



SUPREME COURT OF CANADA

CITATION: R. v. Quesnelle, 2014 SCC 46

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BETWEEN:

Her Majesty The Queen

Appellant

and

Vincent Quesnelle

Respondent

- and -

Attorney General of Alberta,

Canadian Association of Chiefs of Police,

Criminal Lawyers' Association of Ontario and

Barbra Schlifer Commemorative Clinic

Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT: Karakatsanis J. (McLachlin C.J. and LeBel, Abella, (paras. 1 to 68) Rothstein, Moldaver and Wagner JJ. concurring)

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File No.: 35390.

2014: March 20; 2014: July 9.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Evidence — Disclosure — Whether police occurrence reports prepared in the investigation of unrelated incidents involving a complainant or witness are “records” within the meaning of s. 278.1 of the Criminal Code, such that they are subject to the Mills regime — Whether the exemption for investigatory and prosecutorial records applies to all police occurrence reports or only those made in relation to the offence in question — Criminal Code, R.S.C. 1985, c. C-46, ss. 278.1 to 278.91.

Q was charged with sexually assaulting two complainants. Before trial, Q made an application seeking disclosure of certain police occurrence reports which involved a complainant but which were not made in the course of the investigation of the charges against Q. The trial judge ruled that the occurrence reports at issue were “records” under the *Mills* regime, specifically s. 278.1 of the *Criminal Code*. As such, Q applied for disclosure of the occurrence reports pursuant to s. 278.3 of the *Code*. The trial judge dismissed the application and Q was ultimately convicted. The Court of Appeal allowed Q’s appeal on the basis that the police occurrence reports were not “records” under the *Mills* regime and should have been part of regular Crown disclosure under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. The Court of Appeal therefore ordered a new trial.

Held: The appeal is allowed, the order for a new trial is set aside, and the conviction is restored with the sentence appeal remitted to the Court of Appeal.

Sections 278.1 to 278.91 of the *Criminal Code*, known as the *Mills* regime, permit disclosure of private records relating to complainants and witnesses in cases involving particular sexual offences only where a record is likely relevant and its disclosure is necessary in the interests of justice. The regime reflects Parliament's intention to accommodate and reconcile the right of the accused to make full answer and defence with the privacy and equality rights of complainants in sexual offence cases. While it governs the disclosure of "records" in sexual offence trials, the regime does not displace the Crown's duty to make reasonable inquiries and obtain potentially relevant material in accordance with *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66.

Whether a document counts as a "record" depends first on whether the document contains personal information for which there is a reasonable expectation of privacy, and second on whether it falls into the exemption for investigatory and prosecutorial documents. Section 278.1 provides an illustrative list of some types of records that generally give rise to a reasonable expectation of privacy, but other documents will still be covered if they attract a reasonable expectation of privacy. Trial judges will usually assess reasonable expectations on the basis of the type of document at issue. Police occurrence reports prepared in the investigation of previous incidents involving a complainant or witness other than the offence being prosecuted count as "records" and are subject to the *Mills* regime.

Given the sensitive nature of the information frequently contained in such police occurrence reports, and the impact that their disclosure can have on the privacy interests of complainants and witnesses, there will generally be a reasonable expectation of privacy in such reports. Police occurrence reports may contain highly sensitive material including unproven allegations and statements of complainants. They may reveal family status, health information, and other personal details. Most significantly, they can reveal previous instances where the witness or complainant has been the victim of criminal activity, including previous sexual assaults. Disclosure of this information engages complainants' and witnesses' "informational privacy", the right to control how their information is shared. Disclosure of this information to the accused is particularly likely to engage the dignity interests of complainants and witnesses, and to discourage victims of sexual offences from coming forward. The fact that this information has already been obtained by police does not destroy the affected person's interest in keeping the information private from others. People are entitled to provide information to police with confidence that the police will only disclose it for good reason.

The exemption for investigatory and prosecutorial records contained in s. 278.1 does not strip the protection of the *Mills* regime from police occurrence reports. In light of the text of the provision in both languages, as well as its purpose, context, and the consequences of concluding otherwise, the trial judge was correct in deciding that the exemption applies only to records made in relation to the offence in

question, and not to police occurrence reports made in the course of unrelated investigations.

Cases Cited

Referred to: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Esau*, [1997] 2 S.C.R. 777; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579; *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631; *R. v. Dinh*, 2001 ABPC 48, 42 C.R. (5th) 318; *R. v. Dymont*, [1988] 2 S.C.R. 417; *Case of Escher v. Brazil* (2009), Inter-Am. Ct. H.R. (Ser. C) No. 200; *R. v. Fiddler*, 2012 ONSC 2539, 258 C.R.R. (2d) 193; *R. v. McAdam* (2008), 172 C.R.R. (2d) 27; *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217.

Statutes and Regulations Cited

Act to amend the Criminal Code (production of records in sexual offence proceedings), S.C. 1997, c. 30, preamble.

Canadian Charter of Rights and Freedoms, s. 8.

Constitution Act, 1867, s. 133.

Criminal Code, R.S.C. 1985, c. C-46, ss. 193(1), 278.1 to 278.91, 278.2(2), (3), 278.3, 278.5, 278.7.

Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56.

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Gotell, Lise. “When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records” (2006), 43 *Alta. L. Rev.* 743.

