Date: 20010710
Docket No.: CAC 167424

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. D.W.L., 2001 NSCA 111]

Glube, C.J.N.S.; Roscoe and Flinn, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

D.W.L.,
(a young person within the meaning of
the *Young Offenders Act* (Can.))

Respondent

REASONS FOR JUDGMENT

Counsel:	William D. Delaney, for the appellant Robert M. Gregan, for the respondent
Appeal Heard:	June 4, 2001
Judgment Delivered:	July 10, 2001
THE COURT:	Appeal allowed per reasons for judgment of Flinn, J.A.; Glube, C.J.N.S. and Roscoe, J.A. concurring.

Publishers of this case please take note that s.38(1) of the **Young Offenders Act** applies and may require editing of this judgment or its heading before publication. Section 38(1) provides:

> 38(1) No person shall publish by any means any report
> (a) of an offence committed or alleged to have been committed by a young person, unless or order has been made under section 16 with respect thereto, or
>
> (b) of a hearing, adjudication, disposition or appeal concerning a young person who committed an offence
>
> in which the name of the young person, a child or a young person aggrieved by the offence or a child or a person who appeared as a witness in connection with the offence, or in which any information serving to identify such young person, is disclosed.

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

FLINN, J.A.:

[1] On April 1, 2000 a multi-charge indictment, involving 13 offences, was laid against the respondent. Twelve of the charges related to the complainant (S.A.) and alleged offences of assault (five counts), assault causing bodily harm (two counts), sexual assault (four counts) and unlawful confinement (one count). Prior to the trial, counsel for the respondent made an application before Provincial Court Judge Archibald, pursuant to s. 278.3 of the **Criminal Code of Canada** R.S.C. 1985, c. C. 46, s. 1 (the **Code**) for production and disclosure of private diaries of the complainant.

[2] The trial judge decided:

> I find on the basis of the evidence and the arguments that I have heard that the diaries should be turned over so that I can look at them and decide whether or not they can be made available to the defence.

[3] The trial judge was then advised, by counsel for the Crown, that the complainant's counsel had disclosed that the diaries no longer existed. They had, at some time prior to the production order, been destroyed by the complainant.

[4] On a further application of counsel for the respondent, the trial judge stayed the charges against the respondent, deciding that the respondent's right to make full answer and defence was impaired by the loss of the diaries.

[5] The Crown brings this appeal under s. 676.(1)(a) of the **Code** on two grounds involving a question of law alone, and also under s. 676.(1)(c) against the trial judge's order staying the proceedings.

[6] The evidence adduced on the initial hearing before the trial judge provides a more detailed background to this matter which I will review prior to dealing with the Crown's grounds of appeal.

[7] Constable Fred Welsh, an officer with the S. Town Police, who was the investigating officer in matters related to the respondent, met with the complainant

on April 2, 2000 at the C.C. C.. The complainant had been on remand, with respect to another matter, in the juvenile cell on the second floor of the C. C.. There is a requirement that young offenders be kept separate and apart from the adult population.

[8] It appears from the evidence that Constable Welsh had some prior knowledge that the complainant kept a personal diary, and the purpose of his visit with her on April 2nd was to obtain her permission to examine the diaries. On that date the complainant signed a hand written document drawn up by Constable Welsh in which she gave Constable Welsh permission to seize her diaries at her mother's house and to read them. Constable Welsh had indicated to the complainant that he wanted to see if there was anything in the diaries that may provide evidence relevant to the matter that he was investigating.

[9] Constable Welsh took possession of the diaries on April 2, 2000. He testified that he never reviewed them "Because I never had time to be honest with you."

[10] Constable Welsh further testified that, subsequently, he had a conversation with the Crown Prosecutor with respect to the diaries. Prior to this conversation, it appears Constable Welsh was not even aware of s. 278.3 of the **Code**. As a result of this conversation with the Prosecutor, Constable Welsh was of the view that he had not properly explained to the complainant her privacy rights with respect to the diaries, and he took it upon himself to return the diaries to her which he did on August 15, 2000.

