PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v. L.D.*, 2023 NSPC 3

Date: 20230227
Docket: 8571657
Registry: Kentville

Between:

His Majesty the King

v.

L.D.

Restriction on Publication: s.278.9(1)

Judge:	The Honourable Judge Ronda van der Hoek
Heard:	January 5, 2023, in Kentville, Nova Scotia
Decision	February 27, 2023
Charge:	s. 271 (1) *Criminal Code*
Counsel:	Allan MacDonald, for the Applicant Nathan McLean, for the Crown

The court hearing this matter directs that the following notice be attached to the file:

This hearing is governed by section 278.9 of the *Criminal Code*:

Publication prohibited

278.9(1) No person shall publish in any document, or broadcast or transmit in any way, any of the following:

. . .

(*c*) the determination of the judge pursuant to subsection 278.5(1) or 278.7(1) and the reasons provided pursuant to section 278.8, unless the judge, after taking into account the interests of justice and the right to privacy of the person to whom the record relates, orders that the determination may be published.

(2) *Offence.* — Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

☒ An order has been made under s. 278.9(1)(c) allowing these reasons to be published, broadcast or transmitted.

By the Court:

Introduction:

[1] This is a decision denying a stage one s. 278 application for judicial review of records held by an educational institution. On the date of the hearing, I indicated my intention to deny the application, but permitted counsel until today to file any additional materials they wished the Court to consider.

[2] Having taken into account the interests of justice and the right to privacy of the person to whom the record relates, the Court orders, pursuant to s. 278.9 of the *Criminal Code*, that this decision may be published subject to my careful editing to remove identifying information.

Background:

[3] The Applicant was employed at an educational institution when the complainant, CD, a student connected to that institution, provided a statement to police alleging sexual assault, contrary to s. 271 of the *Criminal Code*.

[4] The Applicant provided the Court an excerpt of CD's police statement. In the statement CD: (1) reported an inability to recall details of the alleged offence due to impairment and intermittent loss of consciousness; (2) stated an interest in

obtaining counselling to assist with recovering lost memories; (3) advised police that one of the Applicant's colleagues encouraged making a report about the incident to the educational institution; and (4) stated an intention to report the incident to the institution and work with it toward seeing the Applicant fired.

[5] After providing the police statement, CD met with the human resources department at the educational institution. While there was some initial debate about whether CD actually provided a report arising from emails and correspondence from the institution's legal counsel denying same, eventually the parties agreed CD provided some information that was likely reduced to writing.

[6] The educational institution interviewed various people and met with the Applicant, resulting in termination of employment. The Applicant did not provide an affidavit and as a result the Court has no information about what occurred in the meeting, nor the nature of the employment contract including what would constitute grounds for termination.

Foundation of the application:

[7] The Applicant says consent, reasonable but mistaken belief in communicated consent and the complainant's credibility and reliability are trial issues that require the Court to review the following: (1) the complainant's report

to the educational institution and (2) any similar reports generated as a result of the Applicant's former colleague or the complainant's associates speaking to the institution about the allegations.

[8] The Applicant says there is a knowledge vacuum concerning why employment was terminated, and argues CD's stated animus and incomplete memory of the alleged assault means more or different information was provided to the educational institution than was provided to police. The Court must deem that report likely relevant to the defences and credibility and conduct a judicial review.

[9] The Crown takes no position on the application but says there is no support to conclude CD's unnamed associates, or the Applicant's former colleague provided reports. There is likewise no support for the conclusion CD provided a different statement to the educational institution.

The law:

The legislation:

> Judge may order production of record for review
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> 278.5 (1) The judge may order the person who has possession or control of the record to produce the record or part of the record to the court for review by the judge if, after the hearing referred to in subsection 278.4(1), the judge is satisfied that
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> (a) the application was made in accordance with subsections 278.3(2) to (6);

> (b) the accused has established that the record is likely relevant to an issue at trial or to the competence of a witness to testify; and
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> (c) the production of the record is necessary in the interests of justice.
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> Factors to be considered
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> (2) In determining whether to order the production of the record or part of the record for review pursuant to subsection (1), the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy, personal security and equality of the complainant or witness, as the case may be, and of any other person to whom the record relates. In particular, the judge shall take the following factors into account:
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> (a) the extent to which the record is necessary for the accused to make a full answer and defence;
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> (b) the probative value of the record;
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> (c) the nature and extent of the reasonable expectation of privacy with respect to the record;
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> (d) whether production of the record is based on a discriminatory belief or bias;
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> (e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
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> (f) society's interest in encouraging the reporting of sexual offences;
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> (g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
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> (h) the effect of the determination on the integrity of the trial process.