Keen, Peter Carmichael. “*Gebrekiastos*: Fallout from *Quesnelle*” (2013), 4 *C.R.* (7th) 56.

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APPEAL from a judgment of the Ontario Court of Appeal (Rosenberg, Sharpe and MacFarland J.J.A.), 2013 ONCA 180, 114 O.R. (3d) 779, 303 O.A.C. 18, 1 C.R. (7th) 394, 297 C.C.C. (3d) 414, [2013] O.J. No. 1365 (QL), 2013 CarswellOnt 3337, setting aside the accused’s convictions for sexual assault and assault and ordering a new trial. Appeal allowed and convictions restored.

Milan Rupic, for the appellant.

Najma Jamaldin and *Paul Genua*, for the respondent.

Maureen J. McGuire, for the intervener the Attorney General of Alberta.

Philip Wright, Vincent Westwick and Christiane Huneault, for the intervener the Canadian Association of Chiefs of Police.

Jonathan Dawe and Michael Dineen, for the intervener the Criminal Lawyers' Association of Ontario.

Susan Chapman and Joanna Birenbaum, for the intervener the Barbra Schlifer Commemorative Clinic.

The judgment of the Court was delivered by

KARAKATSANIS J.—

I. Overview

[1] In sexual offence cases, the *Criminal Code*, R.S.C. 1985, c. C-46, limits the disclosure of private records relating to complainants and witnesses. The relevant provisions, ss. 278.1 to 278.91, known as the *Mills* regime, permit disclosure only where a record is likely relevant and its disclosure is necessary in the interests of justice. The regime applies to “records” that contain personal information for which there is a reasonable expectation of privacy, unless they are made by persons responsible for the investigation or prosecution of the offence. The issue on appeal is

whether these provisions apply to police occurrence reports prepared in the investigation of previous incidents involving a complainant or witness and not the offence being prosecuted. The question is whether these unrelated police occurrence reports count as “records” as defined in s. 278.1, such that the statutory disclosure limits apply.

[2] I conclude that the *Mills* regime applies to police occurrence reports that are not directly related to the charges against the accused. Privacy is not an all or nothing right. Individuals involved in a criminal investigation do not forfeit their privacy interest for all future purposes; they reasonably expect that personal information in police reports will not be disclosed in unrelated matters. Moreover, while the regime exempts investigatory and prosecutorial records, that exemption applies only to records made in relation to the particular offence in question.

[3] Accordingly, I agree with the trial judge that the unrelated police occurrence reports at issue were “records” within the definition of s. 278.1 and thus subject to the *Mills* regime. The trial judge was entitled to conclude that the reports should not be disclosed. I would allow the appeal, set aside the order for a new trial, and restore the conviction, remitting the sentence appeal to the Court of Appeal.

II. Facts

[4] The respondent, Vincent Quesnelle, was charged with sexually assaulting two complainants, T.R. and L.I. Prior to trial, CBC Radio aired a documentary about

the complainant T.R. (a street sex worker), during which the lead investigator in this case indicated that she had obtained and reviewed four or five police occurrence reports which involved T.R. but were not made in the course of the investigation that resulted in the charges against the respondent. The detective did not include the reports in the investigatory file.

[5] The police create occurrence reports to document incidents to which they respond, including disturbances, requests for assistance, reports of alleged crimes and even medical emergencies or car accidents. The reports contain police officers' recollections and notes concerning the facts of the incident.

III. Judicial History

A. *Ontario Superior Court of Justice*

[6] Before trial, the respondent made an application seeking disclosure of the police occurrence reports that had been reviewed by the detective. The trial judge, Thorburn J., ruled that the occurrence reports at issue were "records" under the *Mills* regime for two reasons: 2009 CanLII 73645. First, occurrence reports contain personal information in which there is a reasonable expectation of privacy. Second, the reports do not fall under the exception to the *Mills* regime in s. 278.1 because they are not "records made by persons responsible for the investigation or prosecution of the offence": that section excludes only police records made in relation to the case being prosecuted. Under the *Mills* regime, a "record" may only be disclosed to the

accused if the trial judge is satisfied that it is likely relevant to an issue at trial and disclosure is necessary in the interests of justice.

[7] Since the records fell within the *Mills* regime, the respondent applied for disclosure of the occurrence reports pursuant to s. 278.3 of the *Code*. He argued that the records were likely relevant to assess the complainant's credibility. The defence chose not to rely on the documentary in making this application. He did not want to alert the complainant — who was a party to the application — to his theory of the relevance of the occurrence reports. The trial judge ruled against the respondent because there was no evidentiary basis on which to conclude that the documents requested were likely relevant or that their production was necessary in the interests of justice: 2010 ONSC 175 (CanLII).

[8] The respondent was ultimately convicted and sentenced to six and a half years in jail, less credit for time served: 2010 ONSC 3713 (CanLII).

B. *Ontario Court of Appeal, 2013 ONCA 180, 114 O.R. (3d) 779*

[9] The respondent appealed his conviction and sentence to the Ontario Court of Appeal. He argued that the police occurrence reports were not “records” under the *Mills* regime, and therefore should have been part of regular Crown disclosure under *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

[10] The Court of Appeal allowed his appeal on this basis and ordered a new trial. First, MacFarland J.A. concluded that complainants and witnesses who give information to the police have no reasonable expectation of privacy in police documents recording that information. Second, she concluded that s. 278.1 exempts all records that are prepared by the investigating police service, whether or not the records are related to the case being prosecuted. Thus the police occurrence reports at issue were not subject to the *Mills* regime. The court reasoned that the police occurrence reports reviewed by Detective Leaver were fruits of the investigation, and ordered their disclosure.

