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Multiple Sexual Offence Proceedings and the Disclosure of "Records" under the Criminal Code

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Cases Considered:
R. v. Leykin, 2010 ABQB 631

Ruslan Leykin was charged with a number of sexual offences relating to N.W, who is also the complainant in a second sexual assault case involving a different accused. Leykin sought access to records in the possession of the Crown in relation to the second case, and argued that the governing procedure was that in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. The Crown argued that the proper procedure for determination of production of records was that set out under ss.278.1 to 278.9 of the *Criminal Code*, R.S.C. 1985, c.C-46 ("the production provisions"). In a short but important decision, Justice June Ross of the Alberta Court of Queen's Bench agreed with the Crown, holding that the production provisions of the *Criminal Code* apply to records in the possession of the Crown in relation to a separate sexual assault proceeding.

Stinchcombe is generally the governing authority on the Crown's obligations of disclosure in relation to documents in its possession. It provides that the Crown has an obligation to disclose to the defence all information in its possession or control, unless the information is clearly irrelevant or protected by privilege, or withholding the information is necessary to prevent harm to another person (*Stinchcombe* at para 16).

In the mid 1990s, it became routine in sexual assault prosecutions for the defence to seek not only Crown disclosure, but also the production of personal records of complainants in the possession of third parties, for example sexual assault crisis centres who had provided counselling to the complainant (see Jennifer Koshan, "Disclosure and Production in Sexual Violence Cases: Situating *Stinchcombe*" (2002) 40 Alta. Law Rev. 655). The question of what procedure should apply to production of third party records was dealt with by the Supreme Court in *R. v. O'Connor*, [1995] 4 S.C.R. 411. The Supreme Court split 5:4 on this issue, with the majority (per Lamer C.J. and Sopinka, J.) establishing a 2 step common law regime for the production of third party records. This regime stipulated that only third party records that were "likely relevant" would be produced to the trial judge, who would then review the records to determine whether they should be produced to the accused. The decision whether to produce the records to the accused was to be based on several factors, including the following: "(1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record in question; (3) the nature and extent of the reasonable expectation of privacy vested in that record; (4) whether production of the record would be premised upon any discriminatory belief or bias and (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question" (*O'Connor* at para. 31).

The *O'Connor* majority also held that if the Crown came into possession of confidential third party records, its disclosure obligations from *Stinchcombe* would apply, as any concerns regarding complainants' privacy interests "disappear where the documents in question have fallen into the possession of the Crown" (*O'Connor* at para 7). The dissent (per L'Heureux Dubé, J.) declined to comment on that issue as it went beyond the facts of the case and had not been argued (*O'Connor* at para. 98).

O'Connor was met with criticism from women's and anti-violence groups, as the majority decision was seen to place the accused's right to full answer and defence above complainants' rights to equality, security of the person and privacy. In particular, the majority in *O'Connor* had disagreed with the dissenting justices that other factors should be taken into account in production decisions, such as "the extent to which production of records … would frustrate society's interest in encouraging the reporting of sexual offences and the acquisition of treatment by victims" (*O'Connor* at para. 32). Extensive consultations were undertaken by the federal government, leading eventually to the enactment of ss.278.1 to 278.9 of the *Criminal Code* in 1997. These provisions retain the 2 step test from *O'Connor*, but expand the range of factors to be considered in production applications to include those set out in the dissenting judgment. The production provisions also go beyond the majority decision in *O'Connor* in their application to all records relating to the complainant, including those in the possession of the Crown. Section 278.2(2) of the *Code* provides that the production provisions apply "where a record is in the possession or control of any person, *including the prosecutor* in the proceedings, unless, in the case of a record in the possession or control of the prosecutor, the complainant or witness to whom the record relates has expressly waived the application of those sections" (emphasis added). Section 278.2(3) requires the prosecutor to give notice to the accused of records in its possession (without disclosing the contents of those records).

In *R. v. Mills*, [1999] 3 S.C.R. 668, a majority of the Supreme Court upheld the production provisions of the *Code* as constitutional, finding that they struck a proper balance between the rights of accused persons and complainants (even though they departed from the majority judgment in *O'Connor*). Chief Justice Lamer dissented in part in *Mills*, on the basis that the production provisions unjustifiably violated the rights of the accused in their application to records in the possession of the Crown. Lamer C.J. maintained his position from *O'Connor* that *Stinchcombe* should apply to defence applications to access such records. His reasons clearly state the difference between the standards in *Stinchcombe* and the production provisions of the *Code*:

> The standard of relevance which the accused must satisfy according to ss.278.3(3)(*b*) and 278.5(1)(*b*) – *likely relevance* to an issue at trial or to the competence of a witness to testify – is higher than that required for disclosure under a *Stinchcombe* application, which is whether the information "*may be useful* to the defence" (*Mills* at para. 8, emphasis added).

