CITATION: S.C. v. N.S., 2017 ONSC 5566
DIVISIONAL COURT FILE NO.: 057/17
DATE: 20170920

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

KITELEY, NORDHEIMER & D.L. CORBETT JJ.

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BETWEEN:	
S.C., K.C. and H.C. Plaintiffs (Respondent)	*I. McKinnon, S. Feferman & A. Chaisson,* for the respondent
– and –	
N.S., JOHN DOE DON, JANE DOE and UNIVERSITY OF WATERLOO Defendants (Appellant)	*S.C. Hutchison, A. Smith & W.C. McDowell,* for the appellant
– and –	
THE ATTORNEY GENERAL OF ONTARIO, CRIMINAL LAWYERS' ASSOCIATION and BARBRA SCHLIFER COMMEMORATIVE CLINIC Interveners	*J. Im & J. Claydon,* for the intervener, Attorney General of Ontario *J. Lisus & A. Newton-Smith,* for the intervener, Criminal Lawyers' Association *J. Birenbaum & Pam Hrick,* for the intervener, Barbra Schlifer Commemorative Clinic
	HEARD at Toronto: June 14, 2017

NORDHEIMER J.:

[1] The appellant, N.S., appeals with leave from the order of Matheson J. dated January 16, 2017 that dismissed the appellant's motion for:

(a) a declaration that Rule 30.1 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 did not prohibit the appellant from using information and documents obtained through discovery in this action (the "Discovery Evidence") to impeach the evidence of a witness in a related criminal proceeding against him; or

(b) in the alternative, an order *nunc pro tunc* relieving the appellant of his deemed undertaking obligation in order to use the Discovery Evidence for the same purpose.[1]

[2] The respondent, S.C., alleges that her former boyfriend, the appellant, both assaulted and sexually assaulted her on two occasions in 2014: once in Toronto following their graduation from high school and once in Waterloo after the appellant had enrolled at the University of Waterloo. As a result, criminal proceedings were instituted in Waterloo and in Toronto in 2014.

[3] In 2015, the respondent commenced this civil action against the appellant and the University of Waterloo, seeking damages arising from the same allegations. The other two plaintiffs are the respondent's parents. Statements of defence were delivered by the appellant and the University of Waterloo.

[4] In November 2015, the respondent served the Discovery Evidence on the appellant, which consisted of the respondent's unsworn affidavit of documents and copies of her documentary productions. The Discovery Evidence included medical records, counselling records, photographs and academic records. Due to a number of intervening events, examinations for discovery had not taken place at the time the motion was heard by the motion judge.

[5] The Waterloo criminal trial was heard on December 9, 2015 and February 4, 2016. The appellant and the respondent both gave evidence. None of the Discovery Evidence was tendered

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[1] *S.C. v. N.S.*, [2017] O.J. No. 206 (S.C.J.)

as evidence in the Waterloo criminal trial. On February 19, 2015, the trial judge found the appellant not guilty.

[6] In or about May 2016, the appellant's counsel in the Toronto criminal proceeding, discussed with the appellant's civil counsel what use could be made by the appellant of information in the Discovery Evidence that the appellant viewed as inconsistent with the respondent's evidence in the Waterloo trial, statements made to police in the Toronto criminal proceeding, and her anticipated evidence in the Toronto criminal trial. Among other things, the two counsel discussed their obligations to their client, their obligations to the court, and the importance of confronting the respondent with the alleged inconsistencies for the first time in the Toronto criminal trial in the Ontario Court of Justice.

[7] After confirming that the Discovery Evidence would only be used for impeachment purposes, the appellant's civil counsel provided a copy of the Discovery Evidence to the appellant's criminal counsel. In doing so, civil counsel communicated the text of the deemed undertaking rule and the impeachment exception and advised that, in light of the impeachment exception, the deemed undertaking did not prevent the use of the Discovery Evidence to impeach the respondent in the criminal trial. He also confirmed his understanding that this was the limited purpose for which any of the Discovery Evidence would be used by the appellant's criminal counsel.

