

CANADA / JUDGMENT

R. v. Dick

2024 BCSC 1785

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1785 R. v. Dick

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dick,

2024 BCSC 1785

Date: 20240927

Docket: 187341-2, 187341-3

Registry: Victoria

Between:

Rex

v.

Wayne Michael Dick

Restriction on publication: Pursuant to s. 486.4(1)(a) of the Criminal Code of Canada, R.S.C. 1986, c. C-46

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

(Application re Redacted Documents)

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Place and Date of Hearing:

Victoria, B.C.

August 29-30, 2024

Place and Date of Rulings with Written Reasons to Follow:

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August 30, 2024

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September 27, 2024

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INTRODUCTION

[1] Wayne Dick is alleged to have sexually assaulted M.R. on January 27, 2023, in Sooke, BC, contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46 [Criminal Code].

[2] The trial of this matter is set to commence before a judge and jury on September 23, 2024 in Victoria, BC.

- [3] Mr. Dick admits to having sexual intercourse with M.R. on the day in question. The Crown and defence agree that the key issues at trial will be consent, or honest but mistaken belief in consent.
- [4] After the encounter between Mr. Dick and M.R., M.R. reported the incident to the police. The police attended and M.R. was later transported by ambulance to Victoria General Hospital ("VGH"). A nurse conducted a sexual assault forensic assessment of M.R. at VGH; then, M.R. was admitted to VGH and treated by a physician.
- [5] This process generated three separate sets of documents, which were received by the Crown and then redacted before disclosure to the defence:
- a) A sexual assault forensic report, prepared by Suzanne Filion, a registered nurse (the "SANE Report");
 - b) A report from the ambulance attendants (the "Ambulance Report"); and
 - c) A physician's report after M.R. was admitted to VGH (the "Physician Report").
- (collectively, the "Documents")
- [6] On August 6, 2024, Mr. Dick applied for an order that the unredacted Documents are not within the disclosure regime under ss. 278.1-278.91 of the Criminal Code (also known as the "Mills regime"). Mr. Dick seeks an order that the Court review the redactions in terms of their potential relevance and Stinchcombe disclosure. Alternatively, if the redactions in the Documents are "records" within the definition of s. 278.1 of the Criminal Code, Mr. Dick seeks a hearing to determine whether they should be produced to the Court for review, pursuant to s. 278.5 of the Criminal Code.
- [7] The Crown's position is that all of the redactions come within the Mills regime in that they contain personal medical information for which M.R. has a reasonable expectation of privacy. The Crown says that it is necessary to undertake the staged process under the Mills regime in respect of the redactions, which allows review by the Court in terms of the Documents' relevance and whether they should be produced in the interests of justice.
- [8] These are the written reasons for the rulings made by me during the course of this 2-day hearing relating to Mr. Dick's application for document disclosure by the Crown. I heard this application in my role as case management judge, pursuant to s. 551.3(1)(g)(i) of the Criminal Code.

RELEVANT FACTS

- [9] I adopt the Crown's description of the relevant factual background as set out in its argument, as follows:

On January 27, 2023, the Sooke RCMP responded to a complaint of an alleged sexual assault involving the complainant, MR. The police attended outside a residence in Sooke, where they met MR. She was then taken by ambulance to the Victoria General Hospital (VGH). MR was seen by Suzanne Filion, a Forensic Nurse Examiner. MR provided written consent to the physical examination, the advising of law enforcement and the collection of samples. After the Forensic examination was completed, MR was admitted to the hospital.

A charge of sexual assault was laid against [Mr. Dick] on April 25, 2023. Initial disclosure was provided to defence counsel April 27, 2023. Disclosure of the redacted SANE Report and VIHA records was provided to [Mr. Dick] on July 14, 2023. On March 20, 2024, the Crown unredacted portions of these materials and provided this as [an] update to [Mr. Dick].

On July 30, 2024, [Mr. Dick] advised he expected to apply for disclosure of the redacted portions of the SANE report and the VIHA Records. On August 6, 2024, the Crown provided disclosure of item 10 in the VIHA Records. The Crown says the bulk of the redacted portions (items 1 to 9, 11 and 12) contained private and personal information that is not relevant. On August 6, 2024 [Mr. Dick] filed an application for further disclosure.

[10] Accordingly, the focus of this application are the 11 redactions made by the Crown in the Documents. The SANE Report includes redactions #1-2; the Ambulance Report includes redactions #3-6; and the Physician Report contains redactions #7-9, 11-12.

[11] Defence counsel refers to being in the dark about the substance of the redactions in terms of preparing his arguments on this and any later application. However, the Crown says that it is prohibited from disclosing, in the first instance, the contents of any "record" under the Mills regime: s. 278.2(3).

