NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Farler, 2005 NSCA 138

Date: 20051104
Docket: CAC 232410
Registry: Halifax

Between:

Timothy Charles Farler

Appellant

v.

Her Majesty the Queen

Respondent

Editorial Notice

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

Restriction on publication: Pursuant to ss. 278.9(1) and 486(3) of the **Criminal Code**

Judges: Cromwell, Saunders and Fichaud, JJ.A.

Application Heard: September 19, 2005, in Halifax, Nova Scotia

Held: Application allowed in part per reasons for decision of Cromwell, J.A.; Saunders and Fichaud, JJ.A. concurring.

Counsel: Appellant in person
Daniel A. MacRury, for the respondent, Her Majesty the Queen
Jacqueline Scott, for the Director of Victim Services
Dean Smith for the Royal Canadian Mounted Police
Coline Morrow (written submission), for complainant, R.T.
Stephanie Mulcaster (written submission), for Constable P.L.

Publishers of this case please take note that Section 278.9(1)) of the **Criminal Code** applies. The subsections provide:

> 278.9 (1) No person shall publish in a newspaper, as defined in section 297, or in a broadcast, 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.

Publishers of this case please take note that Section 486(3) of the **Criminal Code** also applies. The subsections provide:

> 486(3) **Order restricting publication** - Subject to subsection (4) where an accused is charged with
>
> (a) an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272, 273, 346 or 347,
> (b) an offence under section 144, 145, 149, 156, 245 or 246 of the **Criminal Code**, chapter C-34 of the of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
> (c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,
>
> the presiding judge or justice may make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

Decision:

I. INTRODUCTION:

[1] The appellant was convicted by a Supreme Court judge and jury of 12 sexual offences committed between 1981 and 1990 against five complainants. He was acquitted on a charge relating to a sixth complainant. He has appealed his convictions. For the purposes of the appeal, he applies to the Court for orders for production of certain records and for leave to adduce this and other material as fresh evidence on the appeal.

[2] As indicated during oral submissions, the Court will rule now on any disclosure issues as well as on whether any third party record information should be produced to the Court for review. The decision in relation to the fresh evidence application is reserved until after the appeal has been heard on its merits. The question of whether any third party record information reviewed by the Court should be produced to the appellant will be reserved until after the appeal has been argued on the merits.

II. OVERVIEW OF THE CHARGES:

[3] The appellant was a submariner in the Armed Forces. He served as a Big Brother for B.T., one of the complainants. A second complainant, R.T., was B.T.'s brother. R.T. and B.T. each lived with the appellant at certain times and a third, V.S., got to know the appellant through his friend, B.T. The fourth complainant, J.S., was a friend of R.T. The fifth complainant, R.L., was a member of the Armed Forces and was serving under the appellant at the time of the alleged offence. The sixth complainant was J.P., who was about 20 years old when the appellant allegedly sexually assaulted him on one occasion. (The appellant was acquitted of this charge.) For the purposes of these applications, the charges in relation to B.T., R.T. and J.P. are most relevant.

[4] The charges with respect to B.T. were buggery, gross indecency and sexual assault. In brief, the Crown alleged that the appellant became B.T.'s Big Brother in September of 1982 when B.T. was 13. The Crown evidence was that the appellant maintained close contact with B.T. over the next several years. The appellant began sexually touching B.T. and then the sexual activity progressed to

oral sex on a regular basis and anal intercourse. B.T. lived with the appellant at his residence for a period of time. The appellant's evidence at trial was that his only sexual contact with B.T. occurred between late 1988 and the spring of 1989. At that time, B.T. was over 18 years of age and the appellant testified that the contact was consensual.

[5] With respect to R.T. , who was four years younger than his brother, B.T., the charges were also buggery, gross indecency and sexual assault. In brief, R.T. testified that while he was a pre-teen and a teenager, including the period that he lived with the appellant, the appellant provided him with alcohol and sexually abused him. He also testified that he got in trouble with the law for break and enter and was sent to the Shelburne youth facility for four or five months and then to group homes in [...] and [...]. He testified that when he was released, he went to live with the appellant. R.T. eventually moved to [...] and then to [...] where he reported the abuse to the [...] RCMP in March of 2000. The appellant denied any sexual contact with R.T.

[6] The appellant was also charged with, but acquitted of, one count of sexual assault on J.P. The original Information apparently alleged a time frame starting in 1983 when J.P. was 10 years and seven months old and extended until he was 16. The time frame was amended at the Preliminary Inquiry to allege that the events occurred between 1990 and 1992. The appellant testified that he and J.P. had gone to bed together in August of 1992 but denied there had been a sexual assault.

III. THE APPEAL:

[7] The notice of appeal against conviction sets out 11 grounds, several with many sub-issues. The grounds most relevant to the present applications are:

1. The trial was unfair because there was non-disclosure and incomplete and late disclosure by the Crown;

2. The verdicts of guilty were not supported by the evidence.

3. The investigating officer misled the court; the appellant also argues in the present application that the investigation was biased and incomplete; and

4. Defence counsel at trial was not competent.

IV. THE APPLICATION:

[8] The appellant asks that the following material be produced:

1. Operation Hope file for the complainant, R.T., said to be in the custody of the RCMP;
2. Information about R.T.'s application for criminal injuries compensation;
3. Dartmouth Atlantic Child Guidance Centre record for R.T. for 1987 and, in particular, records relating to his consultation with Brian Crawford, Dr. Holt and Terry Tinglay;
4. Internal RCMP investigation looking into the actions of an RCMP officer, P.L.; and
5. Motor vehicle licensing information for J.P. between the dates of January 1983 and December of 1988.

V. APPLICABLE PRINCIPLES:

1. Overview:

[9] The application is brought under s. 683(1)(a) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. The section authorizes the Court, where it considers it in the interests of justice, to order production of any writing, exhibits or other thing connected with the proceedings.

