**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *R. v. NK*, 2021 NSSC 334

**Date:** 20211213
**Docket:** CRH 505345
**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

NK

**Restriction on Publication of any information that could identify the victim or witnesses and contents of an application: s. 486.4, s. 486.5 and 278.9 *C.C.***

**Decision**

| | |
|---|---|
| **Judge:** | The Honourable Justice Peter Rosinski |
| **Heard:** | December 2, 2021, in Halifax, Nova Scotia |
| **Counsel:** | Christine Driscoll, Q.C. and Jennifer Crewe, for the Crown<br>Ian Joyce, Thomas Morehouse, and Perry Yung, for the Defendant<br>Daniel Boyle, for the Attorney General |

**Publication prohibited**

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

**(a)** the contents of an application made under section 278.3;

**(b)** any evidence taken, information given or submissions made at a hearing under subsection 278.4(1) or 278.6(2); or

**(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.

**Order restricting publication - sexual offences**

**486.4 (1)** Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

**(a)** any of the following offences:

**(i)** an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

**(ii)** any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

**(b)** two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

**Mandatory order on application**

**(2)** In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

**(a)** at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

**(b)** on application made by the victim, the prosecutor or any such witness, make the order.

**Victim under 18 — other offences**

**(2.1)** Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

**Mandatory order on application**

**(2.2)** In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

**(a)** as soon as feasible, inform the victim of their right to make an application for the order; and

**(b)** on application of the victim or the prosecutor, make the order.

**Child pornography**

**(3)** In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

**Limitation**

**(4)** An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

**Order restricting publication — victims and witnesses**

**486.5 (1)** Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information

that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

**Justice system participants**

**(2)** On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

**Offences**

**(2.1)** The offences for the purposes of subsection (2) are

**(a)** an offence under section 423.1, 467.11, 467.111, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;

**(b)** a terrorism offence;

**(c)** an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*; or

**(d)** an offence under subsection 21(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in paragraph (c).

**Limitation**

**(3)** An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community.

**Application and notice**

**(4)** An applicant for an order shall

**(a)** apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and

**(b)** provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

**Grounds**

**(5)** An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

**Hearing may be held**

**(6)** The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.

**Factors to be considered**

**(7)** In determining whether to make an order, the judge or justice shall consider

**(a)** the right to a fair and public hearing;

**(b)** whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;

**(c)** whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

**(d)** society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

**(e)** whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

**(f)** the salutary and deleterious effects of the proposed order;

**(g)** the impact of the proposed order on the freedom of expression of those affected by it; and

**(h)** any other factor that the judge or justice considers relevant.

**Conditions**

**(8)** An order may be subject to any conditions that the judge or justice thinks fit.

**Publication prohibited**

**(9)** Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way

**(a)** the contents of an application;

**(b)** any evidence taken, information given or submissions made at a hearing under subsection (6); or

**(c)** any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings.

**By the Court:**

**Introduction – An Accused's right to full answer and defence versus a witness/complainant's privacy rights.**

[1] Mr. NK is charged with sexually assaulting LY on one occasion on October 18, 2019.[1]

[2] He argues that text messages and photographs (including Snapchat and screenshots of text messages) in possession of LY, and sent between LY, and her friend R; and between LY and TFO, around the time when the alleged offence occurred, are important evidence that he requires to give full answer and defence to the allegations. His right to do so is a constitutionally protected right - *R v Rose*, [1998] 3 SCR 262. The merits of that issue will be argued before me on December 8, 2021.

[3] Mr. NK's application for production of the above-noted records is made pursuant to section 278.3 of the *Criminal Code* ["*CC*"].[2]

[1] His trial by Judge Alone in Nova Scotia Supreme Court is scheduled before me in June 2022.

[2] He has relied upon the Crown disclosure he has received, particularly references in the witness statements of LY and R for the grounds to support his s. 278.3 *CC* application. Therefore, to be clear, the Court has not seen the content of the communications at issue. The s. 278.3 *CC* application did not proceed as scheduled on December 8, 2021. It is presently scheduled for February 17-18, 2022.

[4] At this juncture LY is asking me to appoint (State-funded) counsel to assist her in arguing against Mr. NK's application for production of these records. She is relying upon the common law principles ("inherent jurisdiction") set out by Justice Lynch in *R v TPS*, 2019 NSSC 48 at paras. 12, 22-25.[3]

[5] LY is a *witness* in this criminal proceeding, as contrasted with *the parties* to this proceeding: the State is represented by Counsel of the independent Public Prosecution Service of Nova Scotia - Mr. NK is the accused person and represented by his Counsel.

