File No. 39133

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF BRITISH COLUMBIA)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT /
INCIDENTAL RESPONDENT
(Appellant)

- and –

J.J.

RESPONDENT /
INCIDENTAL APPELLANT
(Respondent)

- and -

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(Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Sections 278.92 – 278.94 of the *Criminal Code* contain a screening procedure specific to sexual offences for the admission of records in the possession of the accused that contain the complainant's private, personal information. By enacting this procedure, Parliament has addressed a legislative gap and protected vulnerable people. Like the sexual activity evidence and third-party records procedures assessed in *Darrach* and *Mills*, the impugned provisions balance competing rights. The careful balance struck by Parliament protects the complainant's privacy and equality rights and the public's interest in ensuring that the truth-seeking function of a trial is not distorted, and is consistent with the accused's right to silence, a fair trial, and the presumption of innocence. The impugned provisions do not offend the right to silence as they do not conscript the accused. Also, ambushing a complainant is not a constitutionally protected right. The provisions do not affect prosecutorial independence, they simply give complainants meaningful participation in the admissibility *voir dire*. Finally, the procedure affords judges sufficient flexibility in trial management to alleviate potential concerns related to the timing of applications.

B. Facts

2. The Attorney General of Canada ("Canada") takes no position on the facts.

PART II – ISSUES

3. Canada intervenes on the constitutional questions raised by the main parties to this appeal and supports the position that the impugned provisions are consistent with s. 7, 11(c) and 11(d), or in the alternative that they are reasonable limits under s. 1 of the *Charter*.

PART III – ARGUMENT

A. Legal developments in respect of sexual offences

i. The continuing impact of twin and rape myths

4. The rules of evidence applicable to sexual offences have evolved over time. Prior to legislative amendments to the *Criminal Code,* the defence was able to adduce evidence and promote inferences based on the complainant's prior sexual activities without restriction.

5. This evidence was used to promulgate what are now recognized as the "twin myths": that because the complainant had consented to sexual activity in the past, they were more likely to have consented to the sexual activity in question, and are less worthy of belief. These falsehoods impair the truth-seeking function of the trial process.[1]

6. In order to combat the twin myths, the first iteration of section 276 of the *Criminal Code* came into force in 1983. Section 276 imposed a blanket exclusion of all evidence of prior sexual activity, subject to three limited exceptions. Almost a decade later, in *R. v. Seaboyer* this Court struck down section 276 because it excluded evidence of prior sexual activity absolutely, without any means of evaluating whether the integrity of the trial process would

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1 *R. v. Goldfinch*, 2019 SCC 38 at para. 33; *R. v. Barton*, 2019 SCC 33 at para. 55.

be better served by receiving it than by excluding it. This Court went on to impose common law rules for the reception and use of sexual activity evidence.[2]

7. In 1992, Parliament responded by codifying the rules set out in *Seaboyer* into a new version of section 276. This new version made sexual activity evidence inadmissible where it is adduced in support of twin myth reasoning. It also made sexual activity evidence presumptively inadmissible in general unless the accused can show that the evidence is relevant to an issue at trial, relates to specific instances of sexual activity, and has significant probative value that is not outweighed by the danger of prejudice to the proper administration of justice. The amendments also imposed a two-stage procedure for determining the admissibility of prior sexual activity evidence in sexual assault cases. This codification, still in force today, was unsuccessfully challenged before this Court in *R. v. Darrach.*[3]

8. In addition to the twin myths, other fabrications called rape myths influence the criminal justice system. Common rape myths - that "true victims" scream and fight back; that victims of abuse react to trauma in predictable ways (including appearing extremely distraught, avoiding the perpetrator and reporting the crime immediately); that accessing therapeutic help renders a complainant less credible; that victims are fully or partially responsible for the assault if they wear revealing clothing, are out alone at night or are intoxicated – infect sexual assault trials and subvert justice.[4] The gendered nature of these rape myths engage the *Charter* guarantees of equality of the law to women.[5]

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2 *R. v. Seaboyer; R. v. Gayme*, [1991] 2 S.C.R. 577 at para. 106.

