CITATION: R. v. Lahens, 2024 ONSC 1948
COURT FILE NO.: CR-22-400004761-0000
DATE: 20240403

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HIS MAJESTY THE KING	)	*J. Cruess*, for the Respondent Crown
	)	
– and –	)	
	)	
TOMMY LAHENS	)	*S. Chung-Alvares*, for the
	)	Defendant/Applicant R. Lahens
Defendant/Applicant	)	
	)	*M. Stephens, Amicus Curiae*
	)	
	)	**HEARD:** January 29, 2024

PUBLICATION BAN

The proceedings were held in camera, as required by s. 278.4(1) of the *Criminal Code*. Subject to any further order by a court of competent jurisdiction, pursuant to s. 278.9 of the *Criminal Code*, no person shall publish in any document, or broadcast or transmit in any way, the contents of the application record, the evidence taken and submissions made at the hearing, or these reasons for decision. This ban does not apply to publication of these reasons in law reports nor to a discussion of the underlying legal principles in other publications, pursuant to s, 278.9(c) of the *Criminal Code*, provided that the identity of the complainant and any identifying information about her is not revealed.

REASONS FOR DECISION

J. R. PRESSER J.

I. OVERVIEW

[1] This is a decision on Stage One of an application by Tommy Lahens for production of private records relating to the complainant, N.C.

[2] Mr. Lahens is charged with human trafficking, receiving a material benefit from human trafficking, withholding documents of a trafficked person, receiving a material benefit from sexual services, procuring, and two counts of assault causing bodily harm. The charges stem from events

alleged to have taken place between March 2018 and March 2021 when the complainant was working in the sex trade.

[3] During the investigation, police obtained personal records from and relating to the complainant. These consist of N.C.'s medical records from two hospital visits following alleged assaults by the applicant, and a download of the entire contents of N.C.'s personal cellphone, including her communications, banking records, geolocation information, web browsing history, photographs, and more. Both parties and *amicus curiae* agree that these are records that attract a high expectation of privacy, and that they are records within the meaning of s. 278.1 of the *Criminal Code*. The cellphone records also engage the privacy interests of third parties with whom the complainant communicated, and who appear in her photographs.

[4] The defence seeks production of some of N.C.'s personal cellphone records that were extracted from her phone under the statutory production regime set out at ss. 278.1 – 278.91 of the *Code.*

[5] The issue for my determination, as case management judge, at Stage One of this private records production application is whether I should order that the records be produced to the court for review. This requires me to decide whether I am satisfied that the records are "likely relevant to an issue at trial or to the competence of a witness to testify" (s.278.5(1)(b)); and that "the production of the record[s] is necessary in the interests of justice" (s. 278.5(1)(c)).

[6] For the following reasons, I have come to the conclusion that the records sought by the applicant are likely relevant and that production is necessary in the interests of justice. The defence Stage One application is allowed. The records at issue will be produced to the court for review.

II. PROCEDURAL HISTORY AND BACKGROUND

[7] The complainant first contacted police because she was concerned that she might be criminally charged with frauds she said were perpetrated by the applicant. She provided two statements to police in March 2021. She told police that the applicant trafficked her for approximately three years, during which time he posted online to advertise her sexual services, exercised control over her, and materially benefitted from her work in the sex trade. The complainant also told police that the applicant had assaulted her twice, necessitating medical treatment at the hospital on two occasions. She said that the applicant used her phone to post online ads for her sexual services, to make arrangements in relation to her work in the sex trade, to communicate with clients, and to transfer funds. N.C.'s statements to police resulted in the applicant being charged with the above-noted criminal offences.

[8] As part of its investigation, the police obtained N.C.'s medical records relating to her visits to the hospital after the alleged assaults by the applicant, as well as a data dump of the entire contents of her personal cellphone. As noted, the Crown, defence, and *amicus curiae* all agree that these are records that attract a high expectation of privacy, and that they constitute records within the meaning of s. 278.1 of the *Criminal Code.*

[9] The Crown gave notice to the defence, as required by s. 278.2(3) of the *Criminal Code*, that there were private records relating to the complainant in its possession. The defence did not seek production of these records under the statutory records production regime.

[10] The Crown then brought an application seeking an order permitting it to produce two categories of records relating to the complainant to the defence. The first category consisted of records it intends to adduce at trial (records contained on USB A). The second category consisted of records the Crown does not seek to adduce at trial, but which it considered may be "likely relevant" to the defence (records contained on USB B).

