Date: 2000 03 23
Docket: CR 03823

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

-and-

WILLIAM PAUL NITSIZA

Applicant

REASONS FOR JUDGMENT

[1] The accused, William Paul Nitsiza, is charged in a two-count Indictment with sexual assault and threatening the complainant, S.A.B. The charges relate to a series of alleged acts of sexual abuse of the complainant committed in 1988 when the complainant was 8 years old. The charges were laid in 1999. The accused's jury trial is scheduled to commence within a few days.

[2] The accused applied, pursuant to s.278.3 of the Criminal Code, for production of certain "records", as that term is defined in s.278.1 of the Code. The first category of records are described as "counselling records" while the second category is a "diary" of the complainant in the possession of the Crown prosecutor. The procedural requirements for such an application were met and an in-camera hearing was held at which time I issued certain directions. These are my reasons for those directions (as required by s.278.8 of the Code).

[3] There is no need for a lengthy dissertation on the rules relating to the disclosure of records containing personal information for which there is a reasonable expectation of privacy in the context of a criminal prosecution. These rules, at least in the context of prosecutions for sexual offences, are set out in sections 278.1 to 278.91 of the Criminal Code and they have been recently analyzed in depth by the Supreme Court of Canada in *R. v. Mills*, [1999] S.C.J. No.68 (Q.L.), 180 D.L.R. (4th) 1, 139 C.C.C. (3d) 321.

[4] The relevant provisions (sections 278.5 and 278.7) require an analysis, first, to determine if the records should be produced to the court for review and, second, if they are reviewed whether they should be disclosed to the defence. At both stages the judge must be satisfied that the record is likely relevant to an issue at trial or to the competence of a witness to testify and that its production is necessary in the interests of justice. In coming to this determination, the judge must consider the salutary and deleterious effects of the determination on the accused's right to make full answer and defence and on the right to privacy and equality of the complainant or witness (as the case may be). In doing so the judge must take into account the factors listed in s.278.5(2). The Court in *Mills* considered both analytical stages and concluded thus on, first, the decision to order production for review by the judge (at para.138):

> It can never be in the interests of justice for an accused to be denied the right to make full answer and defence and, pursuant to s.278(5)(2) the trial judge is merely directed to "consider" and "take into account" the factors and rights listed. Where the record sought can be established as "likely relevant", the judge must consider the rights and interests of all those affected by production and decide whether it is necessary in the interests of justice that he or she take the next step of viewing the documents. If in doubt, the interests of justice require that the judge take that step.

and, second, the decision to order production to the accused (at para.141):

> Trial judges are not required to rule conclusively on each of the factors nor are they required to determine whether factors relating to the privacy and equality of the complainant or witness "outweigh" factors relating to the accused's right to full answer and defence. To repeat, trial judges are only asked to "take into account" the factors listed in s.278.5(2) when determining whether production of part or all of the impugned record to the accused is necessary in the interest of justice, s.278.7(1).

[5] The difference between the two analytical stages is that in the first one, to determine whether to order production for review by the court, the onus is on the accused to establish that the record is likely relevant: s.278.5(1)(b). There is, therefore, an obligation on the accused to provide a reasonable evidentiary base to conclude that the record is likely relevant. A mere assertion of likely relevance is insufficient. This is exemplified by s.278.3(4) which lists eleven assertions that "are not sufficient on their own to establish that the record is likely relevant". These include assertions that the record relates to treatment or counselling, that the

record may relate to the credibility of the complainant, or that the record was made close in time to a complaint. The provision appears designed to prevent an accused from obtaining production orders simply by making bare unsupported assertions based on stereotypical assumptions and to curtail "fishing expeditions" by defence counsel. This was the conclusion of the Court in *Mills* (at para.118): "...(the subsection's) purpose is to prevent speculative and unmeritorious requests for production... It does not entirely prevent an accused from relying on the factors listed, but simply prevents reliance on bare 'assertions' of the listed matters, where there is no other evidence and they stand on their own."