3 *R. v. Darrach*, 2000 SCC 46.

4 *R. v. Osolin*, [1993] 4 S.C.R. 595 at para. 36; *R. v. Shearing*, 2002 SCC 58 at para. 121; *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 119; Katharine D. Kelly, "You must be crazy if you think you were raped: Reflections on the Use of Complainant's Personal and Therapy Records in Sexual Assault Trials" (1997), 9 C.J.W.L. 178 at pp. 187 – 194 (cited in *Mills* at para. 113 and *Darrach* at para. 26); Canadian Intergovernmental Conference Secretariat, "Reporting, Investigating and Prosecuting Sexual Assaults Committed Against Adults – Challenges and Promising Practices in Enhancing Access to Justice for Victims" (2018), online: https://scics.ca at chapter 4.2; Elaine Craig, *Putting Trials on Trial* (Montréal, Toronto: McGill-Queen's University Press, 2018) at 32 – 60.

5 *R. v. Mills*, [1999] 3 S.C.R. 668 at paras. 90 – 93.

9. As a result of rape myths primarily female complainants undergo lengthy and demeaning cross-examinations on personal topics irrelevant to the accusations at issue. Despite the efforts of courts and Parliament, twin myth and rape myth reasoning continues to be pervasive.[6]

ii. Growing recognition of sexual offence complainants' right to privacy

10. The importance of maintaining the privacy of sexual assault complainants is increasingly recognized.

11. In *R. v. Osolin*, a case in which the defence had sought to cross-examine the 17-year-old sexual assault complainant on her mental health records, this Court held that reasonable limitations may be placed upon cross-examination of a complainant in sexual assault trials.[7] In reaching its decision, the Court explicitly factored the rights of complainants into its analysis and accepted that the privacy right of the complainant is an interest meriting protection that must be balanced against the right of the accused to a fair trial.[8]

12. In *R. v. Mills*, in which this Court reviewed the constitutionality of the regime governing the production of third-party records to the accused in sexual offence cases, the Court held that the scope of the accused's *Charter* rights must be determined in light of the privacy rights of complainants.[9]

13. In *R. v. Shearing*, defence counsel had sought to cross-examine the complainant on the contents of her diary, which had come into the possession of the accused. This Court once

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6 See e.g. *R. v. Shearing*, 2002 SCC 58; *R. v. Wagar*, 2015 ABCA 327; *R. v. S.B.*, 2016 NLCA 20 at paras. 43 – 45, 61; *R. v. S.B.*, 2017 SCC 16; Elaine Craig, *Putting Trials on Trial* (Montréal, Toronto: McGill-Queen's University Press, 2018) at 32 – 60; *R. v. Barton*, 2019 SCC 33 at paras. 82 – 83.

7 *R. v. Osolin*, [1993] 4 S.C.R. 595 at para. 34.

8 *R. v. Osolin*, [1993] 4 S.C.R. 595 at para. 43.

9 *R. v. Mills*, [1999] 3 S.C.R. 668 at paras. 77 – 89, 94.

again referenced abusive and distorting cross-examination techniques sometimes employed in sexual assault cases, and limitations on cross-examination have been imposed as a result. One such limitation is the privacy interest of the complainant, "…which is not to be needlessly sacrificed."[10]

14. Despite these advancements, during sexual offence trials complainants are frequently required to sacrifice their privacy interests and publicly recount traumatic, intimate, and embarrassing information about themselves in unsparing detail.[11] Having their private records filed in open court, despite their sometimes limited relevance, can amplify the sense that their privacy is being invaded. It is unsurprising that sexual assault is among the most underreported of crimes.[12]

iii. Addressing the legislative gap: sections 278.92 – 278.94

15. Until 2018, sections 276 and 278.1 to 278.91 of the *Criminal Code* governed many of the evidentiary issues apt to arise in sexual offence trials. However, there was a gap in the legislation: no prescribed procedure to screen records relating to the complainant, already in the possession of the accused, which did not contain sexual activity evidence but did contain personal information that engaged privacy rights.

