R. v. Kasook, 2000 NWTSC 33

Date: May 19, 2000
Docket: CR 03860

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

COREY BENTON KASOOK

Applicant

Application to quash committal for trial. Preliminary inquiry re-opened to allow further cross-examination of Crown witness.

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

Heard at Yellowknife, Northwest Territories
on May 11, 2000

Counsel for the Applicant: John MacFarlane
Counsel for the Respondent (Crown): Alan R. Regel

Date: 2000 05 19
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REASONS FOR JUDGMENT

[1] The applicant accused has been committed to stand trial on a charge of sexual assault. He has applied for judicial review of the preliminary inquiry. He seeks an order in the nature of *certiorari* quashing the committal or, alternatively, an order directing that the preliminary inquiry be re-opened. The purpose of re-opening the inquiry would be to enable the applicant to cross-examine the complainant as to circumstances which may, in the applicant's words, lay the groundwork for an application at trial to compel production of counselling records pursuant to s.278.3 of the Criminal Code.

[2] The applicant does not take issue with the sufficiency of the evidence for the committal. What he does assert is that the preliminary inquiry judge fell into jurisdictional error by precluding cross-examination of the complainant as desired by the applicant. For the reasons that follow, I have concluded that the preliminary inquiry should be re-opened to permit further cross-examination.

The Preliminary Inquiry:

[3] The preliminary inquiry in this case was held on February 15, 2000, in the Territorial Court. The complainant, E.K., was the sole witness called by the Crown. Prior to the inquiry, defence counsel had received, by way of Crown disclosure, information that the complainant had received counselling after the alleged assault and that she had made the initial complaint to the police after this counselling.

[4] At one point during the cross-examination of E.K., she stated that she had difficulty recollecting certain events around the time of the alleged assault, in particular how the complainant's dog came to be hurt. She said that she found out about what happened to her dog through her counsellor. The complainant said, in answer to a question on cross-examination: "...I don't remember what happened." When defence counsel tried to follow up, the preliminary inquiry judge expressed a concern about whether he was getting into the area of counselling records and intruding into the complainant's privacy rights. Defence counsel stated that if he was going to bring an application to compel production of any such records prior to trial then he would have to lay the groundwork for such an application. The presiding judge then stated: " ... if you're not going to produce any records today, then anything that happened by way of a conversation from the counsellor toward the complainant is hearsay, and I'm not going to allow it." There then followed this exchange between defence counsel and the presiding judge:

> Mr. MACFARLANE: Then I am going to be continuing with questioning along the line of when she met with counsellors and what she was meeting them for
>
> THE COURT: What is the basis for the admissibility of this line of questioning?
>
> MR. MACFARLANE: Again, to lay the groundwork for a possible application for third-party records at a trial.
>
> THE COURT: Well, I don't think it appropriate at a preliminary inquiry to go that far.
>
> ...
>
> THE COURT: Does the defence have disclosure?

MR. MACFARLANE: I have disclosure that she's met certain counsellors. There is some indication that she did go for some counselling, I'm not sure what that counselling is about. I don't know who she spoke to about this particular incident, when she spoke to them or anything like that.

THE COURT: We've been -- the cross-examination has gone on for about half an hour. There hasn't been one question put to the witness about what occurred at the material time. A preliminary hearing can be a broad wide-ranging discovery process, but I have yet to hear anything material to the matter before the Court. And at some point it becomes incumbent upon me, a justice at a preliminary inquiry, to close it down and I'm doing that right now. And if I have exceeded my jurisdiction, you may go to the Supreme Court, but you are getting into, as I see it for the purposes of this proceeding, irrelevant, immaterial, and prejudicial areas that could be highly embarrassing to the witness and you're not laying any adequate foundation for doing so.

[5] The preliminary inquiry judge then stated that defence can ask for further disclosure from the Crown and, if the Crown will not provide the information requested, defence counsel could then bring the application for a hearing under the relevant provisions of the Code. The learned judge then stated: "What you are asking the Court to do today is to embark upon a s.278.1 application where there is no basis in law to do so." Defence counsel then sought to explain why he wanted to pursue this questioning and once again the presiding judge prohibited him from doing so:

MR. MACFARLANE: --so I can put on the record my purpose would have been to ask the complainant about when she met with certain counsellors and what she was speaking to them about and my purpose for those lines of questioning to see -- to lay the groundwork for a possible 278 application to argue that those records would be relevant to trial.

