

**SUPREME COURT OF NOVA SCOTIA**

**Citation: *R. v. D. (W.C.)*, 2021 NSSC 37**

**Date:** 20210107

**Docket:** CR Ant No. 496032

**Registry:** Antigonish

**Between:**

Her Majesty the Queen

v.

W.C.D.

**DECISION - VOIR DIRE 1 - IN CAMERA**

**Section 278.92 Criminal Code Records Admissibility**

**Publication Ban:** *Criminal Code* ss. 486.4 & 486.5 – any information that will identify the Complainant, victim or witness shall not be published in any document or broadcast or transmitted in any way. No end date for the ban stipulated in these sections.

**Judge:** The Honourable Justice James L. Chipman

**Heard:** January 7, 2021, in Antigonish (and Halifax), Nova Scotia

**Oral Decision:** January 7, 2021

**Written Decision:** January 8, 2021

(Counsel Only)

**Redacted** February 4, 2021

**Decision::**

**Counsel:** Jonathan C. Gavel, Crown Counsel  
Stanley W. MacDonald, Q.C., Defence Counsel  
Carbo Kwan, Complainant Counsel

**By the Court (orally):**

[1] My December 10 and December 18, 2020 decisions provide detail with respect to what preceded today’s s. 278.92 application. On December 4<sup>th</sup> I ordered production of some of the complainant’s records pursuant to s. 278.5. The records included a book or manuscript titled “[redacted]” which the Complainant authored roughly 13 years ago, along with the Complainant’s Department of Community Services (“DCS”) records. On December 18<sup>th</sup> I ordered production of redacted portions of the former but not the latter.

[2] The Applicant makes this application pursuant to s. 278.92 of the *Criminal Code* for an order allowing him to adduce evidence from the manuscript and to cross-examine the Complainant on the absence of any reference to sexual abuse by Mr. D. in the DCS records at trial.

[3] The relevant *Criminal Code* provisions on this application are as follows:

**Definition of record**

278.1 For the purposes of sections 278.2 to 278.92, record means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, 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.

1997, c. 30, s. 1; 2018, c. 29, s. 23.

...

**Admissibility — accused in possession of records relating to complainant**

278.92 (1) Except in accordance with this section, no record relating to a complainant that is in the possession or control of the accused — and which the accused intends to adduce — shall be admitted in evidence in any proceedings in respect of any of the following offences or in any proceedings in respect of two or more offences at least one of which is any of the following offences:

- (a) an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3; or

(b) any offence under this Act, as it read from time to time before the day on which this paragraph comes into force, if the conduct alleged would be an offence referred to in paragraph (a) if it occurred on or after that day.

**Requirements for admissibility**

(2) The evidence is inadmissible unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 278.93 and 278.94,

(a) if the admissibility of the evidence is subject to section 276, that the evidence meets the conditions set out in subsection 276(2) while taking into account the factors set out in subsection (3); or

(b) in any other case, that the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

**Factors that judge shall consider**

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) society's interest in encouraging the obtaining of treatment by complainants of sexual offences;

(d) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(e) the need to remove from the fact-finding process any discriminatory belief or bias;

(f) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(g) the potential prejudice to the complainant's personal dignity and right of privacy;

(h) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(i) any other factor that the judge, provincial court judge or justice considers relevant.

2018, c. 29, s. 25; 2019, c. 25, s. 403.

**Application for hearing — sections 276 and 278.92**

278.93 (1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 278.94 to determine whether evidence is admissible under subsection 276(2) or 278.92(2).

**Form and content of application**

(2) An application referred to in subsection (1) must be made in writing, setting out detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial, and a copy of the application must be given to the prosecutor and to the clerk of the court.

**Jury and public excluded**

(3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.

**Judge may decide to hold hearing**

(4) If the judge, provincial court judge or justice is satisfied that the application was made in accordance with subsection (2), that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice and that the evidence sought to be adduced is capable of being admissible under subsection 276(2), the judge, provincial court judge or justice shall grant the application and hold a hearing under section 278.94 to determine whether the evidence is admissible under subsection 276(2) or 278.92(2).

2018, c. 29, s. 25

**Hearing — jury and public excluded**

278.94 (1) The jury and the public shall be excluded from a hearing to determine whether evidence is admissible under subsection 276(2) or 278.92(2).

**Complainant not compellable**

(2) The complainant is not a compellable witness at the hearing but may appear and make submissions.

**Right to counsel**

(3) The judge shall, as soon as feasible, inform the complainant who participates in the hearing of their right to be represented by counsel.

**Judge's determination and reasons**

(4) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part of it, is admissible under subsection 276(2) or 278.92(2) and shall provide reasons for that determination, and

(a) if not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;

- (b) the reasons must state the factors referred to in subsection 276(3) or 278.92(3) that affected the determination; and
- (c) if all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.

**Record of reasons**

- (5) The reasons provided under subsection (4) shall be entered in the record of the proceedings or, if the proceedings are not recorded, shall be provided in writing.

