutiny. K. Busby cautions that the use of records to challenge credibility at large

> will subject those whose lives already have been subject to extensive documentation to extraordinarily invasive review. This would include women whose lives have been documented under conditions of multiple inequalities and institutionalization such as Aboriginal women, women with disabilities, or women who have been imprisoned or involved with child welfare agencies.

("Discriminatory Uses of Personal Records in Sexual Violence Cases" (1997), 9 C.J.W.L.148, at pp. 161-62.)

93 These concerns highlight the need for an acute sensitivity to context when determining the content of the accused's right to make full answer and defence, and its relationship to the complainant's privacy right.

(c) Summary

94 **In summary, the following broad considerations apply to the definition of the rights at stake in this appeal.** The right of the accused to make full answer and defence is a core principle of fundamental justice, but it does not automatically entitle the accused to gain access to information contained in the private records of complainants and witnesses. Rather, the scope of the right to make full answer and defence must be determined in light of privacy and equality rights of complainants and witnesses. **It is clear that the right to full answer and defence is not engaged where the accused seeks information that will only serve to distort the truth-seeking purpose of a trial, and in such a situation, privacy and equality rights are paramount. On the other hand, where the information contained in a record directly bears on the right to make full answer and defence, privacy rights must yield to the need to avoid convicting the innocent.** Most cases, however, will not be so clear, and in assessing applications for production, courts must determine the weight to be granted to the interests protected by privacy and full answer and defence in the particular circumstances of each case. **Full answer and defence will be more centrally implicated where the information contained in a record is part of the case to meet or where its potential probative value is high. A complainant's privacy interest is very high where the confidential information contained in a record concerns the complainant's personal identity or where the confidentiality of the record is vital to protect a therapeutic relationship.**

[my emphasis]

[23] The **Mills** decision also commented on what is a reasonable expectation of privacy in section 278.3 records, and on what are the parameters of the fundamental aspects of privacy generally, the so-called “biographical core of personal information” as they relate to such records, at paras 79 - 82 inclusive:

79 This Court has most often characterized the values engaged by privacy in terms of liberty, or the right to be left alone by the State. For example, in *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 427, La Forest J. commented that "privacy is at the heart of liberty in a modern state". In *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 50, per Cory J., privacy was characterized as including "[t]he right to be free from intrusion or interference".

80 This interest in being left alone by the State includes the ability to control the dissemination of confidential information. As La Forest J. stated in *R. v. Duarte*, [1995] 1 S.C.R. 30, at pp. 53-54:

> ... it has long been recognized that this freedom not to be compelled to share our confidences with others is the very hallmark of a free

society. Yates J., in *Millar v. Taylor* (1769), 4 Burr. 2303, 98 E.R. 201, states, at p. 2379 and p. 242:

> It is certain every man has a right to keep his own sentiments, if he pleases: he has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends.

These privacy concerns are at their strongest where aspects of one's individual identity are at stake, such as in the context of information "about one's lifestyle, intimate relations or political or religious opinions": *Thomson Newspapers*, *supra*, at p. 517, per La Forest J., cited with approval in *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, at para. 62.

81 **The significance of these privacy concerns should not be understated. Many commentators have noted that privacy is also necessarily related to many fundamental human relations.** As C. Fried states in "Privacy" (1967-68), 77 Yale L.J. 475, at pp. 477-78:

> To respect, love, trust, feel affection for others and to regard ourselves as the objects of love, trust and affection is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion.

See also D. Feldman, "Privacy-related Rights and their Social Value", in P. Birks, ed., Privacy and Loyalty (1997), 15, at pp. 26-27, and J. Rachels, "Why Privacy Is Important" (1975), 4 Philosophy & Public Affairs 323. **This Court recognized these fundamental aspects of privacy in *R. v. Plant***, [1993] 3 S.C.R. 281, where Sopinka J., for the majority, stated, at p. 293:

> In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of **the Charter should seek to protect a biographical core of personal information** which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. **This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual**.