THE COURT: All right. Well, you can take that before the trial court if the Crown won't give you that information between now and the trial. You may continue. I'm not going to permit that line of questioning at this preliminary inquiry. Who the counsellor is, you may ask that, and the time period she saw the counsellor.

MR. MACFARLANE: Okay.

THE COURT: I don't have a problem with that either.

MR. MACFARLANE: Would I be able to ask what they talked about?

THE COURT: No. You can try and get that from the Crown privately, but not in this courtroom where the public is here.

...

MR. MACFARLANE: Well, I just repeat my earlier comment. If I do bring an application at the trial, my friend or the Crown attorney at that time may argue that I'm not entitled to look at the records because I haven't laid the groundwork to see -- to say that they're relevant, and that's simply what I'm attempting to do today.

THE COURT: Well, all you need do would be to make an application to the Crown by letter, ask the Crown to give you all of that information, assuming there is a committal. If there is no order to stand trial, this becomes irrelevant. If there is an order to stand trial, and the Crown does not comply with your request for disclosure, you can apply to the trial court for an order for disclosure. So it's inappropriate to deal with it now. It's not necessary. You have plenty of avenues open to you, but this isn't the place to do it. So I ask that you move on.

[6] Defence counsel then asked a few more questions of the complainant. The Crown closed its case. The defence did not call any evidence or make submissions. The applicant was committed to stand trial before a Supreme Court judge and jury.

[7] I was informed that, subsequent to the preliminary inquiry, defence counsel requested, by way of Crown disclosure, counselling records relating to the time period leading up to and following the date of the alleged assault. Apparently Crown counsel informed him that the Crown's office was not in possession of any such records and, in any event, such records were considered personal information which the Crown could not disclose. Thus the only information defence counsel has as a result of his questioning at the preliminary inquiry is the name of the counsellor, the facility where counselling took place, and the dates.

Legislative Framework:

[8] To put this application into its proper context, it is necessary to have regard to the legislative framework established by the Criminal Code, as analyzed and interpreted by the Supreme Court of Canada in *R. v. Mills*, [1999] 3 S.C.R. 668, for the production of counselling records.

[9] Sections 278.1 to 278.91 of the Code set up a specific procedure for, and limitations on, the production of records containing personal information for which there is a reasonable expectation of privacy in the context of prosecutions for sexual offences. A two-stage analysis is required to determine, first, if the records should be produced to the court for review and, second, if they are reviewed whether they should be disclosed to the defence. At both stages the judge must be satisfied that the record is likely relevant to an issue at trial or to the competence of a witness to testify and that its production is necessary in the interests of justice. In coming to this determination the judge must consider the salutary and deleterious effects of the determination on the accused's right to make full answer and defence and on the privacy and equality rights of the person to whom the record relates. The application must be made to the trial judge: s.278.3(1). Hence a preliminary inquiry judge has no jurisdiction to consider such an application.

[10] In the first stage of the analysis, that being whether to order that the record be produced for review by the court, the accused must establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify: s.278.5(1)(b). A mere assertion of likely relevance is not enough. Section

278.3(4) lists eleven specific assertions which are not sufficient "on their own" to establish that a record is likely relevant. These include that the record relates to treatment or counselling or that the record was made close in time to the complaint. The purpose of this prohibition is to prevent speculative and unmeritorious requests for production based on stereotypical assumptions (see *Mills* at para.118). There is, therefore, an obligation on the accused to put forth a reasonable, case-specific, evidentiary base to show that a record is likely relevant. This was noted by the Court in *Mills* (at para. 120):

> The purpose and wording of s.278.3 does not prevent an accused from relying on the assertions set out in subsection 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... Conversely, where an accused does provide evidence or information to support an assertion listed in s.278.3(4), this does not mean that likely relevance is made out. Section 278.3(4) does not supplant the ultimate discretion of the trial judge. Where any one of the listed assertions is made and supported by the required evidentiary and informational foundation, the trial judge is the ultimate arbiter in deciding whether the likely relevance threshold set out in s.278.5 and 278.7 is met.

[11] So how is the defence to construct the "evidentiary or informational foundation" (as stated above) for such an application? Where is the defence to find the "case specific evidence or information" that the Criminal Code and the Supreme Court of Canada say is necessary? One of the ways is through the questioning of Crown witnesses at the preliminary inquiry.