IV. Analysis

A. *The Principles Governing Crown Disclosure*

(1) Disclosure in Criminal Cases Generally

[11] The Crown has a broad duty to disclose relevant evidence and information to persons charged with criminal offences. *Stinchcombe*, at pp. 336-40, provides that the Crown is obliged to disclose all relevant, non-privileged information in its possession or control so as to allow the accused to make full answer and defence. For purposes of this “first party” disclosure, “the Crown” does not refer to all Crown entities, federal and provincial: “the Crown” is the prosecuting Crown. All other Crown entities, including police, are “third parties”. With the exception of the police duty to supply the Crown with the fruits of the investigation, records in the

hands of third parties, including other Crown entities, are generally not subject to the *Stinchcombe* disclosure rules.

[12] In *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, this Court recognized that the Crown cannot merely be a passive recipient of disclosure material. Instead, the Crown has a duty to make reasonable inquiries when put on notice of material in the hands of police or other Crown entities that is potentially relevant to the prosecution or the defence. This Court also recognized that police have a duty to disclose, without prompting, “all material pertaining to its investigation of the accused” (para. 14) as well as other information “obviously relevant to the accused’s case” (para. 59).

[13] In *R. v. O’Connor*, [1995] 4 S.C.R. 411, at paras. 15-34, this Court established a separate disclosure regime for records in the hands of “third parties” that are “likely relevant” to an issue at trial. Under *O’Connor*, an application is made to the court and the judge determines whether production should be compelled in accordance with a two-stage test. At the first stage, the applicant has an onus to establish the likely relevance of the record. At the second stage, the judge examines the record and determines whether, and to what extent, it should be produced for the accused: in the case of relevant information, privacy interests yield to the right to a full answer and defence.

(2) Disclosure in Sexual Offence Cases — the *Mills* Regime

[14] Beginning in the late 1980s, it became commonplace in sexual offence trials for defence counsel to seek the private records of complainants in order to attack the complainant through invasive (and often inappropriate) credibility probing: *House of Commons Debates*, vol. 134, No. 122, 2nd Sess., 35th Parl., February 4, 1997. The *Mills* regime, enacted in 1997, was a response to these practices. The provisions of the *Mills* regime are set out in the Appendix. The central idea, according to the preamble to the legislation enacting the regime, is that

while production to the court and to the accused of personal information regarding any person may be necessary in order for an accused to make a full answer and defence, that production may breach the person's right to privacy and equality and therefore the determination as to whether to order production should be subject to careful scrutiny;

(An Act to amend the Criminal Code (production of records in sexual offence proceedings), S.C. 1997, c. 30)

The regime reflects Parliament's intention to accommodate and reconcile the right of the accused to make full answer and defence with the privacy and equality rights of complainants in sexual offence cases. In the words of Professor Lise Gotell, the regime was created in order to "to limit what it is that a woman/child complainant must be forced to reveal at trial as the price of her access to the criminal justice system" (When Privacy is not Enough: Sexual Assault Complainants, Sexual History Evidence, and the Disclosure of Personal Records, (2006) 43 Alta. L. Rev. 743, at p. 745.). That approach was upheld by this Court in *R. v. Mills*, [1999] 3 S.C.R. 668, and its constitutionality is not challenged in this appeal.

[15] The *Mills* regime governs the disclosure of records containing private information of witnesses and complainants in certain sexual offence prosecutions (*Criminal Code*, 278.1-278.91). It establishes a two-part process through which accused persons may apply for disclosure of such records. First, a record — whether in the hands of the Crown, the police, or a third party (s. 278.2(2)) — will only be produced to the court where the trial judge is satisfied that the record is *likely* relevant to an issue at trial or to the competence of a witness to testify, and that disclosure to the court is necessary in the interests of justice: s. 278.5. Second, after reviewing the record, the judge may only order disclosure to the accused if the record is likely relevant and disclosure is in the interests of justice: s. 278.7.

[16] Once the Crown obtains a record and determines that it is covered by the *Mills* regime, it must give notice to the accused: *Criminal Code*, s. 278.2(3). While the Crown may not disclose the contents of the record, it should in appropriate circumstances give an assessment of the likely relevance of a record in its possession, as well as indicate the basis of its relevance. At a minimum, the Crown should advise if it intends to use any information contained in records protected by *Mills* as part of its case against an accused. The Crown's assessment that the record is relevant for a specific reason will likely establish a basis for the judge to order production to the court.

[17] The mere fact that a police occurrence report concerns a complainant or witness is not enough to make the report relevant to an otherwise unrelated

prosecution. The *Mills* provisions echo this Court's frequent warnings against relying on myths and stereotypes about sexual assault complainants in assessing the relevance of evidence in the context of sexual assault trials. For example, the fact that a complainant has reported sexual violence in the recent or distant past, provides sexual services for money, or suffers from addiction is not, without more, enough to render a police occurrence report "relevant": see, e.g., *R. v. Esau*, [1997] 2 S.C.R. 777, at para. 82 (*per* McLachlin J., dissenting); *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at paras. 86-97 (*per* L'Heureux-Dubé J.); *R. v. Osolin*, [1993] 4 S.C.R. 595, at pp. 670-672 (*per* Cory J.). However, occurrence reports which raise legitimate questions about the credibility of the complainant or a witness, or some other issue at trial, will be treated as relevant.