[12] In any event, the Crown was able to advise that the redactions refer to M.R.'s "medical history", which again is asserted as being irrelevant. This was clarified in the course of this hearing to include not only references to historical medical issues, but also references to ongoing medical issues. Even so, the extent of the Crown's description of the nature of the redactions remains in issue, as I will discuss below.

THE "RECORDS" ISSUE

[13] The preliminary issue is whether the Documents, including the redactions, are "records" that are to be addressed under the Mills regime.

[14] Section 278.1 of the Criminal Code defines "record" as:

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.

[Emphasis added.]

- [15] Mr. Dick takes the position that the Documents, including the redactions, come within the exception in s. 278.1 in that they are "records made by persons responsible for the investigation or prosecution of the offence". As such, he says that the Crown is obligated to disclose the redactions, subject to the Crown establishing lack of relevance under the Stinchcombe requirements.
- [16] The Crown concedes that the SANE Report is a record prepared by Ms. Filion, who was responsible for the investigation of the offence as a forensic nurse. However, the Crown argues that the redactions that are contained within the SANE Report do not fall within the s. 278.1 exception because those redactions contain M.R.'s private and personal information that fall within the Mills regime.
- [17] The Crown also takes the position that the Ambulance and Physician Reports clearly fall within s. 278.1 as "records". The Crown says that they do not fall within the exception since the ambulance attendants and the physician at VGH were not investigating the offence, such that a Mills enquiry is required.

ARE THE UNREDACTED DOCUMENTS WITHIN THE MILLS REGIME?

- [18] I will address the SANE Report separately from the Ambulance Report and the Physician Report (which the Crown describes collectively as the "VIHA Records").

A. The SANE Report

- [19] Redactions #1-2 in the SANE Report are found on a page entitled "Forensic Nursing Record". However, based on a review of that page, it is not possible to put redactions #1-2 in any context. Therefore, the Court is left with the Crown's reference to the redactions as relating to M.R.'s "medical history", as described above.
- [20] The Crown concedes that the SANE Report generally falls within the exception to "records" (as a record made by a person responsible for the investigation (i.e. Ms. Filion)), but then argues that the issue under s. 278.1 remains. Therefore, the crux of the issue is whether the redactions can be addressed separately and distinctly from the SANE Report itself in terms of whether the redactions are a "record" within the s. 278.1 definition.
- [21] The Crown refers to a number of case authorities, beginning with those including a more general discussion of the Mills regime and its approach to "records", and ending with specific BC cases that apply the law, although unfortunately in different ways.
- [22] I will begin with the general cases before moving to the specific ones.

- [23] The starting point is of course *R. v. Mills*, 1999 CanLII 637 (SCC), [1999] 3 S.C.R. 668, where the Court upheld the constitutionality of the disclosure regime. However, the Court in *Mills* did not discuss the exception in s. 278.1 as relevant to the issue here.
- [24] In *R. v. Quesnelle*, 2014 SCC 46, the question was whether police occurrence reports prepared in the investigation of prior matters involving the complainant or witness (but not the offence being prosecuted) were "records" or within the exception under s. 278.1. At para. 20, Justice Karakatsanis outlined that the analysis involves two enquiries:
- a) Does the document contain personal information for which there is a reasonable expectation of privacy? Usually, the judge will not have seen the document (as here) such that this determination will be made on the basis of the type of document in issue (para. 21); and
 - b) Does the document fall within the exemption for investigatory and prosecutorial documents?
- [25] On the second issue (whether the exemption applied), the Court in *Quesnelle* stated:
- [55] The definition of "record" in s. 278.1 serves a gatekeeping function within the regime. The reasonable expectation of privacy test sweeps in records that merit the protection afforded by the *Mills* regime. The exemption further contributes to the gatekeeping role of the section by bypassing the balancing process for records that Parliament recognized should always be produced.
- [56] Records created in the investigation of the offence are presumptively relevant to an issue at trial and it is in the interests of justice for the case against the accused to be disclosed to the defence. There is no need to consider such records under the second step of *Mills* because they will always be produced anyway — the exemption is eminently logical. However, for records unrelated to the offence at issue, the balancing exercise will often have important work to do. The rationale for the exemption does not apply, and to bypass the balancing process on the grounds that the document was made by the same police force that investigated the claim would not accord with the goals of the scheme.
- [Emphasis added.]
- [26] The legislative regime outlined in *Mills* was later expanded and discussed in *R. v. J.J.*, 2022 SCC 28. While the focus of the Court was later, amendments to the disclosure process in the Criminal Code, which are not relevant here, as part of its analysis, the Court revisited the definition of "record" in s. 278.1.
- [27] The discussion in *J.J.* at paras. 38-42 turned on a consideration of how s. 278.1 addressed "enumerated documents" versus "non-enumerated documents", with the Court affirming the comment in *Quesnelle* at para. 22 that the "enumerated documents" (which includes "medical records") are documents that usually give rise to a reasonable expectation of privacy. However, given that s. 278.1 contains a non-exhaustive list, even documents that are

not within that list of categories may still be covered by the Mills regime if they contain personal information that gives rise to a reasonable expectation of privacy: Quesnelle at para. 22; J.J. at para. 40.

