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R v UBA, 2025 ABCJ 85

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In the Alberta Court of Justice

Citation: R v UBA, 2025 ABCJ 85

Date:20250509
Docket: 230417966P1
Registry: Calgary

2025 ABCJ 85 (CanLII)

In the Matter of

Between:

His Majesty the King

Respondent/Crown

- and -

UBA

Applicant/Accused

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that could identify the Victim or the Witness must not be published, broadcast, or transmitted in any way.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

Ruling of the Honourable Justice I. L. Maharaj

Overview

[1] UBA (the "Accused" or the "Applicant") is charged with offences contrary to sections 267(b) and 267(c) of the *Criminal Code of Canada* pertaining to an alleged incident on November 29, 2022 (the "Incident Date") involving his stepdaughter, the Complainant ("AM").[1]

[2] AM was about 16 years old on the Incident Date. Her mother, BM, is the former spouse of the Applicant and has three other children together with him. AM is BM's child from a

[1] *Criminal Code of Canada*, RSC 1985, c. C-46.

previous relationship. On the Incident Date, BM and the Applicant were still residing in the same residence, although they had separated in February of 2022.

[3] This is an application for an order requiring the production of a variety of records in the possession of various third parties. This application was made pursuant to the common law regime set out in ***R v O'Connor***, the seminal decision regarding the production of records in the possession of third parties.[2]

[4] The Applicant filed an Amended Notice of Application, dated December 9, 2024, with a supporting affidavit of the Applicant, sworn December 1, 2023 (the "Amended Application"). There was no *viva voce* evidence called by the Applicant or the Respondent/Crown (the "Crown") at the ***O'Connor*** hearing. In fact, the Applicant was not present during the hearing and was represented by his counsel alone.

[5] This Court received written argument from both the Crown and the Applicant and, thereafter, entertained oral submissions on February 7, 2025, from the Crown, the Applicant, counsel for Child and Family Services, counsel for the Calgary Police Service, and counsel for Telus Mobile and Freedom Mobile. Dr. Santosh Dubey was subpoenaed to attend Court but failed to appear and was not represented.

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Position of the Applicant

[6] The Applicant claimed that there are a significant number of records of different types in the hands of various third parties (generally referred to as the "targeted records" and more specifically, when required, by their more specific description) that may provide information relevant to a material issue at trial. The material issue at trial to which the targeted records pertain was defined specifically by the Applicant as being the credibility of BM and AM.

[7] The Applicant outlined twelve groups or types of targeted records which he sought to have produced. However, at the completion of the Applicant's argument, the Applicant abandoned certain of those claims.

[8] The following chart reflects the Applicant's grouping of the targeted records in the left column, with reference to the paragraph numbers in the Amended Application, and the claims for targeted records which have been abandoned or maintained in the right column.

Paragraph in Amended Application	Description of the Records Sought to be Produced	Status of Claim for Production after Argument
(a)	Records in the possession of Dr. Santosh Dubey (psychiatrist) pertaining *to AM* and to BM	*Abandoned with respect to AM*; Maintained with respect to BM

[2] ***R v O'Connor***, [1995] 4 SCR 411.

(b)	Records in the possession of Child and Family Services (Calgary and Edmonton) regarding BM's report that the Accused sexually and verbally assaulted AM and the Accused's three biological children	Maintained
(c)	Records in the possession of Child and Family Services (Calgary and Edmonton) re: similar reports by BM against her ex-husband, the father of AM, including allegations of sexual and verbal assault against BM by her ex-husband	Maintained
(d)	All records in the possession of AM and BM's psychiatrists pertaining to BM's allegedly traumatic history	Abandoned
(e)	All records in the possession of AM and BM's therapists	Abandoned
(f)	Records of reports and documents with Child and Family Services re: complaints made by AM or BM about the Accused *and reports from investigation and conclusions of findings about BM's fitness upon which her decision on her ability and license to work as a care giver rest*	*Abandoned with respect to the italicized portion*; Maintained with respect to the balance
(g)	Unedited video recording of the events of November 29, 2022, created by BM	Maintained
(h)	Phone records of BM reflecting a conversation with an individual ("URA"), allegedly engineered by BM to trigger a criminal prosecution against the Applicant (charges were withdrawn by the Crown)	Abandoned
(i)	Police records of statement made by URA pertaining to events leading to additional criminal prosecution (charges were withdrawn by the Crown)	Abandoned
(j)	Police record showing allegedly false statement made by BM on visit of Accused alleging AM complained that she was afraid to visit with biological father, and police notes from 911 calls made on response to multiple welfare checks made on October 16, 2023	Maintained
(k)	Full 911 call from Accused re: report about BM taking phone and deleting contents on November 29, 2021	Abandoned
(l)	*Order directing Crown to provide records in (a) through (k)* and order directing police to release records of a list of 12 police file numbers	*Abandoned with respect to the italicized portion*; Maintained with respect to the balance

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[9] As a result of abandoning his request for many of the targeted records, the Applicant maintained his request with respect to two groups of records that pertained to AM, being paragraph (b), records of BM's reports to Child and Family Services that the accused sexually and verbally assaulted AM and paragraph (f), records of complaints made by AM to Child and Family Services about the Applicant. These are the only targeted records that bear directly on AM, the Complainant.