[10] All of the material sought arguably constitutes records within the meaning of s. 278.1 of the **Criminal Code**. If any such material had been sought at trial, the third party records provisions found in ss. 278.1 *ff.* of the **Code** would have applied. In my view, the same principles should apply where such material is sought to be produced on appeal: see **R. v. Rodgers** (2000), 144 C.C.C. (3d) 568

(Ont. C.A.) at para. 18. Consistent with this approach, the hearing of the application for production of third party records was held *in camera*.

[11] Production of the third party records for review by the court may be ordered if the three conditions set out in s. 278.5(1) are met, namely, that a proper application has been made; the material is likely relevant; and, production is necessary in the interests of justice:

> **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 subsection 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.

[12] There is a question as to whether the Operation Hope file and the internal RCMP investigation concerning Constable P.L. are records which fall within these special rules. (P.L. is variously referred to as Corporal or Constable in the material. For convenience, I will use Constable.) If they do not, different principles govern the application to have them produced. Therefore, I will first address whether the Operation Hope and internal investigation records fall within the class of records subject to the s. 278.1 regime.

2. Are the Operation Hope and internal investigation files "records" under s. 278.1?

[13] The three requirements set out in s. 278.5 apply to a "record" as defined in s. 278.1. That definition has three elements. The first two describe what is included. The third sets out an exclusion from the definition. Thus, a record is:

- ... any form of record that contains <u>personal information for which there is a reasonable expectation of privacy and includes</u>, without limiting the generality of the foregoing, medical, psychiatric, therapeutic, counselling, education, <u>employment</u>, child welfare, adoption and social services <u>records</u>, 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.

(Emphasis added)

[14] The appellant appears to accept that there is a reasonable expectation of privacy in relation to the records which he seeks. We have had no argument to the contrary. I will, therefore, assume, but without deciding, that all the records sought contain personal information for which there is a reasonable expectation of privacy. However, the Operation Hope and internal RCMP investigation records are in the custody of the RCMP, the investigating police force. The question, therefore, is whether the material is excluded from the definition of "record" because it was "... made by persons responsible for the investigation or prosecution of the offence ...".

[15] We have been referred to two cases interpreting this phrase in s. 278.1. In **R. v. Barnes**, [2004] O.J. No. 5572 (Q.L.) (Ont. Ct. J.) at para. 17, Griffiths, J. held that the exclusion from s. 278.1 does not apply to any police investigation of any offence, but only to records made by persons responsible for the investigation of the offence before the Court. Similarly, in **R. v. Hammond**, [2002] O.J. No. 1596 (Q.L.) (Ont. Ct. J.), at para. 7, Jennis, J. held that the exclusion applies to records prepared by the investigators or prosecutors in relation to the offence before the court. In the context of police complaint files and disciplinary records relating to police officers, whether the disclosure or third party records principles apply turns mainly on the directness of the connection between the investigation of the criminal charges before the Court and the records sought: see, for example, **R. v. Qappik**, [2005] Nu. J. No. 18 (Q.L.)(Nu. C.J.). I generally agree with these interpretations. I will consider the two records in turn.

(a) Operation Hope Material:

[16] As is common knowledge in this jurisdiction, "Operation Hope" was the name given to the police investigation of allegations of widespread institutional abuse in provincial youth facilities. Any Operation Hope file that exists with respect to R.T. was not part of and did not emanate from the investigation of the

charges against the appellant. For that reason, I would hold that the Operation Hope file relating to R.T. is not excluded by the concluding words of s. 278.1. On the assumption that there is a reasonable expectation of privacy with respect to that record, it falls within the definition of "record" set out in that section and is subject to the special third party record rules.

(b) Internal Investigation Material Relating to Constable P.L.:

[17] There is material in the record to show that in the late 1980's, Constable P.L. was a member of the R.C.M.P assigned to the Cole Harbour, N.S. Detachment. That is the detachment which was responsible for the investigation of the allegations against the appellant and it was Constable Stewart of that detachment who swore the original Information against the appellant in April of 2002. There was evidence at trial that R.T. in 1989 or 1990 had told P.L., while on duty and in uniform, about the appellant's abuse. According to R.T., P.L. took no action and, in essence, told R.T. to forget about it. R.T. said in a police statement that he thought his brother, B.T., had also told P.L. about abuse by the appellant. There is also an indication that R.T.'s mother was aware of this.

[18] The appellant deposes in his affidavit that he was interviewed by Sergeant Gil Dares of the Halifax Detachment of the R.C.M.P. on May 19th, 2005. Sergeant Dares apparently advised the appellant that he was investigating Constable P.L. concerning his inaction on the R.T. complaint of sexual assault in 1986. The appellant says that the interview with Sergeant Dares also included questions regarding a possible sexual relationship between B.T. and Constable P.L. and a similar relationship between him and the appellant in the 1980's.

[19] We have been advised by Helene Desgranges, counsel, that Constable P.L. is presently the subject of a disciplinary proceeding before the Royal Canadian Mounted Police Adjudication Board. We have been further informed by Stephanie Mulcaster, P.L.'s counsel, that the appellant is a witness in the internal investigation. A hearing date will be set in the near future but is unlikely to occur before the beginning of 2006. It is a reasonable inference that this disciplinary proceeding is related to P.L.'s alleged inaction in relation to R.T.'s complaint.

[20] The appellant's application requests "internal RCMP investigations looking into the actions of Corporal (as he is now) P.L.". However, it is apparent from the

submissions made to us that the focus of the request is the contents of any statements made by R.T. or B.T. to Constable P.L. and what Constable P.L. said and did in response and why. The particulars of the disciplinary process and the employment aspects of the matter do not at this stage appear relevant.