(3) The *McNeil* Duties and the *Mills* Notice Obligation

[18] The Crown's *McNeil* duty to make reasonable inquiries and the corresponding police duty to supply relevant information and evidence to the Crown apply notwithstanding the *Mills* regime. The *Mills* regime governs the *disclosure* of "records" in sexual offence trials, but does not displace the Crown's duty to make reasonable inquiries and *obtain* potentially relevant material (or the police duty to pass on material to the Crown) under *McNeil*. As an officer of the court and Minister of Justice, the Crown is duty-bound to seek justice, not convictions, and to avoid wrongful convictions, in the prosecutions of all offences, including sexual offences.

The *Mills* regime simply replaces the obligation to *produce* relevant records directly with an obligation to *give notice* of their existence: *Criminal Code*, s. 278.2(3).

B. *Are Unrelated Police Occurrence Reports “Records”?*

[19] The issue in this appeal is whether police occurrence reports prepared in the investigation of unrelated incidents involving a complainant or witness are “records” within the meaning of s. 278.1 of the *Criminal Code*, such that they are subject to the *Mills* regime. Section 278.1 defines “records” 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.

[20] The determination of whether a document counts as a “record” involves two inquiries. First, does the document contain personal information for which there is a reasonable expectation of privacy? Second, does it fall into the exemption for investigatory and prosecutorial documents? I consider these questions in turn.

(1) Documents Attracting a Reasonable Expectation of Privacy

(a) *Section 278.1 Requires a Categorical Approach*

[21] Under the first step of the *Mills* regime, the trial judge makes a preliminary determination of whether a document is a “record” covered by the regime, without seeing the specific document. Only if the judge decides that the document is likely relevant to an issue at trial or to the competence of a witness to testify and that production to the court is necessary in the interests of justice will the judge then have the opportunity to view and assess the particular document. Therefore, the judge will usually determine whether a record “contains personal information for which there is a reasonable expectation of privacy”, on the basis of the *type* of document at issue.

[22] The definition of “record” is broad and non-exhaustive. Section 278.1 provides an illustrative list of some of the types of records that usually give rise to a reasonable expectation of privacy. However, documents that do not fall into the listed categories will still be covered by the *Mills* regime if they contain information that gives rise to a reasonable expectation of privacy.

[23] The question here is whether the trial judge committed a reversible error at the preliminary stage by holding that police occurrence reports relating to the complainant were “records” because they generally contain information that gives rise to a reasonable expectation of privacy. The Court of Appeal concluded that the trial judge erred because the definition of “record” under s. 278.1 contemplates the types of personal information disclosed in the context of a “trust-like, confidential, or therapeutic relationship” and which an individual would “seek to withhold from the

state” (paras. 32-33). In my view, such a restricted approach is not warranted. The trial judge was right to treat the reports as “records” under the *Mills* regime because the reports generally contain information in which there is a reasonable expectation of privacy.

(b) *Reasonable Expectation of Privacy*

[24] In order for a document to constitute a “record” and therefore fall within the *Mills* regime it must be a “record that contains personal information for which there is a reasonable expectation of privacy”: s. 278.1.

[25] The appellant submits that police occurrence reports will often contain deeply personal and potentially embarrassing information, and that witnesses and complainants retain a privacy interest in the reports. The subject of an occurrence report will not expect the report to be disclosed to impeach his or her credibility in an unrelated case.

[26] The respondent agrees with the Court of Appeal that police occurrence reports do not “implicate the types of privacy interests envisioned in s. 278.1 or in *Mills*” (R.F., at para. 58, citing Court of Appeal reasons, at para. 41). The Court of Appeal observed that the complainant cannot have a subjective expectation of privacy in previous complaints to police: she will know, at the time of making a complaint to police, that the information she discloses will end up in a public trial. Moreover, the

victim of an attack does not speak to police in the context of a trust-like, confidential, or therapeutic relationship.

(i) General Principles

[27] The assessment of whether there is a reasonable expectation of privacy for purposes of s. 278.1 of the *Criminal Code* draws on the jurisprudence applying s. 8 of the *Canadian Charter of Rights and Freedoms*: see *Mills*, at para. 99. That jurisprudence establishes that expectations of privacy must be assessed in light of the “totality of the circumstances” (*R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 26; *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 19). The circumstances (or nature of the relationship) in which information is shared is not determinative: the reasonable expectation of privacy is not limited to trust-like, confidential, or therapeutic relationships.

[28] Unlike much of the jurisprudence under s. 8 of the *Charter*, the analysis of the reasonable expectation of privacy in this case does not concern the right to be free from unreasonable intrusion by the state. Rather, the question is whether it is reasonable to expect that the state will keep information that it has legitimately acquired private from *other* private individuals.