[10] The Applicant argued that some or all of the targeted records may contain information that would be relevant to a material issue at trial and could, if there is relevant information in the targeted records, go to support the Applicant's theory that BM has a propensity to lie, exhibited a pattern of lying to authorities, has a motive to fabricate, is mentally unstable, and is generally lacking in credibility.

[11] The Applicant argued that each of the remaining groups of targeted records meets the test of being likely relevant to a material issue at trial, being the credibility of BM, and therefore his request falls within the ambit of the ***O'Connor*** regime for the production of third-party records.

[12] The Applicant argued he requires production of the targeted records to make full answer and defence to the criminal allegations made against him.

Position of the Crown

[13] In order to lend some order to the lengthy list of targeted records, the Crown grouped them into the following five categories, which I found to be more helpful than the dozen unrelated groups of records presented by the Applicant:

- Category 1 - Therapeutic and medical records (paragraphs (a), (d), and (e) of the Amended Application)
- Category 2 - Child and Family Services records (paragraphs (b), (c), and (f) of the Amended Application)
- Category 3 - Unedited video (cell phone recording) in BM's possession (paragraph (g) of the Amended Application)
- Category 4 - Police records (paragraphs (i), (j), (k), and (l) of the Amended Application)
- Category 5 - Phone records (paragraph (h) of the Amended Application)

[14] With respect to the production of the video set out in Category 3 (or paragraph (g) of the Amended Application), the Crown's position is that the video is a first-party document and falls squarely within the Crown's obligation to disclose information in its possession to the Applicant pursuant to ***R v Stinchcombe***.[3] Further, the Crown assured the Court that it has complied with its obligations pursuant to ***Stinchcombe*** and has disclosed the entire video provided by BM.

[15] The Crown argued that each and every one of the targeted records in Categories 1, 2, 4, and 5, are third-party records. The production of third-party records pursuant to the ***O'Connor*** regime requires that the Applicant establish an evidentiary foundation that the targeted records

[3] ***R v Stinchcombe***, [1991] 3 SCR 326.

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actually contain information that is likely relevant to a material issue at trial before a Court may compel the production of third-party records.

[16] The Crown's position is that the Applicant has not established an evidentiary foundation for any of his requests for the production of the targeted records described in Categories 1, 2, 4, and 5 and that the sole purpose of bringing the Application is to search for possible evidence that the Applicant hopes may be found in the targeted record, which information may be likely relevant to a material issue at trial.

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Legal Framework

The *O'Connor* Framework

[17] The framework for the disclosure of third-party was set out by the Supreme Court of Canada in its 1995 decision in ***O'Connor***. The ***O'Connor*** regime is a two-stage process for the production of records in the possession of third parties.

[18] In Stage 1, an applicant must lay an evidentiary foundation to support his request for the production and disclosure of records on the basis that the records in question contain information that is likely relevant to a material issue at trial.[4]

[19] It is not sufficient for an Applicant to simply categorize a record as ***hopefully*** having information that ***might be relevant*** to a material issue at trial, on the assumption that the record must be produced in order to determine whether information that is likely relevant to a material issue at trial exists.

[20] While it may seem self-explanatory, integral to laying the evidentiary foundation of likely relevance is demonstrating that the information sought is actually, or even likely, present in the targeted records. In the absence of this foundation, the request for production of records is merely a fishing expedition whereby an applicant seeks to produce documents to see if there is anything useful to his case contained therein.

[21] There must be some objective reason to believe that the targeted record will have information that is likely relevant to the material issue at trial, even when that issue is credibility. To do otherwise, is to open the flood gates to the production of records in the possession third parties for the purpose of scrutinizing them to determine whether there is relevant information contained within. This is the very definition of a fishing expedition, is a waste of scarce judicial resources, and is the reason for the two-stage process set out in ***O'Conno***r.

[22] In order to meet the "likely relevant" threshold, the Applicant is required to identify case specific evidence or information that is located in the targeted documents to show that the documents are relevant to an issue at the trial or the competence of a witness to testify.[5]

[23] If Stage 1 of the ***O'Connor*** regime results in a finding by the Court that the information contained in the third-party record is likely relevant to a material issue at trial, then Stage 2 of the ***O'Connor*** framework is triggered.

[24] In Stage 2, the third-party records are produced to the Court for an assessment as to the balance to be achieved between protecting the privacy interests of the witness or the complainant

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[4] ***O'Connor*** at paras 21 to 22.
[5] ***Mills*** at para 10.

by not producing the record with an applicant's interest in making full answer and defence to the charges against him which necessitates producing the record.[6]

[25] This weighing and balancing of respective rights only occurs in Stage 2 of the ***O'Connor*** framework, as distinct from the framework set out in ***R v Mills***, a decision of the Supreme Court of Canada, which sets out the framework for disclosure of records pertaining to a complainant's sexual history and which permits the weighing and balancing of respective interests to occur at Stage 1.[7]

[26] In ***O'Connor***, Justices Lamer and Sopinka of the Supreme Court of Canada, dissenting on other issues, described the "likely relevance" standard as follows:

> [22] In the disclosure context, the meaning of "relevance" is expressed in terms of whether the information may be useful to the Applicant (see ***Egger***, *supra*, at p. 467, and ***Chaplin***, *supra*, at p. 740). In the context of production, the test of relevance should be higher: the presiding judge must be satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify. When we speak of relevance to "an issue at trial", we are referring not only to evidence that may be probative to the material issues in the case (i.e. the unfolding of events) but also to evidence relating to the credibility of witnesses and to the reliability of other evidence in the case. See ***R v R (L)*** (1995), 1995 CanLII 8928 (ON CA), 39 C.R. (4th) 390 (Ont. C.A.), at p. 398.[8]
>
> ...
>
> [24] While we agree that "likely relevance" is the appropriate threshold for the first stage of the two-step procedure, we wish to emphasize that, while this is a *significant burden, it should not be interpreted as an onerous burden* upon the accused. There are several reasons for holding that the onus upon the accused should be a low one. First, at this stage of the inquiry, the only issue is whether the information is "likely" relevant. We agree with L'Heureux-Dube J. that considerations of privacy should not enter into the analysis at this stage. We should also not be concerned with whether the evidence would be admissible, for example as a matter of policy, as that is a different query (***Morris v The Queen***, 1983 CanLII 28 (SCC), [1983] 2 S.C.R. 190). As the House of Lords recognized in ***R v Preston***, [1993] 4 All E.R. 638, at p. 664:
>
> > ... the fact that an item of information cannot be put in evidence by a party does not mean that it is worthless. Often, the train of inquiry which leads to the discovery of evidence which is admissible at a trial may include an item which is not admissible ...
>
> A relevance threshold, at this stage, is simply a requirement to prevent the Applicant from engaging in "*speculative, fanciful, disruptive, unmeritorious,*

[6] ***R v McNeil***, 2009 SCC 3 at para 7.
[7] ***R v Mills***, [1999] 3 SCR 668.
[8] ***O'Connor*** at para 22.

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> *obstructive and time-consuming*" requests for production. See ***Chaplin***, supra, at p. 744.[9] (emphasis added)

[27] In ***R v TB***, a decision of Justice Sandra Mah of the Alberta Court of Justice, a young person charged with sexual assault and sexual interference with a minor, sought to produce medical records of the complainant. In that case, Justice Mah said:

> [22] At minimum, there must be some type of nexus between the records which are being sought and relevance to an issue at trial. Anything less would amount to the very type of fishing expedition which has been ruled impermissible in jurisprudence. (***O'Connor*** and ***R v White***, (1999) 132 CCC (3d) 373 (Ont CA)).
>
> [23] "Likely relevance" exists where there is a reasonable possibility that the information sought is logically probative to an issue at trial. Issues at trial involve material issues concerning the unfolding of the event which form the subject matter of the charge. ***R v Jackson***, 2015 ONCA 832, citing ***R v O'Connor***, (1995) 103 CCC (3d) 1 SCC.
>
> [24] If the issue at trial is credibility, the records sought must have some potential to add information not already available to the Applicant or to have some impeachment value. ***R v Batte***, (2000), 145 CCC (3d) 449 (Ont CA).[10]

[28] There has been significant judicial consideration of the ***O'Connor*** regime and its application.[11]

[29] In my opinion, the following key principles have been articulated about the ***O'Connor*** regime:

- There must be some evidentiary foundation laid to establish that the record actually contains information that may be "likely relevant" to a material issue at the trial upon which to base a determination of "likely relevance" to a material issue at trial. Otherwise, the Court is authorizing a fishing expedition.
- "Likely relevance" means that the requested information is more than just useful to an applicant's case.
- "Likely relevance" applies to material issues in the trial going to the unfolding of events, the credibility of witnesses, and the reliability of evidence.
- The burden on the Applicant is intended to be significant but not onerous.
- Privacy and admissibility are not determinative at Stage 1, nor are these concepts intended to be considered at Stage 1 of the ***O'Connor*** regime.
- The purpose of Stage 1 is to prevent "speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming" production requests.

[9] ***O'Connor*** at para 24.
[10] ***R v TB***, 2018 ABPC 192 at paras 22 to 24.
[11] See for example, ***R v Mills***, [1993] 3 SCR 668; ***R v McNeil***, 2009 SCC 3; ***Worldbank v Wallace***, 2016 SCC 15; ***R v Gubbins***, 2018 SCC 144, affirming ***R v Vallentgoed***, 2016 ABCA 358; ***R v Meer***, 2015 ABCA 163.

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What is a "Fishing Expedition"?

[30] The phrase "fishing expedition" has been used throughout the Crown's argument. In order to fully understand the Crown's objection to the Application, it is important to understand what is meant by a "fishing expedition" in the context of the Applicant's request for the production of a wide range of third-party records.