16. In 2012, the Standing Senate Committee on Legal and Constitutional Affairs issued its final report on its statutory review of Bill C-46 (the "Report").[13] Bill C-46 had been enacted in 1997 and created the procedure governing the production of third-party records set out in sections 278.1 – 278.91 of the *Criminal Code*. In the Report, the Senate Committee identified

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10 *R. v. Shearing*, 2002 SCC 58 at para. 76.

11 Elaine Craig, "The Inhospitable Court", University of Toronto Law Journal, (2016) 66:2 University of Toronto Law Journal 197 at pp. 205 – 213, 215 – 218.

12 *R. v. Goldfinch*, 2019 SCC 38 at para. 37.

13 Senate, Standing Senate Committee on Legal and Constitutional Affairs, "Statutory Review on the Provisions and Operation of the *Act to amend the Criminal Code (production of records in sexual offence proceedings*) (December 2012).

the gap in the legislation and pointedly stated that "…we see no logical reason to deny to individuals who have been sexually victimized by persons with access to their personal records the same legal protection of their privacy, security and equality rights afforded to other victims of sexual offences."[14]

17. Former Bill C-51 responded to the Report on December 13, 2018, by bringing into force sections 278.92 to 278.97 of the *Criminal Code*. The Bill made three primary changes to the law governing sexual offences.

18. First, like sexual activity evidence under section 276, subsection 278.92(1) makes a record, as defined in section 278.1, in the possession of the accused presumptively inadmissible in sexual offence trials if it contains personal information in which the complainant has a reasonable expectation of privacy. Section 278.1 defines a record as any form of record that contains personal information for which there is a reasonable expectation of privacy. The definition then lists certain types of records that are presumptively included in the definition, such as medical, therapeutic and child welfare records, as well as 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.

19. In short, to be caught by the definition, the record must contain personal information of a significantly private nature. While certain types of correspondence (including correspondence by text message or email between the accused and complainant), may contain such information, not every document will.

20. Second, Bill C-51 added a two-step procedure at sections 278.92(2) – 278.94 of the *Criminal Code* which allows the accused to apply to have the private records admitted at trial. At the

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[14] Senate, Standing Senate Committee on Legal and Constitutional Affairs, "Statutory Review on the Provisions and Operation of the *Act to amend the Criminal Code (production of records in sexual offence proceedings*) (December 2012) at pp. 18 – 19.

first stage of the procedure, the accused must apply in writing for a hearing to determine the admissibility of the record. The application must set out detailed particulars of the evidence the accused seeks to adduce and the relevance of that evidence to an issue at trial. A copy of the application must be provided to the prosecutor and the court at least seven days before the hearing of the application, or any shorter interval that the court may allow in the interest of justice.

21. The application is considered by the judge in the absence of the jury and the public. If the judge determines that the procedural requirements are met and the evidence sought to be adduced is capable of being admitted at trial, the second stage of the procedure is triggered and an *in camera* hearing may be held to determine the admissibility of the evidence. The test for admission is that the evidence must be relevant to an issue at trial and have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

22. The complainant must be advised that they may retain counsel to represent them and they may make submissions in respect of the admissibility of the evidence at the hearing. After the hearing has concluded, the judge must issue written reasons explaining why the evidence was deemed admissible or inadmissible and how the factors listed in subsection 278.92(3) affected that determination.

23. The third change is Bill C-51's repeal of sections 276.1 – 276.5, which previously set out the procedure by which an accused could apply to have evidence of prior sexual activity admitted at trial. Now, an accused may apply to have this type of evidence admitted under sections 278.92 – 278.95. These sections are substantively the same as former sections 276.1 to 276.5 but now apply to the admissibility of both prior sexual activity evidence and the complainant's private records in the accused's possession.