[29] A reasonable expectation of privacy is not an all or nothing concept: *Mills*, at para. 108. A person may have a reasonable expectation that the state will not

have access to her hotel room, even if she fully expects hotel staff to enter the premises: *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at para. 22, discussing *R. v. Dinh*, 2001 ABPC 48, 42 C.R. (5th) 318. Equally, a person may divulge information to an individual or an organization with the expectation that it be used only for a specific purpose: *R. v. Dymont*, [1988] 2 S.C.R. 417, at pp. 429-30. The same principle applies to disclosure to the police.

[30] In this case, the question is whether the subjects of police occurrence reports could reasonably expect the police to safeguard their private information, unless and until disclosure is justified. After describing the information contained in the reports, I will discuss the privacy interests engaged by that information. Finally, I will address the implications arising from the fact that the reports are in the hands of police.

(ii) The Information in Police Occurrence Reports

[31] Police occurrence reports contain information disclosed to police by the persons concerned, by third parties, or obtained by police through search, seizure, surveillance, or information sharing.

[32] This Court observed in *McNeil*, at para. 19:

Criminal investigative files may contain highly sensitive material including: outlines of unproven allegations; statements of complainants or witnesses — at times concerning very personal matters

[33] Police occurrence reports may reveal family status, health information (including statements concerning mental health or the use of drugs and alcohol), and details about housing and employment. They may reveal personal conflicts or details about relationships between individuals. See P. C. Keen, “*Gebrekirstos: Fallout from Quesnelle*” (2013), 4 C.R. (7th) 56, at pp. 60-61. Moreover, they very often reveal the extent of an individual’s engagement with the criminal justice system. Most significantly, they can reveal previous instances where the witness or complainant has been the victim of criminal activity, including previous sexual assaults.

(iii) The Price of Disclosure

[34] The disclosure of the information described above engages complainants’ and witnesses’ “[i]nformational privacy”, “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others” (*Tessling*, at para. 23, quoting A. F. Westin, *Privacy and Freedom* (1970), at p. 7). As L’Heureux-Dubé J. observed in *R. v. O’Connor*, at para. 119:

Although it may appear trite to say so, I underline that when a private document or record is revealed and the reasonable expectation of privacy therein is thereby displaced, the invasion is not with respect to the particular document or record in question. Rather, it is an invasion of the dignity and self-worth of the individual, who enjoys the right to privacy as an essential aspect of his or her liberty in a free and democratic society.

The disclosure of police occurrence reports that contain intimate personal information — such as details of previous allegations of sexual assault — may do particularly serious violence to the dignity and self-worth of an affected person.

[35] The *Mills* regime regulates disclosure in the context of a criminal trial: information that is disclosed will often be exposed in court. Significantly, even where the information is not used in the trial, it will certainly be seen by the accused, who will often be known to the affected person, and whose use of the information is not subject to the legal oversight of the *Charter* or privacy legislation that applies when such information is given to law enforcement. Consequently, disclosure may involve a more serious violation of the complainant's dignity than disclosure to the state.

[36] There are tangible harms associated with disclosure of personal information in the context of prosecutions for sexual offences, particularly when information about the complainant is disclosed to the person accused of sexually assaulting her. In the preamble to the legislation enacting the *Mills* regime, Parliament recognized “that the compelled production of personal information may deter complainants of sexual offences from reporting the offence to the police”. Victims of sexual offences will be less likely to come forward if they know that doing so will entail disclosure of their past interactions with police to the very person who they claim has wronged them.

[37] It bears repeating that privacy is not an all or nothing concept; rather, “[p]rivacy interests in modern society include the reasonable expectation that private information will remain confidential to the persons to whom and restricted to the purposes for which it was divulged” (*Mills*, at para. 108). Consequently, the fact that information about a person has been disclosed to a third party does not destroy that person’s privacy interests. Because the contents of occurrence reports will be disclosed under *certain* circumstances does not mean that there is not a reasonable expectation of privacy in those records.

[38] The Court of Appeal erred in concluding that the complainant could not have a reasonable expectation of privacy because the information was disclosed outside the context of a “trust-like, confidential, or therapeutic relationship”. While such relationships may give rise to heightened privacy interests, their absence is not dispositive. Whether a person is entitled to expect that their information will be kept private is a contextual inquiry.

[39] Where an individual voluntarily discloses sensitive information to police, or where police uncover such information in the course of an investigation, it is reasonable to expect that the information will be used for the purpose for which it was obtained: the investigation and prosecution of a particular crime. Similarly, it is reasonable to expect individual police officers to share lawfully gathered information with other law enforcement officials, provided the use is consistent with the purposes for which it was gathered.

[40] However, when the government divulges sensitive information to private individuals this may violate reasonable expectations of privacy. For example, if police were to publicly broadcast a wiretap recording this would clearly constitute an interference with privacy (see *Case of Escher v. Brazil*, Inter-American Court of Human Rights, Judgment of July 6, 2009, Series C, No. 200, at paras. 157-58) as well as a violation of s. 193(1) of the *Criminal Code*. To indiscriminately publicize the contents of police occurrence reports would result in similar interference.

[41] That is not to say that all disclosures of personal information by the police unreasonably intrude upon privacy. Where private information becomes part of a criminal case, the disclosure of that information to the court, the accused, and to the public is reasonable and unavoidable. For example, police occurrence reports made in the course of the investigation of the offence being prosecuted must be disclosed under *Stinchcombe*.