[11] Multiple efforts were made by police and also, ultimately, by *amicus curiae* to contact the complainant. She made it clear that she did not wish to participate either personally or through counsel in the Crown's production application. She also made it clear that she did not want her private records used in this prosecution. All parties agreed that the complainant did not expressly waive the operation of the statutory records regime contained in ss. 278.3 to 278.91 of the *Code* within the meaning of s. 278.2(2) as interpreted in *R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 106 and 114.

[12] In light of the legal and factual complexities of the Crown production application, on November 14, 2023, I appointed *amicus curiae* to assist the court: *R. v. Lahens*, 2023 ONSC 6383.

[13] Crown, defence, and *amicus* filed written submissions on the Crown production application. It was heard on December 18, 2024. On January 11, 2024, I released a short endorsement setting out my bottom-line decision, with full written reasons to follow: *R. v. Lahens*, 2024 ONSC 248. Those written reasons are still to follow. In coming to my decision on the Crown's production application, I only considered production of the records the Crown intends to adduce at trial (records contained on USB A). I ordered some of those records produced to the defence, some produced to the defence with redactions, and others not produced to the defence.

[14] I did not consider the Crown's application for production of the second category of records, namely the records the Crown identified as potentially likely relevant to the defence (records contained on USB B). It was my view that it was preferable for the defence to seek production under the statutory records regime for any USB B records it wanted to pursue after receiving production of the USB A records. The reason for this preference was that only the defence knows its theory in this case. It is therefore uniquely situated to establish both likely relevance to a live issue at trial, and how records are necessary to Mr. Lahens's ability to make full answer and defence as part of the requirement that the production of private records be necessary in the interests of justice. In my January 11, 2024, endorsement, I indicated that I had not considered production of the USB B records, and wanted to wait to see if the defence intended to seek production of those records under the statutory records production regime.

[15] In court on January 11, 2024, defence counsel advised that Mr. Lahens would bring an application for production of the records the Crown had identified as potentially likely relevant (USB B records). The applicant filed his production application on January 22, 2024. Stage One

of the defence production application was heard on January 29, 2024. These are my reasons for decision on Stage One of that application.

[16] Between when the Crown filed its production application and when the defence filed this production application, the Crown provided the defence with further disclosure. This consisted of documents, materials, and information that, upon further review, the Crown considered not to be records because the complainant did not have a reasonable expectation of privacy in them. This further disclosure included:

- All communications between the complainant and the applicant that were extracted from the complainant's cellphone; and

- Police-produced detailed maps showing location data for the complainant's and the applicant's cellphones during the period covered by the indictment and for several months after the complainant provided her police statements.

[17] In addition, pursuant to my order for production of records that the Crown intends to adduce at trial following the Crown's production application, Mr. Lahens will have received the following (some of which I ordered redacted to protect the complainant's or third parties' privacy):

- Medical records relating to the complainant's two attendances at hospital for treatment in relation to the two alleged assaults by the applicant;

- Screenshots of communications between the complainant's cellphone and third parties, primarily relating to sex work;

- Photographs of the complainant and the applicant with the complainant's dog;

- Some calendar entries that include geotags specific to attendance at the airport;

- Some internet bookmarks;

- The complainant's call logs; and

- Some messages exchanged by the complainant, including communications: with her mother; with her landlord at 488 University Avenue; relating to a residential tenancy agreement for a Vancouver apartment; with an individual who was going to take her to Montreal; relating to transport from Montreal to Toronto on specific dates; relating to cryptocurrency transactions; relating to banking codes; relating to ordering Viagra; relating to arranging sexual services.

[18] On this production application, Mr. Lahens seeks production of the following records extracted from the complainant's cellphone, identified as potentially likely relevant to the

defence by the Crown (records contained on USB B, with page references to the 1700 pages of the complainant's full cellphone extraction):

- Communications at pages 1-8, 16, 141, 156-157, 163-164, 170, 262-264, 267-268, 273, 289, 290, 301-308, 345, 365, 373-377, 1369, 1370-1372, 1508-1509, 1511-1513, 1524-1527, 1532, 1534, 1535, 1538-1547, 1637, 1640-1642, 1644 -1654, 1662-1663, 1671-1674, 1678-1681, 1712;

- Photos at pages 21-68, 108-140;

- Web history at pages 966-988; and

- Information about a Vancouver apartment rental at page 1614.

