

Case Name:
R. v. M.R.A.

Between
Her Majesty the Queen, and
MRA, Defendant

[2014] A.J. No. 1346

2014 ABQB 714

Docket: 130713951Q1

Registry: Edmonton

Alberta Court of Queen's Bench

M.T. Moreau J.

Heard: November 14, 2014.
Judgment: November 19, 2014.

(15 paras.)

Counsel:

Y. Rory Ziv, for the Applicant.

Robert A. Fata, for the Crown.

Lauren L. Garcia, for the Complainant.

[Editor's note: A corrigendum was released by the Court December 3, 2014; the corrections have been made to the text and the corrigendum is appended to this document.]

**Memorandum of Decision [Ruling on application
pursuant to s. 278.3 of the *Criminal Code* for production
of records relating to the complainant]**

M.T. MOREAU J.:--

I. Introduction

1 The Applicant applied pursuant to s. 278.3 of the *Criminal Code* for an order for production of the Sexual Assault Centre's therapeutic records relating to the complainant and for her psychiatric records. That application was opposed by counsel for the complainant. In oral reasons delivered on November 14, 2014, I directed, pursuant to s. 278.5(1), that these records be produced to the Court for review to determine whether they contain information likely relevant to the credibility and reliability of the complainant's evidence, in particular:

1. Information relating to the complainant's assertion in a March 2014 letter to her aunt that she suffered from PTSD that she was able to remember everywhere in the house where the Applicant committed sexual offences against her: whether she has been diagnosed with PTSD; the history of any medications for a psychiatric condition she may have been prescribed at times relevant to her allegations or currently; any impact of her psychiatric condition or her medication regime (or any failure to follow it), on the reliability of her evidence; and any impact of her contemporaneous counselling and psychiatric treatment on her memory of the alleged events;
2. Information relating to her alleged acknowledgment in questioning by her aunt and grandmother in the spring of 2014 that she may have been dreaming about the alleged events;
3. Information relating to her alleged assertion to her aunt and grandmother in the same conversation that she would "fix" the situation involving her allegations of sexual impropriety against her three cousins and any impact of her contemporaneous counselling and psychiatric treatment on this assertion;
4. Information relating to her depression that she referred to in her letter of June 2012 to her teacher and whether she was being treated with medication at the time of her disclosure of the allegations against the Applicant.

II. The second phase of the production application

2 I have reviewed the complainant's psychiatric records and therapeutic records. In the second phase of the production application, the Court must determine whether the contents of these files or any portion of them will be produced to the Applicant. S. 278.7(2) states:

- (2) In determining whether to order the production of the record or part of the record to the accused, the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy and equality of the complainant or witness, as the case may be, and any other person to whom the record relates and, in particular, shall take the factors specified in paragraphs 278.5(2)(a) to (h) into account.

3 Pursuant to s. 278.5(1), the Applicant must establish to the Court's satisfaction that the records are likely relevant to an issue at trial or the competence of a witness to testify and that production of the records is "necessary in the interests of justice". This involves balancing the accused's right to make full answer and defence and the complainant's right to personal dignity and privacy, taking into account the factors listed in s. 278.5(1).

4 Any one of the assertions listed in s. 278.3(4)(a-k) are not sufficient on their own to establish that the record is likely relevant to an issue at trial or the competence of a witness to testify. In particular, the fact alone that the record relates to psychiatric treatment or therapy the complainant is receiving or has received or that the therapeutic record may relate to the reliability of the complainant's testimony does not establish the likely relevance of the records sought to be produced. The fact that the complainant has revealed allegations of sexual abuse by a person other than the accused is also insufficient on its own to justify production. Having reviewed the therapeutic records and psychiatric records, I find that they relate to the case-specific assertions I earlier identified, to the complainant's emotional condition, psychiatric history including PTSD and her medication history, and are likely relevant to the credibility and the reliability of the complainant's evidence.

5 Section 278.5(2) directs that I consider the salutary and deleterious effects of my determination on the Applicant's right to make full answer and defence and the impact of disclosure on the complainant's privacy and equality rights, as well as the privacy rights of any other person to whom the records relate. S. 278.5(2) also directs that the following factors be taken into account in deciding whether any of the records should be produced to the Applicant:

- 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;
- h) the effect of the determination on the integrity of the trial process.

