PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v. A.B.*, 2022 NSPC 19

Date: 20220603
Registry: Port Hawkesbury

Between:

Her Majesty the Queen

v.

A.B.

Third-party records application

Judge:	The Honourable Judge R. van der Hoek
Heard:	May 24, 2022, in Port Hawkesbury, Nova Scotia
Decision	May 24, 2022
Charge:	278.9, Criminal *Code of Canada*
Counsel:	J. Daniel MacDonald and Lucas Fraser (articled clerk), for the Applicant Sandee Smordin, for the Crown Nadia Shivji, on behalf of the Complainant

PUBLICATION BAN PROVISION:

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

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

Publication prohibited

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

. . .

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

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

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

By the Court:

Cases Considered: *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. W.B.*, 2000 CanLII 5751 (ON CA) (indexed as *Batte*); *R. v. O'Connor* [1995] 4 S.C.R. 411; *R. v. Q.F.*, 2022 ONCJ 22; *R. v. EW*, 2020 NSSC 191; *R. v. G.J.S.*, 2007 ABQB 757; *R. v. Fones*, 2009 MBQB 65; *R. v. L.M.*, 2014 ONCA 640; *R. v. REW* 2009 NSSC 286; and *R. v. J.F.*, 2019 ONSC 2626

Introduction:

[1] This is the decision in a third-party records application seeking production of counselling documents in possession of a school guidance counsellor. On March 24, 2022, the Court dismissed the application with written reasons to follow. Having taken into account the interests of justice and the right to privacy of the person to whom the record relates, the Court orders, pursuant to s. 278.9 of the *Criminal Code*, that this decision may be published subject my careful editing to remove identifying information.

[2] Within an hour of an April [date] meeting and disclosure to the school guidance counsellor, police arrived and took the complainant's statement. The

Applicant was charged with four counts of sexual interference and three counts of forcible confinement.

[3] The Applicant argued reliability and credibility are central to the Crown's case and the Applicant's defence. As such, inconsistencies apparent in the complainant's first statement to police and a second provided some time later, render the counselling record necessary to clarify which account, in those police statements, is correct. The records sought are said to relate to the initial disclosure and any prior allegations of same to the counsellor over the course of six months.

[4] There is no foundation to conclude counselling meetings occurred either before or after the disclosure date, and it was speculative to conclude the counsellor took notes detailing the offences before contacting police. At trial, the complainant can be cross examined on the differences in her two police statements. The Applicant failed to satisfy the first stage of the analysis under the s. 278 regime- that production of the record for judicial review is likely relevant to an issue at trial, or the competence of a witness to testify, thus rendering such a review necessary in the interests of justice. Only speculation supports the existence of a record and a conclusion anything in such a record would meet the "likely relevance test." A judicial review is not necessary in the interests of justice.

The Law:

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

[6] The objective of the regime aims to strike an appropriate constitutional balance between protecting the accused's right to a fair trial with the privacy and equality rights of a complainant. At the first stage, the Court determines whether the record holder should produce any of the records sought for judicial inspection: s. 278.5. At the second stage, the Court determines whether any of the documents reviewed by it should be provided to the defence: s. 278.7.

[7] Before embarking on the two-step process, the Court must first determine whether the documents sought are a record to which an expectation of privacy attaches. The parties agree counselling notes are 'records' defined in s. 278.1 of the *Criminal Code* as "any form of record that contains personal information for which there is a reasonable expectation of privacy" including "medical, psychiatric,

therapeutic, counselling…." The Crown's concession does not, however, extend to accepting such a record exists.

[8] At the threshold stage the Applicant must demonstrate, pursuant to s. 278.5(1)(b), the likely relevance of the record to an issue at trial or the competence of a witness to testify. Likely relevance is demonstrated by evidence, not by speculation or assumptions: *R. v. W.B.*, 2000 CanLII 5751 (ON CA). The likely relevant standard is not a high one, but there must be a reasonable possibility the information sought is logically probative to an issue at trial including credibility of a witness: *R. v. O'Connor* [1995] 4 S.C.R. 411 and *R. v. Mills*, *supra.* The second part of the consideration includes establishing production of the record is "necessary in the interests of justice": s. 278.5(1)(c)

[9] In aid of meeting the test, an applicant can rely on the grounds set out in s. 278.3(4) CC, including "(a) that the record exists" or "(e) that the record may relate to the credibility of the complainant", but is prevented from relying on the bare assertion of those grounds. Instead, there must be a basis to support the assertions. The "mere assertion that a record is relevant to credibility is not enough…. [a]n accused must be able to point to something in the record adduced on the motion that suggests the record contains information which is not already available to the defence or has potential impeachment value: See: *R. v.*

W.B., *supra*, at paragraph 75 ; See: *R. v. Mills*, *supra*, at paragraph 120", and *R. v. Q.F.*, 2022 ONCJ 22.