III. THE GOVERNING LEGAL REGIME

[17] Sections 278.2 to 278.91 of the *Criminal Code* establish the regime that governs production of private records as defined in s. 278.1, relating to a complainant or witness in any proceeding in respect of the offences enumerated in s. 278.2(1). The applicant is charged with enumerated offences. As noted, all parties to this application agree that the records at issue are private records within the meaning of s. 278.1, as do I. Accordingly, this defence production application and any order for production are governed by the statutory records production regime.

[18] The regime is intended to "accommodate and reconcile the rights of the accused to full answer and defence with the privacy and equality rights of complainants" in prosecutions involving enumerated offences. It accomplishes this by ensuring that there is careful judicial scrutiny and limiting of what complainants must be forced to reveal "as the price of [their] access to the criminal justice system": *R. v. Quesnelle,* 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 14 [internal citation omitted]. The balancing contemplated by the statutory production regime requires particular care in this case. The complainant has not waived operation of the regime, and has made it very clear that she neither wants her records to be used at trial, nor to participate in this prosecution. In this way, the complainant maintains her interest in the privacy of her records, but is not present or participating in the process to assert her rights to privacy or equality herself (or through her own counsel). At the same time, the applicant's right to make full answer and defence must be respected and protected. It too is essential to ensure that he has a fair trial.

[19] The statutory regime sets out a two-stage process. At the first stage, the judge holds a hearing in camera (s. 278.4(1)) to determine whether the records should be produced to the court for review (s. 278.5(1)). At the second stage, if production to the court has been ordered, the judge reviews the records to determine whether to order production to the defence (s. 278.6(1)). The

judge may hold an in-camera hearing if that will be of assistance with the second stage determination (s. 278.6(2)).

(1) Stage One

[20] At Stage One, records will be produced to the court if the judge is satisfied that:

- The applicant has met the statutory requirements for bringing a private records production application set out in ss. 278.3(2) to (6) (s. 278.5(1)(a));
- The applicant has "established 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)); and
- Production of the records is "necessary in the interests of justice" (s. 278.5(1)(c)).

[21] Under s. 278.5(2), in deciding whether to order a record produced in whole or part to the court, 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 right to privacy, personal security and equality of the complainant or witness . . . and of any other person to whom the record relates." In so doing, the judge must consider the following factors that are statutorily enumerated in s. 278.5(2):

a. The extent to which the record is necessary for the accused to make 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; and

h. The effect of the determination on the integrity of the trial process.

(i) Likely Relevance

[22] A record will be likely relevant if the applicant established that there is a "reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify": *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 22; *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 124. In *R. v. Batte* (2000), 49 O.R. (3d) 321 (C.A.), at para. 72, the court held that in order to pass the likely relevance threshold, there must be "some basis for concluding that the statements have some potential to provide the accused with some added information not already available to the defence or have some potential impeachment value."

[23] The likely relevance threshold at this first stage is not a significant or onerous burden. It is meant to prevent requests for production that are "speculative, fanciful, disruptive, unmeritorious, obstructive, and time-consuming": *Mills*, at para. 46, citing *O'Connor*, at para. 24. The threshold for likely relevance under s. 278.5(1)(b) is higher than the threshold of relevance for Crown first party disclosure under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, which requires disclosure of information that "may be useful to the defence": *Mills*, at para. 45; *Batte*, at para. 72.

[24] Section 278.3(4) lists a number of assertions that, on their own, cannot meet the likely relevance threshold. These include, by way of example, "that the record exists" (s. 278.3(4)(a)); "that the record may disclose a prior inconsistent statement of the complainant" (s. 278.3(4)(d); "that the record may relate to the credibility of the complainant" (s. 278.3(4)(e)); and "that the record was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused" (s. 278.3(4)(k)). A bare assertion that a record is likely relevant to one of the issues listed in s. 278.3(4) is not sufficient to meet the statutory threshold of likely relevance: *Mills*, at paras. 52, 118. However, an accused may rely on these assertions if there is an "evidentiary or informational foundation to suggest that they may be related to likely relevance": *Mills*, at para. 120. The accused must point to "case specific evidence or information" to show that the record is likely relevant to an issue at trial or the competence of a witness to testify: *Mills*, at para. 120: *R. v. K.C.*, 2021 ONCA 401, 157 O.R. (3d) 161, at para. 31, per Jamal J.A. as he then was, dissenting but not on this point.