[6] The need for an evidentiary foundation was also the subject of comment by the Court in *Mills* (at para.120):

> The purpose and wording of s.278.3 does not prevent an accused from relying on the assertions set out in subsection 278.3(4) where there is an evidentiary or informational foundation to suggest that they may be related to likely relevance... The section requires only that the accused be able to point to case specific evidence or information to show that the record in issue is likely relevant to an issue at trial or the competence of a witness to testify... Conversely, where an accused does provide evidence or information to support an assertion listed in s.278.3(4), this does not mean that likely relevance is made out. Section 278.3(4) does not supplant the ultimate discretion of the trial judge. Where any one of the listed assertions is made and supported by the required evidentiary and informational foundation, the trial judge is the ultimate arbiter in deciding whether the likely relevance threshold set out in s.278.5 and 278.7 is met.

[7] The requirement for an "evidentiary or informational" foundation, and some of the problems in how to present it, were brought to the forefront on this application.

[8] Defence counsel placed before me an affidavit from the accused and the transcript of the preliminary inquiry in this case. The affidavit contained references to the complainant's testimony at the preliminary inquiry, specifically references to her evidence that (a) she took a course of treatment at an alcohol addiction services facility prior to making her complaint to the police; (b) that she made disclosures to a counselor at the facility; and, (c) that she kept a diary which included entries referring to the alleged sexual abuse. The affidavit went on to state (conclusionary statements of argument in reality) that the judge and jury at trial would be assisted by knowing what the complainant said to her counselor and what was in the diary (presumably to see if there are any inconsistencies). In many cases this is about all an accused can do (although argument is not appropriate for affidavits).

[9] The difficulty arose because much of the relevant information that would be helpful on this type of application (such as the type of record in existence if any, the circumstances under which they are made, the reasons for their creation and retention, how they got into the possession of whoever has them, and the complainant's views as to the need for confidentiality) was not presented in any of the usual ways evidence is presented. It all came out by way of hearsay from the mouths of counsel during their submissions. Now I recognize that a certain degree of flexibility needs to be maintained but this is a distinctly unhelpful way of proceeding. Counsel can agree on the facts and then the court may be able to resolve the application on the basis of submissions from counsel without the need to adduce evidence. But, I would expect that on significant points, especially highly contentious ones, evidence would be adduced in a proper form so that it may be tested in the appropriate manner.

[10] The Criminal Code clearly places on the accused an evidentiary burden to establish likely relevance. But that does not, it seems to me, relieve the other parties to this application from an obligation to adduce evidence of facts that those parties think may be relevant to the analysis of the salutary and deleterious effects of production. Otherwise those other parties (be it the Crown, the complainant, or the record-keepers) would also be relying on speculation and assumptions. I do not mean to say that there is an absolute requirement for other parties to present evidence. Subsection 278.4(2) clearly says that the complainant and the record-keeper are not compellable as witnesses. But that subsection also entitles them to appear and make submissions. It seems to me that if those submissions rely on certain facts than those facts should be adduced in some manner other than through evidence from counsel table.

[11] In this case, counsel took the approach that I can accept and consider anything and everything said by counsel (in the way of facts) unless other counsel objected. So, with this position in mind, I took as liberal approach to the evidence as counsel did.

Counselling Records:

[12] The complainant testified at the preliminary inquiry that she was in a rehabilitation programme for alcohol abuse run by Northern Addiction Services. She said that she started to have dreams about the accused and to "remember things" as she "quit drinking". However, when asked directly if she only started to remember the alleged abuse when she stopped drinking, she said: "No, I always remembered

them." In fact, she testified that she had confided to her aunt and talked to her about the alleged assaults many times over the years. While in the counselling programme, the complainant talked about her feelings in some type of group therapy sessions to her counsellors. It was three weeks after the end of the programme that she went to the police.

[13] I was told by counsel for the Government of the Northwest Territories (on behalf of Northern Addiction Services) that there were records made during the course of the complainant's programme. These records consist of daily progress reports that deal specifically with addiction issues . I was told there were no reports dealing with group sessions.