[31] The phrase "fishing expedition" has an idiomatic meaning in ordinary parlance. There are a number of versions of its ordinary meaning, including:

- An attempt to discover information without knowing what it may be. The term implies that the search does not have a specific subject but is rather performed in the hopes that some new information will be found that will be beneficial to the searcher.[12]
- A search for information without knowledge of whether such information exists. (This involves asking questions with no pre-conceived notion of what the answers might reveal.)[13]
- An exploratory search for facts. (This involves asking questions with no pre-conceived notion of what the answers might reveal).[14]

[32] In West's Encyclopedia of American Law, a "fishing expedition" is described as follows:

> Using the courts to find out information beyond the fair scope of the lawsuit. The loose, vague, unfocused questioning of a witness or the overly broad use of the discovery process. Discovery sought on general, loose, and vague allegations, or on suspicion, surmise, or vague guesses.[15]

[33] In the Encyclopedic Dictionary of Canadian Law, McGuinness describes a "fishing expedition" as:

> A noun phrase relevant in any adjudicative or investigative process. 1. A term applied to the pursuit of a wide (or wild) line of inquiry without any foundation to do so. For instance, a search or investigation undertaken in the desperate hope of discovering information that will support a claim, charge, suspicion or allegation, ... 2. An attempt to discover embarrassing or prejudicial [information] by collecting a lot of information. 3. An investigation or examination of witness that does not stick to a stated objective but hopes to uncover incriminating or prejudicial evidence. ... A pejorative term for a non-specific search for information, especially incriminating information, or for a lengthy examination with no purpose other than to wear down an opponent.[16]

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[12] Farlex Dictionary of Idioms, © 2024 Farlex, Inc.
[13] McGraw-Hill Dictionary of American Idioms and Phrasal Verbs. © 2002 by the McGraw-Hill Companies, Inc.
[14] McGraw-Hill's Dictionary of American Slang and Colloquial Expressions © 2006 by The McGraw-Hill Companies, Inc.
[15] West's Encyclopedia of American Law, edition 2. Copyright 2008 The Gale Group, Inc.
[16] The Encyclopedic Dictionary of Canadian Law, volume 2, LexisNexis Canada, (c) 2021, citing as authority HSBC Bank Canada v The Queen, 2010 DTC 1322 at para 3 which states : ... the threshold test for relevancy on discovery is very low but it does not allow for a fishing expedition..." and R v Ahmed, [2012] O.J. No. 6643, 2012 ONSC 4893 at para 32 which states: "... To hold that there is no such requirement would open the door to wide ranging, time consuming, and resource draining fishing expeditions".

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[34] Many jurists have turned their minds to the meaning of the phrase "fishing expedition" in the context of requests for the production of documents in the possession or control of third parties to litigation. The following cases are ones which, in my opinion, elucidate the key concepts to be considered when determining whether a request is a "fishing expedition".

[35] In ***R v Chaplin***, Justice Sopinka, writing for the Supreme Court of Canada stated: "[f]ishing expeditions and conjecture must be separated from legitimate requests for disclosure."[17]

[36] In ***550433 Alberta Ltd v Stealth Alarms Systems Inc***., the Alberta Court of Queen's Bench stated:

> Moreover, the plaintiff, having established a *prima facie* case, i.e. the existence of the defamatory statements made on the specified dates to identified recipients by identified makers, the plaintiff is entitled, on discovery, to ask the defendants if they have made similar statements to other people. This would not be a fishing expedition because the plaintiff would have established reasonable ground – a *prima facie* case – for inferring that other such similar statements had in fact been made.[18]

[37] Presumably, the corollary is also correct. When an applicant has not established "reasonable grounds" or a *prima facie* case that the information (in that case, the defamatory statements) exists (either having been spoken to another person or in a document), then it would be a fishing expedition to seek production of random documents where the information might be found, in the absence of a reasonable belief that it exists in that particular documentary location.

[38] In the oft-quoted passage on this point, Master Funduk, an esteemed Master of the Alberta Court of Queen's Bench (as it then was), spoke about "fishing expeditions", in ***Franco v Hackett***:

> ... But the test is relevant and material. That now cuts out the old fishing expeditions. *There is no fishing without first evidence that there are fish in the pond and a reasonable amount of fish.* The Defendant has not satisfied me of that. *Conjecture is not sufficient*.[19] (emphasis added)

[39] In ***IMS Health Canada, Limited v. Information and Privacy Commissioner***, the Alberta Court of Appeal stated that a "fishing expedition" would not be allowed unless there is "a valid reason for belief in the allegations ...".[20] Again, a valid reason for that belief must be laid by an applicant as a foundation to his request for production.

[40] In ***R v McNeil***, Justice Charron, writing for the Supreme Court of Canada, stated:

> [28] ... In addition, it is important for the effective administration of justice that criminal trials remain focussed on the issues to be tried and that *scarce judicial*

[17] ***R v Chaplin***, [1995] 1 SCR 727 at para 32.
[18] ***550433 Alberta Ltd v Stealth Alarms Systems Inc***, 1998 ABQB 1081 at para 24.
[19] ***Franco v Hackett***, 2000 ABQB 241 at para 34; also quoted in ***Tirecraft Group Inc. (Receiver of) v High Park Holdings ULC***, 2010 ABQB 653 at para 26, as cited in ***Read v Liberty Mortgage Services Ltd***, 2015 ABQB 448 at para 8.
[20] ***IMS Health Canada, Limited v Information and Privacy Commissioner***, 2005 ABCA 325 at para 53.