(ii) Necessary in the Interests of Justice

[25] In addition to establishing that the records they seek are likely relevant, an applicant for production must establish that production is necessary in the interests of justice (s. 278.5(1)(c)). At the first stage, this requires consideration of whether production *to the court for review* is necessary in the interests of justice: *Mills*, at para. 131. The phrase "necessary in the interests of justice" is, according to the Supreme Court in *Mills*, at paras. 131 and 133:

> . . . capable of encompassing a great deal. It permits the judge to look at factors other than relevancy, like the privacy rights of complainants and witnesses, in deciding whether to order production to himself or herself. . . .
>
> . . .

> The criterion in s. 278.5 that production must be "necessary in the interests of justice" invests trial judges with the discretion to consider the full range of rights and interests at issue before ordering production, in a manner scrupulously respectful of the requirements of the *Charter*.

[26] This is a "wide and flexible" discretion that accords the judge "great latitude": *Mills*, at para. 130. It should be exercised in a manner that respects the goals of the statutory records production regime: to protect the privacy and equality rights of complainants and witnesses while preserving the fair trial rights of the accused: *Quesnelle*, at para. 54.

[27] Where the probative value of a record is low and the privacy right in a record is strong, the judge may decide that it is not in the interests of justice to order production: *Mills*, at para. 131. Even where likely relevance has been established, the court must "consider the rights and interests of all those affected by disclosure before documents are ordered disclosed to the court": *Mills*, at para. 126. The judge is "free to make whatever order is 'necessary in the interests of justice' – a mandate that includes all of the applicable 'principles of fundamental justice' at stake": *Mills*, at para. 134.

[28] This will necessarily include consideration of the defendant's ability to make full answer and defence as a major focus: "[i]f the judge concludes that it is necessary to examine the documents at issue in order to determine whether they should be produced to enable the accused to make full answer and defence, then production to the judge is 'necessary in the interests of justice'": *Mills*, at para. 132. Courts have repeatedly warned about the risks of placing the accused in a 'Catch-22' situation, in other words, "in the difficult position of making submissions regarding the importance to full answer and defence of records that he or she has not seen": *Mills*, at paras. 71 and 137.

[29] At the same time, while the defendant's right to make full answer and defence is a principle of fundamental justice, the principles of fundamental justice do not entitle the defendant to "the most favourable procedures that could possibly be imagined" because fundamental justice "embraces more than the rights of the accused": *Mills*, at para. 72. The right to make full answer and defence does not comprehend a right to records that are irrelevant or would distort the truth-seeking function of the trial process: *R. v. Darrach*, 2000 SCC 46, [2006] 2 S.C.R. 443, at para. 37.

[30] Where likely relevance has been established, if after considering the all the various rights and factors at play, the judge is uncertain of whether production is necessary to the defendant's ability to make full answer and defence, the judge should "err on the side of production to the court": *O'Connor*, at para. 152; *Mills*, at paras. 132 and 137.

(2) Stage Two

[31] If the judge orders the records produced to the court for review, the production application moves on to Stage Two. Here, the judge reviews the records in the absence of the parties to

determine whether they should be produced in whole or part to the defendant (s. 278.6(1)), and may conduct a hearing in camera if that will be of assistance (s. 278.6(2)).

[32] At Stage Two, the judge determines whether the records are likely relevant to an issue at trial or to the competence of a witness to testify, and whether its production is in the interests of justice (s. 278.7(1)). In so doing, the judge must again consider "the salutary and deleterious effects of the determination on the accused's right to make full answer and defence and on the right to privacy, personal security and equality of the complainant or witness . . . and of any other person to whom the record relates" (s.278.7(2)). This requires that the judge take the statutorily enumerated factors for consideration contained in ss. 278.5(2)(a) to (h) into account. The judge may impose conditions on the production of any records to the defendant (s. 278.7(3)).

IV. APPLICATION TO THIS CASE

(1) Positions of the Parties

[33] The defence theory is that "the complainant was in a romantic relationship with the applicant and exercised autonomy while working in the sex trade. The complainant was frequently apart from the applicant, routinely under the influence of drugs, engaged in fraud, paranoid, and had motives to fabricate": Applicant's Factum, at para. 18. The applicant submits that the complainant was on drugs at the time she made her police statements. He notes that the complainant has since said that she does not want to participate in this prosecution, and maintains that she lied to police.