82 **That privacy is essential to maintaining relationships of trust was stressed to this Court by the eloquent submissions of many interveners in this case regarding counselling records**. The therapeutic relationship is one that is

> characterized by trust, an element of which is confidentiality. Therefore, **the protection of the complainant's reasonable expectation of privacy in her therapeutic records protects the therapeutic relationship.**
>
> **[my emphasis]**

[24] In a **McNeil/O'Connor** common law application of these principles, Justice Davies observed in **R. v. Tse**, 2009 BCSC 509 at para 9 [conviction affirmed 2013 BCCA 121] that in assessing "likely relevance" as it is implicated in the suggested relevance of a "record" to a complainant / witness' credibility, the jurisprudence tended to require "some link between general credibility issues and some other material issue in the proceedings."

[25] In **R. v. EB** (2002), 162 C.C.C. (3d) 451, the Court addressed "the nature and extent of permissible cross-examination of a complainant, at a preliminary inquiry in a sexual assault case, concerning the complainant's diary, where the stated purpose of the questioning is to lay the foundation for a subsequent production application at trial under s. 278.3 of the Criminal Code." The Ontario Court of Appeal included in its decision a list of questions which would be permissible generally in an attempt to establish the existence of a private record and the nature of its contents - paras. 10, 12, 13, 63 and 64.

[26] The importance of such questions is that they will allow the applicant to know that a record exists, and to put forward cogent arguments to address the reality that the statutory regime is more stringent than the common law regime because such third-party records involve an applicant additionally having to overcome reasonable expectation of privacy factors at the **first stage** of the two-stage analysis – section 278.3(4).

[27] In **R. v. Batte**, 145 CCC (3d) 449, [2000] O.J. 2184 (Q.L.) the Ontario Court of Appeal made significant comments on the "likely relevance" threshold. Justice Doherty for the Court stated:

> 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 DSD that referred to the alleged abuse and matters affecting her credibility. **Anything said by DSD about the abuse or about a matter which could affect her credibility passes the likely relevant 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 counseling 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 complainant's 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 purpose of determining the crown's disclosure obligation and relevance for the purposes of determining when confidential records in the possession of third-party should be produced to a judge.

73 Although I am not testing the trial judge's ruling against **the present statutory scheme**, that scheme **does provide some support from 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:

> 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;

[my emphasis]

74 In upholding the constitutionality of section 273.3 in *R. v. Mills*, [1999] 3 S.C.R. 668 at pages 741 - 42, the Majority said:

> **The purpose and wording of section 278.3 do not prevent an accused from relying on the assertions set out in section 278.3 (4) where there is an evidentiary or informational foundation to suggest that they may be related to likely relevance**… The section requires only that the accused be able to point to case specific evidence or information to show that the record in issue is likely relevant to an issue at trial or the competence of a witness to testify.
> …

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.**

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. [Justice Doherty gives some examples].

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 statement will have some probative value in the assessment of her credibility.

[my emphasis]

[28] In **Mills** the Supreme Court addressed the "waiver" issue at para 114:

> 114 The defence concern that it will be unable to obtain records relevant to its defence will be considered in greater detail later. However, in relation to s. 278.2(2) it is worth pointing out that Parliament inserted two provisions to offset any unfairness that might flow from the Crown's being in possession of documents that the defence has not seen. As discussed above, the first is the provision that if the complainant or witness waives the protection of the legislation, the documents must be disclosed to the defence: s. 278.2(2). Waiver should not be read in a technical sense. Where the complainant or witness, with knowledge that the legislation protects her privacy interest in the records, indicates by words or conduct that she is relinquishing her privacy right, waiver may be found. Turning records over to the police or Crown, with knowledge of the law's protections and the consequences of waiving these protections, will constitute an express waiver pursuant to s. 278.2(2).

By that standard there is no waiver by JB or MR here.

