CR 03224

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

MIKE NITSIZA

Application by accused for production of counselling records in possession of a third party.

Heard at Yellowknife on February 21, 1997

Reasons for Judgment filed: February 25, 1997

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

Counsel for the Applicant (Accused):	James R. Posynick
Counsel for the Crown:	Margo Nightingale
Counsel for McAteer House:	Sarah A.E. Kay

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REASONS FOR JUDGMENT

1 The accused, Mike Nitsiza, is charged that, between January 1st, 1970, and December 31st, 1971, he did have sexual intercourse with G.R., a female person, not his wife and under the age of fourteen years, contrary to what was then s.138(1) of the *Criminal Code*. He has elected trial by judge and jury. He has brought this pre-trial application to compel production of counselling records relating to the complainant.

2 Notice of this application was served on the complainant and the custodian of the records. The complainant did not appear at the hearing of this application but she did express, through Crown counsel, her willingness to let the Court decide whether these records should be produced to the defence. The custodian of the records, the Alison McAteer House, a shelter for abused women and their children, appeared at the hearing by counsel.

3 The alleged circumstances of the offence were initially disclosed in January

1996, to a counsellor, Ms. Janice McKenna, employed by the YWCA Family Violence Outreach Programme. This is a separate organization from McAteer House but, for purposes of this application, Ms. McKenna's records were included as part of the production demand and counsel for McAteer House included these records in her submissions. This spirit of cooperation with the Court's task is to be commended.

4 The alleged crime is one incident occurring 26 or 27 years ago when the complainant was 6 or 7 years old. The complainant testified at the preliminary inquiry that she had attempted to "block out" this alleged incident from her memory for many years but she did have recollections of it albeit they were infrequent. She testified as well that she decided to disclose this incident when she saw that the accused was working as a school counsellor. She said: "...I'm scared there might be more, not just me. I had to live with it for 25 years." The complainant had already been receiving counselling from Ms. McKenna and at the McAteer House for difficulties in her marital relationship. It was after the disclosure to Ms. McKenna that the complainant gave a statement to the police.

5 The accused's counsel seeks access to these records on several grounds. First, he submits that these records may contain details of the first disclosure of the alleged incident and therefore are likely relevant to the complainant's credibility. It is, I think, acknowledged that credibility will be the main focus of the trial as the complainant is expected to be the sole Crown witness. Second, counsel submits that these records may be relevant to an examination of the counselling techniques employed by Ms.

McKenna and others which may then shed light on whether the complainant's memory could be said to have been "shaped" by suggestive techniques. Third, counsel submits that these records may also be relevant to an assessment of the reliability of the complainant's memory and, in particular, her recollection as to what specifically happened and her identification of the accused as the perpetrator. With respect to the second and third grounds, defence counsel relied on an affidavit from Dr. J.D. Read, a professor of psychology, whom the defence anticipates calling at trial as an expert witness.

6 The Crown has already made disclosure of some information relative to these records. This disclosure, coming after this application was launched, consists of the following statement:

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>
> Janice McKenna said that she took no notes in her meetings with (G.R.). She only took information for the organization's statistics. This includes:
>
> number of times she saw her
> the length of time they spent together
> demographic information (ie.ethnic origin)
> general purpose of visit (ie.abuse in relationship)

The Crown, however, does not have the records and Crown counsel has not examined them.

7 There is no question that records such as those demanded here, records that may be labelled "therapeutic" in the general sense, are subject to a judicially created

privilege. They are not automatically admissible because of the important societal interest in maintaining patients' expectations of confidentiality in such records. This privilege, however, is not absolute and must be balanced, in the criminal law sphere, with an accused person's fundamental right to make full answer and defence. The Supreme Court of Canada, in *R v O'Connor* (1996), 103 C.C.C.(3d) 1, attempted to lay down a test and a procedure for this balancing exercise.

8 As a preliminary comment, one must recognize that on these types of applications nothing is to be gained by taking an absolutist position for or against production. This point was made by Elizabeth Bennett, Q.C., in her article "Disclosure of Complainant's Medical and Therapeutic Records", in (1996) 1 *Canadian Criminal Law Review* 17, at page 18:

> Two fundamental points are given and beyond discussion. The first is that there will be special consideration given to complainants in sexual offences. It is pointless to debate the question of full disclosure of the complainant's private records simply upon request, as this will not occur. However, it is also fruitless to debate the question of absolute privilege of these records. The records may be relevant to an issue in a trial and necessary to make full answer and defence to a charge. The answer to the question of production, unsatisfactory as it may be, lies somewhere between these stark positions. As stated by L'Heureux-Dubé J. in *R v O'Connor*:
>
> > The question is therefore not *whether* the defence can be limited in its attempts to

> obtain production of private records held by third parties, but *how* it can be limited in a manner that accords appropriate constitutional protection to all of the constitutional rights at issue.