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> *resources not be squandered in "fishing expeditions" for irrelevant evidence*. The likely relevance threshold reflects this gate-keeper function.[21] (emphasis added)

[41] In ***Edmonton (City) v Gosine***, Justice Douglas Mah, of the Alberta Court of Queen's Bench (as it then was), had the following commentary to add to this discussion:

> [36] Despite the phrase "fishing expedition" frequently being used in legal cases as a metaphor for unnecessary or unreasonable inquiries, I was unable to find any jurisprudential definition. Therefore, I will attempt one. To me, *a fishing expedition consists of an inquiry that is without foundation other than conjecture or speculation*. Other features of a fishing expedition would be dubious relevance, placing an onerous burden on the party examined and lack of demonstrated materiality – negative elements which align with those identified by Master Prowse in ***Dow Chemical***.[22] (emphasis added)

[42] Finally, in ***R v Kaddoura***, the Alberta Court of Appeal stated:

> [15] ... Production of records is not required just because some remote and unlikely line of analysis can be advanced, and it will not be ordered to support lines of pretrial discovery that are *unrealistic, speculative, or without any air of reality*: ***Dow Chemical*** at paras. 19, 21.[23] (emphasis added)

[43] In my opinion, the following themes with respect to the use of the concept of a "fishing expedition" in the context of applications for the production of third-party records have emerged from the foregoing analysis:

- Before the Court wields the power of the state to compel a stranger to the litigation to produce documents in his possession or control, there must be an evidentiary foundation that supports the existence of likely relevant information in the document in question otherwise, the Court is sanctioning a fishing expedition.
- Production of third-party records is not to be based on the hope or speculation that there may be interesting or useful information in the record. Production is not intended for the Court to authorize a "sneak peek" to find out whether the information is present and useful to an applicant.
- There must be a purpose for obtaining the information that is more than trivial for the production of the record to be warranted.
- Scarce judicial resources are not to be squandered chasing evidence that may or may not be relevant to a material issue at trial. The Court is required to be its own gate-keeper in this regard by firmly requiring applicants to do more than guess, speculate, hope, or succumb to conjecture.
- There must be a nexus between the information sought to be produced and a material issue at trial. A material issue at trial can refer to, *inter alia*, the unfolding of events, the competence of a witness to testify, or the credibility of a witness. While the precise use of the information might not be apparent until it is produced, there must be a connection

[21] ***R v McNeil***, 2009 SCC 3 at para 28.
[22] ***Edmonton (City) v Gosine,*** 2020 ABQB 546 at para 36.
[23] ***R v Kaddoura***, 2015 ABCA 154 citing ***Dow Chemical Canada ULC v Nova Chemicals Corp.***, 2014 ABCA 244.

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between the information sought and the material issue at trial before third parties ought to be compelled to produce information in their possession with respect to a matter before the Courts in which they are not involved.

- Production of third-party records must relate to the case at Bar and not be used to acquire or discover records for other litigation between the parties. To do so is an abuse of the Court's process.

[44] It is with the foregoing backdrop in mind that this Court will consider each of the records with respect to which the Applicant has sought production.

Analysis and Conclusions

Targeted Records – by Category

[45] I will now consider each of the targeted records requested for production by the Applicant, based on the categories set out by the Crown.

Category 1 – Medical and therapeutic records

[46] First, with respect to AM, the Applicant has abandoned all claims for medical, psychiatric, and therapeutic records pertaining to AM as set out in paragraphs (a) and (e).

[47] Second, with respect to BM, the Applicant has abandoned all claims for records in the possession of BM's therapists, as set out in paragraph (e), and those records in the possession of BM's psychiatrists regarding her allegedly traumatic history, as set out in paragraph (d).

[48] The only remaining claim for records in this category is for records in the possession of Dr. S. Dubey, BM's psychiatrist, as set out in paragraph (a), EXCEPT as they relate to her traumatic history, as set out in paragraph (d) which was abandoned by the Applicant at the conclusion of his oral argument.

[49] The Applicant alleged that BM has been or is being treated by Dr. Dubey for psychological or psychiatric conditions. He alleged that the records of BM's treatment might provide information supporting her alleged tendency to fabricate experiences as a result of her condition, which condition was not specified by the Applicant in his affidavit.

[50] The Applicant stated in his affidavit that he must be given access to BM's medical, therapeutic, and psychiatric records "to confirm that she is often triggered by the events from her past and that these conjectures are a merely figments from her trauma-induced emotions".[24]

[51] There has been no actual evidence tendered by the Applicant to substantiate his allegations that BM suffers from childhood trauma, a "warped imagination" or that she has "conjur(ed) images in her head". These allegations are without any foundation and fall in alignment with his allegations that she is "a liar and manipulator, capable of cooking up any story that will incriminate and frustrate me".[25]

[52] Psychological, psychiatric, or therapeutic records can be the source of information that may assist an applicant in addressing material issues to be raised in a trial. However, it must not be assumed that because an individual is receiving treatment or counselling that the records of that treatment or counselling contain information that is relevant to a trial. Something more must

[24] Affidavit of UBA, sworn December 1, 2023 at para 25.
[25] Affidavit of UBA, sworn December 1, 2023 at para 20.

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be present in order for there to be a nexus between the treatment records and a material issue at trial.