Why the Applicant has not met the 1st stage of the s. 278.3 threshold for production of the records to the Court

[29] In summary therefore I must ask myself:

1. Has a complete and proper application, evidence, and brief been presented to the Court, and does the Court have jurisdiction over the offences? [I conclude that all these requirements are met, per section 278.3(3)]

2. Have all interested parties received sufficient notice? [I have concluded that they have, as per section 278.3(5)

3. Are each of the sought after records, a "record" as defined in section 278.1 of the **Criminal Code**? [I am satisfied that they are, and no argument was made to the contrary – see for example **R. v. Clifford** (2001), 163 C.C.C. (3d) 3 (Ont. C.A.) paras 44 - 59 per Rosenberg, J.A.;]

4. Have JB or MR waived the application of sections 278.3 to 278.91? [I have concluded that they have not, and no argument was made to the contrary – see for example **R. v. Mills**, [1999] 3 S.C.R. 668 paras. 61 - 62 per McLachlin and Iacobucci, JJ for the Majority]

5. Has G. satisfied the Court that:

(a) the records sought to be produced to the Court are "likely relevant to an issue at trial or to the competence of a witness to testify"; and

(b) "the production of the record is necessary in the interests of justice" pursuant to section 278.5(1)?

[30] Subsection 278.5(2) reads as follows:

> (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 and equality of the complainant or witness, as the case may be, and 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.

[31] Thus once I conclude that a record is "likely relevant" I must consider each of the listed factors and assess the salutary and deleterious effects of that determination

on the accused's right to make a full answer and defence, and on the right to privacy and equality of the complainant JB and witness MR.

[32] Before going on, I should elaborate about how what initially was being advanced in the Notice of Motion changed at the hearing:

One: **IWK** – the representations of counsel at the hearing confirmed that JB had seen a person there (**only once**) in 2011 to assess JB's mental health and ensure that she was at no perceived risk to cause harm to herself [arranged through Victim Services, p. 288(17) preliminary inquiry transcript evidence of MR, Exhibit "C" to the affidavit of Katie Williams]'

Two: **Carol Shirley [Roth Associates]**

(A) the representations of counsel at the hearing confirmed that JB accompanied her mother MR on **one occasion only**, namely in July 2011, when MR had a counselling appointment with Carol Shirley, during which visit Ms. Shirley spoke with JB independently, **but only on that occasion**;

(B) the representations of counsel at the hearing confirmed that MR attended counselling sessions with Carol Shirley **between 2011 and 2012**. At the preliminary inquiry MR was asked about the topics generally discussed – see p. 283(6) - 287(8) of the transcript, Exhibit "C" to the affidavit of Katie Williams.

Three: Department of Community Services [DCS] Halifax District office:

(A) regarding "case recordings of investigations regarding JB, IG, and NG" – counsel for DCS and Mr. Newton confirmed that there are **no such records** regarding IG and NG; Mr. Newton advised that his clients JB and MR do not object to any records in possession of DCS created after September 21, 2010 (when the police became involved) being produced/disclosed to G.

> Notably **before September 21, 2010 DCS only has one "case recording" form intake personnel regarding JB**, and it is a three page document based on a one to two week period of interaction with JB in January 2007. Mr. Newton represents to the Court, having consulted his client(s) that it is not relevant to the charges before the Court. Notably the preliminary inquiry evidence of MR supports this position generally as it relates to MR herself – see p. 284(7) – 285 (2) of the transcript, exhibit "C" of the affidavit of Katie Williams.

(B) regarding the September 28, 2010 interview with MR:

> All counsel agreed that this (video taped) interview could be disclosed as part of **Stinchcombe** disclosure; it appears it was an **oversight** that it had not previously been disclosed.

[33] Thus, remaining in issue for a determination by me as to their "likely relevance" are:

1. the one time 2011 contact between JB and a psychologist at the IWK regarding her well-being;

2. the one time July 2011 contact between JB and Carol Shirley at Roth Associates;

3. the ongoing 2011 - 2012 contact between MR and Carol Shirley at Roth Associates;

4. the January 2007 DCS "case recording" regarding JB's one to two week interaction with their staff, characterized by Mr. Newton as not relevant to the charges before the Court.

Position of G

I – IWK/Carol Shirley records generated by contact with JB:

[34] Mr. Embree on behalf of G concedes that his argument is somewhat weak in relation to the one time contacts by JB with staff at the IWK and Carol Shirley of Roth Associates.