[28] The Court in J.J. further stated:

[42] Ultimately, we conclude that a non-enumerated record will only be captured by s. 278.1, in the context of the record screening regime, if the record contains information of an intimate or highly personal nature that is integral to the complainant's overall physical, psychological or emotional well-being. Such information will have implications for the complainant's dignity.

[29] The Crown places some emphasis on the Court's discussion in J.J. at para. 49 in its approach to the analysis under s. 278.1 in terms of what is a "record" as not focussing on the medium by which the information was shared. However, I do not see that as an issue here. The issue is not how M.R. conveyed her information to Ms. Filion, the issue is whether the information relayed attracted privacy concerns and whether that information comes within the s. 278.1 exemption.

[30] The two competing BC decisions to which the Crown refers are R. v. Hawco, 2024 BCSC 122 and R. v. Callbreath, 2024 BCSC 688 (unreported).

[31] In Hawco, the Court was considering Mr. Hawco's post-conviction application for Crown production. In its investigation, the Crown had obtained the (then) complainant's statement, which was video recorded. Before trial, the Crown had only provided the defence with a redacted transcript of the statement. Mr. Hawco sought disclosure of the unredacted statement and also, the DVD containing the recording.

[32] The Crown in Hawco, as with the present Crown, asserted that the redactions were irrelevant and unrelated to the offence and, in any event, a "record" within the meaning of s. 278.1. Mr. Hawco asserted that the redactions came within the exemption and that the Crown was obliged to produce them, in accordance with Stinchcombe.

[33] In Hawco, G.P. Weatherill J. found that the redactions were potentially a "record", but that they came within the exemption since they were in documents created by the police who were investigating the offence:

[19] Much of the Crown's argument was focused on K.T.'s privacy interests and that the Redacted Portions would qualify as a "record" within the meaning of s. 278.1. However, the definition of "record" in that section specifically excludes "records made by persons responsible for the investigation or prosecution of the offence." Accordingly, the complete and unredacted Statement and DVD must be disclosed, subject to the issue of relevancy. This is because records created in the investigation of an offence are presumptively relevant to an issue at trial, and it is in the interests of justice that they be disclosed to the defence. In my view, there is no need to consider the issues raised in subsections 278.1 to 278.92 because the statements obtained by investigating officers are not "records" as defined by s. 278.1 and

should always be produced, again subject to relevancy.

[Emphasis added.]

- [34] The competing decision to Hawco, and the one upon which the Crown relies is Callbreath, decided only a few months later. As in Hawco, the issue concerned redactions to the complainant's statement, which the Crown asserted were irrelevant. In Callbreath, Justice Basran declined to follow Hawco, stating:
- [20] The Crown's possession of the complainant's private information and its replication in their investigative files does not cause the complainant to lose her reasonable expectation of privacy in her private information. This is because it is the information itself that must be assessed, not the form in which it is kept. The relevant determination is whether the material "may betray 'information which tends to reveal intimate details of the lifestyle and personal choices of the individual'": R. v. Marakah, 2017 SCC 59 at para. 32, quoting R. v. Plant, [1993] 3 S.C.R. 281 at 293.
- [21] Private information may inadvertently become part of a police investigation file via interviews with a complainant, or other people privy to this information. I do not accept that the categorization of this information as part of the police's investigative file somehow transforms and converts the character of information that is otherwise private, and legislatively protected, to information that must be disclosed. If this were the case, the purposes and protections of these legislative safeguards would be defeated. This would be a triumph of the form of the information over the substance of it.
- [24] I decline to follow the reasoning in Hawco in favour of a substantive assessment of whether a document contains private information of the complainant for which there is a reasonable expectation of privacy. I am satisfied that this approach conforms with Parliament's legislative intent in enacting ss. 278.1 to 278.91 and accords with the Supreme Court of Canada's findings that s. 8 Charter principles apply to the legislative regime in ss. 278.1 to 278.91 of the Criminal Code.
- [25] In my view, the information sought by the defence is private information of the complainant contained in a police file and it is protected by ss. 278.1 to 278.91. The defence may apply for production of this information pursuant to s. 278.3.