[21] I will, therefore, treat the application as being limited to: (1) any information in the control of the Crown or the R.C.M.P in relation to statements made by R.T. or B.T. about sexual abuse of them by the appellant to P.L. while P.L. was serving as a police officer at the Cole Harbour Detachment of the R.C.M.P.; and (2) any information in relation to P.L.'s response to any such complaints. In other words, what is sought is information about statements by two of the complainants in relation to their allegations against the appellant made to a member of the same RCMP Detachment that became responsible for the investigation or prosecution of the offences with which the appellant was charged.

[22] I would hold that items of information in relation to these matters are not records within the meaning of s. 278.1. They are records made by persons responsible for the investigation or prosecution of the offences. The material sought, narrowed in the way I have suggested, cannot realistically be said to be information in the hands of third parties either as defined in s. 278.1 of the **Criminal Code** or within the principles set out in **R. v. O'Connor**, [1995] 4 S.C.R. 411. The issue with respect to production of this material, in my view, is whether it falls within the Crown's disclosure obligations. I will address that issue later in my reasons.

3. Conclusion:

[23] Other than the material relating to Constable P.L., I conclude that the records sought are subject to the requirements of s. 278.5. (I repeat that in reaching that conclusion, I have assumed, as has the appellant, that there is a reasonable expectation of privacy with respect to this material. I have not, however, actually decided that in this case.)

VI. THIRD PARTY RECORDS ANALYSIS:

1. General principles:

[24] As noted earlier, s. 278.5 requires the appellant to establish three things: first, that a proper application has been made; second, that the material sought is likely relevant; and, third, that production is necessary in the interests of justice. I will address each in turn.

(a) Proper application:

[25] Sections 278.3 and 278.5 set out the proper method of applying for production of third party records, including provisions governing notice. I am satisfied that these procedural requirements, adapted to make them suitable to the appellate context, have been complied with. We have been advised that notice has been given to all the subjects and custodians of the records sought. We have received submissions from counsel for the RCMP, the Director of Policing and Victim Services, P.L. and R.T. in addition to those from the parties to the appeal.

(b) Likely relevance:

[26] In the trial context, the "likely relevance" threshold means that there is "... a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify." : **R. v. O'Connor**, **supra** at para. 22; **R. v. Mills**, [1999] 3 S.C.R. 668 at paras. 124 - 126. This threshold must be met by case-specific evidence or information and not by mere assertion: **R. v. L.(D.W.)** (2001), 194 N.S.R. (2d) 379 (N.S.C.A.) at para. 26. As Doherty, J.A. said in **R. v. Batte** (2000), 145 C.C.C. (3d) 449 (Ont. C.A.):

> [77] It will not, however, suffice to demonstrate no more than that the record contained a statement referable to a subject matter which would be relevant to the complainant's credibility. The mere fact that a witness has said something in the past about a subject matter on which the witness may properly be cross-examined at trial does not give that prior statement any relevance. It gains relevance only if it is admissible in its own right or has some impeachment value. In my view, the mere fact that a complainant said something about a matter which could be the subject of cross-examination at trial, does not

> raise a reasonable possibility that the complainant's statement will have some probative value in the assessment of her credibility.

[27] The appellant's application for production is brought in the context of a fresh evidence application on appeal, not at a trial. The "likely relevance" threshold set out in s. 278.5(1)(b) must, therefore, be understood and applied in the appellate context and, in particular, in the context of the principles relating to fresh evidence on appeal.

[28] The appellant advances fresh evidence for two purposes: first, to attack the findings of fact made at trial and second, to impugn the validity of the trial process. The rules relating to fresh evidence are different in these two settings and the "likely relevance" threshold must reflect that difference.

[29] A good deal of the fresh evidence advanced by the appellant is to impeach the credibility of the complainant, R.T., in order to show that his evidence ought not to have been relied on. Where fresh evidence is directed to factual issues which were decided at trial, it will only be admitted if, considered in its totality along with the trial evidence, it could reasonably be expected to have affected the verdict: **R. v. Palmer**, [1980] 1 S.C.R. 759; **R. v. Trotta** (2004), 23 C.R. (6th) 261 (Ont. C.A.) at para. 29; application for leave to appeal granted [2005] S.C.C.A. No. 287. It will also generally have to clear the "due diligence" requirement, although that may be relaxed in the interests of justice: **R. v. G.D.B.**, [2000] 1 S.C.R. 520 at paras. 17 - 21; **R. v. Lévesque**, [2000] 2 S.C.R. 487 at para. 15.

[30] Where, as here, production of third party records is sought for the purpose of aiding a fresh evidence application directed to an issue of fact decided at trial, the "likely relevance" threshold should be understood to mean that the material sought has a reasonable possibility of affecting the verdict or leading to additional evidence that has a reasonable possibility of affecting the verdict. This assessment must be made in the context of the trial record and the totality of the proposed fresh evidence. This material cannot be examined piecemeal. The due diligence requirement remains relevant, but because that requirement may be relaxed in the interests of justice, it cannot generally be considered absent an assessment of the probative force of the totality of the proffered fresh evidence.

[31] The appellant also advances evidence directed to the validity of the trial process. Specifically, he wants to show that the investigation was incomplete and biased, that there was late and inadequate disclosure by the Crown and that his trial counsel was ineffective. When the fresh evidence is directed to the validity of the trial process, the *Palmer* test cannot be applied strictly and the admissibility of the evidence depends on the nature of the issue sought to be supported by the fresh evidence: see, eg., **R. v. Wolkins** (2005), 229 N.S.R. (2d) 222 (C.A.) at para. 61.