6 Defence counsel submitted that information as to the complainant's psychiatric and medication history is very germane to the complainant's credibility and reliability. In addressing her expectation of privacy in the records, he noted that she did not maintain confidentiality herself, having written a letter in June 2012 to her teacher describing the circumstances of the alleged offence, alleged offences committed against her by other persons, and her emotional condition. She also wrote a long letter to an aunt in March 2014 who, from the tenor of the letter, was not her confidante, in which she discussed the allegations against the Applicant, allegations involving her father's use of physical force on her during her childhood years, her PTSD, her medications and their effects on her, her emotional state and the support she had received from her therapist.

7 While acknowledging the significant privacy rights attached to therapeutic records, defence counsel submitted that the application is not based on any stereotypical or discriminatory beliefs about sexual assault complainants but on case-specific issues relating to the credibility and reliability of the complainant's evidence that lie at the heart of the case.

8 Counsel for the complainant referred to psychiatric and therapeutic records being at the highest rung of a complainant's entitlement to privacy and reminded the Court of the comments in *R v. Mills*, [1999] 3 S.C.R. 668, at para 136, as to the nature of therapeutic records which should be taken into account in determining their true probative value:

Counselling or therapeutic records can be highly subjective documents which attempt merely to record an individual's emotions and psychological state. Often they have not been checked for accuracy by the subject of the records, nor have they been recorded verbatim.

9 As I noted in my ruling at the first stage of the application, the complainant's privacy, dignity and equality interests are very significant when the records concern a therapeutic relationship. I am not persuaded that the complainant having disclosed her allegations against the Applicant (and others) to her teacher and an aunt reduces her privacy interests

in these records as defence counsel suggested. The therapeutic relationship is anchored in the client or patient's reasonable expectation that this is a safe zone of human interaction, a tool fostering psychiatric and emotional health, not a weapon with which to attack credibility.

10 I have considered the factors in s. 278.5(2). I have also considered the comment of the complainant's therapist that production of the records may end her therapeutic relationship with the complainant. I note that the complainant's participation in therapy sessions became less frequent after December 2014 and there were no sessions between mid-May 2014 and the end of September, 2014. Her sessions with her psychiatrist have been infrequent. I am not persuaded therefore that the criminal proceedings can be held to be fully responsible for any future decision not to attend therapy.

11 I find that the psychiatric records and the portions of the therapeutic records that address the complainant's psychiatric and emotional condition and her medication regime are relevant to the credibility of her case-specific assertions and thus to her overall credibility and reliability. I find that these considerations outweigh in this case the complainant's privacy interest in her therapeutic and psychiatric records.

12 I have also included in the production those documents that are likely relevant to any alleged tainting or enhancement of the complainant's memory through the therapeutic process.

13 Finally, I have also included in the production those documents completed by the complainant's mother relating to the complainant's psychiatric and behavioural history, which are also relevant to the case-specific assertions I have identified, which include reference to the allegations against the complainant's cousins. I find that production of these records is necessary to permit the Applicant to make full answer and defence, which outweighs the privacy interests of the complainant and her mother. Reference to these records at trial will be subject to any arguments the Crown may wish to raise at that time as to their collateral nature.

III. Conclusion

14 I direct that:

1. A sealed copy of the entirety of the therapeutic and psychiatric records will be retained on the Court file and destroyed at the end of any appeal period.
2. One copy of the records with respect to which I have ordered production shall be provided to defence counsel on the following conditions:
 - (i) No further copies shall be made of the records nor shall the copies of the records be removed from defence counsel's office without

prior Court authorization except for copies provided by defence counsel to any expert witness retained by defence counsel who shall return the records to defence counsel at the completion of the trial;

- (ii) The records produced shall not be shown to or discussed with anyone except the Applicant or any expert witnesses retained by defence counsel;
- (iii) The copy of the records forwarded to defence counsel and any copy provided by defence counsel to an expert witness retained by defence counsel shall be returned to the Clerk of the Court immediately after the completion of the trial, shall then be sealed and shall be destroyed after the expiry of any appeal period.

15 As defence counsel reserved his right pursuant to s. 278.7(1) to address whether the Crown should be provided with a copy of the therapeutic and psychiatric records that I have ordered produced, I direct that defence counsel notify the Court in writing of his position in that regard by November 24th, 2014. If defence counsel is opposed to the Crown receiving copies, the issue will be addressed at a hearing to be held on November 26th, 2014 at 1:00 p.m.

Dated at the City of Edmonton, Alberta this 19th day of November, 2014.

M.T. MOREAU J.

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**Corrigendum of the Memorandum of Decision
of
The Honourable Madam Justice M.T. Moreau**

The notice for Restriction on Publication has been removed.