CITATION: R. v. M.F. and P.F., 2010 ONSC 2471
COURT FILE NO.: 117-09
DATE: 2010-04-27

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
HER MAJESTY THE QUEEN	)	Mary Ward, for the Crown
– and –	)	
M.F. and P.F.	)	
Applicants	)	Victoria A.M. Loh, for the Applicant P.F.
	)	Donald R. Fraser, for the Applicant M.F.
	)	Janet MacEachen, for the Complainant
	)	
	)	**HEARD:** April 21, 2010

REASONS FOR JUDGMENT

GRAY J.

[1] This is the second pre-trial application on which I have been asked to rule. In the first application, which I heard on March 30, 2010, I was asked to sever a 15-count indictment and order separate trials on three groups of counts. On March 31, 2010, I dismissed that application.

[2] In this application, both accused request production of certain records held by third parties. At an earlier stage of this proceeding, representatives of the various agencies holding the requested documents attended, pursuant to subpoenas, and tendered the documents to the Court, which were ordered sealed pending argument of the application itself. Prior to argument of the application, I had not seen the documents, nor had counsel for the Crown or counsel for the accused.

[3] At the hearing of the application, on April 21, 2010, counsel had narrowed their submissions so as to request production of two categories of documents relating to the complainant whom I had identified in my first ruling as complainant "A". That complainant is the biological daughter of the female accused. The documents requested are:

(a) records of the Hamilton Children's Aid Society and the Halton Children's Aid Society;

(b) documents prepared in connection with a report dated November 25, 2004, prepared by the Child Advocacy and Assessment Program ("CAAP"), McMaster Children's Hospital.

[4] Counsel was retained for the complainant, and before argument of the application, I directed that copies of all of the sealed documents be prepared by court staff and forwarded to counsel for the complainant. This was consented to by counsel for the Crown and counsel for the accused.

[5] The application is brought pursuant to s. 278.3 of the *Criminal Code*. I have reproduced the provisions of the *Code* that are relevant to this matter in an Appendix to these reasons.

[6] Some of the factual background to this matter has been reviewed in my earlier ruling dated March 31, 2010, and it need not be reviewed again. For the purpose of the application before me, it is only necessary to note that, at the time material to the allegations made by the complainant, the Hamilton and/or Halton Children's Aid Societies had investigated the family, consisting, in part, of both accused, the complainant, and her siblings. The children were referred by the Halton Children's Aid Society to the CAAP of the McMaster Children's Hospital for a child maltreatment assessment. The purpose of the assessment was to determine whether the children had experienced child maltreatment, and to make recommendations. There was no apparent counselling or treatment function as part of the assessment.

[7] A number of professionals were involved in the assessment, and interviews were conducted of all of the family members, as well as "collaterals", including a foster parent and

social worker. Documents were reviewed, including records of the Halton Children's Aid Society.

[8] Of significance in terms of the issues before me, complainant “A” was interviewed on May 19 and 26, 2004, by Dr. Niec and Ms. Derrington, and on June 11, 2004 by Dr. Niec and Dr. Al-Saleh.

[9] A report was issued by the CAAP on November 25, 2004. In three separate places in the report, it is specifically stated that the complainant denied any experiences of sexual or physical abuse. A copy of the report was provided to the accused.

[10] In five of the 15 counts in the indictment, it is alleged that both accused committed sexual assault, gang sexual assault, and touching the complainant for a sexual purpose.

[11] The constitutional validity of the relevant provisions of the *Code* was upheld by the Supreme Court of Canada in *R. v. Mills* (1999), 139 C.C.C. (3d) 321 (S.C.C.). The statutory provisions themselves were enacted by Parliament following the decision of the Supreme Court of Canada in *R. v. O’Connor*, [1995] 4 S.C.R. 411. The Court of Appeal, in *R. v. Batte* (2000), 145 C.C.C. (3d) 449 (Ont. C.A.), has considered the import of the provisions, and the appropriate tests to be considered by a trial judge in determining whether documents should be ordered to be produced.

[12] Under the statutory provisions, a two-stage inquiry is required. At the first stage, the accused must demonstrate that the record is “likely relevant” to an issue at trial or to the competence of a witness to testify, and that the production of the record is necessary in the interests of justice. The accused must satisfy both requirements. If he or she does so, the judge hearing the application may order the person who has possession or control of the record to produce the record to the Court for review by the judge. At the second stage, the judge may order the record to be produced to the accused, subject to any conditions that the judge may impose.

