Case Name:

R. v. Hundle

Between
Her Majesty the Queen, respondent, and
Jasbir Singh Hundle, applicant

[2002] A.J. No. 1549

2002 ABQB 1084

10 C.R. (6th) 37

56 W.C.B. (2d) 334

Action No. 016264954 Q1

Alberta Court of Queen's Bench
Judicial District of Edmonton

Veit J.

Heard: December 6, 2002.
Judgment: December 11, 2002.

(68 paras.)

Criminal law -- Offences against person and reputation -- Sexual offences -- Sexual assault, evidence -- Complainant's records (incl. medical and counselling records) -- Rights of accused -- Right to discovery or production.

Application by Hundle for production of records of the complainant's psychiatrist, her family physician, the group home in which she resided, and the transportation service for which he worked. Hundle was a bus driver for a transportation service for dependent and disabled adults. He was charged with sexual assault. The complainant was 24 years old and suffered from bipolar disorder and autism. She alleged that when Hundle drove her to her group home, he touched her breasts over her clothing. Hundle admitted the activity, but argued that the complainant initiated the activity and that he stopped when he realized it was inappropriate. After the preliminary inquiry, Hundle was

advised by another bus driver that the complainant had initiated unwanted sexual activity with him the year earlier and had been disciplined by the group home as a result.

HELD: Application allowed in part. The report of the other driver was a business record which was producible. The transportation records were not entitled to privacy protection. The group home records relating to any counselling or discipline provided to the complainant relating to inappropriate sexual activity were producible. The records of the psychiatrist were to be produced. The psychiatrist was being called as a witness relative to the ability of the complainant to testify and her need for protection. Hundle was entitled to review the records on which the psychiatrist's opinion was based. The remaining records were not relevant to any issues at trial.

Statutes, Regulations and Rules Cited:

Canada Evidence Act, s. 30(1), 30(7), 30(10)(b), 30(12). Criminal Code, ss. 153.1, 278.3. Freedom of Information and Protection of Privacy Act.

Counsel:

Brij Mohan, for the accused.
C.P Cobban, for the Crown.
P. Hebert, for the complainant.
J.J. Heelan, for Drs. Swanson and Bodmer.
G.J. Stewart-Palmer, for City of Edmonton - DATS Transport.
W.L. Gutter, for Catholic Social Services - Group Home.

MEMORANDUM OF DECISION

VEIT J.:--

Summary

1 Mr. Hundle is charged with one count of sexual assault of A.B. The prosecution alleges that, on January 24, 2001, while Mr. Hundle, a DATS driver, was returning the complainant, a dependent adult, to her group home, Mr. Hundle touched the complainant in the area of her breast, over her clothes. Mr. Hundle acknowledges the sexual activity, but states that the complainant initiated the activity, that the activity was consensual, and that he terminated the activity when he realized that it was inappropriate.

2 At the preliminary inquiry, the prosecution called the complainant's treating psychiatrist to testify about the complainant's ability to testify and her ability to consent to sexual activity. In the

course of his evidence, the psychiatrist testified about the complainant's mental illness.

3 Some time after the preliminary inquiry, Mr. Hundle was advised by another DATS driver that, in 2000, the complainant had initiated unwanted sexual activity with him. Mr. Hundle believes that the complainant was disciplined by the group home on the basis of the other driver's complaint. Mr. Hundle argues that the complainant is now denying that the sexual activity between them was consensual because she is attempting to avoid discipline.

4 Pursuant to the provisions of s. 278.3 of the Criminal Code, Mr. Hundle now asks for the production of the following records:

- The records of Dr. Murray Swanson, the complainant's treating psychiatrist, who gave evidence at the preliminary hearing on four issues, including the complainant's ability to testify as a witness, the complainant's need for protection, and the complainant's bipolar disorder, with symptoms of hyper-sexuality, hallucinations, and sexual delusions;
- The records of Dr. Claude Prefontaine, a treating psychologist who dealt with the complainant some time ago;
- The records of Dr. Madeline Bodmer, the complainant's family physician;
- Certain records of the group home in which the complainant resides, in particular, the record of any discipline meted out to the complainant because of inappropriate sexual activity;
- Certain records of the DATS transportation service provided by the City of Edmonton, in particular the record of any complaints made by, or about, the complainant. In relation to this last group of records, Mr. Hundle argues that, in any event, there is no reasonable expectation of privacy in these records, and no Mills scrutiny is required of them.