[8] The appellant's Toronto criminal trial started on August 16, 2016 in the Ontario Court of Justice before Weagant J. No application was brought in the criminal proceeding in respect of the use of the Discovery Evidence. The respondent commenced her evidence on August 16, 2016, and continued for another day, following which the trial was adjourned for an application under s. 276 of the *Criminal Code*, R.S.C. 1985, c. C-46. The trial resumed on October 6, 2016 with the cross-examination of the respondent. In the course of his cross-examination, the appellant's criminal counsel began to ask questions relating to information from the medical records that formed part of the Discovery Evidence. A specific treating doctor was mentioned. An objection was raised because of the reference to the medical record. No *voir dire* was held on the permissibility of this line of questioning. Rather, the trial was adjourned.

[9] The issue of the use of the Discovery Evidence having crystalized in the criminal trial, on December 21, 2016, the motion for the declaratory relief, as I set out at the outset of these reasons, was brought before the motion judge. After receipt of the motion judge's reasons on January 16, 2017, the criminal trial was scheduled to resume.

[10] On February 1, 2017, the trial judge heard an application by counsel for the appellant for an order that the appellant was properly in possession of the Discovery Evidence and that the production regime in s. 278.1 of the *Criminal Code* did not apply to that material. Counsel for the respondent sought standing to make submissions on the application but standing was denied. On February 7, 2017, the trial judge released his reasons on the application. He concluded that the Discovery Evidence was already in the possession of the defence and thus an application under s. 278.1 was not required. The trial judge concluded his reasons by saying:

> I am prepared to hear argument as to whether the defence can proceed with its questioning.

[11] On February 13, 2017, the date that the trial was to continue, counsel for the respondent attended and advised that the respondent would bring an application for *certiorari* challenging the trial judge's decision that the third-party production regime in ss. 278.1 to 278.9 of the *Criminal Code* did not apply to the Discovery Evidence. The criminal trial was again adjourned. The respondent's application for *certiorari* was heard on May 15, 2017 and was dismissed by Forestell J. on the basis that it was premature. In so concluding, Forestell J. said, in part:

> The propriety of the proposed cross-examination using the information from the records has not been determined. The right of the complainant to make submissions on the propriety of the cross-examination has not been determined (no request having yet been made). The trial judge has not yet ruled on any procedural safeguards that may be employed to protect the privacy of the Applicant/complainant in the course of the argument, including the possibility of an *in camera* hearing.

[12] The criminal charges have since been stayed at the request of the Crown. This change in the factual background might have led to an argument that the issue raised is moot. However, none of the parties (including the interveners) made that submission and, in any event, I would not find it to be so. The Crown has a year to lift the stay and continue with the prosecution so the issue

is not moot viewed from that perspective. However, even if mootness could be raised, I would conclude that this court should exercise the discretion it has to hear and determine the appeal in any event.[2] The issue is important and the proper procedure to be followed should be clarified for the benefit of future cases.

The questions to be determined

[13] Three questions were stated in the order granting leave to appeal:

(i) must a party or counsel seek directions from the court prior to using evidence, referred to in r. 30.1.01(1), under one of the exceptions set out in r. 30.1?

(ii) if the answer to question (i) is yes, must notice of a motion seeking such directions be given to the party whose evidence is sought to be used?

(iii) if the answer to question (i) is yes, should the moving party be permitted to use the discovery evidence, in this case, for the purpose of impeachment in his criminal trial?

The standard of review

[14] As should be apparent from the questions posed, and the analysis which follows, the issue in this case is the proper interpretation of r. 30.1 which is a question of law. Consequently, a standard of correctness applies.[3]

Analysis

[15] In terms of providing some of the background to the deemed undertaking rule, I can borrow from the reasons of the motion judge who said, at paras. 37-41:

> 37 In Ontario, the implied undertaking was definitively recognized in *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (C.A.). It prevented the use of discovery documents or evidence obtained from the opposite party for any purpose other than the proper conduct of the litigation in which the material was produced: *Goodman v. Rossi*, at paras. 47 - 49. Leave of the court was required to depart from the implied undertaking.

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[2] *Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342

[3] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 66.

38 The undertaking is founded on the compulsory nature of discovery in a civil proceeding: *Goodman v. Rossi*, at para. 23. Parties are compelled to produce documents and submit to examinations for discovery under Rules 30 and 31 of the *Rules of Civil Procedure*. During the discovery process, the parties are compelled to disclose information given the public interest in getting at the truth: *Juman*, at para. 25.