[12] In *Mills*, the Court stated (at para.135):

> Furthermore, contrary to the respondent's submissions, there is a sufficient evidentiary basis to support such an analysis at this early stage. This basis can be established through Crown disclosure, defence witnesses, the cross-examination of Crown witnesses at both the preliminary inquiry and the trial, and expert evidence, see: O'Connor, supra, at para. 146, per L'Heureux-Dubé J. As noted by Taylor J. for the British Columbia Supreme Court, "the criminal process provides a reasonable process for the acquisition of the evidentiary basis", Hurrie, supra, at para. 39. To this end, as the Attorney of British Columbia submitted: "Laying the groundwork prior to trial, comprehensive examination of witnesses at trial, will go a long way to establishing a meritorious application under this legislation."

[13] Even in the case that was the catalyst for the current Criminal Code regime for disclosure, *R. v. O'Connor*, [1995] 4 S.C.R. 411, there are several references to the preliminary inquiry as being one source for the necessary evidentiary base. These can be found in the joint judgment of Lamer C.J.C. and Sopinka J. (at para. 26) and the dissenting judgment of L'Heureux-Dubé J. (at para. 146).

[14] The issues raised on this application, however, are the extent to which the complainant can be questioned on the topic of counselling at the preliminary inquiry and whether in this case the preliminary inquiry judge lost jurisdiction by prohibiting such questions.

Submissions of Counsel:

[15] The submissions of counsel for the applicant pointed to the requirement for an evidentiary base as the reason for allowing cross-examination of the complainant as to the circumstances of her counselling. I think it is fair to say that counsel has not definitely decided to launch an application for production because, of course, he does not know what any records may relate to or contain. But, in his submission, if he is unable to question the complainant then he may have no way of obtaining the necessary information.

[16] I think it is also fair to say that defence counsel at the preliminary inquiry was not attempting to elicit, through the complainant, hearsay evidence as to what others, such as her counsellor, may have told her. Unfortunately part of the difficulty in this case arose when the discussion as between the preliminary inquiry judge and defence counsel digressed into concerns about hearsay. Defence counsel outlined his reasons for his line of questioning and the general nature of the questions he wanted to ask ("when she spoke with the counsellor" and "what they may have spoken about"). In my opinion, this is not an issue of hearsay *per se* but of relevance.

[17] Applicant's counsel referred to an Ontario Provincial Court case where the same issue arose on a preliminary inquiry. In *R. v. J.F.S.*, [1997] O.J. No. 5328, the accused's counsel embarked, during cross-examination of the complainant, on a series of questions relating to the possible involvement of the complainant in counselling. Crown counsel objected on the basis that the questions were irrelevant and that this type of questioning was prohibited by sections 278.2 through 278.8 of the Criminal Code. His Honour Judge Jennis formulated the issues thus (at para. 3):

> It appears to me there are two primary issues. The first issue is whether it is permissible for the defence to ask questions relating to the existence and

> source of potentially relevant third party records as opposed to the content of those same records. The answer to the first question is, "Yes", and the second issue is the extent to which the defence can develop those points, since at some point by necessity the areas of existence and sources of these records will overlap with the content or substance of those records.

[18] Jennis P.C.J. cited the discovery purpose for a preliminary inquiry while recognizing that the accused does not have an unfettered right to cross-examine. He went on to hold that the defence is entitled to ask questions of the complainant relating to the existence and source of counselling records provided that the questions do not reveal the contents of the records or the actual substance of the counselling. In the result, Jennis P.C.J. scrutinized the type of questions proposed to be asked and allowed questions in the following areas (as summarized in the applicant's brief):

> -whether the complainant received counselling in regard to the particular allegations before the court following the alleged incident;
>
> -whether the counsellors appeared to take notes or maintain records;
>
> -what was the general nature of the counselling (i.e. one on one or group therapy, hypnosis, memory regression, imaging);
>
> -whether the alleged offence was part of the counselling topics or issues;
>
> -whether the counselling assisted the complainant in recalling that the alleged offence occurred or in recovering forgotten details of its occurrence;
>
> -if there was counselling prior to the complaint, whether that counselling affected the decision to contact the police;
>
> -if there was counselling following the alleged offence whether a narrative of the events comprising the alleged offence was given to the counsellor;
>
> -the names of counsellors involved, the names and locations of the agency they work for, and the duration of the counselling.

[19] Applicant's counsel submitted that in this case the preliminary inquiry judge, by foreclosing these avenues of inquiry, exceeded his jurisdiction by denying the applicant the opportunity to lay the foundation for a s.278.3 application. This, he argued, went beyond a mere error of law on some issue of admissibility, but amounted to a denial of the applicant's right to make full answer and defence.