[34] The applicant takes the position that the records he seeks are "capable of providing evidence of the nature of the complainant's relationship with the applicant, and its eventual breakdown, the impact and use of drugs, her consequent paranoia, her involvement in fraud, jealousy, motives to fabricate, and her autonomy. It would also reveal the inherent dangers of the sex trade and that the complainant was apart from the Applicant at relevant times": Applicant's Factum, at para. 5. The defence submits that "the contents of her phone . . . relate to the allegations, are contemporaneous, and speak to the complainant's state of mind"; and that "[t]he complainant used her phone during the relevant time to communicate for work, to post ads, to make travel and living arrangements, to take photographs, to procure drugs, to commit fraud, and to communicate with the applicant, among other things": Applicant's Factum, at paras. 5 and 19. The applicant relies on *R. v. Yabarow*, 2019 ONSC 3669, at paras. 23 – 25 as authority for the proposition that the ubiquitous use of cellphones as a communication device and camera means that they are often able to offer relevant and probative evidence.

[35] Given the regular use of her cellphone in the period covered by the indictment, the defence argues, it can be expected that there would be information in the records that is likely relevant to

the defence theory that she was in a romantic relationship with the applicant and exercised autonomy while working in the sex trade. And that there would be information that is likely relevant to whether she was frequently apart from the applicant, was under the influence of drugs, was engaged in fraud with the applicant and therefore had a motive to fabricate to avoid criminal liability. In short, the defence argues that the records are likely relevant to the complainant's credibility and reliability. For these reasons, in the defence submission, the threshold of likely relevance has been met.

[36] In addition, the applicant notes that the Crown has identified the records he seeks as likely relevant to the defence. Indeed, when it filed its first application for production, the Crown took that position that if the defence had sought production of these records, they would have met the likely relevance threshold: Crown Applicant Factum, November 22, 2023, at para. 7. This too, in the defence argument, supports a finding that the likely relevance requirement has been met.

[37] With respect to the requirement that production be necessary in the interests of justice, the applicant submits that his production application is limited to a relatively small and closed category of documents. He is not seeking production of the entire 1700 pages of data extracted from the complainant's cellphone in addition to those parts that have already been produced to him as a result of the Crown's production application. Rather, he is only seeking the data extracted from the phone that has been flagged by the Crown as likely relevant to the defence. In this way, the defence argues, the production he seeks is narrowed and involves less potential violation of the complainant's and third parties' rights to privacy and equality. Effectively, the defence position is that the potential violations are proportionate and acceptable given the value of the records to his ability to make full answer and defence.

[38] The Crown made no submissions on this defence production application. The Crown identified the records at issue as potentially likely relevant to the defence, and previously indicated it would agree that the likely relevance threshold was met if the defence sought production. In these circumstances, Crown counsel did not feel it was appropriate for him to make any submissions on the defence application.

[39] *Amicus curiae* has reviewed all the records at issue and filed a chart at para. 35 of her factum, setting out her position in relation to each record by page (or page range). *Amicus* agrees that some of the records sought by the applicant are likely relevant to the issues the defence plans to raise at trial, and that it is necessary in the interests of justice to produce some of them to the court for review. However, *amicus* does not agree that all the records are likely relevant and/or necessary in the interests of justice. *Amicus* submits that the applicant has already received disclosure or production of information that is relevant to some of the issues in relation to which he seeks production of these records. Relying on *Batte*, at para. 72 and *K.C.*, at paras. 51, 65-67, *amicus* argues that this is an important factor in assessing whether the records sought are likely relevant and necessary in the interests of justice.

[40] *Amicus* further submits that the Crown's initial assessment that the records at issue were likely relevant should not be given much weight in the circumstances of this application for three

reasons. First, *amicus* submits, the Crown assessed what records might be likely relevant without knowing the theory of the defence. Likely relevance must always be assessed contextually and with reference to case-specific factors. Here, exercising its obligation to act as a 'Minister of Justice,' the Crown endeavoured to assess potential likely relevance, but it did so in a factual and legal vacuum. Accordingly, its assessment would necessarily have fallen closer to the *Stinchcombe* standard of disclosure – that which may be useful to the defence – than to the more restrictive standard of "likely relevance" required by the statutory records production regime.