39 The primary concern underlying the undertaking is the protection of privacy -- discovery is an invasion of the right of an individual to keep one's evidence and documents to oneself: *Goodman v. Rossi*, at para. 29, adopting Matthews and Malek's *Discovery* (1992), at p. 253; *Juman*, at paras. 3, 25. In some situations, self-incrimination is also an issue: e.g., *Juman*.

40 As put by Binnie J. in *Juman*, the rationale of the undertaking "rests on the statutory compulsion that requires a party to make documentary and oral discovery regardless of privacy concerns and whether or not it tends to self-incriminate": at para. 3. The party making compulsory production and discovery is therefore entitled to some measure of protection.

41 As well, protecting privacy encourages a more complete and candid discovery. Litigants have some assurance that their discovery will not be used for a purpose collateral or ulterior to the proceedings in which they were compelled to give discovery: *Juman*, at para. 26.

[16] The common law implied undertaking was codified through the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 by the adoption of r. 30.1. Rule 30.1 reads:

(1) This Rule applies to,

(a) evidence obtained under,
  (i) Rule 30 (documentary discovery),
  (ii) Rule 31 (examination for discovery),
  (iii) Rule 32 (inspection of property),
  (iv) Rule 33 (medical examination),
  (v) Rule 35 (examination for discovery by written questions); and
(b) information obtained from evidence referred to in clause (a).

(2) This Rule does not apply to evidence or information obtained otherwise than under the rules referred to in subrule (1).

(3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

> (4) Subrule (3) does not prohibit a use to which the person who disclosed the evidence consents.
>
> (5) Subrule (3) does not prohibit the use, for any purpose, of,
>
> (a) evidence that is filed with the court;
> (b) evidence that is given or referred to during a hearing;
> (c) information obtained from evidence referred to in clause (a) or (b).
>
> (6) Subrule (3) does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding.
>
> (7) Subrule (3) does not prohibit the use of evidence or information in accordance with subrule 31.11 (8) (subsequent action).
>
> (8) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

[17] In considering the proper interpretation of r. 30.1, I begin with the established test for statutory interpretation, namely, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[4]

[18] Rule 30.1 starts, in subrule (3), with a prohibition on the use by all parties and their lawyers of information compelled through the civil discovery process for any purpose other than the proceeding in which the information is disclosed. Rule 30.1 then provides for certain exceptions to that prohibition. Subrule (4) creates an exception for consent by the person who disclosed the information. Subrule (5) creates an exception for evidence that is either filed with the court, or given during the course of a hearing. Subrule (6) provides an exception for impeachment of the evidence of a witness in another proceeding. Subrule (7) provides an exception for successor actions involving the same subject matter and the same parties. Subrule (8) provides for a residual authority in the court to make any other exception where the court is satisfied that the interests of justice require it.

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[4] *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 per Iacobucci J. at para. 21.

[19] As is apparent from the plain wording of r. 30.1, the only exception that requires any pre-authorization from the court for its implementation is the residual exception set out in subrule (8). Nevertheless, the motion judge determined that pre-authorization from the court was required for the impeachment exception set out in subrule (6).

[20] The harm identified by the motion judge, that led her to determine that such pre-authorization was necessary, arose out of the oversight role that the motion judge held that the court had regarding compliance with the undertaking. The motion judge said that the "automatic" approach advanced by the appellant would allow for the undertaking "to be entirely or substantially defeated".

[21] I agree that the court has an oversight role with respect to the deemed undertaking, just as the court has with respect to all of the other Rules contained within the *Rules of Civil Procedure*. The court must maintain oversight over compliance with all of those Rules but oversight does not carry with it the need for pre-clearance. Rather, the purpose of the *Rules of Civil Procedure* is to provide guidance to parties and their lawyers as to the conduct of civil proceedings precisely to avoid having to engage the court in that process. It is hoped that the *Rules of Civil Procedure* will permit the parties to conduct their proceedings without court intervention, except where issues arise that are not expressly covered by the existing rules. One example of that is the scenario covered by subrule (8) which was the subject of much discussion in *Juman v. Doucette*, [2008] 1 S.C.R. 157.

