**IN THE PROVINCIAL COURT OF NOVA SCOTIA**
**Citation:** R. v. Maddison, 2008 NSPC 82

**Date:** 20080924
**Docket:** 1893758
**Registry:** Kentville

**Between:**

Her Majesty the Queen

v.

Marlene Doris Maddison

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| **Judge:** | The Honourable Judge Alan T. Tufts |
| **Heard:** | September 9, 2008, in Kentville, Nova Scotia |
| **Written decision:** | June 4, 2009 |
| **Charge:** | 266(b) CC |
| **Counsel:** | Darrell Carmichael, for the Crown<br>Donald Urquhart, for the defence |

O'Connor Application Ruling

**By the Court** (orally):

[1] This is the Marlene Doris Maddison matter. The defendant applies for production of third party records pursuant to the procedure set out in **R. v. O'Connor** [1995] 4 S.C.R. 411, a so-called "O'Connor Application". The records are school records held by the Annapolis Valley Regional School Board and pertain generally to the complainant in this proceeding. The records are memos, assessments and minutes of meetings and other reports considering the complainant's deportment at school. The complainant is "a little boy given to violent outbursts in which he might harm himself or others who needed to be controlled, sometimes physically, to protect himself and others", to use the words of the Crown. The complainant was eight years old at the time of the alleged events.

[2] The defendant is charged with assault. She was the complainant's educational aid and was assigned exclusively to the complainant. The defendant will be relying in part on s. 43 as a defence to this allegation. In a previous ruling of the Court I ordered the delivery of the impugned records to the Court for examination, having been satisfied that the records were "likely relevant"–the first stage of the so-called "O'Connor test". This is my ruling on the second stage.

[3] I have now examined the records and given counsel a summary of what was contained in the files provided to me. The contents are as I described above. The Crown argues that the issue is whether the records have a significant probative value. Just as an aside, this issue came up at the last hearing but I think it is important for the record for me to deal with it specifically. The Crown in its' brief says as follows:

> On the second stage of the O'Connor application the issue is whether the material is of 'significant probative value not significantly outweighed by the danger of prejudice to the proper administration of justice or harm to the privacy rights of the witness or to the privilege to relationship'.

This appears to be a quote from Justice L'Heureux-Dubé's decision in **R. v. O'Connor**, *supra*. **R. v. O'Connor** was a decision of a full panel of judges of the Supreme Court of Canada. The decision is complicated because there were three issues decided with different

> majorities on each issue. It appears that Chief Justice Lamer and Justice Sopinka wrote the majority opinion on the production and disclosure issue of third party records. Justice Cory and Iacobucci concurred in this issue, reference ¶188 as does Justice Major in a separate judgment, albeit dissenting on other issues, reference ¶ 254.

[4] Accordingly, the Lamer and Sopinka judgment is the majority decision on this issue and, in my respectful opinion, I believe it represents the law. Justice L'Heureux-Dubé's judgment is not, in my view, to the extent it differs from the Lamer and Sopinka ruling, the law in this area.

[5] Accordingly the test for the second stage of the O'Connor test is set out in ¶30 of the judgment. A trial judge must examine the records, which has now been done in this proceeding and then,

> weigh the salutary and deleterious effects of a production order and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence.

[6] The test then requires the court to examine the following factors in weighing the competing effects:

1. The degree to which the record is necessary for the defence to make full answer in defence.
2. The probative value of the record.
3. The nature and extent of the reasonable expectation of privacy vested in the record.
4. Whether production of the record would be used on any discriminatory belief or bias, and
5. The potential prejudice to the third party's dignity, privacy or security of the person that would flow from production of the record.

[7] This is the approach argued by the defence with which I agree. Accordingly I will review these factors. Before doing so I want to further address the Crown's submissions. The Crown argues that the defence either did the actions which it is alleged she did, in which case she would be guilty, or she did not, in which case she would be not guilty. It is not possible, the Crown argues, that any of the alleged

application of force could ever be justified. Therefore the Crown argues that the school records are irrelevant as to whether these events occurred or not and accordingly it would be very difficult to imagine these records would have any probative value.

[8] In my opinion, with respect, this is not the correct approach. Clearly the issue in this proceeding is whether the application of force, if any, applied by the defendant comes within the limits prescribed by s. 43 as interpreted by the Supreme Court of Canada in the **Canadian Foundation for Children** [2004] 1 S.C.R. 76. The court has not heard any evidence. The allegations have not been subject to cross-examination. In my opinion it is not clear whether the degree of force or the appropriateness of the force measured by s. 43 may be reasonable or not. In my view it would not be appropriate to assess the merits of any defence or the precise nature of the allegations at this time.

[9] The defence argues that s. 43 is available and in my opinion that may be possible. Whether in the end the facts as found leave that defence available or successful need not be determined at this point. As Professor Paciocco said in his article entitled, A Primer on Law of Third Party Records, reported at 9 Canadian Criminal Law Review 157 at p. 188,

> ...the impact of a production order on trial is a matter for the law of evidence to control: the use the law of evidence permits an accused to make of produced material is simply not relevant to whether it should be produced in the first place.

In short, admissibility is distinguishable from disclosure.