[10] The full process is set out between sections 278.1 to 278.91 of the *Criminal Code* and involves a two-step process for obtaining a complainant's records of personal information in sexual assault proceedings. Such records are presumptively unproducible, and the Applicant bears the burden on the application. (See also the Supreme Court of Canada's interpretation in *R. v. Mills*, [1999] 3 S.C.R. 668.)

[11] The objective of the regime aims to strike an appropriate constitutional balance between protecting the accused's right to a fair trial with the privacy and equality rights of a complainant.

[12] At the first stage, the Court determines whether the record holder should produce any of the records sought for judicial inspection if the Applicant establishes the records are **likely relevant to an issue at trial or to the competence of a witness to testify**, and **production of the record is necessary in the interests of justice**: s. 278.5. At the second stage, the Court determines whether any of the documents reviewed by it should be provided to the defence: s. 278.7.

Is the report a record:

[13] Before embarking on the s. 278.5 stage one process, the Court must first determine whether the documents sought are records to which an expectation of privacy attaches. Section 278.1 defines "record" as "any form of record that contains personal information for which there is a reasonable expectation of privacy and includes education records, and records containing personal information the production or disclosure of which is protected by an Act of a provincial legislature".

[14] The parties agree that CD, while not enrolled in courses at the relevant time, was a student of the educational institution. Statements made to an educational institution, and not obtained by persons responsible for the investigation or

prosecution of the offence before the Court, would constitute records for the purpose of stage one. It is likewise agreed that the meeting between CD and the human resources department resulted in a written record of the allegation before the Court. The Applicant also suggests the educational institution collected similar records from the Applicant's colleague who encouraged CD to report, and CD's associates.

[15] I am comfortable concluding any such records, by their very nature, contain personal information to which attaches a reasonable expectation of privacy-student number, details of the complaint, home address, status, etc. While not argued, it seems likely there may also be legislative protection prohibiting public dissemination of such records. In any event, the report constitutes a record for the purpose of the s. 278 regime.

Likely relevance:

[16] The next step in the process requires the Applicant to lay the foundation for concluding the records are likely relevant. Grounds supporting likely relevance may include those set out at s. 278.3(4) CC, including "(a) that the record exists … (c) that the record relates to the incident that is the subject-matter of the proceeding; (d) that the record may disclose a prior inconsistent statement of the

complainant or witness; (e) that the record may relate to the credibility of the complainant", *but* the Applicant is prevented from relying on the bare assertion of those grounds. Section 278.3(4) is, after all, aimed at "prevent(ing) speculative and unmeritorious requests for production", *Mills, supra,* at para 118.

[17] Likely relevance of the record to an issue at trial or the competence of a witness to testify, is demonstrated by evidence, not by speculation or assumptions: *R. v. W.B.*, 2000 CanLII 5751 (ON CA). While the likely relevant standard is not a high one, there must be a reasonable possibility the information sought is logically probative to an issue at trial including credibility of a witness: *R. v. O'Connor* [1995] 4 S.C.R. 411 and *R. v. Mills, supra.* For example, the "mere assertion that a record is relevant to credibility is not enough.... [a]n accused must be able to point to something in the record adduced on the motion that suggests the record contains information **which is not already available to the defence** or has potential impeachment value: See: *R. v. W.B., supra*, at paragraph 75; *R. v. Mills, supra,* at paragraph 120, and *R. v. Q.F.*, 2022 ONCJ 22.

[18] The Applicant argues a review of CD's statement to police demonstrates uncertainty and equivocation with respect to the allegation. It also suggests animus and desire to work toward seeing the Applicant fired from employment at the educational institution. The Applicant says faced with such a police statement, the

Court should consider reviewing the record which is by its nature reliable and accurate given the context in which it was collected.

[19] The excerpt from CD's statement certainly supports the Applicant's contentions, but I am not persuaded the record is "extremely important for full answer and defence" because it contains a "fulsome account by the complainant of the events which form the subject matter of the charges, and where there is reason to believe that the complainant provided additional or conflicting evidence to the educational institution". There was simply no support for such a speculative conclusion, nor the conclusion the record has probative value.