[22] As I have said, r. 30.1 provides for a prohibition regarding use but with exceptions. There is nothing in the Rule that establishes any requirement that a party must seek the approval of the court before he/she/it relies on one of the exceptions. If there had been an intention to require such approval, the Rule could have so provided. Indeed, to the extent that the Rule is based on the observations of the Court of Appeal in *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (C.A.), it would appear that such approval was expressly not contemplated as it related to the exception for impeachment purposes. As Morden A.C.J.O said, at para. 54:

> It could defeat the impeachment process to require the leave of the court before discovered material could be used for this purpose: [citation omitted]

[23] This same concern is identified in *Juman*. In that decision, the rationale for the implied undertaking was discussed at length. It was made clear that the implied undertaking applied to all material disclosed in the course of a civil proceeding and that such material could only be used, outside the four corners of that litigation, if the court so authorized. However, *Juman* also makes clear that no such authorization is required if the purpose for the use of the disclosed material is to challenge prior evidence given by one of the parties to that litigation. As Binnie J. said, at para. 41:

> Another situation where the deponent's privacy interest will yield to a higher public interest is where the deponent has given contradictory testimony about the same matters in successive or different proceedings. If the contradiction is discovered, the implied undertaking rule would afford no shield to its use for purposes of impeachment.

[24] I would note as well that Binnie J. expressly referred to r. 30.1.01(6) in his discussion of this issue and did not make any comment to the effect that a party needed authority from the court to use discovery material for the purpose of impeachment.

[25] In my view, the motion judge erred by putting in place a procedure requiring pre-authorization for the impeachment exception that is not set out anywhere in the Rule. While I appreciate the concern that the motion judge had regarding the use of this material, in the particular circumstances of this case, her decision is inconsistent with the plain wording of the Rule. The Rule expressly provides for pre-authorization in subrule (8) but that subrule only applies to situations not covered by subrules (4) through (7). The motion judge erred by reading words into the Rule that are not there. The rules of statutory interpretation only require a court to read words into a legislated provision when that is the only way of making sense of the provision. There is no need to do so in the case of r. 30.1. Reading-in is also problematic in this context because the effect is to require yet another step to be taken in a civil proceeding, that not only adds to the expense and burden of the parties and to the work of this court, but, as this case points out, can also result in the disruption of a separate criminal proceeding.

[26] The thrust of the respondent's submissions, in support of this pre-authorization regime, is that a plain reading of the impeachment exception, by which a party could automatically use discovery material for that purpose, would visit a harm on a plaintiff/complainant, especially in

the sexual assault context. In essence, the submission is that the plain reading approach may have a detrimental effect on persons bringing forward such claims. The respondent also suggests, as does the intervener Clinic, that this plain reading of the Rule would allow unlimited distribution of the discovery material to third parties.

[27] I will first deal with this latter concern. The prohibition in subrule (3) applies to "[a]ll parties and their lawyers". Reading the Rule in its entire context, and harmoniously with the scheme of the Rule, leads to the inevitable conclusion that the exceptions, that is the situations where the Rule "does not prohibit" certain actions, refers to use by, and only by, the parties and their lawyers. It does not authorize, nor can it reasonably be read as authorizing, any use by other persons. Consequently, the concern about widespread dissemination to, and use by, third parties does not arise on a fair reading of the Rule.

[28] In terms of the first concern, it must be remembered that whatever interpretation is placed on the Rule, it affects all civil proceedings, not just proceedings where sexual assault is the foundation for the claim. There is no basis in the language of r. 30.1 to fashion a unique approach that applies only to discovery materials obtained in cases involving allegations of sexual assault.

[29] I accept that this plain reading of the Rule might cause potential plaintiffs in civil proceedings for damages arising from a sexual assault to pause when they become aware of the discovery requirements. However, all parties in all civil proceedings have to be mindful of the potential impacts of the discovery requirements as part of trial process. The concern in this case regarding the use of discovery material arises in criminal proceedings where the trial judge is able to balance the interests at stake when determining the admissibility of the evidence. Just because the use of the discovery materials for purposes of impeachment is not precluded by the deemed undertaking in r. 30.1 does not mean that this evidence will be found to be admissible in a criminal trial.

[30] The respondent also submits that the wording of the Rule, specifically the use of the words "does not prohibit", is intended to confer a discretion on the court to determine if the exception ought to apply in each case. I do not see how the respondent draws the presence of a discretion from that language. The language is mandatory, not permissive, in nature. For example, if there

is a prohibition against turning right on a red light but the same law says that it does not prohibit right turns on red lights on Sundays, it does not mean that there is a discretion to be determined whether one can make such turns on a particular Sunday. Rather, the clear meaning is that the prohibition does not apply when turning right on a Sunday.