5 The respondents argue that the accused has not met the standard required to cross the threshold of the first stage of this Mills hearing: the accused has not proved that it is likely that the records are relevant to an issue at trial or to the ability of the complainant to testify and that the production of the records is in the public interest. They rest their position on three grounds. First, they state that the failure of the accused to produce direct evidence from the other DATS driver, and the reliance by Mr. Hundle on hearsay evidence, is fatal to the accused's application. Second, the respondents also argue that the disclosure of their records would constitute a serious breach of the complainant's privacy and that the disclosure of the records would substantially harm their relationship with the complainant. Finally, the prosecutor acknowledges, relative to the records of their witness Swanson that, normally, when a party calls an expert, the documents on which the expert relies to express an opinion are open for inspection by the party opposite. However, the prosecutor notes that, in a case such as this one, even if the records were currently in the hands of the prosecutor, despite the normal Stinchcombe obligation of disclosure on the Crown, the Crown would be unable to produce the psychiatrist's records until and unless the court made a finding that the public interest requires

that the records be produced.

6 In the circumstances here, the evidence produced by Mr. Hundle in support of his motion is adequate. The written report by the other DATS driver, a record made as part of the normal course of employment, contemporaneously with the events it describes, long before these criminal proceedings were contemplated and long before there was any motive to misrepresent the event, is a business record which can be entered as evidence; here the requisite notice of intention to produce the record was given by the applicant to the respondents. Moreover, at common law, this record could be introduced for the truth of its contents, having met the double standard of necessity and reliability. Evidence direct from the driver is not required here.

7 Mr. Hundle has, with respect to some of the records requested, proved that the records are likely relevant to an issue at trial or to the competence of the complainant to testify and that the production of the record is necessary in the interests of justice.

8 In particular, although they are entitled to a high degree of privacy protection, the records of Dr. Swanson must be provided for two reasons: first, the prosecution is calling Dr. Swanson as its own witness relative to two issues - the ability of the complainant to testify and the need of the complainant for protection. Mr. Hundle is entitled to review the records on which Dr. Swanson's opinions are based. Second, the evidence on this hearing establishes that the complainant may, because of her mental illness, have acted on January 21, 2001 in a way which was sexually unwise, but which was consensual. Mr. Hundle is entitled to review records which may help him to establish a version of what happened on that date which would otherwise be counter-intuitive or at least not within the normal experience of members of a jury. Therefore, Dr. Swanson's records must be produced to the court for further review and determination concerning their potential release to the accused.

9 The portion of the records of the group home sought by the accused are records which are entitled to privacy protection. At the hearing, Mr. Hundle limited the scope of the records sought. There is a suggestion in the material presented at the hearing that the complainant may have been disciplined for the event involving the other DATS driver in 2000. If the complainant had been disciplined for her consensual, but inappropriate, sexual activity, that may have an impact on the complainant's motive to lie about the contact she had with Mr. Hundle. Therefore, the records of the group home relating to any counselling provided, or discipline meted out, to the complainant for inappropriate sexual activity must be produced to the court for further review and determination concerning their potential release to the accused.

10 Mr. Hundle has not shown that the records of either the complainant's family physician or her former psychologist come within the ambit of producible records as they are not relevant to an issue at trial or to the complainant's competence to testify.

11 Mr. Hundle has established that the DATS records are not entitled to privacy protection. The only standard that applies to their production is the Stinchcombe standard: all documents containing

relevant information should be produced. Therefore, all DATS records of complaints made by, or about, the complainant in these proceedings, will be produced as soon as practicable to Mr. Hundle.