9 The *O'Connor* case established a two-stage procedure to determine if therapeutic records in the possession of a third party (as opposed to the Crown) should be produced. The first stage requires the accused to satisfy a judge that the information is "likely to be relevant". This was explained in the majority judgment (at page 19):

> ...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... (emphasis in original)

Further on, the majority made clear (at page 20) that this burden on the accused should not be interpreted as an "onerous" one. In addition, considerations as to ultimate relevance and admissibility at trial are not weighed at this stage.

10 If the accused shows that the information is likely to be relevant, then the documents are to be inspected by a judge. It is after such an inspection that the judge must decide whether, and to what extent, production should be ordered. In doing so the judge "must examine and weigh the salutary and deleterious effects of a production order and determine whether a non-production order would constitute a reasonable limit on the

ability of the accused to make full answer and defence" (page 23). The majority went on to list five factors that should be considered (in agreement with the minority judgment of L'Heureux-Dubé J.):

> We also agree that, in balancing the competing rights in question, the following factors should be considered: (1) "the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record in question; (3) the nature and extent of the reasonable expectation of privacy vested in that record; (4) whether production of the record would be premised upon any discriminatory belief or bias"; and (5) "the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question" (para.156).

11 With respect to the first stage test, Crown counsel submits that there must be an evidentiary foundation for the production request. She argues that there is no evidence of lost memory or the implanting of a false memory through suspect therapy techniques. She also points to the disclosure that has been made which suggests that there are no records of the type sought by the defence.

12 I agree that there must be some basis in evidence to support a production application. There must be something more than a bare, unsupported and speculative assertion. If the sole ground upon which this application were brought was the suspicion of implantation of false memories, I may agree that there is a lack of an evidentiary foundation for the application. But the grounds are far more basic than that.

13 It seems to me that in cases where the initial disclosure is made to a therapist or counsellor, as here, the Supreme Court of Canada has come close to creating a presumption that records relating to that disclosure are likely relevant. One can look at

the majority judgment in *O'Connor* (at page 21) for an indication of this approach:

> In other cases, the complainant may reveal at the preliminary inquiry or in his or her statement to the police that he or she decided to lay a criminal charge against the accused following a visit with a particular therapist. There is a possibility of materiality where there is a "reasonably close temporal connection between" the creation of the records and the date of the alleged commission of the offence (*R v Osolin* (1993), 86 C.C.C.(3d) 481 at p.524, 109 D.L.R. (4th) 478 at p.522, [1993] 4 S.C.R. 595) or in cases of historical events, as in this case, a close temporal connection between the creation of the records and the decision to bring charges against the accused.

14 It also seems to me that this approach has gained additional substance from the Court's very recent judgment in *Carosella v The Queen*, [1997] S.C.J. No.12. There the Court was dealing with the issue of whether a stay of proceedings should be ordered as a result of the destruction of records by a counselling centre. In that case there was evidence that notes relating to the initial disclosure were among those destroyed. The majority judgment in that case (at paragraphs 44-46) seems to say that, even without knowing what specifically was in those notes, one can still conclude that they were likely relevant because they related to the initial disclosure of the alleged crime:

> The trial judge was certainly entitled to arrive at the conclusion that these notes were relevant and material. The notes were made by the Centre worker at the time of the initial interview of the complainant. On the evidence of the Centre worker, the notes related to the very subject of the trial, the alleged sexual incidents. On that basis, it was open to the trial judge to conclude that the notes were likely relevant, in that they might have been able to shed light on the "unfolding of events", or might have contained information bearing on the complainant's credibility. The notes related to the complainant's initial disclosure of the alleged incidents to the worker at the Crisis Centre; as such, they apparently constituted the first written record of the allegations. That interview lasted for about 1 3/4 hours. Had the notes contained inconsistencies upon which the complainant could be cross-examined, the possibility existed that the notes would have affected the outcome of the case in a manner favourable to the appellant.
>
> In my view, it is clear that the appellant could have made use of the information in the notes even though it is difficult to specify the precise manner in which the information could have been used without knowing the contents of the notes.