[31] The respondent attempts to bolster her suggested interpretation by relying on the decision in *D.P. v. Wagg* (2004), 71 O.R. (3d) 229 (C.A.). In that case, the Court of Appeal agreed with a screening process that this court had adopted to deal with requests for production of the Crown brief when it is in the possession of a party to a civil proceeding. In my view, the decision in *Wagg* does not assist the respondent for two reasons. The first reason is that the issue in *Wagg* was not expressly covered by the *Rules of Civil Procedure* which is opposite to the situation here. The Court of Appeal found (at para. 33) that the deemed undertaking rule did not apply to the material because the rule "applies only to evidence or information obtained *inter alia* under Rule 30" and that did not include the Crown brief. Absent a specific provision in the *Rules of Civil Procedure*, it fell to the court to devise a mechanism to address the concern.

[32] The second reason is the fact that there were third parties involved in *Wagg* who had a direct interest in the material, namely the Crown and the police, again unlike the situation here. Consequently, it was necessary to involve those third parties in the determination of whether the Crown brief should be disclosed. As Rosenberg J.A. said, at para. 48:

> Like the Divisional Court, I can see no practical way of protecting the interests discussed by that court and by the House of Lords in *Taylor* without giving the bodies responsible for creating the disclosure, the Crown and the police, notice that production is sought.

The decision in *Wagg* simply does not assist in answering the question posed by this case.

[33] The respondent also submits that the requirement of notice by the appellant to the respondent of his intention to use the Discovery Evidence for impeachment purposes, and a ruling by the court as to the propriety of that intention, is supported by the disclosure scheme contained in ss. 278.1 to 278.9 of the *Criminal Code*. The respondent submits that this conclusion strikes the proper balance between the right to make full answer and defence and the privacy interests of a complainant.

[34] The submission seems to ignore the fact that the Supreme Court of Canada in *R. v. Schearing*, [2002] 3 S.C.R. 33 determined that the statutory scheme set out in ss. 278.1 to 278.9 of the *Criminal Code* does not apply to material that is already in the possession of the accused person.[5] There is no dispute in this case that the discovery material is properly in the possession of the appellant. Consequently, according to *Schearing*, there was no need to have reference to that statutory scheme.

[35] Contrary to the submissions of the respondent, and the intervener Clinic, this plain reading of the Rule does not mean that the appellant has a *carte blanche* to use the Discovery Evidence as he wishes. The trial judge in the criminal prosecution will determine if the use of the Discovery Evidence is proper in accordance with the rules that apply to all evidence. Trial judges always have a gatekeeping role regarding evidence that is proffered at a trial. Trial judges must determine if the evidence is properly admissible tested against well-established factors, including whether the evidence is relevant and whether its probative value outweighs any prejudicial effect: *Shearing* at para. 107.

[36] In this case, the trial judge in the criminal proceedings was never given that opportunity because the trial was adjourned in order to bring the motion that was determined by the motion judge. In my view, instead of returning to this court to seek a determination as to whether the Discovery Evidence could be used at the criminal trial, the trial judge in the criminal proceeding ought to have been given the opportunity to determine if the proposed cross-examination was appropriate in light of the usual tests for determining admissibility, as I have referred to them above. I reach that conclusion for two reasons. One reason is that it is normally the responsibility of the trial judge to determine the admissibility of evidence. It is the rare exception where that admissibility is determined by another judge, especially another judge of a different court.

[37] The other reason is that the trial judge in the criminal proceeding is in the best position to determine the admissibility issue. A motions judge in a civil case will not have the same understanding of the background to the criminal case and, more particularly, will not have had the benefit of hearing the evidence in the criminal trial. I would add that it is far from certain, in my

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[5] I note that the trial judge in the criminal prosecution in this case reached the same conclusion.

view, that a ruling made by a judge in civil motions court on this issue would be binding on the trial judge in the criminal proceeding, in any event.

[38] It would be open to the trial judge in the criminal proceeding to consider all of the factors that inform the operation of ss. 278.1 to 278.9 of the *Criminal Code*, and the application of the *R. v. O'Connor*, [1995] 4 S.C.R. 411 regime for disclosure, in reaching a determination of admissibility. That conclusion finds support in the recent amendments proposed by the Federal government to the *Criminal Code* that would mandate just such an analysis as part of the admissibility inquiry when this type of evidence is tendered.[6] In any event, whether those amendments are or are not passed, it would seem to be clear on the existing state of the authorities that criminal trial judges will consider those factors before such material can be used in a criminal trial. Such consideration by the trial judge will directly address the concerns that arise in a case such as this.