[35] At this point I am reminded as well about the preamble to Bill C - 46 which contained the statutory regime, being sections 278.1 to 278.91 of the **Criminal Code**. That preamble states in part:

> WHEREAS the Parliament of Canada continues to be gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual violence against women and children;
>
> WHEREAS the Parliament of Canada recognizes that violence has a particularly disadvantageous impact on the equal participation of women and children in society and on the rights of women and children to security of the person, privacy and equal benefit of the law as guaranteed by sections 7, 8, 15 and 28 of the Canadian Charter of Rights and Freedoms;
>
> WHEREAS the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed by the Canadian Charter of Rights and Freedoms for all, including those who are accused of, and those who are or may be victims of, sexual violence or abuse;

[36] Clearly Parliament recognized the tension between protecting the rights of the complainants and witnesses in such cases, and ensuring that accused persons have the opportunity to make full answer and defence.

[37] This tension has resulted in the compromise contained in the statutory regime, that private records held by third parties will be ordered produced where an accused can establish that a record sought is "likely relevant" to an issue at trial [or to the competence of a witness to testify] and where production of the record is "necessary in the interests of justice."

[38] Where records are suggested to be relevant to a witness' credibility, the application of the test is more difficult because of the broad limits permitted in the cross-examination of witnesses, and because frequently inconsistencies, whether material or not, are put forward in argument as demonstrative of an either dishonest or unreliable witness.

[39] In the case of offences of a sexual nature, they are almost always perpetrated in private, with only the complainant and accused present. Particularly difficult to assess are cases of historical sexual assaults/offenses which offer conflicting distant memories, and often a lengthy delay before the matters are reported to authorities, which can significantly limit a fulsome search for the truth, to the extent that that is ever achievable by means of a criminal trial.

[40] In order to prevent "fishing expeditions" into the private records of complainants or witnesses by an accused person, courts have concluded that, in the context of this statutory regime, an accused should be able to point to "case specific" evidence or information to show that the record in issue is "likely relevant" to an issue at trial, which burden is not to be onerous, but nevertheless significant, given the privacy interests in issue.

[41] In relation to both the 2011 IWK visit and the July 20, 2011 visit by JB with Carol Shirley, there is no evidence that the meetings relate in any way to the alleged abuse between January 2005 and January 2008, which was initially disclosed by JB's mother discovering her diary entries to that effect in September 2009. Moreover these records are best described as therapeutic, and as such there is a strong privacy interest implicated therein. I bear in mind in that respect that JB was a teenager at those times, and the Supreme Court of Canada has repeatedly referred to the heightened vulnerability of youths particularly the context of its decisions involving the *Youth Criminal Justice Act* and in the civil context recently – **A.B. v. Bragg Communications Inc.**, 2012 SCC 46. As with any person seeking a therapeutic relationship, youth may not only be vulnerable, but particularly vulnerable, and courts should be very cautious in ordering the production of private therapeutic counselling records in cases such as the one at Bar.

[42] The evidence and information provided to the Court do not suggest that these records have relevance to, an issue at trial, including the credibility of JB. Moreover the production of these records is in no way "necessary in the interests of justice" according to the circumstances of this case generally, and specifically regarding the factors in section 278.5 (2).

[43] These records therefore will not be reviewed by the Court.

II – The DCS "Case Recording" of January 2007 Generated by Contact with JB

[44] Similarly, the January 2007 DCS "case recording", involving as it did JB's one to two week interaction with their staff, which was characterized by Mr. Newton as not relevant to the charges before the Court, but rather involved the "family dynamic", has not been shown to be likely relevant to an issue at trial, including the credibility of JB, nor is the production of the record "necessary in the interests of justice." There is no case specific information or evidence to support such a view.

[45] I do note at this juncture, that while not determinative in relation to the above-noted records, the fact that G chose not to require the attendance of JB at the preliminary inquiry for purposes of cross examination, tends to weaken his argument that production of the record is "necessary in the interests of justice." Mr. Borden noted that the effect of this decision by G is that JB has not been demonstrated to have been, thus far, contradicted on her allegations. This was not disputed by Mr. Embree. There is also a strong privacy interest in these records.