[10] Section 278.3(4) aims to "prevent speculative and unmeritorious requests for production", *Mills, supra,* at para 118.

[11] These applications are held *in camera*, with proper notice to the complainant whose interests may be protected by submissions of her counsel: s. 278.4.

Background Details:

[12] On April […], 2021, the complainant disclosed a sexual assault to the school guidance counsellor. The complainant is said to have disclosed being sexually assaulted by the Applicant on multiple occasions- between four and six times. The counsellor reported same to the RCMP who arrived at the school within 50 minutes and obtained an initial statement from the complainant. The Applicant submits the police statement recounted five separate incidents of sexual touching as well as confinement.

[13] On […], 2021, the complainant provided a second statement to police. Following review of the two police statements, the Applicant submits they contain contradictory information.

[14] The complainant was also said to have told somebody that there were previous incidents involving the Applicant and potentially criminal sexual acts not the subject of the charges before the Court. The Complainant refused to provide a third statement to police.

[15] The Applicant seeks records prepared by the guidance counsellor during a six-month period that envelopes [the date of the April disclosure to the counsellor].

Position of the Applicant:

[16] The Applicant submitted *Draft Nova Scotia Guidelines for School Counselling Records and Standards of Practice: updated December 2014*. The document contains a section supporting notetaking by counsellors. As such, the Applicant posits the school board encourages notetaking and so it is reasonable to conclude the counsellor prepared written or digital notes documenting any meeting(s) with the complainant. Since the onus on the Applicant is not onerous, and takes into consideration the Applicant has not seen the requested records, the burden has been met to establish a record exists.

[17] The Applicant says records in possession of the counsellor will contain information of likely relevance for the following reasons: the record contains details related to the allegations against the Applicant and, due to the

inconsistencies in the two police statements, there is a reasonable possibility the records contain details related to the allegation that will not otherwise be discoverable to the defence counsel. Finally, the records *may* expose prior inconsistent statements related to the allegations, and quite possibly even a third version of events. The difference in the two police statements include: touching over v. under clothing, the location of assaults, the number of assaults and their order, stating a friend approached the area of an assault v. not mentioning the friend.

[18] In aid of this argument, the Applicant points to a few considerations: the disclosure to the guidance counsellor precipitated police involvement; the necessity to review the guidance counsellor's record to determine a "true version of events", and that the complainant stated, although not apparently in a police statement, that there were previous incidents of the Applicant pressuring her to have sex and sending photographs.

[19] The Applicant concedes there may well be nothing in the records of the guidance counsellor about past allegations of sexual misconduct however only the person who wrote the records knows what they contain. This is not a fishing expedition because specific evidence believed to be contained in the record has

been identified- the allegations of sexual misconduct reported by the complainant to police.

[20] While focused on obtaining the records for the purpose of testing the complainant's credibility, the Applicant argues the "necessary to the interest of justice" aspect of the test is met because the information will put the Applicant in the best possible position to make full answer and defence; there is probative value that outweighs any prejudicial effect to the complainant; disclosure of the records is in the interests of the administration of justice and the Applicant's right to a fair trial; the complainant's expectation of privacy in the record is outweighed by the Applicant's interest in making full answer and defence; production of the record is not premised on any discriminatory belief or bias; the potential prejudice to the complainant's dignity, privacy or security of the person may be reasonably overcome by procedures inherent to the trial process, such as a ban on publication, as well as other conditions outlined in the *Criminal Code*; and the integrity of the trial process would be compromised if evidence which may disclose information is withheld from the Applicant.