[6] Witnesses have no freestanding right, as do the parties, to address the court and make arguments. Therefore, they would not usually be represented by counsel. However, a complainant like LY has a statutory right to appear and make submissions in these circumstances (s. 278.4(2) *CC*).[4]

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[3] I accept that this court has inherent jurisdiction, to appoint *amicus curiae* (as a "friend of the court") or other forms of State funded counsel for accused persons (as counsel for that person) – *Ontario v. Criminal Lawyers Association of Ontario*, 2013 SCC 43; and do respectfully, but somewhat reluctantly, accept Justice Lynch's conclusion that inherent jurisdiction can be the source of this Court's authority to order State-funded counsel *for a witness*. I recognize that s. 278.4 *CC* requires that witnesses, including complainants, must be advised of their "right to be represented by counsel" and confirm that LY "may appear and make submissions at the hearing". LY must be given an opportunity to address this court, as she has indicated she wishes to do so. She may do so with or without legal counsel present.

[4] See the reasons in *R v O'Connor*, (1993) 82 CCC (3d) 495 (BCCA), at paras. 27-28. Only the Crown or Accused have a right to appeal such decisions – s. 278.91 *CC*.

[7] Exceptionally in criminal cases, witnesses/and other non-parties are given the opportunity to have their counsel address the court on their behalf. Usually, this is when the presence of counsel on their behalf is required to provide a proper adversarial context for the resolution by the court of issues specific to their interests.[5]

[8] Generally speaking, counsel for the State, represented in criminal proceedings by Crown Attorneys, are not to "advocate" on behalf of the witness/complainant. This is because they have a special obligation to the court - as Justice LeBel stated in *R v Regan*, [2002] 1 SCR 297:

> 65 The seminal concept of the Crown as "Minister of Justice" is expressed by this Court's judgment in Boucher v. The Queen, [1955] S.C.R.16, in which Rand J. explained, at pp. 23-24:
>
> > It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is [page333] to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.

[5] In other contexts, *amicus curiae* are appointed ("counsel as a friend of the court") by the court for such purposes. These appointments are also an example of "State-funded counsel". See for example the appointment of counsel to represent the interests of the accused in the context of a hearing involving testimony from a confidential informant, where the accused is not entitled to be present: *R. v. Haevischer*, 2021 BCCA 34; and 2021 [SCCA] No. 117, where even the Supreme Court of Canada appointed *amici curiae* to respond to the Crown's application for leave to appeal.

[9] On the other hand, there are circumstances where it is proper for a Crown Attorney to raise issues relevant to the legal interests of a witness, such as a complainant in a sexual assault prosecution. This should be done in a restrained manner, given the special position of Crown counsel. Ultimately however, Crown counsel cannot as fully represent the witness's interests as could their counsel of choice.[6]

[10] In some cases, the Nova Scotia Department of Justice Victim Services Division will provide funding for counsel to advocate for a complainant's personal interests in cases of alleged sexual offences (limited to those listed in section 278.2 *CC*) when an accused makes an application pursuant to section 278.3 *CC*.[7]

[11] However, funding is presently only available in relation to records that are "medical, counselling or therapeutic records" or unrelated "sexual activity". Victim Services does not consider the records requested by Mr. NK from LY to be

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[6] For example, Crown counsel has done so in cases where an accused has requested "disclosure" of specific details of the personal contact information for witnesses to crimes, including complainants – *R v Smith-Tsetta*, 2021 NWTSC 21; *R v Downey*, 2018 ABQB 915, at paras. 19-29; *R v Hitchings*, 2017 SKPC 56, at paras. 16-25. Notably, the *Canadian Victims Bill of Rights*, S.C. 2015, c. 13, requires that Courts consider victim's privacy rights in criminal proceedings.

[7] Justice Mona Lynch's decision in *R v TPS*, 2019 NSSC 48 released February 8, 2019, may have prompted the Victim Services Division to expand its policy, as it did, to create a Sexual Offences Legal Representation ("SOLR") procedure as of May 19, 2019. I note that the circumstances of that case were distinguishable from the one at Bar. There, the accused was charged with offences that he sexually violated the complainant while she was between three and eight years old, and he sought to have produced evidence that she "engaged in sexual activity other than the sexual activity that forms the subject matter of the charge." (at para. 2).