[13] As noted by O’Connor J. in *R. v. L.F.* (2006), 37 C.R. (6^{th}) 152 (Ont. S.C.J.), the accused often finds himself or herself in a dilemma, simply because he or she does not know what the records contain, and is thus hampered in his or her ability to demonstrate likely

relevance. However, it is clear from the cases interpreting the legislative provisions, particularly *R. v. Batte*, *supra*, that the accused must demonstrate likely relevance through evidence, and not through speculation or assumptions. As stated by Doherty J.A. in *Batte*, at para. 53: "The likely relevance of the records to an issue at trial, a witness credibility or the competence of a witness to testify is a prerequisite to an order compelling production of the records to the judge."; and "The onus is on the accused to establish likely relevance. In doing so, the accused cannot rely on speculative assertions or stereotypical assumptions."

[14] The issue in *Batte* related to the potential production of counselling and/or treatment records. It is recognized that such records are particularly sensitive, and there is a strong interest in maintaining confidentiality of such records unless it can be demonstrated that the production of such records is necessary in the interests of justice. In that context, Doherty J.A., at para. 72, expressed his view of the appropriate test as follows:

> 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.

[15] At para. 76, Doherty J.A. stated:

> 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.

[16] However, Doherty J.A. also made it clear that merely because a record might assist in cross-examining a complainant is not sufficient. It must contain something that has impeachment value. At para. 77, he stated:

> It will not, however, suffice to demonstrate no more than that the record contained a statement referable to a subject matter which would be relevant to the complainant's credibility. The mere fact that a witness has said something in the past about a subject matter on which the witness may properly be cross-examined at trial does not give that prior statement any relevance. It gains relevance only if it is admissible in its own right or has some impeachment value. In my view, the mere fact that a complainant said something about a matter which could be the subject of cross-

> examination at trial, does not raise a reasonable possibility that the complainant's statement will have some probative value in the assessment of her credibility.

[17] I will now consider the specific documents requested by the accused.

[18] First, as to the records of the two Children's Aid Societies. There is nothing to suggest that the Children's Aid Societies were engaged in any therapeutic or treatment process, and accordingly, unlike *Batte*, the records of those agencies have a lower expectation of privacy. However, it is still for the accused to demonstrate through evidence that there is something likely relevant to an issue at trial in those records, and that production of the records is necessary in the interests of justice. Counsel for both accused, during the argument of this matter, suggested that there is good reason to suspect that there may be something in those records that would assist their clients. Nevertheless, the argument really came down to one of speculation. At the end of the day, I am simply not persuaded that either accused has shown that there is anything in the records that is likely relevant to an issue at trial or that production of the records is necessary in the interests of justice. Accordingly, the application for production of the records of the Children's Aid Societies is dismissed.

[19] The accused have a much stronger case, in my view, with respect to the records relating to the CAAP assessment. The assessment report contains explicit statements in which it is said that the complainant denied any sexual or physical abuse. She was interviewed on three separate occasions.

[20] Counsel for the Crown and the complainant argued that the CAAP report could not form the basis for the application. It was submitted that it was improper to rely on the report. Counsel submitted that, while the accused had received copies of the report once it had been prepared, nevertheless the contents of the report should be considered confidential as they relate to the children. It was pointed out that it is stated in the report that complainant "A" did not know why she was being interviewed, and it may well have been that she thought the purpose of the exercise was for some therapeutic purpose.

[21] I do not accept these submissions. It is apparent, from an examination of the entire report, that the investigation leading up to the report had no therapeutic purpose. Its purpose was

to investigate possible child maltreatment and to make recommendations. Even if there was some therapeutic purpose, it is clear from *Batte* that even counselling or treatment records can be ordered produced if the requisites of the legislation are satisfied. In this case, the report was freely given to the accused shortly after it was prepared, and there is no reason it cannot be used as evidence to demonstrate that there are records that are likely relevant to an issue at trial, and that it is in the interests of justice that they be produced.