[42] But what of police occurrence reports that were made in connection with separate incidents, rather than as part of the investigation into the offence being prosecuted? There will certainly be times when the disclosure of such records is necessary to ensure a fair trial. Consequently, the *Mills* regime gives trial judges the power to disclose records under such circumstances. The judge must balance the privacy of complainants and witnesses against ensuring the disclosure necessary to make full answer and defence. However, the fact that a record might be disclosed

under appropriate circumstances does not nullify the expectation of privacy in that record in general.

[43] People provide information to police in order to protect themselves and others. They are entitled to do so with confidence that the police will only disclose it for good reason. The fact that the information is in the hands of the police should not nullify their interest in keeping that information private from other individuals.

(c) *Conclusion on Reasonable Expectation of Privacy*

[44] Fundamentally, the privacy analysis turns on a normative question of whether we, as a society, should expect that police occurrence reports will be kept private. Given the sensitive nature of the information frequently contained in such reports, and the impact that their disclosure can have on the privacy interests of complainants and witnesses, it seems to me that there will generally be a reasonable expectation of privacy in police occurrence reports.

(d) *Personal Information Protected by Legislation*

[45] The appellant Crown submits that police occurrence reports are “records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature” and are therefore “records” for purposes of s. 278.1. The trial judge held that police occurrence reports “contain personal information protected by provincial legislation” (2009 CanLII 73645, at

para. 18). Given my conclusion that such reports contain information in which there is a reasonable expectation of privacy, it is unnecessary to decide whether they are protected by the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56.

(2) The Exemption for Investigatory and Prosecutorial Records

[46] Even records that give rise to a reasonable expectation of privacy are not covered by the *Mills* regime if they fall into the exemption contained in s. 278.1:

278.1 . . . “record” . . . does not include records made by persons responsible for the investigation or prosecution of the offence.

278.1 . . . N'est pas visé par la présente définition le dossier qui est produit par un responsable de l'enquête ou de la poursuite relativement à l'infraction qui fait l'objet de la procédure.

[47] The trial judge held that the exemption applies only to records made in relation to the offence in question, and not to police occurrence reports made in the course of unrelated investigations. Other courts have generally reached the same conclusion: see, for example, *R. v. Fiddler*, 2012 ONSC 2539, 258 C.R.R. (2d) 193, at paras. 36-38; *R. v. McAdam* (2008), 172 C.R.R. (2d) 27 (Ont. S.C.J.).

[48] The Court of Appeal, however, held that the exemption applies to all records made by the responsible police force, whether or not they were made in relation to the offence at issue. The Court of Appeal relied on the plain wording of

the English version of the provision, the view that such records are unlikely to engage privacy interests, and this Court's description of the exemption, in *Mills*, as "excluding investigatory or prosecutorial records" (para. 39, citing *Mills*, at para. 50).

[49] With respect, I do not agree with the Court of Appeal's interpretation of the exception. In light of the text of the provision in both languages, as well as its purpose, context, and the consequences of the Court of Appeal's interpretation, I conclude that the trial judge correctly interpreted the exemption to exclude only those records made in relation to the offence at issue.

(a) *The Text of the Provision*

[50] The trial judge reasoned that "[t]he words 'records made by persons responsible for the investigation or prosecution of the offence' must be limited by 'the' offence", encompassing only records made in relation to the offence at issue (2009 CanLII 73645, at para. 20). The Court of Appeal, on the other hand, emphasized that the exemption refers only to the creators of the records — the police and prosecution services — not to the purpose for which they are made. In my view the English text, read in isolation, could bear both meanings.

[51] However, the French "*le dossier qui est produit par un responsable de l'enquête ou de la poursuite relativement à l'infraction qui fait l'objet de la procédure*" can only mean that the exemption applies to records made by police or prosecutors *in relation to* the offences at issue.

[52] The Court of Appeal did not address the French version of the provision, because the Crown's position in that court was that the French text was amenable to both interpretations. Before this Court, the Crown resiled from that position. Because the word "*relativement*" is an adverb, the expression "*relativement à l'infraction qui fait l'objet de la procédure*" must modify the expression "*qui est produit*". The word "*relativement*" cannot modify the nouns "*l'enquête*" or "*la poursuite*". If the last clause of the exemption were intended to apply to "*l'enquête*" and "*la poursuite*", the grammatically correct phrase would be "*de l'enquête ou de la poursuite relative à l'infraction qui fait l'objet de la procédure*".

[53] Section 133 of the *Constitution Act, 1867* establishes that Parliament enacts legislation in both French and English. This "means that both language versions of a bilingual statute or regulation are official, original and authoritative expressions of the law" (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 95). It is a rule of statutory interpretation that where the version in one language can bear two meanings, only one of which is consistent with the version in the other language, the shared meaning governs: *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217, at para. 28.

(b) *The Purpose of the Exemption in Section 278.1*

[54] The *Mills* regime serves two goals: first, the regime protects the privacy of complainants and witnesses, and second, it preserves the fair trial rights of the accused.

[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.

(c) Incongruous Consequences of a Broad Exemption

[57] If the s. 278.1 exemption excluded all documents made by the police force and prosecution agency — even those unrelated to the offence — the consequences would be illogical. This would mean that unrelated police occurrence reports would be treated differently depending on whether they were made by members of the investigating police force or members of a different police force. If Parliament wanted to exempt unrelated police and prosecution documents from the

Mills regime, it is hard to see why it would have excluded only those documents made by some police departments and not others.