[32] Where an appellant alleges that his trial counsel was incompetent, the fresh evidence will be received where it shows that counsel's conduct fell below the standard of reasonable professional judgment and a miscarriage of justice resulted: see **R. v. G.D.B., supra**. Where the fresh evidence is directed to showing that there should be additional disclosure, the appellant must show that there is a reasonable possibility that the material could assist in the prosecution of the appeal: **R. v. Trotta**, **supra**. Where fresh evidence is directed to show inadequate disclosure at trial, the appellant must show that there is a reasonable possibility that the failure to disclose affected the outcome or fairness of the trial: **R. v. Taillefer**, [2003] 3 S.C.R. 307 at para. 71.

[33] In the context of third party production sought in aid of fresh evidence directed to these issues, the "likely relevance" threshold should be understood to require demonstration that the material sought, viewed in light of the trial record, the proposed fresh evidence and the material supporting the application, has a reasonable possibility of meeting the admissibility requirements for fresh evidence applicable to the issue or issues to which it is directed.

(c) The interests of justice:

[34] The third requirement is that production to the Court be necessary in the interests of justice, having regard to "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 ... and any other person to whom the record relates ...": s. 278.5(2). Given the appellate context in which this application arises, reference to the "accused's right to make full answer and defence" must be understood to mean the appellant's opportunity to fully exploit his rights of appeal. Section 278.5(2) requires the following factors to be considered:

> (*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 interest in encouraging the obtaining of treatment by complainants of sexual offences; and
> (*h*) the effect of the determination on the integrity of the trial process.

2. Review of the Records Sought:

[35] In this section, I will apply the relevant legal principles to the records sought. As indicated earlier, I am satisfied that all persons to whom notice had to be given received notice and that the other procedural requirements of ss. 278.3(2) to (6), with some modifications required by the appellate context, have been met. No one suggested otherwise.

[36] The other two requirements, namely, likely relevance and the interests of justice must be assessed on a record by record basis. I turn, therefore, to consider each of the records sought in light of these requirements.

(a) Operation Hope file for the complainant, R.T. said to be in the custody of the RCMP and information about R.T.'s application for Criminal Injuries Compensation.

(i) Likely relevance:

[37] There is evidence in the record that R.T. spent time in the provincial youth facility at Shelburne. It is common knowledge in the province that there was a massive police investigation, known as Operation Hope, into allegations of widespread physical and sexual abuse of youth in that and other facilities. It is

also common knowledge that a large-scale compensation scheme was established for the victims of that abuse. There is no evidence, either at trial or in the rest of the material, that R.T. ever made such an application, although it is common knowledge that many former Shelburne residents did.

[38] The appellant says that he wants the Operation Hope file relating to R.T. for two reasons.

[39] First, he wants to learn whether R.T. applied to the compensation program established for the victims of institutional abuse. The appellant says this information may tend to support his theory that R.T. made false allegations against him for financial gain. For the same reason, he also wants production of the Victim Services file relating to R.T.'s application for criminal injuries compensation. The proposed fresh evidence (FE 14) indicates that R.T. was referred to Victim Services in both [...] and Nova Scotia when he made his complaint to the RCMP in [...] and that he applied for benefits to the Criminal Injuries Counselling Program in Nova Scotia. Counsel for the Director of Victim Services points out that the available remedies under the Victims of Crime legislation in Nova Scotia are limited to counselling services up to the amount of $2,000.00.

[40] In my view, the financial gain motive was never a live issue at the trial. There was brief reference in the evidence of R.T.'s mother at trial concerning a possible civil suit and compensation but, as the trial judge noted, there was no evidence before the court of any pending civil suit. The trial judge, in fact, prevented the appellant from testifying about any civil suit because there was no evidence before the court that any such suit existed.

[41] The records sought, read in the context of the proposed fresh evidence and the trial record, could not make this alleged "financial gain" theory a live issue on appeal. To the extent that the records from Operation Hope and the Victim Services Unit are sought to bolster this alleged motive, they do not pass the likely relevance threshold. In my view, the records sought, considered in the full context of the record and the other proposed fresh evidence, could not reasonably be expected to have affected the verdict at trial on this basis. Moreover, the Operation Hope material is sought based on the conjecture, unsupported by evidence, that R.T. may have applied for institutional abuse compensation. As

regards the Victim Services records, the disclosure material provides considerable information about R.T.'s application and the legislation sets out the very limited parameters of the possible award.

[42] There is no reasonable possibility that the material sought could either meet the conditions of admissibility for fresh evidence (in this instance, the evidence is directed to a factual issue decided at trial) or lead to the discovery of such evidence in relation to the alleged motive of financial gain.

[43] The appellant seeks the Operation Hope records on another basis. He says that he wants to ascertain the dates during which R.T. was in Shelburne. It is a reasonable inference that such information would be found in any Operation Hope records relating to R.T. Knowing those dates, he says, would bolster his submissions on appeal that the various witnesses were so confused as to the chronology of events that their evidence ought not reasonably to have been accepted. The dates R.T. was in Shelburne can be ascertained by objective evidence and serve as a virtually indisputable anchor for assessing the chronology of events.

[44] It is clear that issues of timing and confusion as to timing were very much before the jury at trial. It appears that a significant part of the appellant's argument on appeal is directed to show that the complainants, particularly R.T., were so confused as to relevant dates that their evidence could not reasonably have been accepted. A great deal of fresh evidence is proffered in support of this submission in various ways. The following brief summary of some of the proposed fresh evidence will help place this in context:

- FE 11 relating to the timing of the appellant living at a particular address;

- FE 18 the military investigation of the appellant which he says shows that R.L. and B.T.'s testimonies at trial did not conform to the statements they made to the military police in 1988.

- FE 2, 3, 4, 4A, 5, 6, 7 and 8 - information about sailing schedules for the appellant which, in conjunction with other evidence, he says undermines the dates testified to by R.T.

- FE 9 - a statement which the appellant says shows that a house described by R.T. was actually under construction in 1986

- FE 10 - showing the dates of the appellant's residence at a particular location which differ from the evidence of the complainants.