[20] Crown counsel, in his submissions, argued that the preliminary inquiry judge had no jurisdiction to allow the proposed cross-examination of the complainant because such questioning would have circumvented the comprehensive regime established by the Criminal Code for production of counselling records. The procedures set out in the Code, in his argument, protect not just disclosure of the record but, because of the underlying privacy interests sought to be protected by those procedures, also protect the complainant from this type of questioning. In his submission, the aim of protecting a complainant's privacy interests requires that even the questioning of the complainant about private records be prohibited because to allow such questioning would circumvent that aim and undermine the non-compellability of the complainant as a witness on a s.278.3 application. Crown counsel went so far in his oral argument as to say that the complainant could not even be questioned at trial about such records.

[21] In order to capture the breadth of the Crown's argument, I repeat here what was written in the Crown's brief:

> 5. Allowing the Defence to cross examine the Complainant at the preliminary inquiry about counselling records, even on the basis that the answers may provide a basis for a subsequent application for production of the records, would be to circumvent many of the safeguards Parliament thought were necessary. The spirit of the provisions would certainly be violated. The safeguards that would be violated include the following:
>
> > The *Criminal Code* specifically states the application must be made to the trial Judge who will determine if the records may be relevant to an issue at trial. This requires the defence to reveal what its position is at trial before the request for records is even entertained. This ensures the request is more than a mere fishing expedition in an unknown pond.
> >
> > The ability to hear such applications is specifically declared to be outside the jurisdiction of a justice sitting at a preliminary inquiry. The distinction between asking about the records and asking for production of the records is a distinction

> without a difference. In each case the privacy interests of the complainant are raised.
>
> The hearing before the trial judge may proceed *in camera*. A preliminary inquiry is not *in camera* but in public.
>
> The application for the records has to be on notice to the Complainant and the custodian of the records, both of whom have standing to make representations on whether they should be produced. Neither the Complainant nor the custodian is given notice of the intention to question the Complainant about the records at the preliminary inquiry and even if they were, neither has standing at the preliminary inquiry.
>
> The Complainant is not a compellable witness at the hearing. The philosophy is that the Complainant should not be forced to provide evidence that might be used by the Court in determining whether the records should be produced. On the other hand the Complainant is compellable at the preliminary inquiry. It is no answer that the proposed questions at the preliminary inquiry may be the basis of an application to the trial judge. How could the defence use the questions at the application? The transcript is hearsay and not admissible. Moreover, in determining the Complainant is not compellable on the hearing, Parliament could not have intended that the Complainant could be questioned about the counselling records on another proceeding where the Complainant is compellable, so that the transcript of what she said could be used in place of compelling the Complainant to give evidence at the hearing.

[22] To adequately analyze these submissions, I find it necessary to consider the separate issues of (a) the function of the preliminary inquiry, and (b) the scope of cross-examination of the complainant with respect to counselling records.

Function of the Preliminary Inquiry:

[23] The primary function of the preliminary inquiry is to determine if there is sufficient evidence to put the accused on trial. But, it is now also recognized that another significant function is to provide the defence with an opportunity to test the Crown's case and obtain discovery for purposes of trial. As stated in the majority judgment of the Supreme Court of Canada in *Re Skogman and the Queen* (1984), 13 C.C.C. (3d) 161 (at 171):

> The purpose of a preliminary hearing is to protect the accused from a needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process. In addition, in the course of its development in this country, the preliminary hearing has become a forum where the accused is afforded an opportunity to discover and to appreciate the case to be made against him at trial where the requisite evidence is found to be present

[24] A number of aspects of the discovery function have been identified: testing the Crown's case; obtaining full disclosure; setting up the evidentiary basis to challenge the Crown's evidence at trial; and, obtaining the evidence that may relate to potential Charter defences at trial even though they may be of no concern to the judge conducting the preliminary inquiry: see Salhany, *Canadian Criminal Procedure* (6th ed.) , at para. 5.500; *R. v. George* (1991), 69 C.C.C. (3d) 148 (Ont. C.A.). The means for exercising this discovery function by the defence is the cross-examination of witnesses called on the inquiry by the Crown. Section 540(1)(a) of the Code provides that a justice holding a preliminary inquiry shall take the evidence under oath of the witnesses who are called on the part of the prosecution and allow the accused or his counsel to cross-examine them. Admittedly the defence does not enjoy an unlimited right to discovery. The Crown has the discretion to present only that evidence which will establish a prima facie case and the defence cannot compel the Crown to call any particular witness. But, once a witness is called, the defence has the right to cross-examine, a statutory right granted by the Criminal Code.