[41] Second, *amicus* submits that the Crown assessment of likely relevance should not be given much weight because the Crown did not assess whether production is necessary in the interests of justice. As a result, the Crown's identification of likely relevant records did not include consideration of the potential impact of production on the privacy and equality rights of the complainant or third parties. *Amicus* highlights that the privacy of the complainant is an especially important consideration in this case because "the records being sought are cellphone records, including the complainant's communications with others, her personal photographs, and the web history of her cellphone – all things which are capable of revealing a great deal of personal information about the complainant. Indeed, this fact has been repeatedly recognized by the Supreme Court of Canada in a long line of cases dealing with s. 8 of the *Charter* and changing technology (*R. v. Vu*, 2013 SCC 60, at paras. 38, 40-45; *R. v. Fearon*, 2014 SCC 77, at para. 51 – 58; *R. v. Marakah*, 2017 SCC 59, at para. 31-37; *R. v. Spencer*, 2014 SCC 34, at para. 37)": Factum of the *Amicus Curiae*, at para. 34.

[42] Third, *amicus* submits that the Crown assessment of likely relevance was made before a significant amount of information, including private records of the complainant, was disclosed or produced to the defence. As a result, the Crown's assessment was made without considering whether the further records sought would provide the applicant with added information not already available to him. This is relevant to the *Batte* formulation of likely relevance, and the *K.C.* formulation of necessity in the interests of justice.

[43] Finally, *amicus curiae* submits that there are two categories of records sought by the applicant for which there is simply no basis for a finding of likely relevance or necessity in the interests of justice. The first of these categories is photographs on the complainant's phone. *Amicus* notes that some photographs have already been ordered produced to the defence by me (e.g. one copy of the photographs that include the complainant's dog). She argues that there is simply no basis for a conclusion that any further photographs are likely relevant to any issue at trial or to impeachment of a witness. When considered alongside the very high privacy interest engaged by photographs on the complainant's cellphone, which may reveal personal preferences, associations, and intimate situations, the absence of any established likely relevance for the photographs means that these should not be produced to the court for review. The second category of items sought by the defence for which, in *amicus*' submission, there is simply no basis for production is the complainant's web history. *Amicus* says that the page range identified as web history also contains personal images and photographs that are not web history. There is no established relevance for web browsing history or other photographs to the defence theory or the complainant's credibility

or reliability. And the web history and other items in this page range are of a highly private nature, tending to reveal lifestyle choices and a biographical core of information.

(2) Analysis

[44] I have decided to order production of the records sought by the applicant to the court for review. The Applicant has succeeded in establishing likely relevance and that production is necessary in the interests of justice.

(i) Likely Relevance

[45] In my view, the applicant has met his not "significant or onerous burden" of establishing that there is a "reasonable possibility that the information is logically probative to an issue at trial": *O'Connor*, at paras. 22, 24; *Mills*, at paras. 46, 124. I agree that given the complainant's regular use of her cellphone in the period covered by the indictment, there is a reasonable possibility that the cellphone records contain information that is relevant to the defence theory and to live issues at trial. The records are logically probative, as follows:

- There is a reasonable possibility that the cellphone records will contain communications between the complainant and others, and evidence of her plans and movements, that speak to the nature of her relationship with the applicant and her autonomy. There is a reasonable possibility that the photographs on her cellphone will evidence her movements and her association with others, that in turn also speak to her autonomy. This is logically probative of whether the applicant exercised control over the complainant, which is an essential element of the *actus reus* of some of the human trafficking charges at issue;

- There is a reasonable possibility that the cellphone records, including her photographs and web browsing history, will evidence the complainant's movements at various times in the period covered by the indictment. This may contradict information the complainant gave police in her statements, and in this way they may be logically probative of her credibility and reliability;

- There is a reasonable possibility that the cellphone records will contain evidence that speaks to the nature of the relationship between the complainant and the applicant in the period immediately before she went to the police. This may be logically probative of difficulties in the relationship or even relationship breakdown, which in turn may support a defence argument that the complainant had a motive to fabricate;

- There is a reasonable possibility that the cellphone records will provide evidence that the complainant was using drugs, and of the impact of drug use on her. Drug use in the days leading up to the complainant's statements to police may be relevant to her memory and reliability;

- There is a reasonable possibility that the cellphone records will provide evidence that the complainant was engaged in fraudulent activities with the applicant. The complainant's participation in fraud may be logically probative of a motive to fabricate human trafficking and assault allegations against the applicant, in order to avoid criminal liability for having participated in fraud. In addition, active and willing participation in fraud, an offence of dishonesty, may be logically probative of the complainant's credibility.