"medical, counselling or therapeutic records", or of unrelated "sexual activity". Therefore, LY is presently not eligible for legal representation through the SOLR program.[8]

[12] As a result, LY has made this application for State-funded funding to allow her to have counsel represent her interests on December 8, 2021.[9]

[13] I am not satisfied that I should order State-funded counsel for LY.[10]

**Background – What happens when a sexual offences complainant is denied Victim Services funding that would have allowed them to have counsel to advocate for their privacy rights?**

[14] Before Mr. NK can have copies of, and rely on, any of the communications between LY and R and TFO to defend himself at trial, he must satisfy the court that:

[8] See the affidavit of Dana Bowden, Director of Victim Services filed herein, wherein she confirms LY was denied counsel on November 10, 2021.

[9] Neither the counsel for Mr. NK or the Attorney General took a "position" on the merits of LY's application for State-funded counsel.

[10] By letter dated December 2, 2021, I advised the parties of my conclusion, and that a written decision will follow to explain my reasons. The scheduled December 8, 2021 application was consequently adjourned.

1. (s. 278.5 *CC*) "[each of those communications] is **likely relevant to an issue at trial**…and the production of the record [to the Judge for their inspection only] is necessary in the interests of justice"; and

2. (s. 278.7 *CC*) after only I, as the presiding judge, have seen a copy of the communications, and I am satisfied that some or all of them are "likely relevant to an issue at trial … and its production [to the accused] is necessary in the interests of justice".[11]

[15] In assessing whether the records are "likely relevant to an issue at trial", I must consider (s. 278.5(2) and s. 278.7(2) *CC*): "the salutary and deleterious effects of the determination on the accused's rights to make full answer and defence and on the right to privacy, personal security and equality of the complainant or witness…and any other person to whom the record relates. In particular, the judge shall take the following factors into account:

1. The extent to which the record is necessary for the accused to make full answer and defence;

2. The probative value of the record;

[11] Subject to any conditions the Court may impose in any order granted – s. 278.7(1) *CC*.

3. The nature and extent of the reasonable expectation of privacy with respect to the record;

4. Whether production of the record is based on a discriminatory belief or bias;

5. The potential prejudice to the personal dignity and right of privacy of any person to whom the record relates;

6. Society's interest in encouraging the reporting of sexual offences;

7. Society's interest in encouraging the obtaining of treatment by complainants of sexual offences;

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

[16] I must also consider the following as "insufficient grounds" on their own:

> **278.3(4) Insufficient grounds**
>
> **Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial** or to the competence of a witness to testify:
>
> (a) that the record exists;
>
> (b) that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;
>
> (c) **that the record relates to the incident that is the subject-matter of the proceedings**;

(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 or witness**;

(f) that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;

(g) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;

(h) that the record relates to the sexual activity of the complainant with any person, including the accused;

(i) that the record relates to the presence or absence of a recent complaint;

(j) that the record relates to the complainant's sexual reputation; or

(k) **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**.

[My bolding added]

[17] I interpret this to mean that none of these assertions alone, or in combination, without other legitimate grounds being raised by an accused, will suffice to establish that a record is likely relevant to an issue at trial. Furthermore, the use of language, including "may…", suggests that if the applicant's request rises only to the level of a "fishing expedition", that ground(s) is insufficient. On the other hand, if the request is supported by facts from which, directly or indirectly, the court can conclude that the record sought is "likely relevant to any issue at trial" and if its production is necessary in the interest of justice, then it must be produced.

[18] In *R v KC*, 2021 ONCA 401, both the majority and dissenting reasons (at paras. 29, 102-103 and 126) agreed that the "likely relevant" standard is aptly described as:

> … is a threshold higher than the threshold for Crown disclosure under *R. v. Stinchcombe*, [1991] 3 SCR 326, where relevance means "may be useful to the defence" … However, the threshold for "likely relevance" is not an onerous burden …. Under s. 278.5, "likely relevance" requires "a *reasonable possibility* that the information is logically probative to an issue at trial or the competence of a witness to testify" ….