[39] In addition, that conclusion puts the determination of the use of discovery material for impeachment purposes in the proper venue. It also avoids having criminal trials interrupted while the parties move before a judge of this court for permission to use the discovery material.

[40] The motion judge found that the appellant's counsel had breached the deemed undertaking rule by giving the Discovery Evidence to the appellant's criminal counsel. In my view, the motion judge erred in so concluding. Regardless of whether there is a need to pre-clear the use of discovery material for impeachment purposes, there was no breach committed by civil counsel when he provided the Discovery Evidence to criminal counsel. Once the Discovery Evidence was delivered by the respondent to the appellant, he was entitled to share it with any of his legal advisors. The motion judge's conclusion (reasons at para. 86) that giving a copy of the discovery material to criminal counsel constituted a "use" contrary to r. 30.1.01(3) is in error, in my view, because it interferes with the fundamental right of a person to obtain legal advice – a right that is constitutionally guaranteed: *Canadian Charter of Rights and Freedoms*, s. 10(b). In order to

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[6] See Bill C-51 - An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act, to enact proposed s.278.92 to the *Criminal Code*.

effectively obtain legal advice, a client must be able to provide counsel with any and all relevant material.

[41] I would add, on this point, that the motion judge's conclusion that a person, in the position of the appellant, was entitled to tell his criminal counsel about the contents of the Discovery Evidence but not provide counsel with a copy of that material, elevates form over substance. Counsel is normally in a much better position to determine the relevance and use to which such material might be put in the course of a proceeding, than would the client. Presumably that is one reason that the client seeks the advice of counsel. In order to properly provide that advice, counsel would need to see and review the Discovery Evidence. In my view, there was nothing improper with the appellant sharing the Discovery Evidence with any of his legal advisers for the purpose of obtaining that advice and assistance.

[42] Finally, I think it important to acknowledge that the motion judge was faced with a difficult decision. As is reflected in the proposed legislation before Parliament, there are sound reasons to believe that complainants in criminal cases of sexual assault should have certain of their personal records protected, regardless of how those records may have come into the hands of the defence. The procedures in s.278.1 to 278.9 (third party records), R.30.1 (the deemed undertaking) and the process most recently devised in *R.* v. *Wagg*, all had their genesis in judicial decisions made in reaction to the developing sense that there were gaps in the law that needed to be addressed. The motion judge perceived such a gap, and on the state of the case as it was presented to her, she made what she viewed as a necessary effort to address it. However, as I have said, the motion judge erred in her proposed solution to the problem she identified. The solution should be a question for the criminal trial courts as a matter of common law or, as currently proposed to Parliament, by way of legislation. The solution is not to be found in the deemed undertaking rule.

Conclusion

[43] The appeal is allowed, the motion judge's order is set aside and the declaration sought by the appellant, as set out in paragraph 1(a) above, is granted in accordance with these reasons. In so concluding, I would answer the first question posed on the appeal "No", at least insofar as it contemplates any direction from this court. The second and third questions do not need to be answered. I would note, in passing, that the third question would not have had to be answered in any event given the stay of the criminal charges.

[44] Given the nature of the issues raised in this appeal, its novelty, and the fact that the result is of importance to the administration of justice generally, I would not be inclined to make any order as to costs. However, since the parties did not address the issue of costs, if the appellant wishes to take issue with that preliminary conclusion, he may make brief written submissions within fifteen days of the date of the release of these reasons and the respondent shall file her submissions within ten days thereafter. The submissions of each party shall not exceed ten pages in length. No reply submissions shall be filed without leave of the court.

[45] In any event, there will be no order of costs in favour of, or against, any of the interveners.

NORDHEIMER J.

I agree

KITELEY J.

I agree

D.L. CORBETT J.

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BETWEEN:

S.C., K.C. and H.C.

Plaintiffs
(Respondent)

– and –

N.S., JOHN DOE DON, JANE DOE and UNIVERSITY OF WATERLOO

Defendants
(Appellant)

REASONS FOR JUDGMENT

NORDHEIMER J.

Date of Release: SEP 2 0 2017