[11] In the respondent's affidavit, in support of his application for production of the diaries, he makes reference to the fact that when he was on remand in the C.C. C. he noticed writings on the cell wall which he believes were made by the complainant. He deposes in that affidavit, *inter alia*, as follows:

> 16. That while I was on remand at the C.C. C. in A. on April 4th, 2000, I noticed writings on the wall of the cell that I was in.
>
> 17. That (sic) is my understanding and I do verily believe that the cell in which I was held is a special cell in the C. C. used for holding young offenders.
>
> 18. That the writings I noticed on the wall of the cell were signed "[the

> complainant's full name]" and indicated she was there from March 24-27, 2000. These writings indicated things such as: "I will get you [the respondent's first name]!"; "[the respondent's full name] is a fucken [sic] rat and is getting killed"; . . . "what you give to a person you get it back twice as bad!"; "Now it's your turn to do jail time and I hope you die in there someday. . .".

[12] At the respondent's request his solicitor came to the C. C. along with one A. T., a student, who photographed the writings on the cell wall.

[13] The superintendent of the C.C. C. confirmed that the cell which the respondent occupied, while he was on remand at that institution, was the same cell which had been occupied by the complainant; and that no other person had been kept in that cell from the time of the complainant's discharge until the time the respondent was admitted on remand.

[14] Counsel for the respondent had written to Bruce Baxter, a Crown Attorney in A., on June 21, 2000, requesting a copy of the complainant's diaries. On June 23, 2000 Mr. Baxter responded to counsel for the respondent indicating that he knew nothing about a diary at that point but that if it existed it would fall within the definition of "record" under s. 278.1 of the **Code**.

[15] The only other evidence before the trial judge was the complete affidavit of the respondent, a portion of which is referred to in § 11 hereof. In that affidavit the respondent deposed, firstly, as to the charges against him, and then continued as follows:

> 3. That although I have known the complainant [the complainant's full name] for quite some time, she began coming to my home quite frequently beginning in May, 1999, and she began living in my home with my mother, younger brother and me at 43 C.S., in S., during the first part of December, 1999, and she continued to live there for the most part until sometime just before Christmas, 1999.
>
> 4. That at the time that [the complainant] was living with us she informed me and I do verily believe that she was having difficulties at home and did not have a place to stay, so my family agreed to allow her to live with us.
>
> 5. That during this time, [the complainant] was having a number of emotional difficulties and was having problems with her family.

6. That also during this time [the complainant] was wanting to "hang out" with my friends and be part of our crowd and often times she would come along even when she was not invited.

7. That during the times that [the complainant] stayed at my home, I did not consider that we were boyfriend and girlfriend, although there was some sexual activity between us. Any sexual activity that occurred between the complainant, [the complainant's full name] and me was consensual in nature.

8. That some time in December of 1999, the complainant, [the complainant's full name] confronted me as she thought she was pregnant and she claimed that I was the father of the child.

9. That I questioned whether or not I was the father of her child because of the limited sexual activity between the two of us. When I indicated this to [the complainant], she became very angry and upset.

10. That because of [the complainant's] behaviour, she was no longer allowed to continue to live in my family's home. Despite not being allowed to live at the home, she continued to come around and many, many times, my mother would have to tell [the complainant] to leave.

11. That as I have stated above, the allegations are that I sexually assaulted [the complainant] in November and December of 1999. As I have indicated, [the complainant] continued to come to my home during and after that time and would come to my house even when her presence was not wanted.

12. That [the complainant] kept coming to my home until finally, on March 28, 2000, [the complainant] appeared at my home and she wanted to come in. Usually she was allowed to come in, however, she was drinking and very loud and angry, and as a result my mother, K. L. called the S. police and had [the complainant] arrested. At the time she was arrested, [the complainant] also made death threats against me.

13. That as a result of [the complainant's] actions, I have (sic) informed and do verily believe that she was charged and convicted of uttering death threats against me.

14. That it was while [the complainant] was in custody for charges of uttering these death threats against me that she made the complaint to the police about my having sexually assaulting her, as well as accusing me of assaulting her causing bodily harm and unlawfully confining her.

15. That as a result of these charges, I was picked up by the police and held in custody, in early April, 2000.

Paragraphs 16., 17., 18. see § 11.

19. That upon seeing these message (sic) on the cell wall, I called my solicitor, Robert Gregan and advised him of these writings.

20. That my lawyer, Robert Gregan and a co-op student, who was introduced to me as A. T., came to the C. C. and videotaped those writings.

21. That I did not put the writings on the wall, and as I have indicated, they were signed "[the complainant's first name]".