24. These changes were carefully crafted to address the gap between the procedural protections accorded to sexual assault complainants whose personal information happens to be in the

possession of third parties and sexual assault complainants whose personal information happens to be in the possession of the accused.

B. The impugned provisions are consistent with the accused's *Charter* rights

i. The screening procedure and admissibility standard accord with the presumption of innocence and fair trial rights

25. The screening procedure and admissibility standard established by the impugned provisions for records in the possession of the accused do not violate the presumption of innocence or the fair trial rights of the accused.

26. The screening procedure satisfies constitutional requirements by providing a balanced procedure by which the right of the accused to adduce probative records at trial is preserved. There is no unconstitutional blanket exclusion of evidence.

27. A similar procedure for screening defence evidence survived constitutional scrutiny by this Court in *Darrach*. Accordingly, the Respondent (Appellant on cross-appeal) argues that the "constitutional adequacy" of the sexual activity regime upheld in *Darrach* is set apart from the procedure set out in the impugned provisions because sexual activity evidence is presumptively irrelevant and always prejudicial to the fact-finding process, while records in the possession of the accused are not.[15]

28. The judicial gatekeeping role in respect of defence evidence does not have to be the same in every case in order to be constitutionally permissible. In *Mills*, this Court scrutinized the constitutionality of the third-party records regime, which imposes a judicial gatekeeping role in respect of the production of records of sexual assault complainants and witnesses in the

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15 *R. v. J.J.*, SCC File No. 39133, J.J.'s Application for Leave to Cross-Appeal and Time Extension at para. 37.

hands of third parties. Despite the fact that third-party records are not presumptively irrelevant or always prejudicial, this Court upheld the constitutionality of the production procedure.

29. This finding of constitutionality was due in part to the following underlying facts: (i) where the private information of a complainant is disclosed to persons or for reasons beyond its original function, the complainant may still hold a reasonable expectation of privacy in this information, (ii) the scope of the accused's *Charter* rights, such as the right to full answer and defence, must be determined contextually in light of competing *Charter* rights such as the complainant's right to privacy and equality, and (iii) the right to full answer and defence does not entitle an accused to adduce distorting evidence, even if the evidence is relevant at trial.[16]

30. The analysis in *Mills* applies equally to the impugned provisions. The fact that the record is in the possession of the accused does not mean that the complainant's reasonable expectation of privacy has been lost. The loss of physical possession or ownership of a record does not necessarily equate to a loss of the privacy interest in personal information contained in the document.[17]

31. Further, the accused's fair trial rights, including the right to full answer and defence, must be defined with full consideration of sexual assault complainants' right to privacy and equality. As recognized in *Mills*, privacy is a core aspect of the development and integrity of human relationships.[18] Having a private record of limited or no relevance adduced in public at trial constitutes an unnecessary invasion of a sexual assault complainant's privacy and can prevent complainants bringing these types of underreported offences to the attention of the

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16 *R. v. Mills*, [1999] 3 S.C.R. 668 at paras. 74 – 75, 77 – 94, 108.

17 *R. v. Shearing*, 2002 SCC 58 at paras. 87, 92; see also e.g. *R. v. Marakah*, 2017 SCC 59 at para. 5.

18 *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 81.

criminal justice system. These concerns also engage the equality guarantees of the *Charter* as they are often specific to women given the gendered nature of sexual offences.

