SC CR 14 001

CR 02632

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ALEXIS BLANCHO

Application for disclosure of documents in the custody of the Director of Corrections. Granted.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.Z. VERTES

Heard at Yellowknife, N.W.T.
on October 14, 1994

Judgment filed: October 21, 1994

Counsel for the Applicant (Accused):	S. Duke
Counsel for the Crown:	J.A. MacDonald
Counsel for the Complainant (J.K.):	G. Wallbridge
Counsel for the Director of Corrections (N.W.T.):	D. Jenkins

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REASONS FOR JUDGMENT

The accused, Alexis Blancho, is charged with two sexual assault offences. The complainant, J.K., is a 17 year old male. The charges relate to alleged sexual acts by the accused during a time period from 1989 to 1992. The accused's trial is set to commence on October 31, 1994.

The accused has applied for an order compelling the release of certain records in the custody of the Hay River Secure Centre (a young offenders' secure custody facility). Notice of this application was given to the Territorial Director of Corrections and the complainant, both of whom appeared by counsel at the hearing before me. The records in question are not in the custody of Crown counsel nor have they been reviewed by any of the counsel involved on this application.

3 This application has its genesis in certain information that came out at the accused's preliminary inquiry held on June 2, 1994. At that time the complainant, under cross-examination, stated that the first person he told about the alleged sexual offences was his mother, and then he told a psychiatrist, and then he told the police. All of this happened a few months earlier. After the preliminary hearing, defence counsel wrote to Crown counsel requesting disclosure of any psychiatric or psychological assessments of J.K. together with the circumstances of the disclosure to the psychiatrist. Crown counsel replied that their information, as conveyed to them by the police, was that the territorial Department of Corrections had three reports on file relating to J.K.'s disclosure of sexual abuse by the accused. The authors of the reports were a supervisor at the Hay River Secure Centre, a corrections worker at that facility, and a psychologist on staff at that facility. The Crown further informed defence counsel that the territorial Director of Corrections would require a court order before releasing these documents.

4 In my view, the Crown's response is commendable. They made enquiries and provided the relevant information to counsel. They were not required to do more. The Crown is not deemed to be in possession of documents held by bodies such as social agencies and other governmental departments. The Crown, therefore, has neither the duty nor the power to release information from other agencies. To imply any such responsibility would create an overwhelming burden: R v. Gingras (1992), 71 C.C.C. (3d) 53 (Alta.C.A.).

5 The information provided to me was that the reports in question were made as the result of an initial voluntary and unprompted disclosure by J.K. to the corrections worker. It was not the result of any investigative process initiated by the corrections worker. The context of this disclosure is important.

6 On January 27, 1994, J.K. was arrested on charges of alleged sexual assault on the accused. He was remanded in custody to the Hay River centre. It was there that the first disclosure was made sometime between January 27 and February 1, 1994. The corrections worker's report is dated February 2, 1994. That is followed by the supervisor's report and the psychologist's report, both dated February 3, 1994. The staff at the centre then contacted the police. The complainant was released and sent home on February 10, 1994, and spoke to the police shortly after that. His statements to the police have been disclosed. The charges against J.K. have now been disposed of in Youth Court. The dispositions are not relevant to this application.

7 The Director of Corrections takes the position, and all counsel agree on this, that the reports in question are not "records" subject to the non-disclosure restrictions of the Young Offenders Act, R.S.C. 1985, c.Y-1. Counsel are also agreed that there is no other statutory privilege attaching to these reports.

8 The accused says that these reports should be released because they contain the earliest

written record of the complainant's disclosure. They are part of a chain of disclosure leading to these charges. It is submitted that they are relevant to the issue of fabrication since they are so close in time to the charges laid against J.K. relating to alleged assaults on the accused. The affidavit of the accused's trial counsel, filed on this application, contains the following paragraph:

> 11. THAT I verily believe that I require copies of the reports on (J.K.'s) file relating to disclosure of sexual abuse in order to make full answer and defence on behalf of the Applicant; and I verily believe that I should be able to cross-examine (J.K.) on these records to determine if they reveal a possible motive to fabricate the allegations against the Applicant.