22. That I do verily believe that [the complainant] made these allegations for which I am charged to seek revenge against me.

23. That I believe that [the complainant] was upset because I had broken up what she saw as "boyfriend-girlfriend" relationship between us, and I also believe that she was angry because of her pregnancy and she thought that I was the father, something which I rejected.

24. That I further believe that [the complainant] was very upset and angry because the police were called to my home and she was placed in custody.

25. That I am also concerned that [the complainant] made these allegations against me while she was in custody for uttering threats against me.

26. That I have been advised that [the complainant] kept a diary or journal.

27. That based upon [the complainant's] conduct toward me, and also based upon what I saw written on the wall at the jail on April 4th, it would not surprise me and I do believe that there are things written about me in her diary or journal concerning her allegations against me. She had no problem in writing messages and threats on a jail wall, so I feel she would have no problem in writing about this matter in her diary and writing her thoughts about ways to get back at me.

28. That I also believe that in the diary or journal there may be things written to suggest that [the complainant] has made these allegations up or is plotting revenge against me.

29. That I believe that those diaries may be useful in helping to show my innocence to the charges against me.

[16] The complainant did not testify on the hearing of this application.

[17] The trial judge gave a brief oral decision on the initial application of counsel for the respondent as follows:

> In this case we have two competing rights under the **Charter of Rights**, that of the right to make full answer and defence and secondly the matter of the right to privacy. Those competing rights are discussed in **Mills** at some length. The matter of whether or not the writings on the jail can be attributed to [the complainant], they, the evidence of the jailor, Mr. McLellan, is that [the complainant] was the next person in the cell, or that [the respondent] was the next person in the cell after [the complainant] and although it's not conclusive that she made those writings on the, in the cell, I would say that it's more than probable that she did and for the purposes of this application I think that is adequate. In a sense, the writing on the wall at the jail is part of her record which she kept of these transactions and which by putting on the wall is some sort of a waiver in my view of her right to privacy. As well, she signed a waiver to the police officer, although according to his evidence he did not read the documents after they were turned over to her (sic), but she, in fact, did waive her rights, her right of privacy, and by that document indicated that the officer could read the diaries. The, in situations where competing rights are opposed then I think it is appropriate that if I must err that I should err on the right, rights of the accused, the right of him to make full answer and defence and therefore I find on the basis of the evidence and the arguments that I have heard that the diaries should be turned over so that I can look at them and decide whether or not they can be made available to the defence. So, Miss M., when can that be done?

[18] On the further application of counsel for the respondent for a stay of the charges, the trial judge also gave a brief oral decision as follows:

> Section 24(1) of the **Charter** says:
>
> > Anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> Without reviewing all of the matters of evidence and the various authorities that have been cited, I think it's clear that the crown did have an obligation to see that the diaries were sealed up and turned over to the court to be further dealt with according to section 278. In my view, the crown although not having improper motives for getting the evidence destroyed, nor the police officer having any

> improper motives, in my opinion, there still was a degree of negligence involved that from the defence's point of view was inappropriate and unacceptable because the defence's position has been impaired because of the, of what amounts to negligence on the part of the crown. I do find that the accused's right to make full answer and defence was impaired by the loss of the diaries. In my opinion, it would not be appropriate to hear the evidence in the case and then decide from there whether, what should be the resolution of the **Charter** issue. I think that the crown, the defence's, the defence counsel's position is, is impaired substantially in its right to cross-examination and its right to determine whether or not defence evidence should be called and I think those are serious matters and I think those are all set out in the decision of Justice Sopinka, the late Justice Sopinka, in **Carosella**, and in my opinion, this is one of the clearest of cases which do justify a stay and I am going to order that the, that the trial be stayed in relation to the matters on the multi-count information.

[19] I will deal firstly with the Crown's appeal from the initial order of the trial judge requiring that the diaries be turned over to him for review. This appeal is brought under s. 676.(1)(a) of the **Code** which provides as follows:

> 676.(1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal
>
> > (a) against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone.

[20] The errors of law which the Crown alleges are as follows:

1. The trial judge failed to determine that the diaries were "likely relevant" to an issue at the trial; and, in fact, there is no evidence, short of speculation, that the diaries are likely relevant to an issue at trial;

2. The trial judge failed to take into account the following factors:

   (a) The extent to which the record is necessary for the accused to make a full answer and defence;

   (b) The probative value of the record;

(c) The nature and extent of the reasonable expectation of privacy with respect to the record.