[45] In my view, it is reasonably possible that the dates which R.T. was actually in Shelburne could, in conjunction with the other proposed fresh evidence and the trial record, meet the test for admission of fresh evidence on appeal. I conclude that this single aspect of the Operation Hope record meets the likely relevance threshold.

(ii) The interests of justice:

[46] The next question is whether the production of this limited aspect of the Operation Hope record to the Court is necessary in the interests of justice, having regard to the required balancing of interests set out in s. 278.5 and specifically in light of the factors enumerated in ss. 278.5(2) (a) - (h). I would hold that the portion of the record, if any, which sets out the dates on which R.T. was in Shelburne should be produced for review by the Court.

[47] There seems to me to be only a very limited expectation of privacy with respect to that information. The revelation of the dates R.T. was in custody at Shelburne to three judges of this Court has virtually no potential to prejudice R.T.'s dignity and right to privacy or to discourage complainants from reporting sexual offences or seeking treatment. Production of this information is not in any way based on a discriminatory belief or bias. On the other hand, there is a reasonable possibility that this information could, in conjunction with other proposed fresh evidence, meet the requirements for admission as fresh evidence. The probative value of the totality of that evidence cannot be assessed piecemeal. Production to the Court would permit the potential effect of the fresh evidence to be assessed in its totality. In my view, inspection by the Court of the record to the extent that it sets out the dates R.T. was in Shelburne is necessary in order to assure that the appellant has a full opportunity to take advantage of his right of appeal.

[48] I would order that the part of the Operation Hope record relating to R.T., if any, which indicates the dates of his incarceration in Shelburne be produced to the court for review pursuant to ss. 278.5 and 683 of the **Criminal Code**. Pursuant to s. 278.5, I would impose the condition that only that part of the record which indicates the dates of R.T.'s incarceration in Shelburne be produced as this condition protects the interests of justice and, to the greatest extent possible, the privacy and equality interests of R.T.

(b) Motor vehicle licensing information for J.P. between the dates of January 1983 and December of 1988.

[49] J.P. was the complainant in the charge of which the appellant was acquitted. The appellant says that this record would tend to show that the police investigation was faulty and that the investigating officer misled the court.

[50] As for misleading the court, the submission is that the investigators claimed that these records were not available from the Motor Vehicle Branch when, in fact, they were. With respect to the allegations of faulty police investigation, the appellant says that the original information charged a sexual assault on J.P. between January of 1983 and December of 1988. J.P.'s evidence was that the assault occurred after he had driven to the appellant's residence. This, according to the appellant, would mean that J.P. would have been driving a car from the Annapolis Valley to Eastern Passage when he was between the ages of 10½ and 16½ years of age. The appellant says that at no time in the investigation was J.P. asked when he first obtained his license nor was a check made with the Motor Vehicles Branch to see when he had obtained his driver's licence. This, the appellant says, shows that the RCMP investigation "... was centred on proving guilt and not on uncovering the true facts ..." .

[51] In my view, the record sought does not pass the likely relevance threshold. Given the acquittal at trial on the count involving J.P., the record's only purpose is to feed an argument that the investigation in general was botched and biased. However, the factual basis of that submission (and I do not at this stage comment on its plausibility) could not be materially assisted by the dates on which J.P. had a driver's license. The dates of the offences as alleged in the Information, J.P.'s age, the availability of motor vehicle records and the investigative steps taken are all to be found either in other items of proposed fresh evidence or in the trial

transcript. The production of the motor vehicle branch record could add nothing of potential significance to the material already in the record.

[52] I would dismiss the application for production of this record.

(c) Dartmouth Atlantic Child Guidance Centre ("ACGC") record for R.T. for 1987 and in particular records relating to his consultation with Brian Crawford, Dr. Holt and Terry Tinglay.

[53] C.T., R.T.'s mother, testified at trial that she had taken R.T. to the Atlantic Child Guidance Centre and that as a result of the Centre's intervention, R.T. went to live with the appellant. She thought this had happened in 1986, but other evidence suggests that it was more likely in the summer of 1987. She said she sought the Centre's help because R.T. "... was acting kind of funny like, you know, and smoking and things like that". She believed that the appellant also had been seen at the Centre in conjunction with R.T.'s consultation and that the appellant thought that he "... could be instrumental in helping to regulate [R.T.] on a routine schedule and mak[ing] sure that he was getting to school and things like that." She said that she agreed that it would be a good idea if R.T. wanted to live with the appellant and that he did, in fact, move in with him.

[54] R.T. testified that before, during and after this time, the appellant was providing him with alcohol and sexually abusing him.

[55] The appellant's evidence was this. He purchased the residence in question in May of 1987. R.T.'s mother, C.T., asked him to attend the ACGC in relation to its work with R.T. and that he was asked to take R.T. into his home in order to give him some structure. According to the appellant, R.T. lived with him for about four weeks, from mid-June to mid-July of 1987. He denied providing alcohol to R.T. or sexually abusing him.

[56] In short, the Crown evidence on this point at trial tended to show that the appellant, while presenting himself to C.T. and ACGC as a concerned and supportive friend of the family, was, in fact, supplying R.T. with alcohol and sexually abusing him. R.T.'s moving in with the appellant made his abuse of R.T.

all the easier. On the other hand, the appellant's evidence was that he was simply trying to help a troubled boy and that he did not supply alcohol to, or sexually abuse him.

[57] In his affidavit in support of his application, the appellant deposes that R.T. was seen at the ACGC by, among others, Brian Crawford. The appellant has also filed R.T.'s initial police statement. In it, R.T. indicated that a social worker named Brian Crawford had been responsible for his file. R.T. said that he "might have" told Brian Crawford about the abuse by the appellant He added later in the statement that he did not know if he had ever told Mr. Crawford about the abuse and that he "... tried to be very open with [Mr. Crawford] but then again at that point [he] didn't really trust anybody."