[25] The right of cross-examination has been held to be fairly broad at the preliminary inquiry stage. There is no doubt that the defence can cross-examine in areas that are not strictly confined to the test of sufficiency of the evidence. For example, defence counsel is permitted to cross-examine on affidavits used to obtain search warrants or wiretap authorizations so as to lay a foundation for a Charter challenge at trial: *R. v. Cover* (1988), 44 C.C.C. (3d) 34 (Ont. H.C.J.); *R. v. Dawson* (1998), 39 O.R. (3d) 436 (C.A.). An impetus for this broadened right to cross-examination is the principle enunciated in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, to the effect that an accused's ability to access information necessary to make full answer and defence is constitutionally protected under s.7 of the Charter. That case, of course, dealt specifically with the obligation of the Crown to make disclosure. But the principle underlying that decision has been used to argue for a broad right of discovery at the preliminary inquiry stage. See *R. v. Dawson* (*supra)* at p. 442:

> Before turning to the arguments of the appellants I would also say that I am not persuaded by the respondent's argument that the discovery aspect of a preliminary hearing should be diminished or given less emphasis in light of R. v. Stinchcombe, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1. Stinchcombe emphasizes the entitlement to early disclosure and arguably supports questioning at a preliminary hearing on matters that are not available by other means of discovery. Nor can I accept the Crown's argument based upon R. v. Mills, [1986] 1 S.C.R. 863, 26 C.C.C. (3d) 481, to the effect that the provincial court is not a court of competent jurisdiction under s.24 of the Charter and thus should not be entertaining cross-examination directed to a breach of the Charter. It is now commonplace to have examinations of witnesses at preliminary hearings on all aspects of potential Charter violations. (emphasis added)

See also Salhany (*supra*) at para. 5.320:

> The principles enunciated in *Stinchcombe* would appear to place upon the justice presiding at the preliminary the obligation to ensure that the defence is now given the widest latitude in obtaining disclosure during the course of the preliminary inquiry,

[26] This broad right to discovery through the mechanism of cross-examination also informs considerations as to the relevance of any particular question or item of evidence. It may be that a line of questioning (such as in this case) as to counselling taken by the complainant between the alleged offence and the initial complaint to the police may not be particularly relevant to the issue the preliminary inquiry judge has to determine, i.e., the sufficiency of the evidence; but, it may nevertheless be material to the ability of the defence to challenge the complainant's evidence at trial. As noted by Arbour J.A. (as she then was) in *R v. L. R.* (1995), 100 C.C.C. (3d) 329 (Ont. C.A.), the right to explore, at the preliminary inquiry stage, the availability of potential defences is an important aspect of the right to make full answer and defence. She wrote (at p.336):

> Subject to applicable exclusionary rules, the admissibility of evidence at the preliminary inquiry is determined by the concept of relevance. The purpose of the preliminary inquiry is essentially to determine whether there is enough evidence to justify sending the accused to trial. In so determining, the presiding judge must not embark on an assessment of the credibility of the evidence, pursuant to the test articulated by the Supreme Court of Canada in United States of America v. Sheppard (1976), 30 C.C.C. (2d) 424, 70 D.L.R. (3d) 136, [1977] 2 S.C.R. 1067 sub nom. United States of America v. Shephard. It does not follow, however, that

> the determination of what is relevant evidence at the preliminary inquiry is exclusive of all matters of credibility. If that were the case, one would expect that the defence would not be permitted to ask Crown witnesses whether, for instance, they had criminal records. If relevance was governed solely by the narrow test for committal, not much would be left of either the statutory right to cross-examine the Crown's evidence, or the right to call defence evidence.
>
> Relevance is broader than that because the preliminary inquiry also serves a discovery function...
>
> The function may become less prominent as alternative, informal modes of disclosure are put in place. However, from the defence's point of view, the right to explore, at that early stage, the credibility of the Crown's witnesses and the availability of potential defences is still an important aspect of the right to make full answer and defence.

[27] This broad aspect to the accused's right of cross-examination at the preliminary inquiry convinces me that Parliament could not have intended to insulate the process for production of private records from all inquiry at that level. The fact that the accused bears the burden initially of satisfying the trial judge that records are likely relevant, together with the restrictions on making unsupported assertions, means that the accused must be able somehow to put together the case-specific evidentiary foundation for an application under s.278.3. Usually the only way to do that is by cross-examining the witnesses called by the Crown at the preliminary inquiry. Usually not even the prosecutor has knowledge of the records so it is not simply a matter of requesting disclosure from the Crown (not to mention the restrictions imposed by s.278.2 on records that may be in the possession of the prosecutor).