Position of the Crown:

[21] The Respondent Crown argues the application has not been brought in accordance with s. 278.3. It fails to set out the particulars of the records in possession and the request is much too broad to be considered particularized. Only speculation supports the application, for example the Applicant assumes draft *Guidelines* from 2014 encouraging notetaking were implemented and followed by this particular school and this particular counsellor. It is also speculative to assume any record created by the counsellor contained details of the complainant's disclosure. There is simply no support for such conclusions.

[22] The Crown says the words used in Applicant's brief support the speculative nature of the application and the arguments are tantamount to an admission the application lacks the evidentiary foundation required for such applications. At paragraph 24 of the Applicant's Brief- "not even sure if the records being sought contain any information about the allegation to which [the Applicant] is facing", and "it may very well be the case that the records in the hand of [counsellor], do not contain the past allegations of sexual misconduct perpetuated on the complainant by [AB] or detail the allegations…". The latter refers to speculation a record could contain a third version of events, also not a viable argument when the defence has means to raise that possibility as a triable issue by simply comparing the two police statements in aid of impeaching the credibility of the complainant at

trial. As such, the Applicant has failed to confirm the sought records exist and contain the subject matter of the allegations so as to be considered likely relevant to an issue at trial. [Section 278.3(3)(b)]

[23] Finally, with respect to the Applicant's argument of "likely relevant", the Respondent Crown relies on *Mills* and *O'Connor* which state, likely relevance requires "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." Since any one of the factors contained at ss. 278.3(4)(a)-(k) are insufficient on their own to establish likely relevance and the Applicant has not been able to point to any case specific evidence or information to support any of the assertions listed, likely relevance is not made out.

[24] The parties relied on a number of cases in support of their respective arguments. The Court will refer to a few and consider their applicability to the instant application.

Cases relied upon by the Parties:

(a) Counselling prior to police statements:

[25] *R. v. W.B.*, 2000 CanLII 5751 (ON CA): This case, also known as *Batte*, addressed a situation somewhat similar to the instant application. It is worthwhile to reference a large section of the decision of Doherty J.A. at paras. 69-79:

> [69] There was also no evidence that the counselling process precipitated or contributed to D.S.D.'s decision to go to the police. The evidence was to the contrary. D.S.D. went to the police and gave them a statement some five months before she began counselling. Furthermore, there is no evidence that the counselling process played any role in reviving, refreshing or shaping the memory of D.S.D. Finally, there is no evidence that D.S.D. suffered from any emotional or mental problem which could have any impact on her reliability or veracity, and the nature of the allegations themselves did not suggest any such problems.
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> [70] The appellant's position with respect to the likely relevance of the records must come down to this. The records contained statements made by D.S.D. that referred to the alleged abuse and to matters affecting her credibility. Anything said by D.S.D. about the abuse or about a matter which could affect her credibility passes the likely relevance threshold, even absent any suggestion that the statements differ from or add anything to the complainant's statement and testimony at the preliminary hearing.
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> [71] If the likely relevance bar is that low, it serves no purpose where the records relate to counselling or treatment connected to allegations of sexual abuse. It is impossible to imagine that such records would not contain references to the alleged abuse or matters that could affect the credibility of the complainants' allegation of abuse. In my view, the mere fact that a complainant has spoken to a counsellor or doctor about the abuse or matters touching on the abuse does not make a record of those conversations likely relevant to a fact in issue or to a complainant's credibility.
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> [72] I would hold that where confidential records are shown to contain statements made by a complainant to a therapist on matters potentially relevant to the complainant's credibility, those records will pass the likely relevance threshold only if there is some basis for concluding that the statements have some potential to provide the accused with some added information not already available to the defence or have some potential impeachment value. To suggest that all statements made by a complainant are likely relevant is to forget the distinction drawn by the majority in O'Connor, between relevance for the purposes of determining the

Crown's disclosure obligation and relevance for the purposes of determining when confidential records in the possession of third parties should be produced to a judge.

[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.

[76] The requirement that an accused be able to show that the statements contained in the record have some potential to provide added information to the accused or some potential to impeach the credibility of the complainant is not an onerous one. For example, in this case, the appellant had the initial statement given to the police by D.S.D. before she commenced therapy. He also had a transcript of her lengthy examination- in-chief and cross-examination at the preliminary inquiry taken after she commenced therapy. Had counsel shown material differences between the initial statement and the preliminary inquiry testimony, these differences coupled with the fact that the complainant spoke to a therapist about these matters between the giving of the statement and giving any evidence at the preliminary inquiry may have established that statements she made to the therapist touching on matters relevant to her credibility had potential impeachment value and were, therefore, likely relevant. Similarly, had the appellant been able to produce evidence suggesting a connection between the evidence given by the complainant at the preliminary inquiry and the sessions with her therapist, this would also have established potential impeachment value.