[53] In ***O'Connor***, Justice L'Heureux-Dube, on behalf of herself, Justice La Forest, and Justice Gonthier, stated:

> [144] Finally, it must not be presumed that the mere fact that a witness received treatment or counselling ... indicates that the records will contain information that is relevant to the defence. The focus of therapy is vastly different from that of an investigation or other process undertaking for the purposes of the trial. ... therapy generally focuses on exploring the complainant's emotional and psychological responses to certain events ... Therapy is an opportunity for the victim to explore her own feelings of doubt and insecurity. It is not a fact-finding exercise. Consequently, the vast majority of information noted during therapy sessions bears no relevance whatsoever or, at its highest, only an attenuated sense of relevance to the issues at trial. Moreover, as I have already noted elsewhere, much of this information is inherently unreliable and, therefore, may frustrate rather than further the truth-seeking process. *Thus, although the fact that an individual has sought counselling ... may certainly raise the applicant's hopes for a fruitful fishing expedition, it does not follow, absent other evidence, that information found in those records is likely to be relevant to the accused's defence*.[26] (emphasis added)

[54] Production of medical and therapeutic records must be grounded by an evidentiary foundation establishing that there is a nexus between information that is likely to be, not might be, contained in those records and a material issue at trial.

[55] In the absence of an evidentiary foundation to establish that the remaining Category 1 records contain information that is likely relevant to an issue that is material at trial, the request for production of this type of third-party records constitutes a fishing expedition, as set out by Justice L'Heureux-Dube in ***O'Connor***.

[56] It is insufficient to simply allege, without an evidentiary foundation, that the Category 1 records are likely relevant to the question of BM's credibility because BM is being treated by a psychiatrist. Allegations do not comprise an evidentiary foundation.

[57] The Applicant has no idea of the issues addressed between BM and her medical professionals. It is pure speculation that there may be information that could be used to impeach her in the Category 1 records, and it is conjecture that whatever issues she may be addressing with her medical professionals bear any impact on her credibility or are even in the nature of the issues alleged by the Applicant.

[58] I find that there is no basis for this Court to reach the conclusion that any information contained in the Category 1 records is likely relevant to a material issue at trial (being the credibility of BM) and that, without access to the Category 1 records, the Applicant would be precluded from making a full answer and defence to the charges against him.

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[26] ***O'Connor*** at para 144.

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Category 2 – Child and Family Services records

[59] The Applicant's claim for production of certain Child and Family Services records pertaining to BM's fitness to work as a caregiver was abandoned by the Applicant at the conclusion of his oral argument.

[60] The Applicant's remaining claim includes a wide range of records that may be in the possession of Child and Family Services, including records pertaining to allegations that the Applicant sexually and verbally assaulted AM and his three biological children (paragraph (b) of the Amended Application), general complaints made about the Applicant (paragraph (f) of the Amended Application), and allegations made by BM or AM of abuse by AM's biological father (not the Applicant) against AM (paragraph (c) of the Amended Application).

[61] Dealing first with allegations by the Applicant that there are records in this category that may exist relevant to AM's credibility. For clarity, the only targeted records pertaining to allegations made by BM about abuse suffered by AM at the hands of her biological father and complaints, if any, made by AM about the Applicant.

[62] There is simply no evidentiary foundation, not even a bald assertion, laid by the Applicant through his affidavit to suggest that there is any truth to allegations that AM suffered abuse at the hands of her biological father nor is there any evidentiary foundation to suggest that AM made any complaints to Child and Family Services in this regard. Further, there is no nexus between allegations that may (or may not) have been made by AM against a person who is not involved in the criminal proceedings involving the Applicant. Not to put too fine a point on it, but if there were allegations of abuse against AM by her biological father (which I reiterate has no evidentiary foundation before this Court), there is nothing before me to connect any such event to any issue material to the trial. Moreover, the Applicant has not argued that the Category 2 records that pertain to AM will provide relevant information pertaining to AM's credibility at the trial.

[63] Moving on to the Category 2 records as they pertain to BM, other than the speculation that the targeted records may contain information that may lead to a conclusion that BM has lied in the past or made false reports involving the Applicant and her ex-husband (AM's biological father), or the Applicant and his biological children and AM, the Applicant has provided no evidentiary foundation for there to be a reason to suspect that the targeted records include information of this nature.

[64] In his affidavit, the Applicant asserted that the investigations by Child and Family Services were "baseless and unfounded and lacking merit".[27] In his affidavit, the Applicant states that he believes that the "outcomes of the several investigations conducted by the child and Family Services will show that all [BM's] accusations against me have been baseless and unfounded and lacking merit, every time she made a complaint against my being inappropriate with the children, either sexually or physically". Yet, he does not state the particulars of the alleged complaints, nor does he state the outcomes of any investigations, information that would have been provided to him as the person against whom any accusations were levelled. He simply asserted that the accusations were baseless.

[65] While the thread is clear – the Applicant stated repeatedly, in his argument and in his affidavit, that he believes that BM has exhibited a pattern of lying to authorities, is mentally

[27] Affidavit of UBA, sworn December 1, 2023 at para 27.

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unstable, and is fabricating events to cause him difficulty – he is still obligated to lay an evidentiary foundation that gives this Court some comfort that the targeted records contain information that is likely relevant to a material issue at trial.

[66] In the absence of the evidentiary foundation, the Applicant's conjecture that there may be information contained in the targeted records is just that – conjecture. Production of third-party records requires more than the Applicant's speculation and hope that there might be information contained therein which, if he is right, might be likely relevant to a material issue at trial.

[67] I find that there is no basis for this Court to reach the conclusion that any targeted record in this category contains information that is likely relevant to the trial and that, without access to the records, the Applicant would not be able to make full answer and defence to the criminal allegations against him.