32. Finally, the right to full answer and defence does not entitle an accused to adduce evidence that distorts the fact-finding process. Personal records are as likely to be used by the accused to promulgate prejudicial myths and stereotypes as sexual activity evidence. This Court recognized this reality in *Darrach* when it observed that the use of personal and therapeutic records in evidence during trials of sexual offences is analogous in many ways to the use of evidence of prior sexual activity, and that the protections in the *Criminal Code* surrounding the use of records at trial are motivated by similar policy considerations.[19]

33. The risks posed by the unconstrained use of a sexual offence complainant's personal information were also addressed by this Court in *Shearing.* In that case, the accused had come into possession of the complainant's diary, which did not contain sexual activity evidence but rather "mundane" entries. Despite the absence of sexual activity evidence in the diary, this Court approved of the trial judge's decision to hold a *voir dire* and ultimately restrict cross-examination on it because trial counsel had been attempting to use the diary to put forward a subtle rape myth.[20] Binnie J. emphasized that sexual assault cases "…pose particular dangers" in respect of the promulgation of "unproven assumptions and innuendo" by counsel.[21]

34. The Respondent (Appellant on cross-appeal) also argues that the screening procedure is problematic because it affects a wider spectrum of evidence than the sexual activity regime;[22] yet a procedure cannot be constitutionally suspect simply because it could capture a wide

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19 *R. v. Darrach,* 2000 SCC 46 at para. 26.

20 *R. v. Shearing*, 2002 SCC 58 at para. 120. The admissibility of the same inference was also litigated in *R. v. Boyle,* [2019] O.J. No. 1923 at paras. 41 – 53.

21 *R. v. Shearing*, 2002 SCC 58 at para. 121.

22 *R. v. J.J.,* SCC File No. 39133, J.J.'s Application for Leave to Cross-Appeal and Time Extension at para. 37.

variety of records. It is the fairness of the procedures established by the impugned provisions, rather than the variety of records subject to those procedures, that determines the constitutionality of the legislation. As this Court in *Mills* succinctly put it, "[i]f the legislative regime fairly provides access to all constitutionally required documents, then the spectrum of records brought under the Bill, if in keeping with the Bill's objectives, cannot be challenged."[23]

35. The screening procedure set out by the impugned provisions is fair and balanced. The accused does not have a constitutional right to adduce irrelevant or prejudicial evidence at trial and complainants have the right to have their privacy and equality interests considered. Viewed in this context, a screening procedure in which the record at issue may be admitted at trial if the defence can satisfy the statutory test set out in subsections 278.92(2) and (3) strikes the appropriate balance between these competing rights.

36. The Respondent (Appellant on cross-appeal) also argues that the admissibility standard imposed by the impugned provisions is unconstitutional because it deviates from the common law standard for the admission of defence evidence. However, there is no presumption that legislation is unconstitutional simply because it is different from the common law.[24] Parliament is empowered to make changes to the common law in order to recognize rights and interests and address inequalities, as long as the change is constitutionally acceptable.[25]

37. The standard imposed by the impugned provisions for the admission of records in the possession or control of the accused in sexual offence trials does diverge slightly from the common law admissibility standard for defence evidence, but that does not make it unconstitutional. Interpreted properly and contextually, the admissibility standard applied by

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23 *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 100.
24 *R. v. Mills,* [1999] 3 S.C.R. 668 at para. 60.
25 *R. v. Mills,* [1999] 3 S.C.R. 668 at para. 58.

the impugned provisions accords with the presumption of innocence and the right to fair trial.

38. Section 278.92(2) provides that records in the possession or control of the accused are only admissible where the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. This wording matches the wording, in both English and French, of section 276(2), which was upheld as being constitutional in *Darrach*.

39. In *Darrach*, this Court noted that evidence with "significant probative value" was to be interpreted as evidence that is not "…so trifling as to be incapable, in the context of all the evidence, of raising a reasonable doubt."[26] This interpretation of significant probative value hinged, in part, on the requirement that this evidence be admitted unless it is substantially outweighed by the danger of prejudice to the proper administration of justice. Gonthier J. explained that the adverb "substantially" protects the accused by elevating the standard for the judge to exclude evidence once the accused has shown that it is of more than trifling relevance.[27] The same interpretation should be applied to the admissibility standard imposed by impugned provisions in respect of records in the possession or control of the accused in trials of sexual offences.