[Emphasis added.]

- [35] The differing results in Hawco and Callbreath put the Court in some difficulty in deciding the matter, given the well-known principle by which previous decisions of this Court are to be followed, save in certain circumstances: *Hansard Spruce Mills Ltd. (Re)*, [1954] B.C.J. No. 136 (S.C.), 1954 CanLII 253.

- [36] In support of Mr. Dick's argument, defence counsel refers to one non-BC case, *R. v T.S.*, 2021 ONCJ 299. As particularly relevant to this issue before me, the issue was whether the results of a sexual assault evidence kit (akin to the SANE Report) were a "record" or whether it was covered under the exemption in s. 278.1.
- [37] In *T.S.*, Justice Doody adopted an approach consistent with *Hawco*, finding that the evidence kit came within the exemption and should be produced, subject to Stinchcombe principles. Doody J. stated:
- [44] I concluded in *K.T.* that the determining factor in the issue of whether the exemption applies is the same as it was for the issue before the Supreme Court in *Quesnelle* - the purpose for which the document was created. If the document in issue was made for the purpose of investigating the criminal offence before the court, it is exempted from the application of the regime which requires the particular scrutiny and procedures mandated by s. 278 to s. 278.92. If the document in issue was made for another purpose - such as to investigate a complaint under a workplace harassment policy, or a complaint of child abuse to the Children's Aid Society, it is not exempted and will be subjected to that scrutiny and those procedures so long as it is a document in which the complainant has a reasonable expectation of privacy.
- [Emphasis added.]
- [38] I will begin by stating that I have no doubt that M.R. had a reasonable expectation of privacy with respect to the "medical history" that she shared with Ms. Filion and which apparently is referred to in the redactions in the SANE Report. That answers the first enquiry posed at para. 20 of *Quesnelle*.
- [39] That leads to the second enquiry - namely, do the redactions fall within the s. 278.1 exemption?
- [40] I have considered the three cases - *Hawco*, *Callbreath* and *T.S.* - and find that the approach and result in *Hawco* and *T.S.* is more consonant with the *Mills* regime, as intended by Parliament.
- [41] Firstly, I agree with the reasoning in *T.S.* (para. 42) that an appropriate starting point is to consider the statutory interpretation of the *Mills* regime, including the well-known principles that were discussed in *R. v. Stipo*, 2019 ONCA 3. Under s. 278.1, the wording of the exemption is clear, in that even if a document would otherwise be a "record" attracting privacy interests, the *Mills* regime is not engaged if it comes within the exemption.
- [42] I also agree with the reasoning in *T.S.* that it is helpful to consider the purpose of the *Mills* regime.
- [43] As noted in *Quesnelle* at para. 54, the regime is intended to provide a statutory balance between the twin goals of protection of privacy and ensuring the fair trial rights of an accused. As such, while privacy interests are protected if the documents are a "record", that

protection falls away when the record is prepared by an investigating body because the document is then considered presumptively relevant and subject to disclosure (Quesnelle at para. 56). The Mills regime, including the definition of "records", illustrates the balance which Parliament has chosen in order to reconcile these two competing interests.

- [44] In this case, the Crown has conceded that Ms. Filion conducted her SANE examination as an investigator with respect to the offence for which Mr. Dick is charged. It can be presumed that Ms. Filion gathered information that she considered relevant to her investigation. Ms. Filion completed her examination and prepared the SANE Report for the express purpose of turning that Report over to the police. She did so with M.R.'s express consent, in that M.R. agreed that "any information obtained by and/or any observations by the Forensic Nurse Examiner" would be given to law enforcement, as evidenced by her signature on the consent form.
- [45] Given the purpose of Ms. Filion's forensic examination was to create a SANE report - to investigate the alleged sexual assault - it should not be a surprise to anyone that M.R. was expected to disclose private information and that she did so. As such, s. 278.1 presumes that the SANE Report in its entirety is relevant to the offence and should be produced under Stinchcombe.
- [46] This is an entirely different scenario from one in which a stray medical record just happens to become part of a police file. To some extent, the Court's discussion in Callbreath at para. 21 - as to information "inadvertently" becoming part of a police investigation - might be seen as inviting the result in that case. Having said that, there is nothing in Callbreath to indicate that the redactions in the statement were "inadvertently" included and it is difficult to see how that could happen in the middle of a videotaped statement where a complainant is asked to tell her story and answer questions by a police officer.
- [47] In Quesnelle, the Court stated that the Mills regime would still apply to documents that the police obtained without waiver, even though they may be found in the investigative file:
- [61] However, the scheme and purpose of the regime run counter to such an interpretation. Section 278.2(2) of the Criminal Code provides that the Mills regime applies to records "in the possession or control of any person, including the prosecutor in the proceedings". Hence the Mills regime operates in part as an exception to the Crown's obligation to produce the fruits of the investigation. If the exemption captured all documents in the investigative file — all the fruits of the investigation — the Mills regime would not perform this function or protect privacy interests the regime was meant to serve. The fact that documents in the investigative file may generally be presumed to be relevant does not mean that the privacy value of those documents will always be outweighed. For example, where police obtain a highly sensitive therapeutic record without waiver, to exclude the record from the scrutiny of the Mills regime simply because it is included in the investigative file would undermine the purposes of the regime. I would therefore reject the suggestion that the exemption excludes all documents made by third parties simply because they are placed in the