9 All other counsel, including Crown counsel, opposed the application. Essentially they say that this is nothing more than a fishing expedition for possible inconsistencies. They point to the above-quoted extract from the affidavit and say that it is speculative to think that these reports relate to any issue in the criminal proceedings. Furthermore, even if there are statements repeated in these reports, such statements are inadmissible hearsay. Finally, they say that the complainant may have a privacy interest in these reports. I emphasize "may" since there was no direct evidence from the complainant on this point.

10 Much of the discussion on this application referred to the recent British Columbia Court of Appeal decision in R v. O'Connor (No. 2) (1994), 90 C.C.C. (3d) 257. I agree with the statements of principle in that case. It provides valuable guidance on these types of applications.

11 The O'Connor judgment deals with the disclosure of records relating to treatment which may be described as therapeutic in nature ----- "medical records" in their broadest connotation ----- and specifically records relating to treatment of complainants. The judgment, following comments made by different judges of the Supreme Court of Canada in Osolin v. The Queen (1993), 86 C.C.C. (3d) 481, notes that such records are not automatically admissible due to the important privacy interest in such records that the patient is presumed to have and to expect. The judgment, recognizing the need to balance this privacy interest with an accused's right to make full answer and defence, established a two-stage process to determine whether medical records of a complainant (or any witness) should be disclosed (at page 261):

> At the first stage, the applicant must show that the information contained in the medical records is likely to be relevant either to an issue in the proceeding or to the competence of the witness to testify. If the applicant meets this test, then the documents meeting that description must be disclosed to the court.
>
> The second stage involves the court reviewing the documents to determine which of them are material to the defence, in the sense that, without them, the accused's ability to make full answer and defence would be adversely affected. If the court is satisfied that any of the documents fall into this category, then they should be disclosed to the parties, subject to such conditions as the court deems fit.
>
> The test to be met by an applicant on the initial application to have the medical records produced to the court is necessarily lower than the test to be applied by the court in deciding whether to release any of those documents to the parties. A less stringent test is appropriate at the first stage since, at the point in time when the application is first made, it is unlikely that anyone other than the witness and the physician, psychiatrist or therapist will know what is in the records.

This procedure has been used in this jurisdiction in numerous cases.

12 In the case before me I directed that the reports be produced to me for my review in private. I did this because of the close temporal connection between the disclosure and the charges laid against the complainant. The circumstances surrounding the initial disclosure may indeed be "likely relevant" to the issue of fabrication since the very fact of being charged and incarcerated could give one a motive to retaliate.

13 The O'Connor judgment also addresses the question of invoking credibility as an issue and relying on the possibility of inconsistencies with which to test credibility (at pages 265 and 266):

> The submission that medical records should be produced because they may be relevant to the credibility of a complainant is patently inadequate to justify their production, in the absence of evidence indicating that there is likely to be something in those records relevant to the credibility of the complainant with respect to a particular issue in the case. Invoking credibility "at large" is not sufficient to justify such an interference with the privacy interests of a complainant ...
>
> Further, production of medical records is not to be compelled simply because the defence hopes that they might disclose a prior inconsistent statement of a complainant. Without more, such a submission amounts to no more than a request to go fishing in these very private documents in the hope that something useful might be discovered, but without any basis being posited for believing that such evidence might be found.

14 But it must be remembered that O'Connor deals with the disclosure of medical records, not any record. The privacy interest of a person in her or his medical records, and the public interest in maintaining such privacy, have been recognized in numerous judgments (including my own in R v. Mandeville, [1994] N.W.T.R. 126). But the same privacy interest cannot be said to extend to any and all records kept by some third party.

15 I have always understood it to be the one great principle in our law that all facts which are relevant to an issue may be proved. Any evidence which can throw light on the matters in issue is receivable. One need not refer to ancient texts to establish these fundamental propositions. One need only refer to the words of former Chief Justice Dickson in R v. Corbett (1988), 41 C.C.C. (3d) 385 (S.C.C.), at page 404:

> I agree ... that basic principles of the law of evidence embody an inclusionary policy which would permit into evidence everything logically probative of some fact in issue, subject to the recognized rules of exclusion and exceptions thereto. Thereafter the question is one of weight. The evidence may carry much weight, little weight, or no weight at all. If error is to be made it should be on the side of inclusion rather than exclusion and our efforts in my opinion, consistent with the ever-increasing openness of our society, should be toward admissibility unless a very clear ground of policy or law dictates exclusion.