[46] These records therefore will not be reviewed by the Court.

III – The Therapeutic Records Created by Carol Shirley and Generated by Contact with MR

[47] That leaves for my consideration the ongoing 2011 - 2012 contact that MR had with Carol Shirley and Roth Associates.

[48] G's position on this was set out by Mr. Embree as follows: MR is a critical witness which the Defence seeks to have confirm *inter alia* that when confronted by her mother and father in September 2009 JB initially insisted her diary entry of oral sex incidents between her and G were truthful, but ultimately at that time she conceded that they were not truthful; and that this was not because G had made a threatening gesture to JB at that time as JB claimed later, since MR was in a position to see this and has not, to date, claimed to have seen this gesture.

[49] Mr. Embree notes that he expects MR will try to resile from her earlier position, which he says is to the effect that MR stated it was not possible that JB was threatened by a gesture from G in September 2009 because she was present and would have seen it had it occurred.

[50] He argues that G should be entitled to test MR's evidence about why her statements to the police in October 2010, which were to the effect that G could not have made those gestures/threats at the time, changed such that at the time of the preliminary inquiry in February 2013 MR, was in effect saying it could have happened as she cannot say with certainty that it did not.

[51] Mr. Embree argues that the counselling with Carol Shirley intervened between those two conflicting positions taken by MR in 2010 and 2013, and that therefore this provides a link between the records sought and an issue at trial – i.e. the credibility of JB.

[52] Moreover Mr. Embree argues that as her mother, MR would have discussed with Carol Shirley her observations of JB's behaviour throughout the period of 2011 - 2012 and possibly earlier, and that these observations are similarly relevant to an issue at trial - i.e. JB's credibility and motivation for making a complaint to the police on September 21, 2010.

[53] Mr. Embree characterized this in part as attempting to have MR explain why her belief, which itself is irrelevant, of JB's allegations against G changed from not believing JB after the initial disclosure in September 2009 to now believing the truthfulness of JB's allegation. He says that is the specific link to the record from the evidence he has presented on this application. He says that the evidence is contained at page 285 (3) to 285 (21) of the preliminary inquiry transcript of MR at Exhibit "C" to the sworn August 30, 2013 affidavit of Katie Williams.

[54] Even assuming that the therapeutic records of psychologist Carol Shirley can be said to be "likely relevant" to an issue at trial including the credibility of JB, I note that G has had the benefit of a September 28, 2010 videotaped interview of MR, and police statement of October 15, 2010 from MR, as well as the benefit of having cross-examined her at the preliminary inquiry on February 7, 2013, which transcript runs 344 pages. There are likely also other associated Crown disclosure which reveal MR's statements regarding the allegations herein or commentary on matters which could affect the credibility of JB.

[55] I specifically bear in mind here that MR was at times on medication for post-traumatic stress disorder after JB's biological father had taken his own life when JB

was only 14 months old. The stress of that event on MR and JB as they made their way in the world thereafter is not to be lightly dismissed.

[56] When asked at the preliminary inquiry why she saw Carol Shirley, MR responded that she talked to her "about issues with [JB]. Issues with the marriage. Issues with [RDDG]… and specifically [the allegations]" - page 285 (13) - (21) of the preliminary inquiry transcript.

[57] Importantly however MR also stated that in January 2011 "I had that same feeling, and so that's why went to see my doctor again, and she gave me a referral to see this new group of psychologists… and that's where I met Carol. And so Carol helped me sort out my emotions." - page 285 (6) - (12).

[58] In my view, MR was clearly referring to "the same feeling" that she had when she had the relapse in 2007 of posttraumatic stress disorder referenced at page 284 (10). Regarding that time. She stated:

> "I was under the care of our family physician, and my marriage wasn't the best… It was so stressful, balancing family life, trying to get a career started and finding work in Halifax. It was hard. So I was put on antidepressants and a sleeping aid. I was on that for a year, and it created a lot of stress between R. and I and the children, because I wasn't present for them. I was there, but mentally I was - I wasn't present."