[20] The Applicant has available to it plenty of fodder for cross examination in the police statement. It also appears from the short excerpt I reviewed, that there is likewise support for addressing the stated defences. It is speculative to conclude the report contains anything more or different from that already in the possession of the Applicant.

The second part of the consideration includes establishing production of the record is "necessary in the interests of justice": s. 278.5(1)(c):

[21] Addressing the "necessary to the interests of justice, requires the Court to consider the salutary and deleterious effects of the determination on the accused's

right to make a full answer and defence and on the right to privacy, personal security and equality of the complainant." Doing so requires consideration of:

> **(a)** the extent to which the record is necessary for the accused to make a full answer and defence;
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> **(b)** the probative value of the record;
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> **(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. (s.278.5(2))

[22] I have already concluded the record is not necessary for the Applicant to make full answer and defence and there is no support to conclude it is has probative value. I agree CD may have only a negligible privacy interest in the record and perhaps reasonably expected the record would be shared with the Applicant given the circumstances. Perhaps such a record does not hold nearly the same privacy interests as other sensitive records that often come before the Court. Producing the record would minimally, if at all, impact reporting of sexual offences and would not impact the integrity of the trial process. If the records had met the likely relevance test and were not speculative and containing information

already in possession of the Applicant, the case may have been strong. However, it was not and is therefore not producible for review in the interest of justice.

Consideration of case law:

[23] The Applicant provided a few cases for the Court's consideration.

[24] *R. v. Carey*, 2012 CanLII 20684 (NL PC): Judge Gorman thoroughly canvassed both the common law and the s. 278 regime for ordering production of third-party records. At stage one the court was asked to judicially review records of a paramedic governing body obtained while interviewing the complainant to a charge of sexual assault. The decision criticized the applicant for not making clear why the record was necessary to make full answer and defence yet, granted the application. Upon review it was not exactly clear why the matter met the test, and since this decision is from a court of similar level in another province, I decline to follow it.

[25] *R v D(WC)*, 2020 NSSC 391: The court of first instance ordered a stage one judicial review of numerous materials because the applicant pointed to some "case specific evidence or information" to justify that assertion there were differences between the preliminary inquiry evidence and the various historic records. The

Court considered the following legal principles, which I also adopt, in conducting the stage one analysis:

> [25] Returning to Justice Arnold's decision in *R. v. E.W.*, he carefully reviewed the Stage One evidentiary requirement as set out by the Ontario and Nova Scotia Courts of Appeal at paras. 19 – 21:
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> > 19 In R. v. Batte (2000), 2000 CanLII 5751 (ON CA), 145 C.C.C. (3d) 449, [2000] O.J. No. 2184 (Ont. C.A.), the court explained the evidentiary requirement on an applicant to be successful at Stage One:
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> > > …
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> > > 69 There was also no evidence that the counselling process precipitated or contributed to D.S.D.'s decision to go to the police. The evidence was to the contrary. D.S.D. went to the police and gave them a statement some five months before she began counselling. Furthermore, there is no evidence that the counselling process played any role in reviving, refreshing or shaping the memory of D.S.D. Finally, there is no evidence that D.S.D. suffered from any emotional or mental problem which could have any impact on her reliability or veracity, and the nature of the allegations themselves did not suggest any such problems.
> > >
> > > 70 The appellant's position with respect to the likely relevance of the records must come down to this. The records contained statements made by D.S.D. that referred to the alleged abuse and to matters affecting her credibility. Anything said by D.S.D. about the abuse or about a matter which could affect her credibility passes the likely relevance threshold, even absent any suggestion that the statements differ from or add anything to the Complainant's statement and testimony at the preliminary hearing.
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> > > 71 If the likely relevance bar is that low, it serves no purpose where the records relate to counselling or treatment connected to allegations of sexual abuse. It is impossible to imagine that such records would not contain references to the alleged abuse or matters that could affect the credibility of the Complainants' allegation of abuse. In my view, the mere fact that a Complainant has spoken to a counsellor or doctor about the abuse or matters touching on the abuse does not make a record of those conversations likely relevant to a fact in issue or to a Complainant's credibility.
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> > > 72 I would hold that where confidential records are shown to contain statements made by a Complainant to a therapist on

> matters potentially relevant to the Complainant's credibility, those records will pass the likely relevance threshold only if there is 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. To suggest that all statements made by a Complainant are likely relevant is to forget the distinction drawn by the majority in *O'Connor*, between relevance for the purposes of determining the Crown's disclosure obligation and relevance for the purposes of determining when confidential records in the possession of third parties should be produced to a judge.