[28] I also cannot agree with the prosecution argument in this case that, due to the privacy interests sought to be protected by these Criminal Code provisions ---- privacy interests that have a constitutional aspect in themselves ---- Parliament intended to put any inquiry into private records beyond the scope of a preliminary inquiry judge. Whether one considers the issue of disclosure of records as purely an evidentiary and procedural question within the confines of a particular case, or as a Charter issue requiring a balancing of the accused's right to make full answer and defence and the complainant's right to privacy, or as a combination of both, there is nothing to suggest that merely asking questions about the circumstances surrounding such records is somehow beyond the purview of a preliminary inquiry. It cannot be simply because privacy concerns are at stake since the other significant Criminal Code provision that is rooted in privacy and equality principles ---- the "rape-shield" provision in s.276 of the Code ---- is not expressly restricted

to the trial forum. It is certainly arguable that a preliminary inquiry judge has jurisdiction to hear and decide an application under that section: *R. v. Alibhai* (1998), 123 C.C.C. (3d) 556 (Ont. Ct. Gen. Div.).

[29] In my view, there is nothing inherent in this subject that would necessarily preclude its consideration at the preliminary inquiry level other than the fact that the preliminary inquiry judge by statute does not have jurisdiction to hear an application for production. That is not the same thing as allowing questions as to the circumstances of the counselling so as to enable the defence to make an application in the appropriate forum. In my respectful opinion, the fundamental error in the Crown's submission on this application is that it conflates cross-examination as to the circumstances of counselling with the actual application for production.

Cross-Examination of the Complainant:

[30] The thrust of the Crown's submission is that, no matter what avenues may be otherwise available to an accused to piece together the evidentiary foundation for an application under s.278.3, cross-examination of the complainant is not one of them. As quoted above from the Crown's brief on this application, to allow cross-examination on this issue would circumvent the safeguards imposed by the Criminal Code. The complainant is not a compellable witness on a s.278.3 application. In the Crown's submission, the philosophy behind non-compellability is that the complainant should not be forced to provide evidence that might be used by the court in determining whether records should be produced. Thus, because the complainant is compellable at the preliminary inquiry (and at the trial), she should not be required to answer any questions relating to such records if she is a witness.

[31] In this case the defence did not seek to elicit what any counsellors said to the complainant. That would clearly be hearsay. Nor did the defence seek to find out what specifically the complainant said to her counsellors. That may raise other issues with respect to privacy and the collateral fact rule. Here the defence sought, as noted in the extracts above, to question the complainant as to when she met with counsellors and for what purpose. All he was allowed to ask was who was the counsellor and the time period of the counselling. The proposed line of questioning, in my view, is not the same thing as asking the complainant to reveal the detailed substance of her discussions with the counsellor.

[32] Every case that has considered the framework set up by the Criminal Code has recognized the need for an evidentiary foundation to an application for production

of counselling records and identified the preliminary inquiry as one forum in which the evidence for that foundation can be gathered. I suggest further that every case that has considered this question (including the *Mills* case in the Supreme Court of Canada) has assumed without question that the complainant, if she is called to testify at the preliminary inquiry, may be questioned as proposed in this case.

[33] First, as noted by Professor David Paciocco in his article, "Bill C-46 Should Not Survive a Constitutional Challenge" (1996), 3 *Sexual Offences Law Reporter* 185, the prohibited grounds of argument itemized in s.278.3(4) prevent accused persons from relying upon the general nature of counselling records to gain access to them. Thus the accused must confront the hurdles of having to establish likely relevance but yet unable to rely on the general assertions prohibited by the Code. Leaving aside that author's contention about the constitutionality of these provisions (a question now resolved definitively in *Mills),* Prof. Paciocco highlighted the very things that the jurisprudence has noted (at p.188):

> There are only two ways around these hurdles, and they each require the accused to obtain specific information. The first, based solely on fortuity or chance, is that there may be something specific in the Crown's file, or something learned from someone close to the complainant that would get beyond these general bars. The second is for counsel to cross-examine the complainant and to receive accurate information about the existence of the therapy, the records, and the contents of those sessions. Counsel is dependent upon receiving reliable testimony about these matters from the complainant, when more often than not the objective in getting the records is to determine whether the complainant is willing and able to be truthful. Moreover, unless there has been a preliminary inquiry, this cross-examination will have to occur before the trial judge, during the trial proper. This is because under the statute, complainants are not compellable witnesses during the application hearing. If defence counsel is successful in obtaining the specifics necessary to gain production to the judge, adjournments will be required, extending the time that accused persons are suffering the loss of liberty or security of the person that criminal prosecutions are recognized as causing. (emphasis added)

[34] As an aside, the point made above about adjournments at trial was one also made by applicant's counsel on this hearing. If defence counsel is unable to question the Crown witnesses at the preliminary inquiry about these issues, then counsel will have to do so at the trial. At that point, if information is obtained suggesting the advisability of a s.278.3 application, there will inevitably be lengthy delays

(something inimical to the interests of the complainant, the accused, and the administration of justice).