[59] Thus, it is clear to me that the primary issue in January 2011, when she sought out the services of Carol Shirley, was rooted in her post-traumatic stress disorder which had resurfaced at that time and was directly intended for her personal benefit. That is to say, her contact with Carol Shirley was for significant therapeutic intervention. There is no evidence that the allegations were in any way front and center other than incidentally insofar as they would affect her own well-being, and indirectly that of JB and the other children.

[60] Turning back then to the position of G, I conclude as follows:

[61] One - regarding Mr. Embree's argument that the specific link, between the records sought and an issue at trial or the credibility of JB, is the September 2009 confrontation at which there is an issue whether G made threatening gestures and turned his head from side to side indicating "no" to JB when MR asked her if her diary notations were true, I find that there is little evidence to suggest that MR

specifically and meaningfully would have discussed this incident with Carol Shirley. She did discuss "the allegations" by her own admission at the preliminary inquiry.

[62] Yet even taking the most favourable view of the facts possible for G, and concluding that the record is "likely relevant" to the credibility of MR, and thereby indirectly JB, I note that section 278.3 (4) states:

> 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...
>
> (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;
>
> ...

[63] Nevertheless, if one were to move on I would then ask myself whether the production of this therapeutic record of MR is "necessary in the interests of justice" in this case?

[64] I find that the record is not necessary for G to make a full answer and defence. It is well established that an accused only has a right to a fundamentally fair trial – not a perfectly fair trial where all advantage is his. G has the police statements of both JB and MR and the September 28, 2010 video taped interview of MR. G decided against requiring JB to attend for cross-examination at the preliminary inquiry, but did have the benefit of very extensive cross examination of MR, at a time at which G's counsel was aware that MR may be changing her position [since sometime in 2011 as I recall his representation to the Court].

[65] I find that on the evidence and information I have before me, that the probative value of the record is minimal, even if it contains further references to the diary incident in question or otherwise regarding the behaviour of JB during the relevant periods. At some point the rule against rebuttal on collateral issues may be triggered – **R. v. NAA** (1996), 149 N.S.R. (2d) 219, [1996] NSJ No. 114 (CA). There is only marginal value added of more commentary by MR about this incident to Carol Shirley, in a therapeutic context where the focus is not the accuracy of the patient's experiences, but rather the perceived effect of numerous experiences, and the record

keeping of a patient's verbatim responses has been suggested to be necessarily unreliable.

[66] On the other hand the nature and extent of a reasonable expectation of privacy with respect to the record in question is very high as it relates to a therapeutic relationship rooted in a terrible tragedy for both MR and JB.

[67] I consequently also find that the potential prejudice to the right to privacy, and perhaps dignity of MR and JB is very significant.

[68] As Mr. Newton reminded me, the interests of privacy that MR and JB have in relation to this record and others, is also intended to be applicable to me. I should not, merely because of my position as the person deciding these issues, presume that I should be more likely privy to these records than anyone else otherwise would be entitled.

[69] I also have a concern that allowing access to such highly private therapeutic records may discourage the reporting of sexual offenses and/or discourage the obtaining of treatment by complainants or witnesses.

[70] Overall, I do not find that it is "necessary in the interests of justice" to produce the record sought, as the effect of the determination on the integrity of the trial process will be imperceptible.

[71] Therefore on the grounds argued by Mr. Embree, I am unsatisfied that the production of the record sought is "necessary in the interests of justice", and I therefore will not review the record sought.

Conclusion

[72] In relation to this application by G for the records sought, I find that each record is either not "likely relevant to an issue at trial" including the credibility of a witness, and/or its production is "not necessary in the interests of justice."

[73] Having said that, counsel have agreed that I should order that the DCS September 28, 2010 videotaped interview of MR be produced and disclosed, and I so order that this be done by DCS maintaining the original until the trial and any

relevant appeals of this matter are concluded, and by ensuring that true copies thereof are provided to G, and the Nova Scotia Public Prosecution Service.

[74] I authorize the publication of this Decision pursuant to section 278.9(1) of the **Criminal Code of Canada**.

Rosinski, J.