[22] I do not consider it to be part of my function, at this stage, to assess the weight to be given to evidence that is relevant to an issue at trial, nor to assess any explanation that may be given by the complainant for her apparent denial of sexual or physical abuse. As I understand the Crown's submission, the complainant did not admit to any sexual abuse for many years after it occurred. The Crown submits that this is common in cases of sexual abuse, and the complainant's denial is consistent with this phenomenon. However, the appropriate weighing of the evidence is to be done by me as the trial judge, once I have heard the evidence of the complainant and any other relevant evidence at trial. At this stage, based on the contents of the report, it was apparent that it is highly probable that the documents related to the CAAP assessment contain information that is likely relevant to an issue at trial. In the case of a denial that any sexual or physical abuse occurred, it is clearly in the interests of justice that any records that may disclose such a denial be produced. Accordingly, I determined that the accused had satisfied their onus on the first stage of the inquiry. Thus, I opened the records for my inspection.

[23] Upon examining the records, I determined that only the notes of two of the three interviews with the complainant had any information that might conceivably be relevant. I found that the notes of the interview on May 26, 2004 contain a note of a statement by the complainant that no one had ever hurt her. The notes of the interview on June 11, 2004 contain notes of statements by the complainant that she had suffered no sexual abuse and that she denied physical abuse. In my view, the notes of these statements by the complainant are clearly relevant to an issue at trial, and the production of the records to the accused is necessary in the interests of justice. Accordingly, I will order the relevant excerpts from the notes produced, subject to certain conditions.

[24] I have redacted the balance of the notes. While they contain material that would undoubtedly be of some assistance to counsel in cross-examining the complainant, they do not rise to the somewhat exacting standard, as stated by Doherty J.A. at para. 68 of *Batte*, as being "a free-standing piece of evidence going to the question of whether the abuse occurred."

[25] The production of the excerpts from the notes shall be on the following conditions:

(a) that the accused and counsel for the accused not disclose the contents of the excerpts to any other person, except with the approval of the Court;

(b) that no copies of the excerpts be made, except with the approval of the Court;

(c) that at the conclusion of the case, and after the expiry of any time limit for appeal, or upon the disposition of any final appeal, the records shall be destroyed.

[26] I have returned the records to the sealed envelope from which they came, and I have resealed it.

[27] Since there is only a limited right of appeal from my decision, by way of direct appeal to the Supreme Court of Canada upon obtaining leave of that Court, counsel requested that I allow a brief period following the release of my reasons for counsel to consider their options. Accordingly, unless I have been advised by April 30, 2010 that an application for leave to appeal has been filed, the relevant documents will be released to counsel for the accused, counsel for the Crown, and counsel for the complainant, on May 3, 3010.

[28] Pursuant to s. 278.9(1)(c) of the *Code*, I order that these reasons may be published, provided measures are taken to preserve anonymity.

GRAY J.

Released: April 27, 2010

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HER MAJESTY THE QUEEN

– and –

M.F.and P.F.

Applicants

REASONS FOR JUDGMENT

GRAY J.

Released: April 27, 2010

APPENDIX

Application for production

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

No application in other proceedings

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

Form and content of application

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

(*a*) particulars identifying the record that the accused seeks to have produced and the name of the person who has possession or control of the record; and

(*b*) the grounds on which the accused relies to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify.

Insufficient grounds

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

(*a*) that the record exists;

(*b*) that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;

(*c*) that the record relates to the incident that is the subject-matter of the proceedings;

(*d*) that the record may disclose a prior inconsistent statement of the complainant or witness;

(*e*) that the record may relate to the credibility of the complainant or witness;

(*f*) that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;

(*g*) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;

(*h*) that the record relates to the sexual activity of the complainant with any person, including the accused;

(*i*) that the record relates to the presence or absence of a recent complaint;

(*j*) that the record relates to the complainant’s sexual reputation; or

(*k*) that the record was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused.

Service of application and subpoena

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

Service on other persons

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

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.

Persons who may appear at hearing

(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.

Costs

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

Judge may order production of record for review

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.

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 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.

Review of record by judge

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.

Hearing *in camera*

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

Provisions re hearing

(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).

Factors to be considered

(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.

Conditions on production

(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.

Copy to prosecutor

(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.

Record not to be used in other proceedings

(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.

Retention of record by court

(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).

Record of reasons

(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.

Offence

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