> The classic use of such evidence is, of course, to cross-examine the witness on inconsistent statements. Although in this case the complainant could not have been cross-examined on the notes themselves as the notes were not statements of the complainant, they could have afforded a foundation for cross-examination. If the notes indicated an inconsistency with evidence in the witness box, the witness could have been confronted with this inconsistency, and if denied, the statement could have been proved by calling the note-taker.
>
> In addition, the notes could have assisted the defence in the preparation of cross-examination questions. They may have revealed the state of the complainant's perception and memory. They might have revealed that some of the complainant's statements resulted from suggestions made by the interviewer. They could have pointed the appellant in the direction of other witnesses. The notes may have demonstrated, in addition to the rest of the evidence disclosed to the accused, that he would not have had to testify at the trial, or that he would have had to mount a defence.

15 In my opinion, there are two bases for concluding that the records in this case are likely relevant. First, the initial disclosure was made to the counsellor. Second, in the particular circumstances of this case, the records may contain information that bears on the complainant's credibility in the sense that they may reveal factors relevant to the reliability of her memory. The bare-bones outline of what the notes contain, as revealed by the disclosure information, do not help to determine what actually may be in those records. For these reasons, I directed that the records be produced for my inspection.

16 The records I reviewed fall into two categories. First (what I will call category "A") is a two-page summary of consultations by the complainant with Ms. McKenna. The summary contains, as noted in the Crown's disclosure document, basic statistical information. There are, however, some references to the disclosure of this alleged crime.

17 In my opinion this summary does not contain information of the type that could be said to trigger a significant privacy interest nor information that would if revealed be harmful to the complainant's dignity, health or security. On the other hand, it does provide information on the general type of sessions held between the complainant and Ms. McKenna and the frequency of them so as to potentially provide some useful information to the defence to explore the issue of what influence, if any, these sessions had on the disclosure. For these reasons, I direct that the two-page summary designated as category "A" be produced.

18 The second type of records (what I will call category "B") consist of "daily reports" and "case management forms" prepared by counsellors at the McAteer House. Many of the notations relate to observations of the complainant's activities while a resident there. None of the notes relate to the subject matter of this charge nor to the disclosure of this alleged crime. They relate almost exclusively to the reason why the complainant was at the McAteer House, that being, as she said at the preliminary inquiry, because of problems in her marital relationship. As such these records are irrelevant to this case. If production of these records were ordered then it could be said that such an order is based on discriminatory and stereotypical beliefs that a sexual assault complainant's personal life is open territory. That is not the case and the *O'Connor* test has been developed with the aim, at least in part, of eradicating such beliefs. For these reasons, the records designated as category "B" will not be produced.

19 Counsel for the McAteer House urges me to impose some protective measures to limit the distribution of any documents to be produced. I agree that in every case where such a production is ordered, careful consideration has to be given to adequate protective measures.

20 In summary, I order as follows:

1. The documents, sealed on the court file and marked as category "A", are to be produced to counsel for both the defence and the Crown. Counsel may attend at the Clerk's office and the Clerk will provide copies to them. Counsel for the McAteer House may also attend and obtain copies from the Clerk. The original documents in category "A" will remain sealed in the court file until the expiry of the appeal period after the trial of this charge. At that time, the document is to be returned to counsel for the McAteer House.

2. The production is subject to the following conditions: counsel may not reproduce or distribute copies of the documents to anyone other than expert witnesses retained by them in connection with this case; the documents are to be used only in connection with this case; and, the contents of the documents are not to be divulged to anyone not entitled to inspect them.

3. The documents, sealed on the court file and marked as category "B", will remain sealed until the expiry of the appeal period after the trial herein at which time the document will be returned to counsel for the McAteer House. If counsel for McAteer House wishes to obtain a copy of these documents so that the McAteer House records may be complete, she can attend on the Clerk who will provide copies to her. No copies will be made available to anyone else.

21 I thank all counsel for their submissions.

J.Z. Vertes,

J.S.C.

Dated at Yellowknife, NT, this
25th day of February 1997.

Counsel for the Applicant (Accused): James R. Posynick

Counsel for the Crown: Margo Nightingale

Counsel for McAteer House: Sarah A.E. Kay