SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Webber*, 2018 NSSC 350

Date: 20180816
Docket: CRH 462516
Registry: Halifax

Between:

Her Majesty the Queen

v.

Renee Allison Webber

***Voir Dire* # 2A**
Restriction on Publication: ss. 486.4, 486.5, 517(1) and 539(1) of the *Criminal Code of Canada*

Judge:	The Honourable Justice Christa M. Brothers
Heard:	August 16, 2018, in Halifax, Nova Scotia
Oral Decision:	August 16, 2018, in Halifax, Nova Scotia
W**ritten Decision:**	November 22, 2019
Counsel:	Cory Roberts and Erica Koresawa, Counsel for the Crown Donald Murray, Q.C., Counsel for the Defence

By the Court:

[1] The accused Renee Allison Webber filed an Application and Notice of Motion with the court on July 20, 2018, seeking an order pursuant to s. 29(6) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, to inspect and take copies of entries in any account or accounts of the complainant, M.S., held at various financial institutions.

[2] After receiving briefs from the parties and hearing oral argument on August 16, 2018, I gave a bottom-line decision. I concluded that the accused's process for seeking disclosure under s. 29(6) was proper and ordered immediate production of the sought-after records.

Positions of the Parties

[3] The Crown did not oppose the spirit of the application for production but questioned the process. The Crown submitted that the materials sought by the accused may be relevant to the proceeding and did not oppose the order, provided that steps were taken to protect M.M.S.'s privacy. However, the Crown submitted that the court must take into consideration whether ss. 278.1 to 278.91 of the *Criminal Code* apply.

[4] The Crown did not take a position as to whether the *Mills* regime applied, but simply asked the Court to consider the issue and if the court concluded that the *Mills* regime applied then the accused had to take different steps to seek production.

[5] The Defence argued that there was no judicial authority for the proposition that an application dealing with access to banking records or financial records required a process under s. 278 of the *Criminal Code*.

Analysis

[6] Section 29 of the *Canada Evidence Act* sets forth an evidentiary short cut to admit banking records into evidence without the need to call bankers or other *viva voce* evidence. In *R. v. McMullen* (1979), 47 C.C.C. (2d) 499 (Ont. C.A.), the court noted that the purpose of s. 29 was to save bankers and financial institutions from the inconvenience of being subpoenaed frequently during trials.

Furthermore, the court in *R. v. MacMullen*, 2013 ABQB 741, stated the following, at para.115:

> CEA, ss. 29-30 are statutory provisions intended to reduce the barriers to the admissibility of business and banking records. These two sections have a long history in Canada and have been described as being pragmatic legislation to not inconvenience bankers but also to facilitate the reality that financial record documents are generally reliable as a consequence of the checks and balances inherent in the financial industry; these institutions have a reputation of reliability.

[7] The Crown acknowledges that some of the banking records of M.M.S. may be relevant to the proceeding and asked that only those created or in existence during the indictment period, (October 1, 2015 to May 22, 2016) be produced, with redaction of any permanent personal identifying information such as a social insurance number and any personal information that could identify M.M.S.'s current residence or place of work. The Defence had no difficulty in agreeing to those stipulations.

[8] The Crown did not provide the court with any case law which would indicate that this motion required an application of the *Mills* regime, as described in *R. v. Mills*, [1999] 3 S.C.R. 668. The *Mills* regime applies to certain therapeutic records. The majority commented on the purpose of ss. 278.1 to 278.91 of the *Criminal Code* as follows:

> 96 In enacting Bill C-46, Parliament was concerned with preserving an accused's access to private records that may be relevant to an issue on trial, while protecting the right to privacy of complainants and witnesses to the greatest extent possible.
>
> …
>
> 99 The response to these claims is to remember that the legislation applies only to records "for which there is a *reasonable* expectation of privacy" (s. 278.1 (emphasis added)). Only documents that truly raise a legally recognized privacy interest are caught and protected: see *R. v. Regan* (1998), 174 N.S.R. (2d) 230 (S.C.). The Bill is therefore carefully tailored to reflect the problem Parliament was addressing – how to preserve an accused's access to private records that may be relevant to an issue on trial while protecting, to the greatest extent possible, the privacy rights of the subjects of such records, including both complainants and witnesses. By limiting its coverage to records in which there is a reasonable expectation of privacy, the Bill is consistent with the definition of s. 8 privacy rights discussed above. Moreover, as will be discussed below, the mere

> fact that records are within the ambit of Bill C-46 will not, in itself, prevent the accused from obtaining access to them. Applied in this way, ss. 278.1 and 278.2(1) will not catch more records than they should, and are not overly broad.

[9] The majority held that the *Mills* regime for production of complainants' private records did not violate the Charter.

[10] It is true that the *Mills* regime applies to proceedings in relation to a list of enumerated offences, including ss. 153, 271, 279.02, 286.3 and 279.011. In other words, the *Mills* regime may apply to some of the enumerated offences that the accused was charged with. The records to which the *Mills* regime applies are defined as "any form of record that contains personal information for which there is a reasonable expectation of privacy". There is a non-exhaustive list of records in s.278.1. This enumerated list does not include banking records.

[11] The Crown provided case law which indicated that some courts have found that an individual may, in certain circumstances, have a reasonable expectation of privacy in his or her own personal banking information. For instance, in *Schreiber v. Canada*, [1998] 1 S.C.R. 841 the Court commented that documents and records relating to accounts including personal financial records obtained from a bank are the sort of records that a person may expect would remain confidential and may be part of the "biographical core of personal information". The issue in *Schreiber* was whether the Charter applied when the Canadian government sent a letter of request to Swiss authorities respecting certain bank accounts, in connection with a criminal investigation. I do not find *Schreiber* applicable here. It dealt with a different legal context and did not speak to the analysis under s. 278.1-278.91.

[10] There were no authorities located addressing the applicability of the *Mills* regime to the types of records sought in this case, that is, the complainant's banking records.

[12] The philosophy underpinning s. 278.1 seems to contemplate records that relate to personal, emotional, medical, education, counseling and even justice system documents. There does not seem to be any reference to this regime applying to financial information and banking records.

[13] I agree with the Defence that pursuance of an application for banking records through s. 278.1 is novel. In *R. v. Fayant*, 2004 ABQB 436, the court

noted that information relating to compensation for injuries received as a result of crime "does not, in and of itself, involve privacy interests on the level with therapeutic records or diaries" (see also *R. v. Petrov*, [2012] A.J. No.1477 (Altn. Q.B.))

[14] The Crown conceded that if s. 29(6) was the only consideration, then the Order for Production should be made. In the circumstances, there does not appear to be any basis to conclude that there is a reasonable expectation of privacy of all banking records. There may be some portion of banking records which in some contexts may carry a reasonable expectation of privacy. These records do not go to the biographical core of an individual. Banking records are not the same as health records or counseling records. They do not by their very nature usually contain intimate information. In fact, the complainant herself is not objecting to the records being produced as long as the contact information and her social insurance number is not disclosed.

Conclusion

[15] Based on the case law that has been provided, and the lack of case law with regard to the application of the *Mills* regime, the request for production is appropriate under s. 29(6) of the *Canada Evidence Act.* The defence's motion is granted.

[16] I order that the documents be disclosed to the court, I will review the documents and redact any information that could assist in locating the complainant or any social insurance information.

Brothers, J.