Cases and authority cited

12 By the applicant: R. v. Mills (1999), 28 C.R. (5th) 209 (S.C.C.); R. v. Sutherland (2001), 156 C.C.C. (3d) 264 (Ont. C.A.); R. v. McKay [2002] A.J. No. 571 (Q.B.); RVG (W.), [2000] N.J. No. 86 (Nfld T.D.); R. v. Leipert, [1997] 1 S.C.R. 281.

13 By the complainant: R. v. N.(E.A.) 2000 Carswell BC 274 (B.C.C.A.); R. v. Mills 1999 Carswell Alta. 1055 (S.C.C.); R. v. Lalo [2002] N.S.J. No. 311, 2002 Carswell NS.

14 By Drs. Swanson and Bodmer: R. v. Mills [1999] 180 D.L.R. (4th) 1 (S.C.C.); Hay v. University of Alberta Hospital [1990] A.J. No. 333 (Q.B.); Stoodley v. Ferguson [2001] A.J. No. 357 (Q.B.); Phillip (Next Friend of) v. Whitecourt General Hospital [2001] A.J. No. 460 (Q.B.).

15 By the City of Edmonton: Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25, s. 1(n).

16 By the prosecutor: R. v. Mills [1999] S.C.J. No. 68; R. v. Batte [2000] O. J. No. 2184 (Ont. C.A.).

17 By the court: Stinchcombe v. Queen (1991) 68 C.C.C. (3d) 1 (S.C.C.); Khan [1990] 2 S.C.R. 531; Canada Evidence Act, R.S.C. 1985, c. C-5, s. 30; Monkhouse [1987] A.J. No. 1031 (C.A.); BMO v. Lysyk [2002] A.J. No. 1124 (Q.B.); Marquard [1993] 4 S.C.R. 223

1. Background

18 Mr. Hundle is a Disabled Adults Transportation Service - DATS - driver. The complainant is a 23 year old dependent adult who resides in a group home.

19 Mr. Hundle is charged that on January 29, 2001, he sexually assaulted the complainant by passing his hand over the complainant's breast area, over the top of her clothes. It is the Crown's position that Mr. Hundle picked up the complainant at the college where she was taking an art course, and that instead of driving her to her group home, he took her to the parking lot of a Tim Horton's and then to another parking lot where the sexual activity occurred.

20 A preliminary inquiry into this charge was held on October 3, 2001. At the outset of the preliminary inquiry, the Crown called the complainant's treating psychiatrist who testified that:

- he has been treating the complainant since 1997, when she was hospitalized for a manic episode of her bipolar illness;
- he has been treating the complainant for her bipolar disorder since the 1997 incident and that the complainant also suffers from autism from

childhood;

- although the complainant's chronological age was 23 at the time of the incident, her mental age is substantially under 16. The complainant is currently 25 years old;
- that the complainant is capable of relating a version of what occurred to her;
- that the complainant is currently taking mood stabilizer medication called Tegretol and two anti-psychotic medications, Seroquel and Zyprexa, which also have mood stabilizing properties;
- since 1997, he has seen the complainant about 5 or 6 times a year;
- that it is possible for persons suffering from bipolar disorders to enter into sexual relations with total strangers, with people they don't like or people they don't know;
- that although he has not tested the complainant's developmental delay which is a component of her autism, "she's probably young teens as far as her emotional development goes"... "I think she's probably less than 16, maybe substantially less";
- that the complainant is "capable of saying yes if she wants something or she can say no if she doesn't want something ... This is where it gets dicey because I guess you have to decide what you consider consent. I mean, she can tell you whether she wants a glass of water or not but she can't make major decisions about life management and that's why she - I believe she has a guardian and she has people who look after her basically. ... I think [the complainant] has poor judgment when it comes to social interactions. I think she can potentially put herself in dangerous positions if she doesn't have some supervision.";
- that persons who suffer from bipolar disorder can suffer from delusions when they are either depressed or in a manic state and that when in that state, they can think of an incident as a nightmare even if nothing happened;
- that when the complainant was acutely ill, "she had pressured thoughts, kind of flight of ideas. She had some grandiose ideas. She was hyper-sexual. She was hallucinating. She had some delusions ... They seemed to be primarily sexual in nature at that time. ... Well she thought that she was previously married. She thought that she had been previously divorced. She thought she'd had miscarriages. According to all information, none of it was true."
- that, apart from the delusions the complainant had when she was acutely ill, he had never known the complainant to lie;
- that the complainant only had one full blown manic episode and that was in 1997. Since then, she's had brief periods "where she's been perhaps a bit