[19] In advance of Mr. NK's December 8, 2021, section 278.3 *CC* application, he requested that the court issue subpoenas *duces tecum* to have LY and her friend R appear on December 8, 2021. The wording of the subpoena in relation to **R** reads:[12]

> "This is therefore to command you to attend before the Supreme Court of Nova Scotia... to give evidence concerning the said charge, and to bring with you anything in your possession or under your control that relates to the said charge, and more particularly the following:
>
> 1-All communication between you and [LY] with respect to [Mr. NK] and with respect to the alleged October 18, 2019, incident that forms the basis of the charge before the court.
>
> Take note
>
> You are only required to bring the things specified above to the court on the date and at the time indicated, and you are not required to provide the things specified to any person or to discuss their contents with any person unless and until ordered by the court to do so.

[12] Mr. NK's grounds for the subpoenas' issuance and his section 278.3 *CC* application are contained in the affidavit of Thomas Morehouse, of counsel for Mr. NK. I observe that proper proof of text messages and visual data (including Snapchat communications; screenshots of text messages etc.) at trial is contingent on applying for third-party Production Orders to telecoms companies who are the service providers and holders of the records, as opposed to attempting to introduce this evidence through electronic communication device users and subscribers. Arguably, the former would provide the "best evidence" of such matters. Parties should also be aware of, and consider, sections 31.1 – 31.8 of the *Canada Evidence Act*.

> If anything specified above is a record as defined in section 278.1 of the *Criminal Code*, it may be subject to a determination by the court in accordance with sections 278.1 to 278.91 of the *Criminal Code* as to whether and to what extent it should be produced.
>
> If anything specified above is a record as defined in section 278.1 of the Cr*iminal Code*, the production of which is governed by sections 278.1 to 278.9 of the *Criminal Code*, this subpoena must be accompanied by a copy of an application for the production of the record made pursuant to section 278.3 of the *Criminal Code*, and *you will have an opportunity to make submissions to the court concerning the production of the record*.
>
> If anything specified above is a record as defined in section 278.1 of the *Criminal Code*, the production of which is governed by sections 278.1 to 278.91 of the *Criminal Code*, you are not required to bring it with you until a determination is made in accordance with those sections as to whether and to what extent it should be produced.
>
> As defined in section 278.1 of the *Criminal Code*, record means, any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counseling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other act of parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

[20] The wording of the subpoena in relation to **LY** is similar, but different insofar as what LY is ordered to bring to the court on December 8, 2021. It reads:

> This is therefore to command you to attend before the Supreme Court of Nova Scotia... on December 8, 2021, at 9:30 AM to give evidence concerning the said charge, and to bring with you anything in your possession or under your control that relates to the said charge, and more particularly the following:
>
> 1-all communication and records of communication between you and [R] with respect to [Mr. NK] and with respect to the alleged October 18, 2019, incident that forms the basis of the charge before the court;

> 2-All communication and records of communication between you and [TFO] with respect to [Mr. NK] and with respect to the alleged October 18, 2019, incident that forms the basis of the charge before the court;
>
> 3-All photographs taken by you on October 17, 2019, and October 18, 2019, and all photographs in your possession taken by any party on October 17, 2019, and October 18, 2019; and
>
> 4-all screenshots of communication between you and [Mr. NK], between you and [R] with respect to [Mr. NK], and between you and [TFO] with respect to [Mr. NK] taken by you.

[21] LY intends to challenge the subpoenas and Mr. NK's s. 278.3 *CC* application. Pursuant to s. 278.4(2), LY and R "may appear and make submissions at the hearing, but are *not compellable as witnesses* at the hearing."[13]

[22] Based on Crown counsel's representations, I am satisfied that LY does not have sufficient means to reasonably be expected to pay for counsel to represent her.

[23] She was denied funding after she made application to the Nova Scotia Department of Justice Victim Services Head Office, pursuant to their Sexual Offence Legal Representation (SOLR) Program referral and approval procedures.

[13] My preliminary view was the subpoenas were properly issued as drafted, namely, to ensure the attendance of LY and R at the application hearing – although I recognized that they cannot be compelled to testify. However, if they qualify as "the person who has possession or control of the record" (s. 278.3(3) *CC*), they can be required to produce the "record" – or assist in its production by a third party record holder - whatever its nature, form and content may be.