[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. [Emphasis added]

[26] *R. v. EW* 2020 NSSC 191: The Applicant argues the court ordered production because the complainant's report to police directly followed counselling by a guidance counsellor. Disclosure was deemed necessary to make full answer and defence and to allow the applicant to know how and why police became involved in the investigation.

[27] The Crown argues the case is distinguishable because it involved alleged historical sexual abuse. The counselling had taken place for well over a year before the police became involved and as such, Arnold J. granted the application stating that knowing how and why the police came to lay the charges was a significant factor in reaching his conclusion. Distinguished on its facts, the Crown points to no evidence the complainant had ever met with the counsellor prior to the date of the disclosure. The police became involved within an hour of the disclosure and, as a result, the applicant knows precisely how and why the police came to lay charges.

[28] After reviewing *EW*, I note Arnold J. described counselling that predated police involvement as a "very discrete point." It appears the decisions in *R. v. G.J.S.*, 2007 ABQB 757 and *R. v. Fones*, 2009 MBQB 65, involving historic sexual assaults and subsequent counselling prior to a report to police, were very persuasive in supporting the decision in *EW* to order production. While it may be attractive to conclude *EW* and *WB* generally support production based on

counselling preceding police involvement, that is not the *ratio* of these cases and would, in any event, position the "likely relevance bar" too low.

[29] Applying the analysis in the foregoing cases requires much more than considering the mere existence of a conversation between a complainant and a counsellor. In the instant case, the complainant disclosed to the guidance counsellor who immediately contacted police who attended within 50 minutes to take a statement. As such, the nature of the "counselling relationship" may be more accurately described as a guidance relationship because the complainant was guided directly to the police. There was no support on the application for a "counselling process" and no evidence such a process "played any role in reviving, refreshing or shaping" the complainant's memory. Likewise, there was no evidence the complainant suffered from problems that could impact her veracity or reliability.

Inconsistencies:

[30] *R. v. L.M.*, 2014 ONCA 640: The Court concluded the test was not met where the appellant was unable to point to anything other than inconsistencies between the complainant's statement to the police and her preliminary hearing testimony- "one of the assertions which will not suffice on its own to establish the

record is likely relevant is that the record may disclose a prior inconsistent statement of the complainant" (para 38). While accepting some inconsistencies existed between those two statements, the Court concluded they were neither significant nor material to the substance of the allegations, noting there was an opportunity at trial to cross examine the complainant on the inconsistencies. It is useful to consider the inconsistencies as they are not dissimilar to the ones raised in the instant application. At para. 40:

> [40] The appellant's argument for the production of the third-party records is anchored on the basis that there were significant and material inconsistencies between the complainant's original videotaped statement and her testimony at the preliminary inquiry. In particular, the appellant states that the complainant's evidence changed drastically in relation to the following:
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> (1) her account of how the first sexual contact in the log house occurred (*i.e.*, the appellant coming into the complainant's room, rather than her going into his);
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> (2) the complainant saying that the first time the appellant attempted intercourse was "maybe a week", or up to "three weekends" after the first sexual contact, and that intercourse occurred in the log house, rather than a year or so later when they moved to the brick house as stated in the police interview; and
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> (3) the complainant's description of the belt used to tie her up as being "rubbery" as opposed to having spikes on it. [page267]

[31] The Applicant argues *LM* is distinguishable from the instant case as it related only to inconsistencies between a statement and preliminary inquiry testimony and the evidentiary inconsistencies related only to timing and venue issues, not to the substance of the allegations. He says the inconsistencies before this Court involve matters of substance with respect to the alleged offences, and in

particular whether touching took place over or under the complainant's clothing and the timeline. With respect, I disagree. Touching under and over clothing for an alleged sexual purpose while different in description, is not particularly different with respect to effect. I prefer the Ontario Court of Appeal's approach to such issues and find the noted differences are "neither significant nor material to the substance of the allegations." The differences are contained in the two police statements and producing a record of the counsellor will not serve to assist in determining truth. Rather, the opportunity is already available to challenge credibility using the two police statements at trial.