> sped-up and a bit irritable ... and then she's had some periods where she's been on the down side for ... a couple of months maybe. But I think actually for the most part she hasn't required any further hospitalizations and she's been, I think, pretty stable for the last four years.";
> - that she is taking some art courses at [a college] but that he did not think that she was in a mainstream program; her art was quite childlike and quite primitive.

21 In October, 2001, Mr. Hundle was committed to trial at the conclusion of the preliminary inquiry.

22 In March 2002, Mr. Hundle was approached by another DATS driver who knew about this charge and who informed Mr. Hundle that, in April 2000, the complainant had made unwanted sexual advances towards him. The other DATS driver had filed a formal complaint against the complainant, shortly after the incident occurred, in the following terms:

> Today I had picked up this client at front [college] downtown. She sat at front seat and told me about her boy friend and she was feeling very good she said. All the way she was talking about her boy friend and said me that I looks like her boy friend and she likes me too. When I was going to park my van to drop off her behind her home she suddenly kept her hand on my right leg and tried to kiss me. After dropping her off, I took my van back and informed the dispatcher.

23 On April 20, 2000, the other DATS driver received the following written message from the Community Relations Representative of DATS:

> Thanks for letting me know of the problems you had with this passenger. I have advised her group home and they will be dealing with her accordingly. They were certain that this would not occur again. Thank you for your patience and timely report of the matter. Let me know if you have any further difficulties.

24 Because the information from the first DATS driver was not made available to the accused until after the preliminary inquiry, there was no evidence from the complainant's psychiatrist at the preliminary hearing about the incident in 2000. Nor was the psychiatrist asked at the preliminary inquiry if the complainant had discussed with him the 2001 incident with which we are concerned.

2. Use of "hearsay" records in support of application

25 In the circumstances here, the applicant is entitled to rely on the record of evidence from the first DATS driver in support of his application; that evidence is a business record. Direct evidence from the individual who created the record is not required.

26 The respondents object to Mr. Hundle's use of what they describe as hearsay evidence to

support his application: they say that Mr. Hundle's lawyer's assistant's affidavit, to which a photocopy of the other DATS's driver's handwritten complaint is attached, constitutes an insufficient basis for the application.

27 I disagree. The Canada Evidence Act establishes that:

> 30 (1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record.

28 Government and governmental activity is included within the ambit of "business": s. 30(12).

29 The written statement was made by the other DATS driver as a record kept in the normal course of business. It was made contemporaneously with the events. It was accepted and acted upon by the administrators of the DATS program. It was made long before the events with which we are concerned in these proceedings at a time when no legal proceedings were contemplated and at a time when the first DATS driver would have no motive to falsify the record. The copy of the record was provided to the respondents approximately two months prior to the hearing, a notice period well in excess of the time periods set out in the Canada Evidence Act: s. 30(7). For the reasons set out elsewhere in this decision, the production of the evidence itself would not be contrary to public policy: s. 30(10)(b).

30 Moreover, using the common law standards of allowing hearsay evidence into evidence for the truth of its content, this evidence would be admitted at common law even without reliance on the statutory provisions of the Evidence Act: Monkhouse. Subsequent common law developments have enhanced the treatment of hearsay evidence in decisions such as Monkhouse: Khan.

31 This situation is not similar to Lysyk. In that case, the existence of parallel proceedings in which the declarant was a defendant clearly took the case out of each of the business records or the common law exceptions to the hearsay rule.

32 Therefore, in the circumstances here, it is appropriate to consider the extract from the DATS record either as a business record under the Canada Evidence Act or as a hearsay statement which was made in circumstances of sufficient reliability that the court is entitled to rely on the record for the purposes of this hearing.