16 It seems to me that the burden to establish that some record, to quote O'Connor, is "likely to be relevant" is not the same as establishing that it is relevant. That may only be assessed in the context of all of the evidence at the trial. In my view it is akin to the test for the issuance of a subpoena under s.698(1) of the Criminal Code: "likely to give material evidence".

17 Once this threshold is met then the evidence is at least producible unless there is some type of privilege that prevents its disclosure. That privilege may be, as characterized in R v. Gruenke (1991), 67 C.C.C. (3d) 289 (S.C.C.), a "class" privilege (such as solicitor-client communications) or a "case-by-case" privilege. It may be argued that by now medical records fall under the category of "class" privilege in that there is a prima facie presumption of inadmissibility. The term "case-by-case" privilege is used to refer to documents which are not prima facie privileged but which may nevertheless be excluded from evidence (and from disclosure) on some policy basis. That policy must be weighed against potential relevance in determining whether the document must be disclosed. But there must be an identifiable policy reason for the exclusion.

18 In the case before me no one has been able to identify an overriding privacy interest, either personal or public, in these reports. The reports, made for internal record keeping purposes ("activity logs" would be a good way to describe them), relate the interaction of staff with J.K. and the fact of his making disclosures. None of them relate what J.K. said in his disclosure. None of them (including the one prepared by the psychologist) reveal any therapeutic purpose to the interaction. The reports in fact reveal that J.K. wanted to speak to others including the police.

19 There is nothing, in either my review of the reports or in the circumstances of their preparation or in the submissions made to me, to support the conclusion that J.K. has an over-

riding expectation of privacy in these reports, or that there is an element of confidentiality essential to the interaction between J.K. and the centre staff, or that there is a societal interest in fostering confidentiality with respect to these specific communications. As such they fail to meet the test for a "case-by-case" privilege.

20 Furthermore, considering the circumstances and timing of the disclosures, these reports may be relevant evidence as to how the disclosures were made and what motivated the complainant. This in turn may be relevant and material to the issue of fabrication.

21 In M.H.C. v. The Queen (1991), 63 C.C.C. (3d) 385 (S.C.C.), the court considered, as one issue, the obligation on the Crown to disclose a statement given by a third party as to statements and possible disclosures made by the complainant. The judgment was a precursor to the now established disclosure requirements outlined in R v. Stinchcombe (1992), 68 C.C.C. (3d) 1 (S.C.C.), and quoted with approval in that case. The court held that such evidence may be relevant to the issue of fabrication and affect the jury's conclusions on credibility.

22 The case before me is not a Crown disclosure case but the analysis called for is the same. This evidence may be useful to the defence in meeting the case for the Crown or to advance a defence. The reports should be disclosed.

23 Accordingly I direct that Crown and defence counsel attend at the Clerk's office and

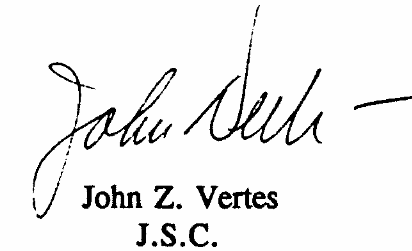
obtain copies of the reports which are currently sealed in an envelope in the file. Those reports in the file shall thereafter remain sealed unless a judge orders otherwise.

24 Finally I wish to make a few comments about the procedure on these types of applications. And again the O'Connor case provides valuable guidance.

25 Applications to compel disclosure of documents in the possession of a person or agency not a party to the proceedings should be brought by notice of motion accompanied by an affidavit containing a statement of the material grounds supporting the application. There should not be a new style of cause or new parties added to the style of cause. The application is within the context of the criminal proceedings so the same style of cause should be maintained. To do otherwise creates unnecessary administrative complexity.

26 The application should be brought well in advance of the trial. Notice of the application should be served on the Crown, the person in possession of the documents sought to be disclosed, and the complainant or other witness to whom the documents relate. All of these people should be entitled to present evidence and make submissions as to the issues raised by the application. This seems to me to be the most comprehensive manner of dealing with these applications.

27 The order banning publication of the evidence, submissions, and results of this application shall continue until the present prosecution against the accused is concluded.



John Z. Vertes
J.S.C.

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