[14] Defence counsel argued that these records are likely relevant because they should reveal details of the complainant's initial disclosures. This argument, however, overlooks the complainant's testimony that she had talked about these allegations previously, over many years, with her aunt. Her aunt will testify at the trial. Her aunt has given a statement which has been disclosed to defence counsel. So it is not a situation where either the initial disclosure was made during therapy or that the complainant's memory of the alleged abuse was somehow "recovered" through therapy. There is no evidence to suggest that any therapeutic methods were employed to influence the complainant's memory of the alleged events.

[15] In *R. v. Carosella*, [1997] 1 S.C.R. 80, the Supreme Court dealt with a case involving the destruction of records made by a sex assault crisis centre social worker. The majority concluded (at pages 108-109) that the social worker's notes of the initial interview of the complainant were likely relevant since they related to the complainant's initial disclosure of the alleged assault. The minority disagreed on this point. They held (at page 139) that these notes were not likely relevant aside from the bare assertion of defence counsel that the material could somehow have been used to cross-examine the complainant. L'Heureux-Dubé, on behalf of the minority, wrote (at page 146):

> In my view, the appellant failed to even get over the threshold of likely relevance. While there was some evidence indicating that the complainant spoke of the offence, this is a far cry from saying that there were details given which could have impacted upon her credibility on a material issue if she were to be cross-examined. The appellant failed to establish an evidentiary basis which would allow a court to conclude that these materials met the threshold of likely relevance.

[16] In my opinion, the same reasoning applies in this case. The judgment in *Carosella* was delivered prior to the enactment of sections 278.1 to 278.91 of the Code. By the explicit inclusion, in subsection 278.3(4), of those assertions that are not sufficient on their own to establish that a record is likely relevant, and the constitutional validation of that subsection in *Mills*, I think it is safe to conclude that the minority opinion in *Carosella* (just like the minority opinion in *R. v. O'Connor*, [1995] 4 S.C.R. 411, generally) has carried the day on this argument

[17] All that the evidence before me shows is that the complainant was in an alcohol abuse treatment programme, that records were kept of her progress in that programme, and that she talked about the allegations against the accused. There is nothing to suggest any more than the record may relate to the incident in question or that it was made close in time to the complaint. These two assertions, standing on their own, are insufficient in the context of this case to establish likely relevance. These were not the first disclosures nor were they the only disclosures.

[18] In addition, in considering the factors particularized in s.278.5(2), it is important to note what evidence there is in this case relating to the type of records in question. I was told that these are reports that chart the complainant's progress through a set 35-day programme. The reports address the alcohol addiction concerns that the programme is meant to address. No doubt they also address the complainant's emotional and psychological states but the programme itself is not meant to nor designed to deal specifically with sexual abuse issues. Thus, the reports would have little direct probative value in their subject matter. Furthermore, the nature of these records would mean that the deleterious effects of disclosure on the complainant's privacy would be significant compared to the salutary effect on the accused's right to make full answer and defence.

[19] In *Mills*, the Court addressed the issue of the type of record being a factor in the assessment of whether production should be ordered even for purpose of review by the court (at para. 136):

> The nature of the records in question will also often provide the trial judge with an important informational foundation. For example, with respect to the privacy interest in records, the expectation of privacy in adoption or counselling records may be very different from that in school attendance records, see for example, *R v. J.S.P.*, B.C.S.C., Vancouver Registry Nos. CC970130 & CC960237, May 15, 1997. Similarly, a consideration of the probative value of records can often be informed by the nature and

> purposes of a record, as well as the record taking practices used to create it. As noted above, many submissions were made regarding the different levels of reliability of certain records. Counselling or therapeutic records, for example, can be highly subjective documents which attempt merely to record an individual's emotions and psychological state. Often such records have not been checked for accuracy by the subject of the records, nor have they been recorded verbatim. All of these factors may help a trial judge when considering the probative value of a record being sought by an accused.