33 The second concern of the respondents relates to the argument advanced by Mr. Hundle that the complainant appears to have been either counselled or disciplined as a result of the sexual activity with the previous DATS driver. The respondents state that Mr. Hundle has not advanced specific evidence of discipline on which he can build his application for discipline records. In relation to this evidence, there are two factors that militate in Mr. Hundle's favour. The first is that a

normal interpretation of the DATS letter suggests that some action was taken by the group home as a result of the complaint. The second is that Mr. Hundle is not on a fishing expedition: he has identified a specific incident as possibly leading to some action by the group home that might have been interpreted by the complainant as being disciplinary action. Naturally, he cannot produce an actual record of the discipline because he has not had access to the records. But, he has established a reasonable basis on which to ground his application for records.

3. Are the requested records ones in which the complainant has a privacy interest?

34 The court observes that each of the respondents is jealously guarding the complainant's privacy. That is expected of them. Each has thoughtfully and helpfully advanced the privacy concern on this application.

35 The Canadian right to privacy is being developed by dialogue between Parliament and the courts. Parliament and the Supreme Court of Canada have held that it is not every record pertaining to an individual which deserves privacy protection. Where there is no reasonable expectation of privacy in a record, no full Mills assessment is required.

i) Medical records

36 There is no doubt that the complainant's medical records, including the records of her psychologist, are records in which she has a strong privacy interest. Those records concern aspects of the complainant's "individual identity" and relate to a relationship which is "therapeutic or trust-like", to repeat the language of Mills.

ii) Group home records

37 It may well be that there are some group home records which do not deserve privacy protection. For example, it may be that records relating to administrative matters, such as funding, are not records in which the complainant has a reasonable expectation of privacy. However, it is not necessary to decide that issue on this hearing because the accused does not wish access to all of the group home records, only those records which deal with the complainant's unusual sexual behaviour. The complainant undoubtedly has a legitimate expectation of privacy in those records; those are records which deal with aspects of her identity as an individual and which may well be crucial to her relationship of trust with her guardians in the group home.

iii) Transportation records

38 The DATS transportation records are not records in which the complainant has a reasonable expectation of privacy.

39 The City of Edmonton notes that the definition of "personal information" under the Freedom of Information and Protection of Privacy Act to which, as a "public body" it is subject, is very

broad:

> "Personal information" is defined by in Section 1(n) of FOIP as:
>
> (n) "personal information" means recorded information about an identifiable individual, including
>
> (i) the individual's name, home or business address or home or business telephone number,
> (ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,
> (iii) the individual's age, sex, marital status or family status,
> (iv) an identifying number, symbol or other particular assigned to the individual,
> (v) the individual's fingerprints, blood type or inheritable characteristics,
> (vi) information about the individual's health and health care history, including information about a physical or mental disability,
> (vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,
> (viii) anyone else's opinions about the individual, and
> (ix) the individual's personal views or opinions, except if they are about someone else; [emphasis added]

40 The City of Edmonton indicates that the records should not be disclosed because the City obtains information of the type requested from its drivers to deal with the conduct of DATS passengers in order to ensure the safe and efficient transportation of DATS patrons and drivers. The City is concerned that drivers may not provide the city with information if information of this type were to be released.

41 In this specific case, the other DATS driver provided a consent to the release of the information he provided to the City.

42 In the result, while the records kept by the City of Edmonton contain personal information, they are not records in which the complainant has a reasonable expectation of privacy. While she could expect that the City would respect the FOIP requirements, the complainant should also expect that where the conduct on a city operated transport vehicle leads to criminal charges, any transportation records relating to the transport itself will be disclosed. Therefore, these records are not subject to the full-blown Mills analysis, but are subject only to the normal requirements of relevance as set out in Stinchcombe, and elsewhere. The City of Edmonton must therefore provide

to the accused all records in its possession relating to complaints made by, or about, the complainant.

4. Has the applicant proved that the requested records are likely relevant to an issue at trial or to the competence of the complainant to testify and that the production of the record is necessary in the interests of justice?