[46] I am satisfied, given the live issues to which the records are possibly reasonably logically probative, that the defence production application is not "speculative, fanciful, disruptive, unmeritorious, obstructive, and time-consuming": *Mills,* at para. 46, citing *O'Connor,* at para. 24.

[47] The Crown assessment that these records are potentially likely relevant to the defence lends some further support to my conclusion that they are so at this first stage. I appreciate *amicus curiae's* concerns about placing too much weight on the Crown assessment of likely relevance to the defence. Indeed, as *amicus* suggests, the Crown was reviewing the records without knowing the defence theory. As such, the Crown would necessarily have been applying a broad concept of relevance. It would necessarily have been considering whether the records *may* be useful to the defence, rather than whether the records met the more restrictive threshold of *likely relevance* that is required for production under the statutory regime.

[48] However, at Stage One of this application, I do have the defence theory and its argument as to why there is a reasonable possibility that the records are logically probative of live issues at trial. The Crown's assessment of potential likely relevance, even with its limitations, provides some support to the defence position. It bolsters my conclusion that the records are likely relevant at this first stage.

[49] *Amicus* submits that some of the records sought do not reach the likely relevance threshold because they are duplicative of materials already in the defence possession. At para. 29 of her factum, *amicus* sets out the live issues to which the defence says the records are relevant, but for which he already has other relevant information available to him. I agree that the applicant already has disclosure and production of materials and records that speak to some of the live issues that arise from the defence theory. However, at this stage, I have no way of assessing whether the records sought would be *merely* surplusage, or whether they would provide the applicant with added information that is not already available to him. I do consider that there is "s*ome basis* for concluding" that the records "have *some potential* to provide the accused with *some added information* not already available to the defence or have some potential *impeachment value*": *Batte,* at para. 72 [emphasis added]. In these circumstances, I consider it appropriate to order production to the court for my review to determine whether the records sought do provide added information that is not already available to the applicant from other sources in his possession.

(ii) Necessary in the Interests of Justice

[50] Having assessed the interests of justice, including the protection of the privacy and equality rights of the complainant and third parties while preserving the fair trial rights of the applicant, I have come to the conclusion that production to the court is necessary.

[51] I recognize that the records at issue attract a very high expectation of privacy. In *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at para. 51, the Supreme Court recognized that the search of cellphones "implicates important privacy interests." Cellphones "may have immense storage capacity, may generate information about intimate details of the user's interests, habits and identity without the knowledge or intent of the user, may retain information even after the user thinks that it has been destroyed, and may provide access to information that is in no meaningful sense 'at' the location of the search": *Fearon*, at para. 51, citing *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at paras. 41-44. There is no question that the records in the complainant's cellphone have the ability to reveal intimate details, lifestyle choices, and a biographical core of information about her. The records also impact on the complainant's dignity and her right to equality: *Mills*, at paras. 89-93.

[52] The records at issue may also implicate the privacy interests, dignity, and equality of third parties with whom the complainant communicated or who appear in her photographs.

[53] That some records from the complainant's phone have already been disclosed and produced to the defence does not lessen her privacy, equality, and dignity interests in the rest of the records that have not been produced. Privacy is not an all-or-nothing concept: *Quesnelle*, at para. 37.

[54] It is especially important to pay careful and respectful attention to the complainant's dignity, privacy, and equality interests in the circumstances of this case. These are records in which the complainant has an extremely high expectation of privacy. She has indicated that she does not want the records used in court, and has effectively indicated that she wants nothing further to do with this prosecution. She is not present in this application to speak for herself, or assert her own rights. The third parties whose privacy and dignity interests are implicated have no standing on this application. As a result, they also have not been able to speak for themselves or assert their own rights. *Amicus curiae* has ably and fairly raised and made submissions about the privacy, equality, and dignity interests of the complainant and third parties, to assist the court. But *amicus* is not counsel to the complainant, much less the third parties. She is the court's lawyer. I am very mindful in these particular circumstances that it falls to me to ensure that the privacy, equality, and dignity interests of the complainant and third parties are given full and meaningful consideration in determining what the interests of justice require.

[55] At the same time, the applicant's fair trial rights and his right to make full answer and defence must also be given full and meaningful consideration in determining whether the interests of justice necessitate production of the records.

[56] In my view, the records sought by the defence implicate his right to make full answer and defence. I am satisfied that there is a reasonable possibility that the cellphone records will contain

information that is logically probative of the defence theory, and that may be of assistance to the defence in raising a reasonable doubt. I am also satisfied that the defence does not seek production based on a discriminatory belief or bias.