investigative or prosecution file.

[Emphasis added.]

- [48] In this case, given the circumstances under which Ms. Filion's examination occurred and the SANE Report that was prepared, including M.R.'s express consent that it be done for police investigative purposes, I fail to see how the SANE Report could not fall squarely within the exemption in s. 278.1.
- [49] In addition, as I stated above, I do not consider that it is a matter of what medium is used to relay the information, as the Crown asserts (per J.J. at para. 49). This issue seems to be consistent with the comment in *Callbreath* at para. 19 that the "location and form of the information is not determinative". The point here is that all of the information was gathered by Ms. Filion into one form that was to be given to the police for the purposes of further investigation of the offence.
- [50] I agree with the defence that the Crown's approach (relying on *Callbreath*) of tweezing out portions of information found in documents that clearly come within the exemption has the potential to completely erase the legislative purpose behind the exemption itself. If Parliament intended that to be the case, then there was no need for the exemption at all, since all documents, both in the enumerated and non-enumerated categories, and whether they were gathered for investigative purposes or not, would be subject to the *Mills* regime simply on the basis that some or all of the contents attract privacy concerns.
- [51] If sensitive or private information is included by the police in its records prepared for an investigation, M.R. is not left without protections. The *Stinchcombe* process must still be followed, as was discussed in *Hawco* (paras. 22-27). Even within the auspices of *Stinchcombe* disclosure, privacy interests remain and can be addressed within that process: *R. v. McNeil*, 2009 SCC 3 at paras. 18-20, 42-46. In *McNeil*, the Court stated in particular:
- [18] While the *Stinchcombe* automatic disclosure obligation is not absolute, it admits of few exceptions. Unless the information is clearly irrelevant, privileged, or its disclosure is otherwise governed by law, the Crown must disclose to the accused all material in its possession. The Crown retains discretion as to the manner and timing of disclosure where the circumstances are such that disclosure in the usual course may result in harm to anyone or prejudice to the public interest. The Crown's exercise of discretion in fulfilling its obligation to disclose is reviewable by a court.
- [19] As this Court confirmed in *Mills*, the Crown's obligation under *Stinchcombe* to disclose the fruits of the investigation does not signify that no residual privacy interest can exist in the contents of the Crown's file. It should come as no surprise that any number of persons and entities may have a residual privacy interest in material gathered in the course of a criminal investigation. Criminal investigative files may contain highly sensitive material including: statements of complainants -- at times concerning very personal matters; medical reports . The privacy legislation of all 10 provinces addresses the disclosure of information contained

in law enforcement files. [statute citations omitted].

- [20] Implicit in the Crown's broad duty to disclose the contents of its file under Stinchcombe are not the absence of any residual expectation of privacy, but rather the following two assumptions. The first is that the material in possession of the prosecuting Crown is relevant to the accused's case. Otherwise, the Crown would not have obtained possession of it (O'Connor, at para. 12). The second assumption is that this material will likely comprise the case against the accused. As a result, the accused's interest in obtaining disclosure of all relevant material in the Crown's possession for the purpose of making full answer and defence will, as a general rule, outweigh any residual privacy interest held by third parties in the material. These two assumptions explain why the onus is on the Crown to justify the non-disclosure of any material in its possession.

[Emphasis added.]

- [52] For the above reasons, I find that redactions #1-2 in the SANE Report are not a "record" within the meaning of s. 278.1 of the Criminal Code, which requires a further hearing under the Mills regime. The redactions are subject to the Stinchcombe disclosure process, which requires the balancing exercise if those redactions include information that is unrelated to the offence (Quesnelle at para. 56).