Category 3 – Unedited video (cell phone recording) in BM's possession

[68] The Applicant claims that the short video footage of some or all of the alleged incident that has been produced by the Crown is incomplete or has been edited by BM. The video is described in paragraph (g) of the Amended Application.

[69] The only evidence that the Applicant has relied upon with respect to this submission is a choppy passage from an Emergency Protection Order confirmation hearing from June 2, 2023, where the following questions were posed to BM by the Applicant's family lawyer and BM provided answers:

> Q How many minutes –
>
> A – to do so I stop –
>
> Q -- was your recording?
>
> A It was probly (phonetic) less than 3 minute (sic), which I have in my phone which I sent to the police.
>
> Q It was less than 3 minutes? Are you sure?
>
> A I can take a look at it. I'm – its not up to 5 minute.[28]

[70] The Applicant asserted that this passage is evidence of three things: first, that the entire video has not been produced; second, that the 45 seconds of video that has been produced has been edited in some fashion by BM; and third, that BM is an untruthful witness.

[71] At the outset, the Crown confirmed that this video was provided by a potential Crown witness, BM, and given to the police, and subsequently to the Applicant, through the ordinary disclosure process.

[72] The Crown's position is that the video that was disclosed to the Applicant is a full copy of the video that was provided by BM. The Crown stated that it has not made any alterations, additions, or deletions to the video. Whether the creator of the video edited it, is information that is in the possession of the creator, BM, and may be requested of her at the trial.

[73] For clarity, the Crown's position is that the video is a first-person record and, therefore, it is not subject to the ***O'Connor*** regime for disclosure. Its disclosure is subject only to the

[28] Transcript of Emergency Protection Order hearing, June 2, 2023, Action No. FL01-38835 at page 20, lines 1 to 9.

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Crown's obligations pursuant to ***Stinchcombe***, which obligation the Crown stated on the record it has fulfilled. The Crown reiterated that it has a duty to produce all of the information that is properly in its possession and that it has complied with that duty. The Crown stated that it would not be appropriate for it to withhold a different version of the video as the Crown is a minister of justice and has an obligation to conduct itself in a manner that does not bring the administration of justice into disrepute.

[74] The Applicant has not laid a sufficient evidentiary foundation to support its allegation that the entire video was not produced. There is no information provided by the Applicant to show that the video was edited or altered; he merely argued that the video is so short compared to the short, stumbling passage referred to above where the suggestion was being put to BM that the video was possibly three to five minutes in length.

[75] While there may be an apparent discrepancy between BM's testimony in the Emergency Protection Order confirmation hearing where her recollection was that the video recording may have been up to 3 minutes, and not more than 5 minutes, rather than the 45 seconds that was produced, that question may be addressed in cross-examination if BM is produced at the trial as a witness.

[76] The Applicant is simply speculating that the video was altered or truncated on the basis that it supports his theory that BM is lying and manipulating the evidence to support a criminal prosecution against him.[29] Her confusion does not lead to a logical conclusion that she tampered with the video recording. Should the Applicant wish to conduct a forensic examination of the video, he may do so in the ordinary course.

[77] With respect to the likely relevance of the video, I find that it is likely relevant, insofar as it may document some or all of the alleged interaction that is the foundation of the criminal charges against the Applicant. However, it has already been produced, the Crown has confirmed on the record that it has produced the video that is in its possession pursuant to ***Stinchcombe***, and is not properly the subject of an ***O'Connor*** application for disclosure in the absence of sufficient evidence for this Court to suspect that, in this case, the creator of the video has altered or truncated it and has not disclosed that fact to the Crown.

[78] I find that there is no reasonable basis upon which this Court could reach the conclusion that the Crown has failed in its obligations under ***Stinchcombe*** to produce the relevant information that is in its possession.

Category 4 – Police records including 911 calls

[79] This category of records was described in paragraphs (i), (j), (k), and (l) of the Amended Application.

[80] First, with respect to URA's statement to the police in an unrelated criminal prosecution, the Crown argued that any information that might be included in URA's statement is irrelevant to the case at Bar as it pertained to a totally different criminal proceeding and the Crown chose not to proceed with the charges. The Crown may choose not to proceed with charges for a number of reasons, not all of which may be disclosed to a complainant or to an accused person.

[29] Affidavit of UBA, sworn December 1, 2023 at para 11.

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In this case, the targeted record sought to be produced was only a statement upon which an investigation may have been conducted with respect to an unrelated criminal prosecution.

[81] The Applicant states only that he believes that URA was manipulated by BM into making a telephone call to attempt to settle the family law matters between the Applicant and BM.

[82] Second, the Applicant seeks production of phone records which, in the absence of a wire tap, can only show the date, time, and duration of any phone calls between BM and URA, not the content of the phone calls. No relevant information in the case at Bar can be gleaned from these phone records and, thus, there is no evidentiary foundation that they are relevant.

[83] At the conclusion of his oral argument, the Applicant abandoned his request that the statement made by URA and any related police records, as well as the related phone records, be produced as containing information of likely relevance to a material issue at trial.

[84] Third, the Applicant seeks production of targeted records described as police records relating to a parenting visit on October 16, 2023, between the Accused and his biological daughter, not AM, which may contain notes of the complaints made by BM. The Crown argued that, not only did this incident allegedly occur 10 months after the Incident Date, but the Applicant has also offered no information or context to connect any comments allegedly made by BM at that time to any material issue to be raised in this trial. At best, the Applicant argued that if the targeted records showed that if there had been a conclusion that BM had lied in that interaction, then it would go to show her propensity to lie and, potentially impact her credibility at the trial of this matter.