[57] The complainant's and the third parties' privacy, equality and dignity interests in the records militate against the production sought by the applicant. So too does society's interest in encouraging the reporting of sexual offences. The applicant's right to make full answer and defence militates in favour of production. Neither set of rights trumps or negates the other: *Mills*, at para. 17. However, in some circumstances, the right to make full answer and defence may override competing considerations: *Mills*, at para. 76. A judge considering a production application should err on the side of ordering production to the court if there is a real risk that non-production could infringe on the right to make full answer and defence: *Mills*, at para. 137.

[58] I would have concluded that this was a borderline case where I should err on the side of ordering production to the court. But two meaningful considerations have tipped me over into a more firm conclusion that production is necessary in the interests of justice here.

[59] First, the applicant only seeks production of a subset of the full cellphone data extraction. He does not seek all of the information in the Crown's possession that has been taken from the complainant's phone. He is not proposing to go on a wide-ranging fishing expedition through all of the highly private information relating to the complainant in the hands of the Crown. Rather, he limits his application to those records that the Crown has flagged as potentially likely relevant. This is a more limited request than he might have made, and it is one that involves less intrusion on the privacy, dignity, and equality interests of the complainant and third parties. This more limited production request will still adversely impact on the privacy and equality rights of the complainant and third parties, but it will do so in a less severe way than broader production would have. The Crown identified the particular records sought as being potentially likely relevant. I have determined that they are likely relevant at this first stage, and that they may assist the applicant in exercising his right to make full answer and defence. As I weigh and balance all of the rights at play, the targeted nature of the defence application and its lesser intrusion on the complainant's rights support my conclusion that production is necessary in the interests of justice.

[60] The second consideration is the potential effect of a decision not to order production on the integrity of the trial process. In particular, I am concerned about fairness and the appearance of fairness.

[61] The Crown reviewed the complainant's private records, identified those that are useful to the prosecution, and sought production of those to the defence. Many to most of those records were produced (or were produced with redactions). The Crown intends to rely on them as part of the prosecution case at trial.

[62] In the unique circumstances of this case, the Crown also identified records that it thought might be relevant to the defence. The Crown went so far as to initially seek production of those

records to the defence, and it indicated that it would have consented to having those records produced to the court for review if the defence had sought production under the statutory regime.

[63] In my view, it could negatively impact on the fairness of the trial process, and on the appearance of fairness, to deny at least Stage One production of these records to the court for review. The applicant should not be denied production of records because he applied for them, when the same records might well have been produced to him on the Crown's application had he hung back and done nothing to seek them himself.

[64] I agree with *amicus*' submissions as to why the Crown's initial assessment of likely relevance to the defence cannot be determinative of this application. However, at the highest level of generality, it would not appear fair to the defence to deny production to the court for review of records that even the Crown considered might be likely relevant. I considered this general appearance of fairness concern alongside my own assessment that the applicant has met the Stage One likely relevance threshold, and my own assessment that his right to make full answer and defence is implicated by these records. I am not allowing Stage One of the defendant's application because the Crown identified the records as potentially likely relevant. But that the Crown did so contributes a fairness and appearance of fairness concern that weighs in favour of the necessity of first stage production in the interests of justice. It is my considered opinion that this is an effect of the Stage One determination on the integrity of the trial process that weighs in favor of production to the court.

[65] After careful consideration of all of the factors set out s. 278.5(2)(a) – (h), I have come to the conclusion that it is necessary in the interests of justice to order production of the records to the court for review.

(3) Conclusion

[66] Having considered the salutary and deleterious effects of production on the applicant's right to make full answer and defence and on the right to privacy, personal security, dignity, and equality of the complainant; as well as the effects of production on the privacy and dignity of third parties; I have concluded that the applicant has established that the records are likely relevant and that their production to the court is necessary in the interests of justice.

V. DISPOSITION

[67] Stage One of Mr. Lahens's production application is allowed. The records at issue will be produced to the court for review. The matter will proceed to Stage Two.

J. R. PRESSER J.

Released: April 3, 2024

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COURT FILE NO.: CR-22-400004761-0000
DATE: 20240403

ONTARIO

SUPERIOR COURT OF JUSTICE

HIS MAJESTY THE KING

– and –

TOMMY LAHENS

Defendant/Applicant

REASONS FOR DECISION

J. R. PRESSER J.

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