[20] The Court recognized that there is a "spectrum" of privacy interests depending on the type of record that is involved. The case referred to in the above extract, *R. v. J.S.P.*, was one where the defence sought different types of records. At a lower end of the spectrum were school records and Workers' Compensation forms; at what was described as the "top" of the spectrum were counsellor's notes and personal diaries. The court there held that, before such documents are ordered to be disclosed, even for review by the court, such a step should be taken with great care in order to properly balance the interests of the parties and to preserve the integrity of the trial process: see also *R. v. Romano*, [1997] B.C.J. No. 2437 (Prov. Ct.). This point about a "spectrum" of privacy interests becomes relevant in the balancing of the factors, particularly that of probative value, in the determination of whether to order disclosure. As stated in *Mills* (at para.131): "Where the privacy right in a record is strong and the record is of low probative value or relates to a peripheral issue, the judge might decide that non-disclosure will not prejudice the accused's right to full answer and defence and dismiss the application for production."

[21] In this case, there is no case-specific evidence or information with respect to these counselling records to establish that they are likely relevant to an issue in the trial. Even if they had some relevance, their probative value would be low and marginal at best in comparison to the privacy interests at stake. For these reasons, I concluded that it would not be in the interests of justice to order their production for my review.

<u>The Complainant's Diary:</u>

[22] The concerns about a high privacy interest apply equally to diaries. Generally speaking a person's expectation of privacy in such personal journals is of great importance. Many times they are used as therapeutic tools: see, for example, *R. v. J. W.*, [1994] O.J. No. 1282 (Gen. Div.).

[23] In this case, the complainant testified at the preliminary inquiry that she wrote down some of the things she remembered in a journal. She did not show it to the police but she gave it to a victim assistance worker connected with the prosecution office. Crown counsel disclosed to defence counsel that they have this journal but, as of the start of the hearing before me, no one in the Crown's office had read it so no one knew if it contained relevant material. I adjourned the hearing for a brief time to enable Crown counsel to inform herself further about the contents of the journal and the circumstances under which the complainant delivered it to the victim assistance worker.

[24] Upon resumption of the hearing, Crown counsel told me (again without objection) that apparently the complainant had been told by the investigating police officer that she should turn the journal over to the Crown's office. What else she may have been told about any protection for her privacy rights I do not know. The complainant apparently did tell the victim assistance worker that her journal was highly confidential (indeed these very words are written on the front cover of the journal).

[25] Crown counsel indicated that there was one entry in the journal which made specific reference to the accused. When asked if, in Crown counsel's opinion, that entry would have been subject to the usual disclosure obligation of the Crown (leaving aside all other considerations), Crown counsel quite candidly acknowledged that it would be.

[26] Subsection 278.2(3) specifically addresses the obligations of the prosecutor with respect to a record which contains personal information for which there is a reasonable expectation of privacy that is in the possession of the prosecutor:

> (3) In the case of a record in respect of which this section applies that is in the possession or control of the prosecutor, the prosecutor shall notify the accused that the record is in the prosecutor's possession but, in doing so, the prosecutor shall not disclose the record's contents.

> The only exception to this obligation is if the complainant has expressly waived the application of the Criminal Code protections: s.278.2(2).

[27] In this case there can be no realistic argument that the complainant waived her right to confidentiality. There is no evidence to suggest that she was fully informed of the protections available by law for her journal. But I certainly think it would be prudent for a complainant, such as the one in this case, to be advised of those protections since, as the Court noted in *Mills*, waiver is not to be determined on a technical basis and may be discerned in words or conduct (at para. 114):

> Waiver should not be read in a technical sense. Where the complainant or witness, with knowledge that the legislation protects her privacy interest in the records, indicates by words or conduct that she is relinquishing her privacy right, waiver may be found. Turning records over to the police or Crown, with knowledge of the law's protections and the consequences of waiving these protections, will constitute an express waiver pursuant to s.278.2(2).

[28] Once the document is in the possession of the Crown, however, with or without a waiver by the complainant, the Crown in my opinion still has a duty to satisfy itself as to the potential relevance of the document.