43 At this initial stage of the Mills application, Mr. Hundle must prove that the requested records meet the double-barrelled test imposed by Parliament.

i) Relevance to an issue at trial or to the competence of the complainant to testify

44 Mr. Hundle has proved that certain of the requested records are relevant to an issue at trial or to the competence of the complainant to testify.

45 Mr. Hundle has not proved that the records of the complainant's family physician or psychologist are relevant to an issue at trial or to the competence of the complainant to testify. Those records are therefore not producible.

a) Competence of the complainant to testify

46 The only records which deal with the ability of the complainant to testify are the records of the psychiatrist. Those records may contain evidence about whether the complaint has the capacity to observe, recollect and communicate the evidence: Marquard.

47 The accused is entitled to make informed submissions to the court on the complainant's capacity. The issue of the complainant's capacity is "part of the case to meet," to repeat the language of Mills.

b) Relevant to an issue at trial

48 The records which deal with issues at trial are the records of the psychiatrist and certain of the records of the group home. At this stage, those records are properly characterized as relating to an issue at trial.

49 The issue at trial will be consent. In that context, the complainant's credibility, her suggestibility, and her motive to lie are all core issues.

50 The prosecutor and the other respondents have very properly reminded the court that this complainant, like all other parties who appear in our courts, deserves non-stereotypical assessment. I have therefore been very concerned, even at this first stage of the Mills hearing, to determine whether this complainant is being treated by the justice system like a complainant who did not suffer a mental illness. If a complainant did not suffer from a mental illness, it is clear that records

of the complainant's sexual activity with other individuals would not normally be relevant to the issue of whether her activity with this accused on this occasion was consensual. Should this situation be treated differently?

51 I have concluded that it must be treated differently because, at least at this stage of the inquiry, I cannot be satisfied that the trier of fact can reliably rely on its everyday experience to interpret the evidence that it will hear on this issue. The trier of fact will require evidence not only about the general parameters of the complainant's illness, but about what is known of this complainant's specific symptoms of illness, in order to better appreciate the evidence.

52 At this stage of the proceedings, based on the psychiatrist's evidence at the preliminary hearing, and based on the evidence of the earlier incident with a DATS driver, the psychiatrist's records may provide evidence concerning the complainant's suggestibility as a witness and her sexual behaviour linked with her illness and which departs from the norm.

53 Any evidence concerning a complainant's motive to lie is relevant to the issue of her credibility. It is true that this complainant is, because of her illness, much more subject to record-keeping than other complainants. But the issue of whether it is in the interests of justice to release the records must be addressed in the second stage of analysis. The applicant has clearly met the hurdle set in the first stage.

54 In summary, the applicant has met the first part of the first test in relation to two sets of records: he has established that the psychiatrist's records, and the group home's records concerning counselling or discipline for sexual activity, are records that are likely to relate to an issue at trial.

ii) Production of the record necessary in the interests of justice

55 Mr. Hundle has proved that the production to the court for assessment of certain records which are relevant to an issue at trial or to the competence of the complainant to testify is necessary in the interests of justice.

56 Overall, the court begins the assessment with the recognition that the alleged crime is serious: although the specific assault alleged is at the low end of the scale of sexual assaults, the vulnerability of the complainant and the unique position which the accused occupied relative to the complainant make these allegations very serious. In this context, it does not matter if the unique position is characterized as a relationship of trust or an imbalance of power. The stigma attaching to any conviction for sexual assault is presumably increased when the victim of a sexual assault is a child or a child-like victim. Therefore, the stakes for both the accused and the complainant are high.

57 The court also accepts, at this stage, that the records kept by the group home, for example, are not "truth oriented", i.e. that therapeutic action may be initiated no matter who did what to whom. That is an issue that can be more fully explored in the second stage.

58 The court accepts the general argument advanced by the respondents to the effect that courts could expect a chilling effect on the relationship between the complainant and her psychiatrist and between the complainant and her group home guardians if disclosure were ordered of these records. However, I note that there is no evidence before the court that the disclosure of the records would be "frightening" to the complainant in the words of her lawyer.