[21] There is no dispute that the diaries which the respondent sought to be produced fit within the definition of "record" in s. 278.1 and 278.2(1) of the **Code**.

[22] Section 278.3 of the **Code** deals with the requirements of the respondent's application in this regard; and s. 278.5 of the **Code** lists the factors which the court must consider before ordering production of a record for review. These two sections are set out as follows:

> **278.3**
> (1) An accused who seeks production of a record referred to in subsection 278.2(1) must make an application to the judge before whom the accused is to be, or is being, tried.
>
> (2) For greater certainty, an application under subsection (1) may not be made to a judge or justice presiding at any other proceedings, including a preliminary inquiry.
>
> (3) An application must be made in writing and set out
>
> > (a) particulars identifying the record that the accused seeks to have produced and the name of the person who has possession or control of the record; and
> >
> > (b) the grounds on which the accused relies to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify.
>
> (4) 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.

(5) The accused shall serve the application on the prosecutor, on the person who has possession or control of the record, on the complainant or witness, as the case may be, and on any other person to whom, to the knowledge of the accused, the record relates, at least seven days before the hearing referred to in subsection 278.4(1) or any shorter interval that the judge may allow in the interests of justice. The accused shall also serve a subpoena issued under Part XXII in Form 16.1 on the person who has possession or control of the record at the same time as the application is served.

(6) The judge may at any time order that the application be served on any person to whom the judge considers the record may relate.

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

> (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
>
> (c) the production of the record is necessary in the interests of justice.

(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 and equality of the complainant or witness, as the case may be, and any other person to whom the record relates. In particular, the judge shall take the following factors into account:

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

[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.

[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.

[25] In **R. v. Mills**, [1999] 3 S.C.R. 668 McLachlin and Iacobucci, JJ. said at § 118:

> 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".
>
> . . .
>
> The purpose and wording of s. 278.3 do not prevent an accused from relying on the assertions set out in s. 278.3(4) where there is an evidentiary or informational foundation to suggest that they may be related to likely relevance. (An exception is "recent complaint" which has been abolished by the jurisprudence and cannot be relied on in any event, quite apart from the section.) 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.

[26] This test was followed by the Ontario Court of Appeal in **R. v. Batte**, [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 § 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.

[27] In the respondent's application before the trial judge pursuant to s. 278.3 of

the **Code**, the respondent listed ten grounds as the basis for his application for production and disclosure of the diaries. Those grounds are as follows:

> **AND FURTHER TAKE NOTICE** that the grounds for this application are as follows:
>
> 1. That the records exist;
> 2. That the records relate to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;
>
> 3. That the records relate to the incident that is the subject matter of the proceedings;
>
> 4. That the records may disclose a prior inconsistent statement of the complainant;
>
> 5. That the records may relate to the credibility of the complainant;
>
> 6. That the records may reveal allegations of sexual abuse by the complainant by a person other than the accused;
>
> 7. That the record relates to the sexual activity of the complainant with any person, including the accused;
>
> 8. That the records relate to the complainant's sexual reputation; or
>
> 9. 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;
>
> 10. Such further and other grounds as counsel may advise and this Honourable Court may permit.

[28] Other than the fact that it was acknowledged that the diaries did exist, the other nine assertions by the respondent in his grounds of appeal were unsupported by any evidence. Further, it is clear that the respondent's application proceeded solely upon an argument which was based on § 27 of the respondent's affidavit, which I repeat here as follows:

> 27. That based upon [the complainant's] conduct toward me, and also based upon what I saw written on the wall at the jail on April 4th, it would not surprise me and I do believe that there are things written about me in her diary or journal

> concerning her allegations against me. She had no problem in writing messages and threats on a jail wall, so I feel she would have no problem in writing about this matter in her diary and writing her thoughts about ways to get back at me.

[29] The source of the appellant's belief "that there are things written about me in her diary" are not disclosed. There is, in fact, no admissible evidence whatsoever as to what is contained in the complainant's diaries.