[85] There is no evidentiary foundation laid by the Applicant that any of the information provided by BM pertaining to the October 16, 2023, incident was untruthful. The Applicant seeks production of this category of targeted records with the hope that they may show that BM lied when she made her report to the police, but he has proffered no evidentiary foundation to suggest that his assumption is true. These requests are based on mere conjecture by the Applicant that the targeted record might contain information that might be likely relevant to a material issue at trial.

[86] Fourth, the Applicant seeks production of a transcript of a 911 call made by him on November 29, 2021, 13 months prior to the Incident Date. The substance of the 911 call was that the Applicant called 911 to report that BM had taken his phone and deleted the contents. The Applicant has abandoned his claim for the police records about this alleged incident and, therefore, the 911 call is irrelevant as there is no evidentiary nexus to any of the issues in the case at Bar.

[87] Fifth, the Applicant listed approximately 12 case files in the possession of the police. He gave no evidentiary foundation whatsoever to connect these case files, or what he anticipated would be found in them, to any issue relevant to the trial, other than his expressed desire to see if there might be evidence contained in those police files that he could then correlate to argue that BM is an untruthful witness. With no evidentiary nexus, other than a generalized desire to challenge the credibility of BM in a broad sense, there is no basis for these records to be produced.

[88] I find that there is no basis for this Court to reach the conclusion that any information contained in this category of records is likely relevant to the trial and that, without access to the

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records, the Applicant would not be able to make full answer and defence to the criminal charges against him.

Category 5 – Phone records

[89] This category of targeted records was described in paragraph (h) of the Amended Application. This claim was abandoned by the Applicant at the conclusion of his oral argument. Therefore, I will not pursue an analysis of whether these records are likely relevant to any material issue at the trial of this matter.

Conclusion of Analysis

[90] Each of the foregoing categories of records, except Category 3 records, suffers from a lack of evidentiary foundation or is a product of speculation, conjecture, and mere wishful thinking that the production of the targeted records will reveal likely relevant information that might be useful to impeach the credibility of BM or AM.

[91] It is clear from the scope of the jurisprudential interpretation of the concept of a "fishing expedition" that the Applicant's request for production of Category 1, 2, 4, and 5 records fall within this concept.

[92] There is no air of reality with respect to the claims of relevance made by the Applicant and, while the threshold for likely relevance is not intended to be an onerous burden on the Applicant, there must be some kind of clear evidentiary foundation for this Court to compel the production of the records requested by the Applicant.[30]

[93] The Applicant, throughout the argument, stated that the purpose of seeking production of the targeted records was ***to see whether there was information*** contained in any of the targeted records that might be the foundation for the Applicant to impeach the credibility of BM. Very little mention was made of challenging the credibility of AM during the Applicant's argument, although certain of the targeted records were alleged to contain information pertaining to AM, although not explicitly AM's credibility.

[94] If the material issue at trial is credibility, the targeted records must be the source of information that is not available to an applicant, or they must have some real value as a source of impeachment.[31]

[95] Throughout his argument, both written and oral, the Applicant made it clear that he is not certain whether any of the targeted records (except for the Category 3 video) contain information that may be likely relevant to a material issue at trial. His argument is that he seeks production of the targeted records to examine them and discover whether there is likely relevant information contained therein. That, with all due respect, is the very definition of a fishing expedition and this Court is not inclined to facilitate fishing expeditions based on speculation, conjecture, guesses, and hopes.

[30] ***O'Connor*** at paras 145-147; ***R v Gubbins***, 2018 SCC 44 at paras 57-58; ***R v Levin***, 2014 ABCA 142 at pars 46-49.
[31] ***R v Batte***, (2000), 145 CCC (3d) 449 (Ont CA).

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[96] Further, there is no evidentiary foundation laid to support a conclusion that the information to be gleaned from any of the targeted records that would provide a foundation for the impeachment of either AM, the Complainant, or BM, a potential witness.

Summary of Ruling

[97] Based on the foregoing analysis and application of the law to the facts provided to me with respect to each of the categories of records targeted by the Applicant for production, I make the following rulings:

- *Category 1 – Medical and therapeutic records* – Application for production of records is dismissed.
- *Category 2 – Child and Family Services records* – Application for production of records is dismissed.
- *Category 3 – Unedited video (cell phone recording) in BM's possession* – Application for production of records is dismissed.
- *Category 4 – Police records including 911 calls* – Application for production of records is dismissed.
- *Category 5 – Phone records* – Application for production of records is dismissed upon being abandoned in its entirety by the Applicant.

[98] Based on the foregoing determinations, the Applicant's application is dismissed in its entirety. There is no need to proceed to Stage 2 of the **O'Connor** regime analysis.

Heard on the 7th day of February, 2025.
Decision delivered at Calgary, Alberta this 3rd day of April, 2025
Dated at Calgary, Alberta this 9th day of May, 2025.

I. L. Maharaj
A Justice of the Alberta Court of Justice

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Appearances:

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for the Applicant/Accused

M. Parhar
for the Respondent/Crown

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