40. Properly interpreted, the requirement that the record in issue have significant probative value violates neither the presumption of innocence nor the right to a fair trial. This Court has long held that the fact that evidence is relevant does not automatically make it admissible.[28] Simply put, the accused does not have an inviolable constitutional right to adduce evidence of trifling relevance that may distort the truth-seeking function of a trial.

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26 *R. v. Darrach*, 2000 SCC 46 at para. 39.

27 *R. v. Darrach*, 2000 SCC 46 at para. 40.

28 *R. v. Mills*, [1999] 3 S.C.R. 668 at paras. 74, 90 - 93; *R. v. Osolin*, [1993] 4 S.C.R. 595 at paras. 34, 36; *R. v. St-Onge Lamoureux*, 2012 SCC 57 at para. 71.

41. This maxim has particular force in cases of sexual offences. As discussed above, private records of sexual offence complainants are as equally subject to damaging and misleading myths and stereotypes as evidence of sexual activity. In this context, ensuring that the proffered evidence is of more than trifling relevance and is not substantially outweighed by the danger of prejudice to the proper administration of justice by distorting the truth-seeking function of the trial, does not violate an accused's *Charter* rights.

ii. The right to silence is not engaged by the impugned provisions

42. Further, the impugned provisions do not conscript the accused. Like the Respondent (Appellant on cross-appeal), the applicant in *Darrach* argued that having to submit an affidavit to support his section 276 application violated his right to silence because it "…compels him to reveal his defence and to disclose evidence he hopes to call at trial."[29] In rejecting this argument, this Court pointed out that "…the accused is not forced to embark upon the process under s. 276 at all," as there is an important distinction between a legal obligation to testify and a tactical decision to testify.[30] Where there is no legal obligation to testify, mere tactical pressure on the accused to participate in the trial does not offend the principle against self-incrimination.[31]

43. As in a section 276 *voir dire*, the accused does not have to testify in a section 278.94 *voir dire* because the Crown bears the sole duty of establishing all of the elements of a sexual offence beyond a reasonable doubt. Instead, it is a tactical choice that motivates an accused to testify at a section 278.94 *voir dire*, which derives from his desire to raise a reasonable doubt about the Crown's case by adducing a record at trial.[32] This tactical choice does not shift the burden of proof from the Crown to the accused, and there is therefore no violation of the right to silence.

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29 *R. v. Darrach*, 2000 SCC 46 at para. 54.
30 *R. v. Darrach*, 2000 SCC 46 at para. 55.
31 *R. v. Darrach*, 2000 SCC 46 at paras. 50 – 52.
32 *R. v. Darrach*, 2000 SCC 46 at paras. 51 – 52, 61.

iii. The right to a fair trial does not include the ability to ambush a witness

44. The participatory role granted to the complainant by the impugned provisions at a section 278.94 *voir dire* does not violate the accused's right to a fair trial. This role does not differ in substance from the role played by the complainant in the sexual activity evidence and third-party records regimes, both of which have been found to be constitutionally valid and both of which require that the complainant be made aware of the defence's argument on the *voir dire*.

45. In *Darrach*, this Court upheld the original section 276 regime while also acknowledging that the complainant would be made aware, in advance of trial, of the evidence the defence was seeking to adduce and its supposed relevance at trial. The Court held that the ability to ambush a witness at trial is not a constitutionally protected right.[33]

46. In *Mills*, this Court upheld the third-party records regime, which requires that an accused who is seeking access to the complainant's private records, usually for the purpose of cross-examination at trial, serve a written application on the complainant detailing why the record is likely relevant. In many cases, establishing such relevance requires the accused to "disclose," to some extent, an aspect of his trial strategy or theory of the case, yet the regime was found to be constitutional.