20 Similarly, in *R. v. D.W.L.*, 2001 NSCA 111, dealing with an application for the production and review of a Complainant's diary, the court said:

> 23 It is clear from s. 278.5(1) of the Code that the judge may order that the diaries be produced to the court for review if the judge is satisfied that the diaries are "likely relevant" to an issue at trial or to the competence of a witness to testify. The onus is on the applicant to establish likely relevance.
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> 24 Further, an assertion that the diaries exist, and an assertion as to what those diaries may disclose, are not sufficient on their own to establish that the diaries are likely relevant to an issue at trial or to the competence of a witness to testify.

21 In adopting the reasoning in Batte, Flinn J.A. said:

> 26 This test was followed by the Ontario Court of Appeal in *R. v. Batte*, 2000 CanLII 5751 (ON CA), [2000], 49 O.R. (3d) 321. While the case fell to be decided on common-law principles (because the matter was heard by the Motions Court before the enactment of s. 278 of the Code) Justice Doherty noted that the applicable law in respect of likely relevance had not changed. Writing for the unanimous court, Justice Doherty said at para. 75:

> The determination of likely relevance under the common law scheme requires the same approach. The mere assertion that a record is relevant to credibility is not enough. An accused must point to some "case specific evidence or information" to justify that assertion. In my view, an accused must be able to point to something in the record adduced on the motion that suggests that the records contain information which is not already available to the defence or has potential impeachment value.

[26] *R. v. P.O.*, ONCJ 392: The court ordered a stage one judicial review upon information the complainant had concluded a crime occurred, only after receiving

counseling. As such the applicant pointed to something in the record that warranted the review.

[27] The Applicant argues this case is similar to *P.O.* because it appears from CD's statement they may have reached an *ex post facto* conclusion that there had been no consent to sexual activity with the Applicant. Even if that was the case, CD provided a police statement setting out concerns, equivocations, and lack of memory. There is no support whatsoever that CD presented a version of events different from that in the police report. All of the troubling aspects of CD's statement are available to the Applicant for cross examination at trial. It is speculative to conclude the report differs from the police statement.

Conclusion:

[28] There is simply no support for the Applicant's position CD told the educational institution more or different than what was conveyed to police. There is a properly sworn Information before the Court, and the Court would be engaging in speculation if it concluded CD must have said more to the educational institution to result in the Applicant's termination. While the Applicant claims a knowledge vacuum on that point, there is certainly every reason to believe the allegation alone, or any other fraternization factors, was sufficient to result in the termination.

The Applicant did not file an affidavit in support of his position and provided no information as to the details of their own meeting with the former employer.

[29] After hearing the submissions and considering the caselaw, I find there is no foundation to support a judicial review of records.

[30] Unlike CD, there is no foundation to support a conclusion other people provided statements to the educational institution. Likewise, there is no suggestion the former colleague was present at the time of the alleged offence nor any indication as to what, if any, relevant information that person may have had to share with the educational institution.

[31] The Applicant argues counselling to recover memories may also have occurred prior to that meeting, but there is no support for such a conclusion that same actually took place.

[32] Finally, the portion of the statement provided on the application was not the entirety of it, nor indeed the total investigation, and the Court pointed out during counsel's submissions that it is certainly fair to conclude the charging officer determined, based on the total investigation, that there were reasonable grounds to swear the Information.

[33] The Court queried whether there were educational institution policies prohibiting fraternizing, drinking and sexual activity between students and staff such that a breach could lead to termination of employment, regardless of criminal allegations arising therefrom. There was no satisfactory response.

[34] The Applicant has failed to satisfy the requirements of the first stage of the analysis under the s. 278 regime- that production of the record for judicial review is likely relevant to an issue at trial, or the competence of a witness to testify, thus rendering such a review necessary in the interest of justice. Only speculation supports the conclusion anything in the report would meet the likely relevance test. Being the "ultimate arbiter in deciding whether the likely relevance threshold set out in ss. 278.5" is met, I conclude a judicial review is not necessary in the interest of justice. (at para. 120 *Mills, supra)*

[35] Application denied.

van der Hoek PCJ.