[24] Dana Bowden is the Director of Victim Services within the Nova Scotia Department of Justice. In her affidavit she confirms that their SOLR program has been in place since May 19, 2019, and that:

> "The policy currently requires that requested documents be therapeutic, medical, or counseling treatments in order to qualify for assignment of legal representation in section 278 [*Criminal Code*] applications.
>
> Victim Services is looking to review the SOLR policy and has applied for Federal Funding to support a potential expansion of the SOLR program to include additional records. At this time, no such funding has been received.
>
> Victim Services does not currently have the infrastructure, or the financial resources to assign legal representation for complainants for all records that might be sought under section 276 or section 278 of the Criminal Code... The complainant's application was denied on November 10, 2021, because the information sought by the Defendant in this matter is limited to electronic communications between the complainant and the Defendant, the complainant and a friend, and the complainant and another alleged victim of the Defendant. None of this information relates to therapeutic, medical, or counseling records."

## Why it is not appropriate to order State-funded counsel to represent LY in her response to Mr. NK's application for production of her text messages and visual data in relation to the alleged offence of October 18, 2019

[25] Ordering State-funded counsel to assist individuals in the criminal justice system process is an exceptional step. It is not routinely ordered, even when the applicant is an accused person, who does not have sufficient means to retain counsel.[14]

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[14] In *R v Keating* at para. 12 Justice Bateman agreed, regarding an accused person's entitlement to State-funded counsel: "There is no constitutional right to be provided with counsel at state expense (*R. v. Rowbotham*, (1988), 41 C.C.C. (3d) 1 (Ont.C.A.)). The right to retain counsel pursuant to s. 10(b) of the *Charter*, and the right to be

[26] Moreover, an accused in a criminal trial has a special position different from that of a witness: as a party to the litigation, they have the benefit of the protection of the *Canadian Charter of Rights and Freedoms*, including the right to full answer and defence, and to a fundamentally fair trial. The adversarial context requires the individual accused to defend themselves against the accusations of the State, which typically has more resources, and which process could result in criminal conviction, and the consequent stigma and significant penalties associated therewith.

[27] On the other hand, *Charter of Rights* protections may also accrue to witnesses in certain circumstances where the jurisprudence has infused those rights into the considerations that govern matters directly affecting the interests of complainants in criminal cases. This is commonly so where complainants' human dignity and privacy rights issues arise. However, complainants' rights are not given the same prominence as are an accused person's countervailing *Charter of Rights* protections, where the two conflict.

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provided with counsel at government expense are not synonymous. The Court in *Rowbotham* wrote at p. 66: 'However, in cases not falling within provincial legal aid plans, ss. 7 and 11(d) of the *Charter*, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial.'"

[28] The Province of Nova Scotia has considered, and decided, when it will provide funding to retain counsel for sexual offence complainants as set out in its SOLR policy and program.[15]

[29] If the Court orders State-funded assistance for complainants such as LY, it will be over-riding the policy decisions of the Provincial government, which is also responsible for paying the costs of State-funded legal counsel.

[30] It would be inappropriate for the court to order State-funded counsel for a witness without a clear constitutional, statutory or jurisprudential authority to do so, and with compelling underlying circumstances. I remain mindful of the frequency with which our courts see allegations of sexual offences, in conjunction with relevant communications made using electronic devices. However, each case must be decided on its own facts.

[31] The SOLR policy regime recently created by the Province, has limited itself to funding complainants' counsel where the records in issue are those with arguably the highest expectation of privacy: "**medical, counselling or therapeutic records, and regarding unrelated "sexual activity".**

[15] Under the present SOLR policy the complainant in *TPS* would be eligible to have counsel appointed to assist her in opposing the accused's records application because he sought records of unrelated "sexual activity".

[32] The Province did so knowing that in Section 278.1 *CC*, Parliament has more broadly defined than that which records are subject to privacy protection:

> "For the purposes of sections 278.2 to 278.92, '**record' means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence**."

[33] The records sought by Mr. NK from LY and R are text messages, photographic images, screenshots of communications and the like, between LY and Mr. NK, LY and R, and LY and TFO, which relate to Mr. NK, her sexual assault allegation against Mr. NK, and are in relation to October 17 and 18, 2019.

[34] The law recognizes that there are different expectations of privacy in relation to different kinds of records. Ultimately, it is the information in the records that is protected.

[35] The greatest expectation of privacy will arise from records that are closest to the core biological information of persons, which is by definition the most private information about us.