B. Ambulance / Physician Records (VIHA Records)

- [53] The Ambulance Record was prepared by the BC Emergency Health Services (BCEHS). The document itself is entitled "BCEHS Patient Care Record Summary".
- [54] The defence points to certain portions of the Ambulance Record. For example, just before redactions #3-4 - under "History of Chief Complaint" - there is a reference to M.R. expressing a desire to preserve evidence at the hospital. Redaction #5 refers to the notation under "Medical History Obtained From: Patient". Redaction #6 is under the category of "Incident" which includes details of the crew members, locations and time stamps for various steps after the ambulance arrived.
- [55] Having considered the entirety of the Ambulance Report, I reject the defence's argument that the Report was not for the purpose of treatment, but to preserve evidence.
- [56] Based on the limited facts before me, the only inference I can draw is that BCEHS was merely asked to transport M.R. to VGH for the purposes of the SANE examination and possible medical treatment, if that was required. There is no indication that the ambulance attendants were performing their duties for any other reason; certainly, there is no indication that the ambulance attendants were responsible for the investigation of the offence and that they were preparing their notes for that purpose. The attendant's noting of various aspects of M.R.'s medical history, or facts incidental to the offence or M.R.'s desire to undergo the SANE exam, did not elevate their task beyond addressing any medical issues faced by M.R. that required immediate attention after their arrival and until they had safely

transported her to VGH.

- [57] In that sense, the Ambulance Record is within the enumerated list of records from s. 278.1 - being a "medical record" - that contains personal information for which M.R. has a reasonable expectation of privacy.
- [58] This is consistent with J.J. where the Court referred to a complainant's relaying of her medical history, stating:
- [56] For example, if complainants communicate details about their own medical history, this is the kind of information that would be found in a medical record over which they have a reasonable expectation of privacy. It would therefore be subject to the record screening regime.
- [59] The Physician Record indicates that Ms. Filion asked the doctor to see M.R. based on her concerns regarding M.R.'s mental health and suicidal ideation. Redaction #7 appears to refer to information retrieved from M.R.'s previous physician. Redactions #8-9, 11-12 appear to relate to various medical information.
- [60] The defence argues that while the initial part of the Physician Report began as therapeutic, the Report was really a forensic assessment of M.R.
- [61] I disagree. Reading the Physician Report as a whole, the doctor was doing nothing more than caring for M.R. after she was admitted to VGH. The record does refer to M.R. having requested "forensic assessment" and that the doctor was going to respect her wishes to "limit assessment". However, in my view, this means nothing more than the doctor acknowledging that it was Ms. Filion who had completed the forensic assessment and that the doctor was only addressing the more general medical issues that arose from M.R.'s condition. There is no indication that the doctor was responsible for the investigation of the offence and prepared the Physician Record for that purpose, so as to come within the s. 278.1 exception.
- [62] In that sense, as with the Ambulance Record, I conclude that the Physician Report is within the enumerated list of records from s. 278.1 - being a "medical record" - that contain personal information for which M.R. has a reasonable expectation of privacy.
- [63] Given my conclusions, any application for disclosure and production of the redactions from the Ambulance and Physician Records must be conducted within the framework of the Mills regime.

DOCUMENT PRODUCTION ISSUES

- [64] I ruled on the above issues early in the morning after court convened on August 30, 2024. Counsel then addressed the disclosure issues that arose, this time with the involvement of M.R.'s counsel.

A. Disclosure of the VIHA Records under Mills

[65] This portion of my reasons concern the defence's application for disclosure and production of the redactions from the Ambulance and Physician Records (or the VIHA Records) within the framework of the Mills regime.

i) Crown Disclosure re Nature of Redactions

[66] The defence maintains that the Crown is obligated to disclose more about the VIHA Records beyond a reference to "medical history", failing which it will be hamstrung in terms of arguing its application for disclosure under the Mills regime.

[67] The obligations of the Crown under s. 278.2(3) in respect of disclosure of "records" are very clear in terms of prohibiting any disclosure of the contents of a document that is a record:

- (3) In the case of a record in respect of which this section applies that is in the possession or control of the prosecutor, the prosecutor shall notify the accused that the record is in the prosecutor's possession but, in doing so, the prosecutor shall not disclose the record's contents.

[Emphasis added.]

[68] There is discussion in the case law about the limits of what the Crown is able to disclose to the defence.

[69] In *R. v. Boudreau*, [1998] O.J. No. 3526 (S.C.J.), 1998 CanLII 14769, Justice Ewaschuk stated:

[20] Finally, I note the obvious that the Crown's possession or control of the record may actually help the accused in gaining production of the record. Once the Crown has possession or control of the record, s. 278.2(3) imposes a duty on the Crown to notify the accused that the record is in its possession. The Crown must also inform the accused in a meaningful manner the nature and particulars of the record without disclosing its specific contents. In this way, the accused may acquire evidence or information beyond "mere assertion" to help him or her in establishing that the record is likely to be relevant to a trial issue or to the witness's competency to testify.

