

CANADA / JUDGMENT

R. v. Wilkerson

2025 BCSC 2719

COURT

Supreme Court of British Columbia

DECIDED

30 October 2025

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Wilkerson,

2025 BCSC 2719

Date: 20251030

Docket: 98090-2, 98090-3

Registry: Abbotsford

Rex

v.

Holden Gregory Wilkerson

Restriction on Publication: Pursuant to s. 486.4(2) of
the Criminal Code of Canada

Before: The Honourable Justice Dley

Oral Reasons for Judgment re Disclosure Application

Counsel for the Crown,

appearing by videoconference:

P.M. Woytkowiak

Counsel for the Accused,

appearing by videoconference:

T.B. Martin

Place and Date of Trial/Hearing:

Abbotsford, B.C.

October 20, 2025

Place and Date of Judgment:

Abbotsford, B.C.

October 30, 2025

- [1] THE COURT: Mr. Wilkerson is charged with sexual assault. The Crown has disclosed a redacted copy of the complainant's statement. The Crown maintains that the redactions are necessary to protect the complainant's privacy rights. The defence argues that the statement must be disclosed in its entirety so that a full answer and defence can be advanced.
- [2] There are conflicting decisions in this province as to whether a police statement is a record that must be disclosed.

Background Facts

- [3] Mr. Wilkerson is alleged to have sexually assaulted the complainant on September 16 and 17, 2023. The complainant provided a statement to the police on September 29, 2023.
- [4] The transcript of the statement as disclosed to the defence has several pages of redactions. The Crown says that while these redactions were labelled initially as irrelevant, the proper reason was for the protection of the complainant's privacy. Apparently, the redactions referred to other matters that occurred four years prior and did not involve Mr. Wilkerson.
- [5] There are three decisions of this Court that deal squarely with the issue as to whether such a statement should be disclosed without redactions:
- a) R. v. Hawco, 2024 BCSC 122;
 - b) R. v. Callbreath, 2024 BCSC 688 (unreported); and
 - c) R. v. Dick, 2024 BCSC 1785 (unreported).
- [6] The question of disclosure involves the analysis of what has become known as the Mills regime (R. v. Mills, [1999] 3 S.C.R. 668), as legislated by ss. 278.1 to 278.91 of the Criminal Code. Those provisions limit access to a complainant's records where the complainant has a reasonable expectation of privacy. If a document is a record, then the accused must apply within the provisions of the Criminal Code sections to gain access and disclosure. If the document is not a record as contemplated by the Criminal Code provisions, then as long as the document is relevant, the accused is entitled to obtain disclosure of it.

[7] Section 278.1 states the following:

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.]

[8] In *Hawco*, the court concluded that the impugned statement was not a record and therefore subject to disclosure. At para. 19, the court stated:

[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.

[9] Four months later, the court in *Callbreath* declined to follow *Hawco* and ruled that redactions in the complainant's police statement need not be disclosed because they contained personal information for which there was a reasonable expectation of privacy. At paras. 20-24, the court stated:

[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'": [citations omitted].

[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.

- [22] The information sought involves a violative act that occurred when the complainant was 11 years old. I am satisfied that this is personal information for which there is a reasonable expectation of privacy that is not lost or transformed simply because it is contained in a police investigative file.
- [23] In my view, the information sought by the defence remains private and protected unless:
- a) the complainant abandons her expectation of privacy over the information;
 - b) the complainant provides a s. 278.2(2) waiver supported by an understanding of the protection afforded to this information and an informed decision to waive these protections; or
 - c) the court orders its production under s. 278.7.
- [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.
- [10] Five months later, Justice Fitzpatrick in the *Dick* case considered all of the issues that were argued in *Hawco* and *Callbreath* and preferred the *Hawco* reasoning.
- [11] In *Dick*, the court also had the benefit of the reasoning in *R. v. T.S.*, 2021 ONCJ 299, which had addressed similar issues. The T.S. court decided that the determining factor was the purpose for which the document was created, and if made for the purpose of investigating the particular offence before the court it was not a record subject to the *Mills* regime; *T.S.*, at para. 44.
- [12] In *Dick*, the court stated the following, at paras. 35 and 40-43:
- [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.
- [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.

Discussion

- [13] The Crown argues that the Hawco decision failed to consider the privacy provisions in the Canadian Charter of Rights and Freedoms [Charter]. The defence argues that the Callbreath decision failed to consider the concluding words of s. 278.1 which provide for the records exemption.
- [14] It may be assumed that the courts in Hawco and Callbreath were aware of the respective privacy concerns in the Charter and s. 278.1 of the Criminal Code. Simply because there was no specific mention or discussion of those provisions does not mean that the respective courts did not consider them. It is not necessary that reasons for judgment mention all issues as long as the rationale for the decision is apparent. Reasons for judgment are not to be a "watch-me-think" exercise.
- [15] However, it is plainly obvious that Justice Fitzpatrick had all of the arguments and issues before her in the Dick case. Justice Fitzpatrick was aware of the Charter issues and the s. 278.1 record exemption.
- [16] The fact patterns in Hawco and Callbreath were closely aligned. The decisions cannot be distinguished based on differing facts. That left the application of the law to those facts. Justice Fitzpatrick resolved the conflict in the decisions and preferred the Hawco reasoning. That is the most recent precedent in this province. It has not been overtaken by appellate authority to the contrary.
- [17] The defence argues that because of horizontal stare decisis (Re: Hansard Spruce Mills Ltd., [1954] 4 D.L.R. 590 (B.C.S.C.), at p. 592), the Dick decision is binding on me.
- [18] Horizontal stare decisis and the factors justifying departure from precedent were explained in R. v. Sullivan, 2022 SCC 19, at para. 75:
- [75] The principle of judicial comity -- that judges treat fellow judges' decisions with courtesy and consideration -- as well as the rule of law principles supporting stare decisis mean that prior decisions should be followed unless the Spruce Mills criteria are met. Correctly stated and applied, the Spruce Mills criteria strike the appropriate balance between the competing demands of certainty, correctness and the even-handed development of the law. Trial courts

should only depart from binding decisions issued by a court of coordinate jurisdiction in three narrow circumstances:

1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;
2. The earlier decision was reached per incuriam ("through carelessness" or "by inadvertence"); or
3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.

[19] There is no appellate authority that undermines the Dick decision. The Dick decision was not reached through carelessness or inadvertence. The decision was fully considered. It was not taken in exigent circumstances.

[20] The result is that the Dick decision is binding authority.

[21] The facts of this case are the same as those in Hawco. As a result of the reasoning in the Dick case, Hawco is also binding authority.

[22] Accordingly, I conclude that the police statement is not a record as contemplated by the Mills regime and is subject to disclosure.

"Dley J."

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