[58] In summary, the material before the court suggests that there was a social work and psychological professional intervention with R.T., probably in 1987, and that it resulted in his going to live with the appellant at a time that it is alleged that the appellant was providing alcohol to and sexually abusing R.T.

[59] We have been advised that these records are now held by the Isaak Walton Killam Health Centre. A representative of the hospital attended the pre-hearing conference in chambers and indicated that the hospital did not intend to retain legal counsel or make submissions on the question of production of the records.

[60] This information was not sought by the appellant before or at trial. The involvement of the ACGC was, however, obvious from the disclosure material.

(i) Likely relevance:

[61] The appellant says that these records are relevant for two reasons. First, R.T. testified that the appellant was a source of drugs and alcohol for him. However, the appellant claims that the ACGC recommended that R.T. should live with him because R.T. had been drinking and doing drugs. That recommendation is inconsistent with any notion that the appellant was the source of the drugs and alcohol for R.T. Second, the appellant says that he wants to see if the records indicate any allegations of abuse by R.T.

[62] Has the appellant demonstrated by case-specific evidence, that the material sought, viewed in light of the trial record and the other proposed fresh evidence, has a reasonable possibility of meeting the admissibility requirements for fresh evidence in relation to the issue or issues to which it is directed?

[63] The records sought relate to professional assistance given to R.T. which apparently resulted in his going to live with the appellant. As noted, R.T. testified at trial that, both immediately before and after this professional intervention, the appellant was providing him with alcohol and sexually abusing him. It is a reasonable inference that the personnel of the ACGC were not aware of these allegations and, in fact, formed the view that the appellant would be a positive influence on R.T. It is also a reasonable inference that R.T. may have contributed to the ACGC personnel forming that view and, therefore, that R.T. did not disclose the alleged abuse to them and may have reported favourably on his relationship with the appellant.

[64] These circumstances combine, in my respectful view, to meet the likely relevance threshold in two respects. First, there is a reasonable possibility that these records, in combination with other proposed fresh evidence, will meet the admissibility requirements for fresh evidence directed to the validity of the verdict. Second, there is a reasonable possibility that these records will meet the admissibility requirements for fresh evidence in relation to whether the appellant had the effective assistance of counsel and, in particular, whether counsel's failure to obtain these records gave rise to a miscarriage of justice. In the circumstances of this case, the record provides more than a mere assertion that the contents of the record relate to the incidents which are the subject-matter of the proceeding and may disclose prior inconsistent statements by the complainant. Rather, these conclusions are reasonable inferences from the case-specific evidence filed in support of the application.

(ii) The interests of justice:

[65] The expectation of privacy with respect to records of this kind is high. Even its production to the Court for review gives rise to some potential prejudice to R.T.'s personal dignity and right to privacy. Access by the Court to these records might have some limited affect on the willingness of complainants to report sexual offences. However, production to the Court for review limits access to the records

to three judges who have already had access to a great deal of personal information about R.T. Given the obvious 'disconnect' between the results of the professional intervention and the allegations made by R.T. against the appellant relating to the same time period, the potential probative value of the record and its importance to the full exercise of the appellant's right of appeal may be considerable. This assessment of the potential importance of the record to the appeal – and I emphasize that I am speaking only in terms of **potential** importance – is not based on any discriminatory belief or bias. There is no suggestion that the intervention to which the record relates was for the purpose of treating any alleged sexual abuse. Therefore, production of the record to the court for review could not adversely affect society's interests in encouraging complainants of sexual offences to seek treatment.

(iii) Conclusions:

[66] I would order the production of all records in the possession or under the control of the Isaak Walton Killam Health Centre relating to the ACGC intervention in relation to R.T. in 1986 and 1987 which resulted in R.T. going to live with the appellant to the Court only, for review. I would order a legible copy of the original record to be produced rather than the original.

VII. PRODUCTION OF OTHER MATERIAL:

1. Statements allegedly made by R.T. and B.T. to Constable P.L. and his response:

[67] I have previously indicated that material in the possession of the R.C.M.P. concerning statements made by R.T. and B.T. to P.L. and information concerning his response to such statements do not constitute records within the meaning of s. 278.1 of the **Code** or third party records within the principles set out in **R. v. O'Connor**, **supra**. Records relating to the employment aspects are not relevant.

[68] The question is whether this material falls within the Crown's disclosure obligation, either at trial or on appeal. Although the information sought is not in the possession of the Crown, it appears to be in the possession of the investigating police force. It is, therefore, deemed to be in the possession of the Crown because the Crown has an obligation to obtain information that ought to be disclosed from

the police and the police have an obligation to provide such information to the Crown: see **R. v. L.A.T.** (1993), 84 C.C.C. (3d) 90 (Ont. C.A.) at 94; **R. v. W.J.V.** (1992), 72 C.C.C. (3d) 97 (Nfld. C.A.) at 109; **R. v. Bottineau**, [2005] O.J. No. 4034 (S. Ct. Jus.). At issue, therefore, is whether this material triggers the disclosure obligation.

2. Disclosure on appeal:

[69] Disclosure issues may arise in two ways on appeal. First, the appellant may argue, as the appellant here apparently intends to do, that the Crown failed to make timely disclosure at trial. Second, the appellant may seek to enforce the Crown's obligation of continuing disclosure pending the hearing of the appeal.