[30] **R. v. M. (D.)**, [2000] 37 C.R. (5th) 80 (Ont. Sup. Ct.) is a recent decision where a trial judge refused to order production of a complainant's diary for review by the trial judge, in a sexual assault case. Justice Hill, applying the principles set out in **Mills**, supra, and **Batte**, supra, said the following at § 37:

> The initial stage, whether production should be ordered to the court for review, calls for the trial judge to apply a likely relevant standard. While the burden is not to be overly onerous, at the same time the requirement is not to be reduced to an altogether standardless process. Relevance is contextual, a case specific application of logic and experience to determine whether the evidence assists in proving a fact in issue. Whether or not the evidence in question has some tendency to make the proposition for which it is advanced more likely than were the evidence absent requires the court to assess an evidentiary or informational foundation grounded in the circumstances of the case at hand: *R. v. Mills* (1999), 139 C.C.C. (3d) 321 (S.C.C.) at 380; *R. v. Batte* (2000), 34 C.R. (5th) 197 (Ont. C.A.) at para. 74.

And further at § 41 and 42:

> The mere pleading that D.G.'s diary may contain a prior inconsistent statement is entirely speculative. Simply asserting that a record may disclose a prior inconsistent statement of the complainant is not itself sufficient to establish the record is likely relevant to an issue at trial or to the competence of the witness to testify: s. 287.3(4)(d) of the *Code*. This proposition could be asserted respecting any pre-trial writing of any complainant. There is no evidence to realistically suggest with respect to this complainant confusion or changing versions of the allegations against D.M.
>
> The fact of a diary recording of something about sexual abuse by an accused person is a factor worthy of consideration in determining whether a complainant's diary should be produced for review by the courts. Without something more, raising the matter from the general to the specific, giving a real prospect of securing added information, the court need not review the diary. Such is the case here.

[31] In the present case the trial judge did not mention, let alone apply, a likely relevance standard to the complainant's diary.

[32] I agree with the Crown's submission in this case that the respondent's argument that the complainant's diaries might contain material relevant to the complainant's animus against him is highly speculative, and falls far short of establishing likely relevance to an issue at this trial or to the competence of a witness to testify.

[33] Further, s. 278.5(2) of the **Code** requires the trial judge to consider the extent to which the diaries of the complainant are necessary for the accused to make a full answer and defence. As I have indicated, the respondent made application to have the diaries produced because of that which they might show with respect to the complainant's animus against him. In view of the evidence of that animus which already exists - in the form of the writings on the cell wall - it is difficult to imagine how these diaries, even if they did, in fact, contain evidence of the complainant's animus against the respondent, are necessary in order for the respondent to make full answer and defence. The trial judge did not consider, in his decision, the extent to which the diaries were necessary for that defence.

[34] Likewise, the trial judge failed to consider, as he is required to do under s. 278.5(2), the probative value of the diaries. Even if the diaries contained reference to the complainant's ill will against the respondent, the probative value of such evidence would be marginal considering the other evidence already available to the respondent.

[35] Lastly, the trial judge made only passing reference to the privacy interests of the complainant in her diaries. He is required, under s. 278.5(2) of the **Code**, to take into account the nature and extent of the reasonable expectation of privacy with respect to the diaries and the potential prejudice to the personal dignity and right to privacy of any person to whom the diary relates.

[36] In **Mills** the Supreme Court said the following concerning fundamental aspects of privacy at § 81:

> This Court recognized these fundamental aspects of privacy in *R. v. Plant*, [1993] 3 S.C.R. 281, where Sopinka J., for the majority, stated, at p. 293:

> In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the *Charter* should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual. [Emphasis added.]

[37] In **R. v. M. (D.)**, supra, Justice Hill said the following concerning diaries and the matter of privacy at § 43 as follows:

> A diary generally contains significantly intimate thoughts, ideas, and emotional recordings. As such, there exists a high expectation of privacy in a personal diary and, with disclosure, even to the court, prejudice is occasioned to the personal dignity and right to privacy of the complainant. The societal interest in encouraging the reporting of sexual offences is threatened where a judge rules in favour of production for review of a complainant's diary containing writings relating to sexual abuse in the absence of material demonstrating that the writings have some realistic potential to provide added information to the accused or a reasonable prospect to impeach the complainant's credibility. Again, merely pleading linkage between the diary and the credibility of D.G. fails to discharge the likely relevance onus of establishing a reasonable possibility that the complainant's prior writings will carry some probative value in the assessment of her credibility: *R. v. Batte, supra,* at para. 72-78.