[29] The obligation on the prosecutor with respect to privacy records must be considered in conjunction with the disclosure obligations imposed by *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. The Crown has an obligation to disclose all relevant material in its possession. Material is relevant if it could reasonably be used by the defence in meeting the case for the Crown. Hence I think the Crown necessarily must examine the records or document in its possession. It is not enough to simply seal it up and not look at it. After all the Criminal Code requires that the prosecutor notify the accused of the existence of the record. While the contents are not to be disclosed the notification given by the Crown "should ensure that information as to date and context are provided so that the documents can be sufficiently identified" since this "will help furnish the accused with a basis for arguing that the documents may be relevant" (as per *Mills* at para. 115).

[30] This was a point also made by Ewaschuk J. in the earlier case of *R. v. Boudreau*, [1998] O.J. No. 3526 (Gen. Div.). He wrote (at para. 20):

> Finally, I note the obvious that the Crown's possession or control of the record may actually help the accused in gaining production of the record. Once the Crown has possession or control of the record, s.278.2(3) imposes a duty on the Crown to notify the accused that the record is in its possession. The Crown must also inform the accused in a meaningful manner the nature and particulars of the record without disclosing its specific contents. In this way, the accused may acquire evidence or information beyond "mere assertion" to help him or her in establishing that the record is likely to be relevant to a trial issue or to the witness's competency to testify.

[31] Ewaschuk J. also went on to "flag" a further point that is of interest in this application (at para. 21):

> I also note that I need not resolve, on this application, the important question of whether the Crown is under a legal or ethical duty to inform either the accused or the Court that a particular record Crown counsel has seen, without disclosing its contents, may likely be relevant to the case.

[32] In my opinion, the Crown does have an obligation to inform the accused, and the court if there is a disclosure application, that a particular record may at least be "relevant" in the sense of the *Stinchcombe* disclosure rules. In most cases this would be the same as saying that the record is "likely relevant", as that term is used in subsections 278.5(1)(a) and 278.7(1). I say this because, as noted in numerous cases, the obligation resting upon the Crown to disclose material gives rise to a corresponding constitutional right of the accused to the disclosure of all material which meets the *Stinchcombe* standards. Therefore, in circumstances where the Crown has possession of records that may be relevant, the Crown should inform the accused of that since the Crown, in its public role, must ensure that the accused's right to a fair trial and to make full answer and defence are protected. Thus I had no qualms about asking for Crown counsel's opinion as to the "relevance" of the journal entry.

[33] Once I received Crown counsel's opinion, and keeping in mind the admonition in *Mills* (quoted above) that, if a judge is uncertain about whether production is necessary to make full answer and defence the judge should rule in favour of inspecting the document, I directed that the complainant's journal be produced to me for review. I was satisfied that it was necessary in the interests of justice to inspect the entire journal so that the one entry referred to by Crown counsel can be placed in context.

[34] I have reviewed the journal and I have concluded that there is no probative value either to the specific entry naming the accused or any other parts of the journal. There is nothing in there that could relate to the complainant's credibility, her disclosures of the offences, her recollection of the alleged incidents, or the unfolding of events. It is obvious that the journal was kept as a therapeutic tool during the alcohol rehabilitation programme the complainant attended and therefore the nature of the complainant's expectation of privacy is quite high.

[35] For these reasons, I have concluded that the journal, or any part of it, is not subject to production to the accused.

[36] I direct that Crown counsel attend at the clerk's office to retrieve the sealed package containing the complainant's journal. The Crown is to maintain control of that journal until the later of the expiration of the time for any appeal and the completion of any appeal in the proceedings against the accused, whereupon the journal may be returned to the complainant.

J. Z. Vertes, J.S.C.

Dated at Yellowknife, NT
this 23rd day of March, 2000

Counsel for the Accused (Applicant): Thomas H. Boyd

Counsel for the Crown: Sue Kendall

Counsel for the Government
of the Northwest Territories: Heather L. Potter