59 However, the court also notes that this is a case on which essentially the whole of the prosecution case against the accused consists of the evidence of the complainant; the complainant's credibility is the core of the prosecution case. There is no independent evidence of the allegation of sexual assault.

60 Therefore, in the circumstances of this case, information contained in the identified records is "part of the case to meet" in the words of the Supreme Court of Canada in Mills.

61 The production of records from the complainant's psychiatrist relating to the complainant's ability to testify is necessary in the interests of justice because the trier of fact is not in a position to rely on its experience to determine if the complainant has the capacity to become a witness at trial; the accused is entitled to make submissions on this issue but in order to do so requires access to the records. In this context the court also notes that the prosecution has not laid a charge under s. 153.1 of the Code, but has called evidence about the complainant's capacity to consent. It is not yet clear, therefore, what position the Crown will take at trial concerning the issue of whether this 23 year old complainant should be treated according to her chronological age or according to her emotional age, which might be 13. In these circumstances, the accused is faced with a very complex issue to meet on the element of consent; the records might help him and the court.

62 In addition to the general testimony regarding the complainant's ability to articulate the evidence, the psychiatrist may also be called upon to give evidence at trial relating to the suggestibility of the complainant.

63 Finally, it would be unfair for the prosecutor to call the evidence of the psychiatrist and to deny access to the records on which that opinion is based because the accused is entitled to a determination as to whether the complainant's evidence will be heard on oath or will be heard on a promise to tell the truth, or will be heard at all. Not only is the accused entitled to such a determination, if the court allows the complainant to testify, the trier of fact is entitled to an instruction concerning the distinction between a witness who is testifying on a promise to tell the truth and a witness who is testifying under oath, and the accused is entitled to make informed submissions on that instruction.

64 The production of records of the complainant's psychiatrist relating to the complainant's mental illness is necessary in the interests of justice because there is every chance that both the accused and the trier of fact will not be in a position to weigh the evidence concerning the actions of the complainant without expert assistance in interpreting that evidence. The psychiatrist has used the expression "pervasive" in relation to the complainant's development delay. At this stage, his

whole chart is potentially relevant to the issues at trial. The second stage analysis will refine this assessment. There is no suggestion at this stage that the psychiatrist is treating the complainant for problems unrelated to the issues at trial.

65 Even at this first stage of the Mills application, the court must balance the potential interference in the therapeutic and trust-like relationships the complainant has built up with her psychiatrist and her group home against the accused's right to make full answer and defence. However, the degree of assessment is not as detailed at this point, and will be carried out fully under the second part of the Mills test.

66 The respondents argue that the psychiatrist will be called as a witness at trial, and therefore pre-trial production of his records is not required. While there are some circumstances in which the availability of a witness at trial answers a disclosure concern, this is not one of them. If the accused issued a subpoena duces tecum, requiring the psychiatrist to bring his records to the courthouse, he would still object to their production. The issue of the production of the record must be answered and it is in the public interest that it be answered prior to trial rather than at trial. The right to cross-examine an expert witness without access to the expert's records is an exercise based in hope of a lucky strike rather than an exercise based in rational process. We must try to make the process as rational as possible.

67 The production of records from the complainant's group home is necessary in the interests of justice because, at this stage of the proceedings, the issue of motive to lie is still a realistic issue to be determined. The records, although likely relevant, still have to be reviewed by the court before a decision is made about whether they will be turned over to the defence.

5. Publication of reasons

68 Parliament has legislated that a court may order that its determination concerning whether records should be produced may be published if the court so orders, after taking into account the interests of justice and the right of privacy of the person to whom the records relate. It is important for the public to have the opportunity of assessing the approach taken by the courts to the complex task of balancing opposing rights; therefore, I order that these reasons may be published. As no preliminary inquiry publication ban is in effect, and these reasons do not identify the complainant, there is no cause not to permit these reasons to be published.

VEIT J.

cp/ci/e/nc/qlmmm/qlltl