[58] This would mean that an accused whose case was investigated by a large police force would be more likely to get easy access to occurrence reports than if the case was investigated by a small force. For example, where the RCMP is involved in an investigation, the Court of Appeal's interpretation of the exemption would waive the *Mills* regime for RCMP occurrence reports from across the country.

(d) *Application of the Exemption to Other Third Party Documents in the Investigative File*

[59] I would reject the submission of the intervener the Attorney General of Alberta that all documents in the investigative file — all of the fruits of the investigation — are covered by the exemption. This point was not addressed in the courts below, and was raised only at oral argument.

[60] The English and French versions of the provision, considered in isolation, provide some support for the intervener's position. The terms "record" and "*dossier*" can refer to individual documents or to collections of documents such as case files. Consequently, on a purely textual basis, one might think that the exemption covers the investigative "record" in its entirety, as opposed to only individual "records".

[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.¹ 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.

(e) *The Effect on Trial Fairness*

[62] The respondent and the intervener the Criminal Lawyers’ Association of Ontario raise concerns about the effect of an expansive interpretation of “records” in s. 278.1 on trial fairness. A broad interpretation of “records” means that the *Mills*

¹ The legislative history of the *Mills* regime further confirms that it was intended to apply to third party records in the hands of the police or the Crown: see, e.g., *House of Commons Debates*, vol. 134, No. 122, 2nd Sess., 35th Parl., February 4, 1997, at p. 7664 (Gordon Kirkby); *House of Commons Debates*, vol. 134, No. 150, 2nd Sess., 35th Parl., April 7, 1997, at pp. 9361-9362 (Shaughnessy Cohen).

regime applies to a larger number of documents. While this furthers Parliament's objective of protecting the privacy of complainants and witnesses, it may also impose procedural burdens on defendants and create the risk that some helpful documents would not be available to the defence. However, largely for the reasons set out in *Mills*, I do not think these concerns require a narrower reading of s. 278.1.

[63] Documents protected by the *Mills* regime are not inaccessible to the defence. Defendants can access records when the privacy infringement is proportionate, given the relevance of the record to the defence. Where the Crown plans to use information from police occurrence reports as part of its case against an accused, disclosure of that information will always be in the interests of justice. In *Mills*, this Court held that the process for accessing documents was adequate to preserve the constitutionality of the regime.

[64] The principles of fundamental justice and trial fairness do not guarantee defence counsel the right to precisely the same privileges and procedures as the Crown and the police (*Mills*, at para. 111). Nor is the right to a full answer and defence a right to pursue every conceivable tactic to be used in defending oneself against criminal prosecution. The right to a full answer and defence is not without limit.

[65] Because the Crown is an officer of the court, with undivided loyalty to the administration of justice, the Crown is not in an adversarial role in relation to its disclosure obligations. The information obtained through investigation is "not the

property of the Crown for use in securing a conviction, but the property of the public to be used to ensure that justice is done” (*Stinchcombe*, at p. 333). The Crown has an obligation under s. 278.2(3) of the *Criminal Code*, to notify the accused of records in its possession covered by the *Mills* regime. Moreover, as discussed above, both police and Crown have common law duties aimed at ensuring proper disclosure, which apply notwithstanding the application of the *Mills* regime.

(f) *Conclusion on the Exemption*

[66] For these reasons, I conclude that s. 278.1 exempts records made in relation to the offence being prosecuted, not other records made by the same police or prosecution agencies.

V. Disposition

[67] It follows from this analysis that the police occurrence reports mentioned in the CBC radio documentary were subject to the *Mills* regime for disclosure, not *Stinchcombe*. The trial judge was right to require a *Mills* application before disclosing them to the defence, and the Court of Appeal was wrong to interfere. The trial judge’s application of the *Mills* regime was not challenged before us. Accordingly, I would allow the appeal, set aside the order for a new trial, and restore the conviction, remitting the sentence appeal to the Court of Appeal.

[68] I would grant the motion to strike para. 10 of the respondent's factum, but dismiss the motion to strike para. 11. I would also grant the motion to strike the appellant's reply factum.

APPENDIX

Criminal Code, R.S.C. 1985, c. C-46

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.

278.2 (1) No record relating to a complainant or a witness shall be produced to an accused in any proceedings in respect of

(a) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272 or 273,

(b) an offence under section 144, 145, 149, 156, 245 or 246 of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,

or in any proceedings in respect of two or more offences that include an offence referred to in any of paragraphs (a) to (c), except in accordance with sections 278.3 to 278.91.

(2) Section 278.1, this section and sections 278.3 to 278.91 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.

(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.

278.3 (1) An accused who seeks production of a record referred to in subsection 278.2(1) must make an application to the judge before whom the accused is to be, or is being, tried.

(2) For greater certainty, an application under subsection (1) may not be made to a judge or justice presiding at any other proceedings, including a preliminary inquiry.

(3) An application must be made in writing and set out

(a) particulars identifying the record that the accused seeks to have produced and the name of the person who has possession or control of the record; and

(b) the grounds on which the accused relies to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify.

(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.

(5) The accused shall serve the application on the prosecutor, on the person who has possession or control of the record, on the complainant or witness, as the case may be, and on any other person to whom, to the knowledge of the accused, the record relates, at least seven days before the hearing referred to in subsection 278.4(1) or any shorter interval that the judge may allow in the interests of justice. The accused shall also serve a subpoena issued under Part XXII in Form 16.1 on the person who has possession or control of the record at the same time as the application is served.