[36] Parliament has expressly identified the privacy contained within the records in section 278.1 *CC* as deserving of protection. It decided to make the definition of

"record" non-exhaustive when it legislated that " *'record' means any form of record* that contains personal information for which there is a reasonable expectation of privacy *and includes*…".

[37] At the s. 278.3 *CC* application hearing, the Court will be focused on whether the records sought are of a nature that they fall within the definition "any form of record that contains personal information for which there is a reasonable expectation of privacy…"[16]

[38] Without wishing to prejudge those questions, the arguments will focus on whether Mr. NK seeks records which "contain personal information" and whether "there is a reasonable expectation of privacy" therein.[17]

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[16] See *R v Quesnelle*, 2014 SCC 46 at para. 20; and in relation to whether there is a reasonable expectation of privacy see paragraphs 27-30. Notably, at para. 37, the court stated: "It bears repeating that privacy is not an all or nothing concept; rather '*privacy interests in modern society include the reasonable expectation that private information will remain confidential to the persons to whom and restricted to the purposes for which it was divulged' (Mills, at para. 108). Consequently, the fact that information about a person has been disclosed to a third party does not destroy that person's privacy interests*. Because the contents of occurrence reports will be disclosed under certain circumstances does not mean that there is not a reasonable expectation of privacy in those records." Using the same definition of "record" as is applicable here, the Supreme Court of Canada determined that the police occurrence reports of the complainant's past interactions with police were properly considered a "record".

[17] Nevertheless, I did find the reasons of Justice Horsman in *R v RW*, 2021 BCSC 1672, helpful in relation to the contextual jurisprudential background relevant to my determination herein.

[39] When I consider whether to order State-funded counsel, I also think, in the specific circumstances of this case, what could her counsel achieve for her that Crown counsel could not also achieve?

[40] To date, the Crown has appropriately, and in a restrained manner, attempted to assist LY in putting forward her concerns.[18]

[41] If LY does not have counsel to represent her, I anticipate that the Crown will similarly continue to act in a restrained manner, but be prepared to raise concerns on behalf of LY in appropriate circumstances.

[42] The Court itself will also be prepared to ensure the human dignity and privacy interests of LY are respected to the extent that the law permits, including that Mr. NK's right to full answer and defence is not materially prejudiced.

[43] As I understand the communications and visual images in issue, if they are all in the nature of commentary between the respective persons about what happened at the relevant times before the alleged offence, and after the offence, then they do not involve highly private and sensitive aspects such as: prior sexual history; intimate images; or details of the alleged sexual activity with Mr. NK.

[18] See for example Crown counsel Ms. Kirby's September 7, 2021, letter regarding her concerns in relation to the issuance of the subpoenas to LY and R; and the Crown's brief written to assist the court dated November 26, 2021.

[44] My understanding is that, if made available to him and found to be admissible, Mr. NK would wish to rely upon these communications and visual images to cross-examine LY and R/TFO in an attempt to undermine their credibility should they testify at trial.[19]

[45] I agree that LY's privacy and human dignity must be respected at the s. 278.3 *CC* application, and at trial. The Court is prepared to intervene as required to ensure this. I am satisfied that both at the application and at the trial, a sufficiently adversarial context will prevail as between the Crown and Mr. NK, such that LY does not require State-funded counsel to represent her interests at the s. 278.3 *CC* application.

**Conclusion**

[46] I am not satisfied that LY requires me to order State-funded counsel, in order to ensure that her privacy and dignity interests are properly protected in this proceeding.

[19] The position of Mr. NK seems clear that he is not intending to use the evidence sought in any impermissible manner, insofar as "prohibited reasoning" or reliance on myths or stereotypes is concerned. However, as noted above – the communications may not be found to be relevant in any event, and therefore not ordered to be produced, if they violate s. 278.3(4) *CC*. I bear in mind that s. 278.3(4) prohibits a mere "assertion" by Mr. NK that the record "may" disclose a prior inconsistent statement or "may" relate to the credibility of the complainant or a witness. Moreover, it is also possible, since I have not yet seen the proposed evidence, that the Crown could in proper circumstances rely thereon as corroboration of LY's allegation - e.g. See *R v Rose*, 2021 ONCA 408 at paras. 22-23.

[47] Therefore, I decline to order State-funded counsel to assist her in relation to Mr. NK's section 278.3 *CC* application for the records he seeks.

Rosinski, J.