2018, c. 29, s. 25

[4] In terms of evidence I have the material before me from the December 4<sup>th</sup> and 18<sup>th</sup> hearings. I also have Mr. MacDonald's brief filed January 4, 2021 along with the cases of *R. v. Boyle*, 2019 ONCJ 232; *R. v. Brown*, 2019 ONSC 1335; and *R. v. JP*, 2019 ONCJ 871. The Crown and Complainant did not file written submissions.

[5] Today I heard argument from Mr. MacDonald on behalf of the Applicant and Mr. Gavel on behalf of the Crown; Ms. Kwan, Complainant's counsel, put on the record that she agreed with the Crown's submissions.

[6] Having regard to ss. 278.92 and 278.93, the manuscript portions I ordered to be produced for the Defendant are presumptively inadmissible at trial.

[7] In *R. v. JP*, Justice Green stated as follows:

3 ... , the rules governing admissibility, as prescribed by s. 278.92 of the Code, renders a "record" in a defendant's possession presumptively inadmissible unless a judge, following observance of the application and hearing procedures set out in ss. 278.93 and 278.94, respectively, determines that the tendered evidence is relevant and that its probative value is not outweighed by its prejudicial impact on the administration of justice. In conducting this final balancing a judge must, as directed by s. 278.92(3), "take into account" a series of factors, including an accused's right to make full answer and defence, prejudice to a complainant's personal dignity and right of privacy, and societal concerns to preserve trial integrity and to encourage both sexual assault reporting and the treatment of the victims of such offences. ...

[8] I accept Justice Green's interpretation and adopt it in coming to my decision on today's application. As pointed out by Justice Doody in *R. v. Boyle* at para. 28, a record is admissible under s. 278.92 (b), if:

- a. it is relevant to an issue at trial; and

- b. it has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[9] With respect to the manuscript, I agree with the Defence that the portion Mr. MacDonald has clarified that he wishes to put to the Complainant on cross-examination is relevant. This is because it contains descriptions of the alleged events that differ considerably from the Complainant's subsequent descriptions of these events in her police statement, at the preliminary inquiry and in her civil law suit.

[10] Further, I agree that the manuscript is probative and has minimal prejudicial effect. It is probative because it contains a version of events, authored by the Complainant that differ markedly from subsequent allegations made by the Complainant on the same series of events. In my view, the accused's ability to make full answer and defence to the charges pursuant to s. 278.92(3)(a) will be severely impeded if he is unable to elicit this evidence at trial.

[11] Furthermore, the Complainant has no reasonable expectation of privacy in the contents of the manuscript. She willingly provided her manuscript to the Crown and did not object to its production to the Court or to the Defence. She has also stated that she may publish the manuscript in the future.

[12] Finally, the Applicant's intent to adduce evidence from the records at issue is not based on any discriminatory belief or bias or to improperly influence a jury pursuant to s. 278.92 (3)(e) and (f). I have appropriately vetted and redacted the record and the only portions the Defence intends to elicit are a direct recounting of the allegations in issue.

[13] With respect to the DCS records, although they have not been provided to the Defence, the Applicant asks to cross-examine the Complainant at trial on the absence of entries in the DCS records related to the allegations before the Court.

[14] I agree that the Court's decision not to disclose the records to the Defence does not preclude the Applicant from cross-examining the Complainant on what was not contained in the records. The Complainant testified at the preliminary inquiry that she told the late [redacted] everything regarding the allegations against Mr. D. and that [redacted] was making notes when she did so. The Complainant also testified at the preliminary inquiry that the DCS records did not contain any reference to the allegations facing Mr. D.

[15] The allegations in this matter are historical and the Complainant's credibility is a key trial issue. In this regard the case has some parallels with *R. v. SL*, 2020 ONSC 497, where it was stated at para. 32:

32 The credibility of the complainant is a significant issue. The absence of entries relating to sexual abuse by the applicant is significantly probative for two reasons: (1) The complainant testified that she reported sexual abuse by the applicant to her CAS worker and (2) It might reasonably be expected that such a report would be recorded and acted upon by the CAS worker.

[16] There are no doubt various possible explanations why the records do not contain mention of the alleged abuse. It is open for the Crown to advance those explanations. Nevertheless, in my view – to the extent there are competing explanations – they go to the issue of weight and not the central issue of admission of the evidence at trial.

[17] In the circumstances of this historical case, where the Complainant has very clearly stated that she reported sexual abuse at or around the time of its occurrence, I am of the view that the Defence must be permitted to cross-examine the Complainant on the complete absence of any reference to such allegations in the DCS records.

[18] In all of the circumstances I believe that cross-examination on the DCS records is probative and would have little prejudicial effect. The prejudicial effect is low because Mr. D. through his counsel has said that he only intends to establish the fact that the DCS records contain no mention of the allegations. As such, any sensitive medical and personal information that might be expected to be contained in such a file is in no jeopardy of coming to light at the trial or influencing the trier of fact in this matter.

[19] Further, Mr. D's intent to adduce evidence from the records at issue is not based on any discriminatory belief or bias or to improperly influence a jury, pursuant to *Code* s. 278.92(3) (e) and (f).

[20] In the result I hereby order pursuant to s. 278.92 of the *Criminal Code* that defence counsel be permitted to adduce evidence from the records at issue in this application.

Chipman, J.