[10] I will now consider the factors required by **O'Connor**. Before doing so let me explain that there is a considerable amount of duplication of the documentation because the materials forwarded to me seem to be a combination or an accumulation of several files. I have attempted to preserve the order of these documents in the way that they were provided to me and have not tried to cull the files for duplicates. Also much of the material is repetitive; that, is it contains the same observations by many of the same individuals over periods of time. While this may favour against all of these materials being admissible it does not really say anything in my opinion about the test required under **O'Connor**.

[11] As I indicated above the materials can be generally described as:

1. Observations by teachers and other educators about C.B.'s (the complainant's) deportment;
2. Minutes of meetings confirming observations and making recommendations for how C.B.'s behaviour should be managed in the school, and
3. Reports and assessments of other professionals.

Obviously there are paragraphs and passages which are quite irrelevant to any of these proceedings, however for practical reasons I have not attempted to parse these documents to redact those passages when there are simply no privacy issues whatsoever. For example, there are general descriptions of other school activities or general information about educational issues unrelated to any particular student. In my analysis I will refer only to the general description of the documents.

[12] Let me begin with the **O'Connor** criteria:

1. <u>The extent to which the records are necessary for the accused to make full answer in defence:</u>

The defence relies on s. 43 of the **Criminal Code**. The legal scope of this defence has been considered by the Supreme Court of Canada, as I said, in the **Canadian Foundation for Children** case. Chief Justice McLachlin describes "the zone in which discipline risks criminal sanctions", reference ¶39 *et. seq.* of her decision. Whether the proven actions of the defendant fall within the permitted zone is an issue. The records which I have reviewed in my opinion are relevant to this inquiry. They describe C.B.'s behaviour generally and the challenges he presented. They also contain recommendations from Dr. Magee which the defendant has indicated was one of the professionals who made presentations to the defendant and other teachers on how to manage C.B.'s conduct. The records will assist, in my opinion, the defendant in this regard to make full answer in defence.

[13] 2. <u>The probative value of the records in question</u>:

The records of observations by other teachers and educators of C.B.'s conduct are probative, in my opinion, of the observations of other witnesses including the defendant of the events in question.

[14] 3. <u>The nature and extent of the reasonable expectation of privacy vested in the records:</u>

The records which have been requested generally described above are mostly chronicles of events which occurred in a public school setting in the presence of other students and teachers. Other observations described which occurred at home

are described for the purpose, clearly, for assisting and informing educators on how appropriately to teach C.B. in a public school. In my opinion there is very little if any privacy expectation in these records. There are portions of Dr. Magee's report which detail family background and other personal information which does have some expectation of privacy. However as I will explain later there is little relevance to these and I have concluded that other than Dr. Magee's recommendations and portions of her letter dealing with behavioural observations and diagnostic impressions, those other portions should be redacted. The records do not contain other types of personal information, for example medical and psychological other that relate to C.B.'s behaviour in the school.

[15] 4. Whether production of the records would be premised upon any discriminatory belief or bias:
This in my opinion is not a factor in this case nor has it been suggested or argued.

[16] 5. The potential prejudice to the complainant's dignity, privacy, security of the person that would be occasioned by the production of the records in question:
In my opinion no such potential for prejudice exists. As the defence argued, this information is available to the teachers and other educators of the school. C.B.'s conduct which is the subject matter of most of the material occurred in a public setting. Any opinions expressed by the professionals while relevant can be protected from further public availability by court order.

[17] In my opinion after considering the factors above the documents requested should be disclosed under certain conditions. However, as I mentioned earlier, disclosure and admissibility are distinct issues and public disclosure of these documents would not be an issue until the documents are tendered at trial, if it is legally permissible to do that in the event that admissibility was even sought. At the risk of repeating myself I should mention that precisely what occurred and what type or amount of force if any was used by the defendant is of course dependent on the evidence as it unfolds at trial. The records in question are relevant clearly to C.B.'s conduct and actions and relevant to the reasonableness of whatever actions the defendant took.

[18] While there is some privacy expectation in the disclosure of these records in my opinion it is outweighed by the salutary effects of production and disclosure as

I described above. Accordingly I order disclosure of the documents as requested on the following conditions:

1. Dr. Magee's report will be redacted of the background personal history which, while being not particularly private, has little or no probative value.

2. Melissa Smith's, and I am saying this particularly for the benefit of the parents who are unfortunately not here today, but will have an opportunity of reading this I suppose at some future date–Melissa Smith's report which was not, I believe, requested, was one specifically referred to by C.B.'s parents. It is not to be disclosed.

3. The same applies to Michelle Higgins' report and those reports are really irrelevant to the proceedings at hand.

4. The impugned documents are not to be copied beyond what is necessary for counsel to prepare for trial. All copies will be destroyed after the conclusion of this proceeding or any retrial and after all appeal periods have expired.

5. The contents of these documents will not otherwise be circulated or distributed, communicated or published beyond what is reasonably necessary for counsel to prepare for trial. The Crown will have copies of these disclosures if requested and finally,

6. Counsel will file an affidavit after the conclusion of all the proceedings verifying compliance with these conditions.

A. Tufts, J.P.C.