[70] It does not appear controversial that the Crown's disclosure obligations continue through the appellate process: **R. v. Trotta**, **supra** at para 22. The threshold for ordering disclosure on appeal requires the appellant to show that the material sought has a reasonable possibility of assisting in the prosecution of the appeal. Doherty, J.A. explained this requirement in **Trotta** at para. 25:

> ¶ 25 ... To obtain production, the applicant must first demonstrate a connection between the request for production and the fresh evidence he proposes to adduce. The applicant must show that there is a reasonable possibility that the material sought could assist on the motion to adduce fresh evidence. By assist, I mean yield material that will be admissible as fresh evidence, or assist the applicant in developing or obtaining material that will be admissible as fresh evidence. The applicant must next demonstrate that there is some reasonable possibility that the evidence to which the production request is linked may be received as fresh evidence on appeal. Unless the appellant can make both links, there is no reasonable possibility that the material sought could assist in the prosecution of the appeal and consequently, no reason for this court to require the Crown to disclose it.
>
> (Emphasis added)

[71] As this passage makes clear, the applicant does not have to show that the material sought will, itself, be admissible evidence. This is consistent with general

disclosure principles: see, e.g., **R. v. Bottineau**, **supra** at para. 31 and authorities referred to therein.

[72] A somewhat different analysis applies where the appellant alleges a failure of the Crown to disclose at trial. In that situation, the burden on the appellant is to show that there is a reasonable possibility that the failure to disclose affected the outcome or the overall fairness of the trial: **Taillefer, supra** at para. 71. The diligence of defence counsel in seeking disclosure is an element of considering whether the trial was unfair: **R. v. Dixon**, [1998] 1 S.C.R. 244 at para 37.

3. Factual Context:

[73] The investigation leading to the charges against the appellant started when R.T. contacted the R.C.M.P. in [...], [...]. He made a lengthy statement to the police there in March of 2000. In that statement, R.T. said that years before, he had complained about sexual abuse by the appellant to Constable P.L. who, it seems, was at the time a member of the Cole Harbour Detachment of the RCMP. R.T. placed this complaint in the autumn before he went to Shelburne. There is some evidence in the record to support the conclusion that R.T. went to Shelburne in December of 1987.

[74] R.T. stated that Constable P.L. would come over and park in the driveway of his mother's house "... just to try to get [him] you know labeled as you know a rat or something like that. Like he would purposely come over ...". R.T. said that he told Constable P.L. that the appellant was sexually abusing him and the Constable told him that he should simply forget it and move on with his life. As far as R.T. knew, the Constable did not open a file or write anything down.

[75] R.T. indicated that the Constable "hung around" with his brother, B.T., and he thought that his brother had told Constable P.L. as well. R.T. also said that he had recently been speaking with his mother and she told him that Constable P.L. had also told her "just to leave it alone because it would only cause more problems ..." for R.T. R.T. believed he was 13 at the time he made this disclosure and that it was in the autumn before he was sent to Shelburne.

[76] At the trial, R.T. was cross-examined about his disclosure to Constable P.L. He indicated that he came back from [...] after the school year in 1989 or '90 and

that he made a complaint to Constable P.L. after his return. His evidence was that Constable P.L. was in uniform and that he had attended regularly at the house to park in the driveway for a couple of hours a day on a regular basis. R.T. said that he twice told him about the abuse at the appellant's hands and that Constable P.L. specifically said not to do anything about it, that disclosure would ruin his life. He also testified that he was not sure whether his mother became aware of this conversation or not.

[77] R.T.'s brother, B.T., testified at trial that he was a friend of Constable P.L. and knew him fairly well. He said that he had never disclosed the abuse to Constable P.L.

[78] The appellant also referred to Constable P.L. in his trial evidence, testifying that after December of 1989, he developed a friendship with him.

[79] The alleged disclosure by R.T. to Constable P.L. was noted in the disclosure material and there was apparently some effort on the part of the appellant's trial counsel to contact him shortly before trial. There is in the record a letter from defence counsel to the appellant on November 26th, 2003, (the trial began on December 1st), indicating that the Crown had undertaken to provide him that day with Constable P.L.'s phone number. At trial, defence counsel referred to the complaints to P.L. to attack the complainants' credibility, saying to the jury, "Do you really believe that a uniformed member of the R.C.M.P. is going to ... hear two complaints ... of sexual assault and not do anything?

[80] The appellant has pursued this aspect of the matter in preparing his appeal. After further digging and prodding by the appellant, he received confirmation from the Crown in June of 2005 that Constable P.L. had graduated from the R.C.M.P. Depot in Regina in May of 1989 and had started at the Cole Harbour Detachment around June of 1989.

[81] On the face of the record we have, there are a number of aspects of this incident which give rise to concern. R.T.'s first police statement speaks of one conversation with P.L. in the fall of 1987, a conversation of which his mother was aware. Moreover, R.T. thought that his brother, B.T., had also made disclosure to the same officer. R.T.'s trial evidence spoke of two conversations with the officer, not one, probably in 1989 or 1990, not 1987 and about which, contrary to his

initial statement, his mother was not aware. B.T.'s trial evidence was that he made no disclosure to Constable P.L.

[82] As mentioned earlier, the nub of what the appellant seeks is information relating to a complaint against him allegedly made by one (or perhaps two) of the complainants in this case to a member of the R.C.M.P. stationed in Cole Harbour, the Detachment which subsequently became responsible for the investigation of the appellant on these charges.

[83] The material is claimed to be relevant in two ways. First, the appellant submits that what R.T. told Constable P.L. and what Constable P.L. did in response and why are directly relevant to an assessment of R.T.'s allegations against him. Second, the appellant submits that his trial counsel was aware of the alleged statement by R.T. to Constable L.F. for at least a year prior to trial, but failed to take appropriate steps to obtain all information in the possession of the police about this matter. As a subsidiary point, the appellant also complains about the late disclosure (that is, on November 26th, 2003, only a few days before the trial started) of Constable P.L.'s contact information, claiming that the Crown's disclosure obligation extended to the statements allegedly made to Constable L.F. while he was a member of the Cole Harbour Detachment.