[32] Ultimately the Ontario Court of Appeal supported the trial judge's conclusion the application in *LM* was "based on the hope that the material might contain a prior inconsistent statement of some kind", was speculative, and tantamount to a fishing expedition.

[33] *R. v. REW* 2009 NSSC 286: The Applicant argues this decision supports threshold disclosure where there are inconsistencies in the evidence going to the complainant's credibility. Justice Scaravelli ordered threshold disclosure where a report from a social worker contained the complainant's denial of any sexual contact with the accused. The court concluded there must have been a material

difference between that statement and the report made to the Department of Community Services that led to the police investigation and charges.

[34] The Respondent Crown argues the matter is distinguishable because there is no evidence a record was created, nor the existence of differences between the record and that contained in either police statement.

Conclusion:

[35] While the standard for meeting the first stage is not high, having reviewed the arguments of the Applicant and the Respondent Crown as well as the case law, the Court finds the Applicant has not provided case specific evidence and did not lay a proper foundation for this application. Records precipitating police involvement, standing on their own, are not enough. In this case the disclosure to the counsellor led to immediate attendance by police who took a statement from the complainant.

[36] The Court does not accept the existence of draft *Guidelines* are enough to support a conclusion this counsellor took notes of that particular meeting. Unlike other applications, this is not one where a complainant, a police statement, or a preliminary inquiry transcript report the existence of notes taken at a counselling meeting. The Applicant has failed to point to something in the record adduced on

the motion that suggests such a record contains information which is not already available to the defence or has potential impeachment value. The ability to challenge the complainant's credibility remains viable and arises from the purported differences between the two police statements. There is no impediment to impeachment occurring at the trial.

[37] The Court agrees with the Crown, an assertion the complainant did not provide a third statement to police after telling someone about other incidents, does not support the application. Rather, the topic was speculative in the face of a lack of concession from Crown Counsel that it actually occurred. Ultimately, credibility of a complainant cannot be attacked on the basis of failing to provide disclosure about allegations not before the Court and does not form the basis to produce records.

[38] Likely relevance has not been established and the Court does not accept any purported record made by the counsellor should be produced at the threshold stage. The Court relies heavily on the decisions of *Mills* and *Batte*. There is no basis to conclude such a record will provide added information not already available to the defence given the immediate report to police. As noted by Doherty J.A. at para. 72, in *Batte*:

> [72] I would hold that where confidential records are shown to contain statements made by a complainant to a therapist on matters potentially relevant to the complainant's credibility, those records will pass the likely relevance threshold only if there is some basis for concluding that the statements have some potential to provide the accused with some added information not already available to the defence or have some potential impeachment value. To suggest that all statements made by a complainant are likely relevant is to forget the distinction drawn by the majority in O'Connor, between relevance for the purposes of determining the Crown's disclosure obligation and relevance for the purposes of determining when confidential records in the possession of third parties should be produced to a judge.

[39] I agree this is “a fishing expedition” that supposes the complainant’s guidance counsellor took notes and the complainant described in detail the allegations before the Court and beyond. That is not enough to ground likely relevance and the bald assertions of the Applicant do not meet the test. Ultimately the application asks the Court to review counselling records to see if there is anything of relevance in them. Likely relevance must be established prior to a judicial review of a record, not as a result of reviewing the record. (See *R. v. J.F.*, 2019 ONSC 2626 at paragraph 34)

[40] The privacy right in the records is strong and the probative value of the records, if any, is extremely low. I find that non-disclosure of the records will not prejudice the accused’s right to a full answer and defence. Guidance counselling records have a very high expectation of privacy for students. Production of these records, even to the Court, is a significant intrusion into the privacy and personal security of a complainant and could undermine society’s interest in encouraging

the reporting of sexual offences and discourage students from obtaining guidance for such issues in the school setting.

[41] For the reasons set out, I am not satisfied the Applicant has established that the records exist nor that they are likely relevant to an issue at trial or the competence of a witness to testify, nor is production of the records necessary in the interests of justice.

[42] The application is dismissed. Should more information become available, a similar application may be brought in future.

[43] Judgment accordingly.

van der Hoek JPC