Chief Justice Lamer's views on records in the possession of the Crown did not prevail, however. As noted by Justice Ross in *Leykin* (at para. 6), the documents sought by the accused – documents relating to another prosecution that were in the possession of the Crown – were subject to the production provisions, provided that the documents were "records" as defined under the *Criminal Code*. That definition provides as follows:

> 278.1 For the purposes of sections 278.2 to 278.9, "record" means any form of record that contains *personal information for which there is a reasonable expectation of privacy* and includes, without limiting the generality of the foregoing, 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).

Leykin made two arguments as to why documents in the possession of the Crown in relation to another sexual assault proceeding involving the same complainant did not meet this definition.

First, he argued that these documents were "made by persons responsible for the investigation or prosecution of the offence" and were thus excluded from the definition of "record". Justice Ross rejected this argument. She agreed with two Ontario decisions where courts held that the language of s.278.1, and in particular, reference to "*the* offence", restricts the exception to investigatory and prosecutorial documents made in relation to the offence before the court (see *R. v. Quesnelle*, 2010 ONSC 175 (CanLII) (Ont. S.C.J.); *R. v. McAdam*, 172 C.R.R. (2d) 27, 2008 CanLII 20346 (Ont. S.C.J.)). Quoting from *McAdam*, Justice Ross noted that this interpretation "reflects the axiom that "records made by the police relating to the investigation or prosecution of the offence before the Court must be produced"" (at para. 8, citing *McAdam* at para. 18).

Leykin's second argument was that the documents in question did not contain "personal information for which there is a reasonable expectation of privacy". Justice Ross noted (at para. 10) that the definition of "record" included documents containing personal information, the production or disclosure of which is protected by provincial legislation. She found that the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (*FOIPPA*), is just such legislation. *FOIPPA*'s definition of "personal information" in s.1(n) includes "recorded information about an identifiable individual" that could encompass the kind of information that one would expect to find in records relating to an investigation and prosecution (at para. 11). Further, Justice Ross noted that *FOIPPA* covers personal information found in records "in the custody or under the control of a public body", and that the Crown and police are defined as "public bodies" in *FOIPPA* ss.1(p) and (j) (at para. 11). The production provisions thus seemed to incorporate the kinds of personal information protected under the provincial *FOIPPA* regime.

However, Justice Ross clarified that the production provisions only apply to records in which there is a reasonable expectation of privacy in respect of the personal information contained therein (at para. 12). Could this be said of records relating to a separate criminal investigation concerning the same complainant? Justice Ross cited the recent case of *R. v. McNeil*, [2009] 1 S.C.R. 66 at para. 12, for the proposition that there is a reasonable expectation of privacy in records relating to a criminal investigation. According to *McNeil*, "[t]his principle holds equally in respect of criminal investigation files relating to third party accused that are *not* in the possession or control of the prosecuting Crown" (at para. 12, emphasis in original). *McNeil* did not involve a sexual offence, and so *O'Connor* (rather than *Stinchcombe*) was found to be the governing regime for the third party records involved in that case. In *Leykin*, because the production provisions replaced *O'Connor* for applications seeking access to third party records in sexual offence proceedings, Justice Ross held that the production provisions (rather than *Stinchcombe)* should apply.

This decision seems to me to be the correct one, based on the wording of the production provisions and the application of *McNeil*. Further, it seems only logical that if the accused must apply under the production provisions for access to records in the possession of the Crown that relate to the offence before the court, he must also follow that procedure for records that are further removed from the matter at hand.

Justice Ross's ruling also upholds one of the objectives of the production provisions, which was to encourage the reporting of sexual offences. Sexual offences are vastly under-reported, and studies have shown that one reason victims do not report is fear of disclosure of their personal records (see e.g. Tina Hattem, *Survey of sexual assault survivors* (Ottawa: Department of Justice Canada, 2000) at 15). By finding that the production provisions comprehensively apply to such records, even when they are in the possession of the Crown and relate to a different proceeding, this decision ensures that production applications will be governed by procedures that better balance the rights of accused persons and complainants than the approach under *Stinchcombe*. Further, by ensuring that complainants who are the subject of multiple proceedings have equal protection of their records under the production provisions, the approach in *Leykin* may help to encourage reporting of multiple sexual offences.