[84] In my view, these points examined in the context of the trial record and the other proposed fresh evidence, meet the requirements for production to be ordered in relation to an alleged failure to disclose and also in relation to the Crown's ongoing disclosure obligation pending the appeal. The information sought relates to statements allegedly made by one, and possibly two, of the complainants to a police officer in the detachment which investigated and laid the charges. The statements allegedly relate to the subject-matter of those charges. In my view, there is a reasonable possibility that the information sought could assist in the prosecution of the appeal in the sense that it might afford admissible fresh evidence or lead to admissible fresh evidence in relation to the appellant's allegation of the Crown's failure to disclose at trial or to his submissions in relation to the effective assistance of counsel at trial.

[85] Crown counsel says that the disclosure obligation should not apply because there was a "different kind of relationship with these individuals than ... an ordinary investigating police officer would have ..." and that "... it is not clear

whether it was in his personal capacity or his investigating capacity when these matters were disclosed to him ...". However, the record supports the view that one or two of the complainants complained about alleged criminal offences to a uniformed police officer working in the detachment which laid the charges. In my view, the burden is on the Crown to show why its disclosure obligation does not apply to some or all of the material sought. Vague suggestions of "different relationships" or speculation that P.L. was acting in a personal capacity do not discharge that burden.

[86] However, as pointed out by counsel for the R.C.M.P. and P.L., disclosure of this information or some of it may be prevented by provisions of the Federal **Privacy Act**, R.S.C. 1985, c. P-21 and/or the **Royal Canadian Mounted Police Act**, R.S.C. 1985, c. R-10. In my view, the proper way for issues of that nature to be resolved is for the R.C.M.P. and the Crown to disclose what, in their view, can be lawfully disclosed and to make specific claims of exemption from disclosure with respect to specific items.

[87] I would order, therefore, that all information in the possession of the R.C.M.P. concerning allegations of sexual abuse by the appellant made by R.T. and B.T. to Constable P.L., as well as all information in the possession of the R.C.M.P. concerning Constable P.L.'s actions, if any, in response to those allegations be disclosed subject, of course, to specific claims that specific pieces of information are not permitted to be disclosed by reason of statute or other recognized grounds for non-disclosure.

VIII. THE PROCESS TO BE FOLLOWED FROM HERE:

[88] The orders I propose may necessitate further applications to resolve various issues in relation to disclosure and production. I would advance the following process and timetable:

1. The material ordered to be produced to the Court for review (that is, the Operation Hope and ACGC material) shall be provided to the Registrar of the Court in sealed envelopes no later than December 1st, 2005. If, however, there are any issues to be resolved in terms of the scope or mechanics of the required production, an appropriate application should be brought before the panel at the conclusion of

the argument of the appeal on February 8, 2006. Such applications, if any, must be filed with the Registrar by December 1, 2005.

2. The issue of what, if any, of this material should be produced to the appellant will be reserved until after the appeal has been argued on its merits.

3. The material ordered to be disclosed (that is, the P.L. material) will be provided to the appellant no later than November 14, 2005. If, however, there are issues concerning the scope of the required disclosure or any other issues that need to be resolved in relation to it, an appropriate application should be made to the panel at a date and time to be established by the Registrar. Such applications, if any, are to be filed no later than November 14th, 2005.

4. If the appellant seeks to have any of the disclosed material admitted as fresh evidence, he should file a supporting affidavit and the material advanced as fresh evidence within one week of receiving it.

5. As indicated earlier, the Court's decision on the fresh evidence application will be reserved until after the appeal is heard on the merits. While it has been necessary to refer to the proposed fresh evidence in the course of my reasons, nothing in them in any way addresses the question of whether the conditions of admissibility, including the due diligence requirement, are met. Those issues are reserved and will be addressed after the Court has heard the arguments on the appeal.

6. At the conclusion of the oral argument of the merits of the appeal, the Court will reserve judgment on the appeal and conduct an *in camera* hearing on the issue of whether the records ordered to be produced for review by the Court should be produced to the appellant. (This assumes there are no further issues to be reviewed in relation to production to the Court.) Counsel for the R.C.M.P., R.T. and the Isaak Walton Killam Health Centre will be entitled to make submissions at this hearing along with the Crown and appellant. If the Court is of the view that any third party record material should be

produced to the appellant, the Court will so order and provide an appropriate opportunity for additional fresh evidence applications and additional submissions on the merits of the appeal in light thereof.

IX. DISPOSITION:

[89] I would order the following records be produced for review of the Court under ss. 683 and 278.5 of the **Criminal Code**:

1. That part of the Operation Hope record relating to R.T., if any, which indicates the dates of his incarceration in Shelburne. Pursuant to s. 278.5, I would impose the condition that only that part of the record which indicates the dates of R.T.'s incarceration in Shelburne be produced. A legible copy of the relevant part of the record will be delivered in a sealed envelope to the Registrar of the Court.

2. All records in the possession or under the control of the Isaak Walton Killam Health Centre relating to the ACGC intervention in relation to R.T. in 1986 and 1987 which resulted in R.T. going to live with the appellant. A legible copy of the original record will be delivered in a sealed envelope to the Registrar of the Court.

[90] Pursuant to s. 683 of the **Criminal Code**, I would order disclosure of the following material to the appellant:

1. All information in the possession of the R.C.M.P. concerning allegations of sexual abuse by the appellant made by R.T. and B.T. to Constable P.L. as well as all information in the possession of the R.C.M.P. concerning Constable P.L.'s actions, if any, in response to those allegations be disclosed subject, of course, to specific claims that specific pieces of information are not permitted to be disclosed by reason of statute or other recognized grounds for non-disclosure.

[91] The procedure to be followed is set out in para. 86 of my reasons.

Cromwell, J.A.

Concurred in:

Saunders, J.A.

Fichaud, J.A.