(6) The judge may at any time order that the application be served on any person to whom the judge considers the record may relate.

278.4 (1) The judge shall hold a hearing *in camera* to determine whether to order the person who has possession or control of the record to produce it to the court for review by the judge.

(2) The person who has possession or control of the record, the complainant or witness, as the case may be, and any other person to whom the record relates may appear and make submissions at the hearing, but they are not compellable as witnesses at the hearing.

(3) No order for costs may be made against a person referred to in subsection (2) in respect of their participation in the hearing.

278.5 (1) The judge may order the person who has possession or control of the record to produce the record or part of the record to the court for review by the judge if, after the hearing referred to in subsection 278.4(1), the judge is satisfied that

(a) the application was made in accordance with subsections 278.3(2) to (6);

(b) the accused has established that the record is likely relevant to an issue at trial or to the competence of a witness to testify; and

(c) the production of the record is necessary in the interests of justice.

(2) In determining whether to order the production of the record or part of the record for review pursuant to subsection (1), the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy and equality of the complainant or witness, as the case may be, and any other person to whom the record relates. In particular, the judge shall take the following factors into account:

(a) the extent to which the record is necessary for the accused to make a full answer and defence;

(b) the probative value of the record;

(c) the nature and extent of the reasonable expectation of privacy with respect to the record;

(d) whether production of the record is based on a discriminatory belief or bias;

(e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;

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

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

(h) the effect of the determination on the integrity of the trial process.

278.6 (1) Where the judge has ordered the production of the record or part of the record for review, the judge shall review it in the absence of the parties in order to determine whether the record or part of the record should be produced to the accused.

(2) The judge may hold a hearing *in camera* if the judge considers that it will assist in making the determination.

(3) Subsections 278.4(2) and (3) apply in the case of a hearing under subsection (2).

278.7 (1) Where the judge is satisfied that the record or part of the record is likely relevant to an issue at trial or to the competence of a witness to testify and its production is necessary in the interests of justice, the judge may order that the record or part of the record that is likely relevant be produced to the accused, subject to any conditions that may be imposed pursuant to subsection (3).

(2) In determining whether to order the production of the record or part of the record to the accused, the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy and equality of the complainant or witness, as the case may be, and any other person to whom the record relates and, in particular, shall take the factors specified in paragraphs 278.5(2)(a) to (h) into account.

(3) Where the judge orders the production of the record or part of the record to the accused, the judge may impose conditions on the production to protect the interests of justice and, to the greatest extent possible, the privacy and equality interests of the complainant or witness, as the case may be, and any other person to whom the record relates, including, for example, the following conditions:

(a) that the record be edited as directed by the judge;

(b) that a copy of the record, rather than the original, be produced;

(c) that the accused and counsel for the accused not disclose the contents of the record to any other person, except with the approval of the court;

(d) that the record be viewed only at the offices of the court;

(e) that no copies of the record be made or that restrictions be imposed on the number of copies of the record that may be made; and

(f) that information regarding any person named in the record, such as their address, telephone number and place of employment, be severed from the record.

(4) Where the judge orders the production of the record or part of the record to the accused, the judge shall direct that a copy of the record or part of the record be provided to the prosecutor, unless the judge determines that it is not in the interests of justice to do so.

(5) The record or part of the record that is produced to the accused pursuant to an order under subsection (1) shall not be used in any other proceedings.

(6) Where the judge refuses to order the production of the record or part of the record to the accused, the record or part of the record shall, unless a court orders otherwise, be kept in a sealed package by the court until the later of the expiration of the time for any appeal and the completion of any appeal in the proceedings against the accused, whereupon the record or part of the record shall be returned to the person lawfully entitled to possession or control of it.

278.8 (1) The judge shall provide reasons for ordering or refusing to order the production of the record or part of the record pursuant to subsection 278.5(1) or 278.7(1).

(2) The reasons referred to in subsection (1) shall be entered in the record of the proceedings or, where the proceedings are not recorded, shall be provided in writing.

278.9 (1) No person shall publish in any document, or broadcast or transmit in any way, any of the following:

(a) the contents of an application made under section 278.3;

(b) any evidence taken, information given or submissions made at a hearing under subsection 278.4(1) or 278.6(2); or

(c) the determination of the judge pursuant to subsection 278.5(1) or 278.7(1) and the reasons provided pursuant to section 278.8, unless the judge, after taking into account the interests of justice and the right to privacy of the person to whom the record relates, orders that the determination may be published.

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

278.91 For the purposes of sections 675 and 676, a determination to make or refuse to make an order pursuant to subsection 278.5(1) or 278.7(1) is deemed to be a question of law.

Appeal allowed.

Solicitor for the appellant: Attorney General of Ontario, Toronto.

Solicitors for the respondent: Najma Jamaldin, Toronto; Paul Genua, Toronto.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitor for the intervener the Canadian Association of Chiefs of Police: Ottawa Police Service, Ottawa.

Solicitors for the intervener the Criminal Lawyers' Association of Ontario: Dawe & Dineen, Toronto.

Solicitors for the intervener the Barbra Schlifer Commemorative Clinic: Ursel Phillips Fellows Hopkinson, Toronto.