[Emphasis added.]

[70] In *Mills*, the Court cited *Boudreau* with approval as to what information should be included by the Crown to the defence:

[115] The second aid to the accused is the requirement in s. 278.2(3) that the prosecutor notify the accused of the private documents in his or her possession. While the contents are not to be disclosed at this stage, the notification requirement reveals the existence of the record to the accused and allows the accused to make an application for production. When notifying an accused, the Crown should ensure that information as to date and context are provided so that the documents can be sufficiently identified. This will help furnish the accused with a basis for arguing that the documents may be relevant to the defence under s. 278.5: see

Boudreau, *supra*, per Ewaschuk J.

[Emphasis added.]

[71] A similar statement is found in Quesnelle in stating that the Crown:

[16] should in appropriate circumstances give an assessment of the likely relevance of a record in its possession, as well as indicate the basis for its relevance.

[72] The defence relies on the discussion found in *R. v. L.F.*, (2006) 37 C.R. (6th) 152, 2006 CanLII 1024 (Ont. S.C.J.). At para. 10, Justice O'Connor discusses the "obvious dilemma" faced by an accused in attempting to show "likely relevance" where he has simply not seen the document and he has no idea what the record may contain. However, as O'Connor J. later notes, this dilemma was addressed within the Mills regime in terms of balancing privacy rights against an accused's right to make full answer and defence.

[73] I am satisfied that the Crown has properly and sufficiently disclosed the nature of the redactions in the VIHA records in a meaningful manner, in order to allow the defence to advance argument under the Mills regime. To require more would put the Crown in a position of violating s. 278.2(3).

ii) Should the VIHA Records Redactions be Produced to the Court?

[74] The first stage of a production application under the Mills regime under s. 278.5(1) requires that the judge be satisfied:

- a) the application was properly made in accordance with ss. 278.3(2) to (6);
- b) the accused has established the record is likely relevant to an issue at trial; and
- c) the production is necessary in the interests of justice.

[75] The standard of "likely relevance" under s. 278.5(1)(b) is a "reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify": *Mills* at para. 124; *R. v. R.M.R.*, 2018 BCSC 1889 at para. 10.

[76] The accused must provide an evidentiary basis to establish the likely relevance of this material. He must provide specific evidence or information to show that the redactions are likely relevant to an issue at trial or the competence of a witness": *Mills* at para. 120; *R.M.R.* at paras. 11-14.

[77] Section 278.3(4) sets out that certain assertions by an accused are insufficient to establish a record as likely relevant:

- (4) Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify:
 - (a) that the record exists;

- (b) that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;
- (c) that the record relates to the incident that is the subject-matter of the proceedings;
- (d) that the record may disclose a prior inconsistent statement of the complainant or witness;
- (e) that the record may relate to the credibility of the complainant or witness;
- (f) that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;
- (g) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;
- (h) that the record relates to the sexual activity of the complainant with any person, including the accused;
- (i) that the record relates to the presence or absence of a recent complaint;
- (j) that the record relates to the complainant's sexual reputation; or
- (k) that the record was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused.

[78] Assuming likely relevance is established, the court is to consider the factors set out in s. 278.5(2) in determining whether production is necessary in the interests of justice under s. 278.5(1)(c).

[79] As was stated in Quesnelle at para. 21, I must first determine whether the redactions are likely relevant based on the Crown's description and the type of document at issue, without seeing the specifics of the redactions.

[80] The defence argues that the VIHA Records are relevant because they were made to preserve evidence of the alleged offence and that they "appear" to contain forensic records and information pertaining to the alleged offence. He suggests that the redactions likely relate to M.R.'s account of the alleged assault, and not her medical history.

[81] Earlier in these reasons, I rejected this characterization of the VIHA Records as being a part of the evidence gathering process, in contrast to the role of Ms. Fillion in completing the SANE Report.

[82] I have already described the general tenor of the Ambulance Record in that the ambulance attendants were documenting what M.R. told them - her "medical history" - simply for the purpose of providing immediate medical care to M.R. before her arrival at VGH. M.R. has a reasonable expectation of privacy with respect to her medical information (whether in the past or continuing) and in the ambulance attendants' note of what she reported. The fact of M.R.'s disclosure of that medical history in those circumstances clearly falls within s.

278.3(4)(a), (b) and (k) as an insufficient basis upon which to find likely relevance.