[38] Because the respondent:

1. did not establish that the complainant's diaries are likely relevant to an issue at trial or to the competence of a witness to testify;

2. did not demonstrate that the diaries are necessary in order for him to make full answer and defence;
3. did not demonstrate what, if any, probative value the diaries have;

in my view it is clear, considering the complainant's privacy interests in the diaries, that the trial judge should not have ordered the diaries to be produced for review by him. The respondent's application fell far short of the requirements of s. 278.5 of the **Code**. The errors of law of the trial judge were his failure to properly consider the above matters which he is required to consider before making an order for production of the diaries under s. 278.5 of the **Code**.

[39] I also agree with the Crown that the trial judge erred in granting a stay of proceedings against the respondent under s. 24(1) of the **Charter**.

[40] The trial judge gave no indication as to how the respondent's s. 7 **Charter** rights were breached nor did he explain why this was one of the "clearest of cases" where a stay of proceedings must be granted.

[41] Given my conclusions with respect to the failure of the respondent's application to demonstrate that the diaries were likely relevant, that their production was necessary in order for him to make full answer and defence, and his failure to establish what, if any, probative value there was in the diaries, the loss of those diaries could not constitute a breach of the respondent's rights under s. 7 of the **Charter**. These conclusions lead to the inevitable result that the trial judge's order staying proceedings must also be set aside, because that order was based on the fact that the diaries were not available.

[42] In **R. v. O'Connor**, [1995] 4 S.C.R. 411 Justice L'Heureux-Dubé said at § 82 of her reasons for judgment:

> It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued.

[43] While the trial judge purported to apply the "clearest of cases test" to the question of whether he should order a stay in this case, he failed to consider the test in its entirety, particularly, with respect to the prejudice to the accused's right to make full answer and defence - how that prejudice was impaired, and why the impairment could not be remedied.

[44] In assessing prejudice to an accused's right to make full answer and defence, the Ontario Court of Appeal set out the following approach in **R. v. Bradford**, [2001] O.J. No. 107 at § 6-8:

> In assessing the prejudice to the accused's right to make full answer and defence as secured by s. 7 of the Charter, it is important to bear in mind that the accused is entitled to a trial that is fundamentally fair and not the fairest of all possible trials. As stated by McLachlin J. in O'Connor, supra, at pp. 78-79:

> . . . the Canadian Charter of Rights and Freedoms guarantees not the fairest of all possible trials, but rather a trial which is fundamentally fair: R. v. Harrer, [1995] 3 S.C.R. 562. What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice but fundamentally fair justice.
>
> In a similar vein, Justices McLachlin and Iacobucci commented in R. v. Mills, [1999] 3 S.C.R. 668 at p. 718 that fundamental justice embraces more than the rights of the accused and that the assessment concerning a fair trial must not only be made from the point of view of the accused but the community and the complainant. The fact that an accused is deprived of relevant information does not mean that the accused's right to make full answer and defence is automatically breached. [See Note 1 below] Actual prejudice must be established: Mills, supra, pp. 719-720, citing R. v. La, [1997] 2 S.C.R. 680 at p. 693.
>
> Note 1: Other public interests that are recognized as limiting the accused's ability to gain access to potentially relevant information are, for example, the privilege attaching to the identity of police informers, as acknowledged in Mills, supra, at 719-720.
>
> The fact that a piece of evidence is missing that might or might not affect the defence will not be sufficient to establish that irreparable harm has occurred to the right to make full answer and defence. Actual prejudice occurs when the accused is unable to put forward his or her defence due to the lost evidence and not simply that the loss of the evidence makes putting forward the position more difficult. To determine whether actual prejudice has occurred, consideration of the other evidence that does exist and whether that evidence contains essentially the same information as the lost evidence is an essential consideration.
>
> (Emphasis added)

[45] As pointed was out earlier in these reasons there is evidence upon which the respondent can rely with respect to the complainant's animus towards him. That evidence is represented by the writings on the cell wall. It cannot be said that the respondent is prejudiced by the loss of these diaries, the contents of which are unknown.

[46] Therefore, I would allow this appeal. I would set aside the decision of the trial judge ordering that the diaries of the complainant be produced to him for review, and any order issued pursuant to that decision. I would also set aside the decision of the trial judge staying these proceedings against the respondent and any order issued pursuant to that decision. I would also order a new trial.

Flinn, J.A.

Concurred in:

Glube, C.J.N.S.

Roscoe, J.A.