[35] Back to the point, in *R. v. Boudreau*, [1998] O.J. No. 3526 (Gen. Div.), Ewaschuk J. implicitly acknowledged the ability of the defence to cross-examine the complainant as proposed in this case. He wrote (at para.9):

> Section 278.3(4) merely requires that the applicant must be able to point to some specific evidence or information that shows that the record in issue is likely relevant to an issue at trial or to the competence of a witness to testify. Section 278.3(4) does not preclude a Court from considering any of the enumerated factors from being likely relevant to an issue at trial or to the competence of a witness to testify. Section 278.3(4) only requires the applicant to point to an evidentiary or informational foundation, from any source, additional to the mere assertion that the record is likely relevant. That is not an impossible requirement and is easily fulfilled, for example, following the testimony at the preliminary inquiry of the witness whose private record is in issue. Where there has been no preliminary inquiry, the application may even be made during the witness's testimony. (emphasis added)

[36] In *Mills*, in paragraph 135 of the Court's reasons (the extract quoted above in paragraph 12 of these reasons), the Court noted that the necessary evidentiary basis to support a s.278.3 application can be established through, among other things, the cross-examination of Crown witnesses at the preliminary inquiry. What Crown witness is there usually at a preliminary inquiry on a sexual assault charge but the complainant? Yet, the Court in *Mills* makes no distinction for the complainant. Furthermore, the Court quotes in that extract from the judgment of Taylor J. of the British Columbia Supreme Court in *R. v. Hurrie*, [1997] B.C.J. No. 2634. In that case, Taylor J. is quite emphatic about the ability to cross-examine the complainant (at paras. 23-25):

> Quite apart from that duty to disclose by the Crown, an accused is not without mechanisms to determine the existence of therapeutic records in the hands of third persons. That, as in this case, may come about from the cross-examination or it may come as a result of other information coming to the attention of an accused person, whether that be by reason of the disclosure of the existence of these reports by Crown counsel or general inquiries. The result is the establishment of an evidentiary basis for production and application.
>
> There is no mechanism to stop or prevent an accused making those inquiries either prior to a trial or preliminary, or at a trial or preliminary inquiry. While revelations, as in this case, may give rise to the interruption

> of trials whilst applications for production are made, that does not, in and of itself, infringe a right to full answer and defence. Thus, while a preliminary hearing judge does not have the power to order production, there is nothing in the legislation or in either of the judgments in Regina v. O'Connor or the law generally that prohibits the exercise of the right of cross-examination at the preliminary inquiry to provide an evidentiary basis for such an application, which must be made to the trial judge. Whether that application is made prior to the trial or during it is a matter of timing and choice by counsel. Indeed, it would be hard to imagine any basis for objection to such a cross-examination, given that the issue of credibility, including aspects of recollection, is always a live issue even at a preliminary inquiry.
>
> Those procedures to which I have referred do not limit the right of cross-examination of a complainant or witness in terms of establishing this evidentiary basis. I do not regard section 278.4(2) as imposing any limitation on the extent of cross-examination towards this end. (emphasis added)

[37] All of these references convince me that cross-examination of the complainant, at a preliminary inquiry, into the surrounding circumstances of counselling that she may have received in relation to the alleged offence is clearly contemplated as being a necessary part of the regime established by Parliament governing production of these types of records. What the Crown is really suggesting is that the complainant enjoys a blanket immunity from answering any questions, either at a preliminary inquiry or at a trial, about counselling she may have received. This, in my opinion, is tantamount to arguing for a "class" privilege over this type of evidence, something that is not stated in the legislation nor supported by the jurisprudence. Indeed, the most vocal jurist in favour of limiting access to such records, Justice L'Heureux-Dubé of the Supreme Court, expressly rejected the creation of a "class" privilege for private records of complainants since such a privilege would constitute an unjustifiable limit on what she termed as the "truth -finding principle" of our justice system and consequently, would impair the accused's right to make full answer and defence: *L.L.A. v. A.B.*, [1995] 4 S.C.R. 536 (at para.68). If such records do not enjoy a blanket privilege, I fail to see how the complainant *as witness* would have the benefit of privilege.