- [83] The same can be said of the Physician Record, which was completed in order to provide medical care to M.R. after the completion of Ms. Filion's examination.
- [84] It is speculative to suggest that, because portions of the VIHA Records were disclosed to the defence as they related to the alleged sexual assault, the redacted portions are likely relevant.
- [85] I agree with the Crown that the defence has not provided any evidentiary foundation to show that the redacted portions of the VIHA Records are likely relevant to an issue in this case.
- [86] The defence does not suggest that M.R. gave conflicting statements about the alleged sexual assault that may be revealed in the redactions in the VIHA Records. At its highest, the defence submissions amount to nothing more than speculation and a fishing expedition into M.R.'s private information: L.F. at para. 20.
- [87] Similarly, in Boudreau, the court cautioned against fishing expeditions:
- [6] I disagree. It is my view that s. 278.3(4) merely requires that the applicant provide the court hearing the application with some evidence or credible information beyond the applicant's mere assertion that the record is likely relevant. In other words, the applicant must be able to point to some evidentiary or informational foundation showing that the record is likely to be relevant to an issue at trial or to the competence of a witness to testify. Parliament has deemed the applicant's mere assertion that the record is likely relevant to be an impermissible and unlawful attempt to indulge in a fishing expedition. Random trolling through private records is prohibited in the absence of specific evidence or information the records are likely relevant to the particular case. Conjectural or speculative possibility that the records may be relevant is insufficient to override the complainant's privacy interest in the record. Fishing in private records without judicial licence is lawfully prohibited.

[Emphasis added.]

- [88] The defence's submissions also seek to rely on stereotypical assumptions that are not appropriate. In McNeil at para. 31, the Court stated that:

the likely relevance standard adopted by Parliament under the Mills Regime is tailored to counter speculative myths, stereotypes and generalized assumptions about sexual assault victims and about the usefulness of private records in sexual assault proceedings.

- [89] Defence counsel advances a speculative argument - that M.R. may have a continuing medical condition - such as mental health issues, like schizophrenia - that may go to the reliability of M.R.'s evidence. This is the very type of stereotypical argument that the Mills regime was meant to avoid, in suggesting that people with mental health issues are less worthy of belief by reason of that condition. This argument is also directly met by s. 278.3(4) (f) which provides that likely relevance is not established by the mere assertion that the

record may relate to the reliability of the testimony of a complainant or witness merely because she has received or is receiving psychiatric treatment, therapy or counselling.

[90] I have concluded that the defence has not established any likely relevance in respect of the redactions found in the VIHA Records. As such, it is not necessary to consider the other branch of the test under s. 278.5(1) in terms of whether production is in the interests of justice.

[91] M.R.'s counsel raises issues concerning the manner in which the police obtained the VIHA Records. M.R. agreed to waive any privacy rights with respect to the unredacted portions; however, she states that she did not consent to any disclosure of the redactions. The issue of M.R.'s consent to the disclosure of the VIHA Records to the police would have a relevant consideration in relation to issues such as the interests of justice under s. 278.5(1), however, that is not necessary in light of my conclusion as to likely relevance.

B. The Sane Report

[92] As above, I concluded that the redactions in the SANE Report were not a "record" within the meaning of s. 278.1, which requires a further hearing under the Mills regime.

[93] The defence's application for disclosure of these redactions remains to be determined under Stinchcombe.

[94] The principles of Stinchcombe disclosure were ably and succinctly described in Hawco:

[22] The overarching rule under the Stinchcombe regime is that the Crown must disclose everything relevant or potentially relevant to the defence. Crown has a limited discretion to redact information that is either irrelevant or privileged. If irrelevant, the Crown has the authority to withhold the information. It is a relatively high threshold.

[23] Crown's discretion is not unfettered and is reviewable by the court.

[24] The Statement and DVD were obtained by Constable Ruitenbeck while investigating the alleged offence and both are prima facie producible under the Crown's obligation to disclose, subject to relevancy. This means that the defence application must be allowed, unless Crown satisfies the Court that it was entitled to excise the Redacted Portions because they were irrelevant and of no use to the defence.

[25] Crown's decision to excise the Redacted Portion is reviewable by the court. This review is to be guided by the general principle that information should not be withheld if there is a reasonable possibility that it would impair the right of the accused to make full answer and defence.

[95] Both Crown and defence agreed that I should review the redactions to determine if the Crown has properly exercised its discretion to remove that information. That unredacted SANE Report was put into evidence and immediately sealed.

[96] Having reviewed the SANE Report, I agree with the Crown that the information contained in redactions #1-2 are irrelevant to the issues at trial and any competence issues of witnesses at trial. They do not impair Mr. Dick's right to make full answer and defence.

[97] I conclude that the Crown has abided by its Stinchcombe disclosure obligations in respect of the redactions in the SANE Report.

"Fitzpatrick J."

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