[38] I think it appropriate to consider this issue within the context of the accused's right to cross-examine witnesses, whether at the preliminary inquiry or at the trial. In *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 (S.C.C.), the Court emphasized that the right to cross-examine constitutes a principle of fundamental justice that is

critical to the right to make full answer and defence. McLachlin J. (as she then was) wrote (at p. 389):

> The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution. As one writer has put it (Doherty, *ibid*, p.67):
>
> > If the evidentiary bricks needed to build a defence are denied the accused, then for that accused the defence has been abrogated as surely as it would be if the defence itself was held to be unavailable to him.
>
> In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled. The defence which the law gives with one hand, may be taken away with the other. Procedural limitations make possible the conviction of persons who the criminal law says are innocent.

[39] In this case, if the defence is not able to cross-examine the complainant as to her counselling then it will not have the necessary information to decide whether to bring a s.278.3 application or not. It will not be able to present the necessary evidentiary foundation for such an application. This in turn may deny the defence the opportunity to even try to establish a defence or challenge the Crown's evidence at trial. In the words quoted above, the "evidentiary bricks needed to build a defence" may be denied. Thus I conclude that the applicant in this case should have been able to pursue the line of questioning proposed by defence counsel.

[40] I also wish to comment briefly on Crown counsel's assertion that, even if cross-examination were permitted, the transcript of that evidence could not be used on the s.278.3 application since the transcript would be inadmissible hearsay. I do not agree. While technically the transcript may be hearsay, I can think of no impediment to its reception through a principled exception to the hearsay rule (as per *R. v. Hawkins* (1997), 111 C.C.C. (3d) 129 (S.C.C.) at pp. 153-154). First, the evidence is reliable in that it is given under oath and indeed under cross-examination. Second, it is necessary because the witness is not compellable. Furthermore, the evidence from the preliminary inquiry is not being used for the truth of the evidence but merely to provide the necessary informational and evidentiary basis for an application that, in and of itself, does not decide guilt or innocence. I also know of no case where it has been suggested that a transcript of the preliminary inquiry evidence could not be used on such an application.

Conclusions:

[41] Proceedings for an order in the nature of *certorari* are available to review the committal of an accused for trial where there has been jurisdictional error. Such error may arise (a) where a committal is made in the absence of evidence capable of supporting a conviction, or (b) where the presiding judge fails to observe a mandatory provision of the Criminal Code, or (c) where there has been a denial of natural justice. Ordinarily, *certiorari* does not lie for an error of law made within jurisdiction (such as an erroneous ruling on the admissibility of evidence or that a line of questioning cannot be pursued). This is subject of course to the proviso that rulings limiting the right to cross-examine may develop into a violation of natural justice. It is a question of the extent to which the statutory right to cross-examine has been restricted. Numerous decisions indicate that, while incidental questions in cross-examination may be curtailed by the judge at the preliminary inquiry, a blanket refusal to permit cross-examination on matters that may be relevant to issues at trial constitutes a denial of the right to make full answer and defence at the subsequent trial and would thus be jurisdictional error: *Dubois v. The Queen*, [1986] 1 S.C.R. 366; *R. v. George (supra)*; *R. v. Dawson (supra).*

[42] In this case there was a foundation for the proposed line of questioning. The fact that the complainant received counselling between the alleged offence and her complaint to the police was disclosed by the Crown. In my opinion, the presiding judge's refusal to permit the proposed cross-examination, in the circumstances of this case, constituted a denial of natural justice that went beyond mere error of law. It was jurisdictional error.

[43] The appropriate remedy, however, is not to quash the committal (something that is not disputed in any event), but to re-open the preliminary inquiry so as to allow the cross-examination that should have been allowed in the first place. I therefore remit this matter back to His Honour Judge Bruser for the continuation of the preliminary inquiry (as was done in *R. v. L. R. (supra)* and *R. v. R.F.C.L.* [1996] O.J. No. 4262).

I commend the approach followed in the *J.F.S.* case (noted above). It will be up to Judge Bruser, however, to decide whether any particular question is improper and whether he wishes to pre-screen the questions proposed to be asked.

J. Z. Vertes J.S.C.

Dated at Yellowknife, Northwest Territories
this 19th day of May, 2000.

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