47. There are other situations in which complainants become aware of potential lines of cross-examination in advance. Two examples are where a mistrial has resulted after the complainant has testified or where there is a retrial following an appeal. In those circumstances, the complainant is likely to become aware of the defence theory or strategy. In many cases, they will have detailed knowledge of the cross-examination they can expect to face at the new trial. They may have even read the judgment from the first trial (in the case of an appeal), and could be aware of the first trial judge's view of his or her evidence.

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[33] *R. v. Darrach,* 2000 SCC 46 at para. 55.

48. In these circumstances, the accused can address the complainant's access to materials in cross-examination. Where there is a basis to do so, the accused may seek to discredit the complainant by suggesting his or her evidence was tailored to fit what they learned. Further, in almost all cases the complainant will have already provided a statement to the police, if not multiple statements, and may have also testified at a preliminary hearing. This means that if complainants do "modify" their evidence in response to defence materials, they can be readily cross-examined on that fact. Where this occurs, a complainant's knowledge of the defence strategy may impact the weight given to his or her evidence.

49. This holds true regardless of how the complainant learns about a potential defence strategy – such as if their awareness arises from receiving defence materials on a section 278.92 application. The fact of their acquired knowledge does not, however, give rise to a breach of the accused's right to a fair trial.

iv. The involvement of the complainant does not offend prosecutorial independence

50. Nor does the presence of the complainant at a section 278.94 *voir dire* violate the principle of prosecutorial independence. The impugned provisions have not changed the role or obligations of the Crown in any way. It is the Crown, not the complainant, which must prove the offence beyond a reasonable doubt. The Crown retains the sole discretion to determine whether there is a reasonable prospect of conviction and whether the prosecution is in the public interest.[34]

51. A section 278.94 *voir dire* is a hearing on the admissibility of a discrete piece or pieces of evidence, not the trial proper. A complainant's attendance at the hearing is optional. Their role at the *voir dire* is limited to participating and making submissions, so that the application judge may hear their perspective on the records over which they hold an expectation of privacy. A complainant is not permitted to make submissions as to the guilt or innocence of

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[34] *R. v. A.C.*, 2019 ONSC 4270 at para. 61.

the accused. If the complainant were to attempt to "derail the process" or pursue an inappropriate line of cross-examination, the court may exercise its power to control its own process and take appropriate action to keep the hearing on track, just as it would with a self-represented litigant.

52. Permitting the complainant in a sexual offence case to participate in an admissibility hearing is not novel. In *Shearing*, when the admissibility of portions of the complainant's diary came into question at trial, the complainant retained her own counsel for the *voir dire* and argued the diary should be returned to her and a third-party records application should be made by the accused.[35] This Court's decision in *Shearing* does not suggest that the role played by the complainant's counsel in the *voir dire* violated the principle of prosecutorial independence.

53. The participation of complainants in a section 278.94 *voir dire* provides the court with a valuable perspective on the effects of the proposed evidence on their privacy and allows their voices to be heard to combat the myths and stereotypes that plague sexual offences.[36] It is a procedural option that does not violate the principle of prosecutorial independence.

v. The notice requirement in sub. 278.94 does not preclude the exercise of discretion

54. The application judge did not have an issue with any of the features of the regime mentioned above. In other words, she had no concern with the filtering process itself, or the participation of the complainant in that process. She did however find a *Charter* breach in subsection 278.93(4), which requires that before the application be heard, a copy of the application must be "*given to the prosecutor and to the clerk of the court at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice*."

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35 *R. v. Shearing*, 2002 SCC 58 at para. 86.

36 *R. v. Mills*, [1993] 3 S.C.R. 668 at paras. 90 – 93.

55. The application judge understood this as requiring that the application necessarily be brought prior to the trial. However, the legislation does not impose such an inflexible requirement. The Court has the inherent power to grant adjournments of trials for a variety of reasons, including to accommodate the timing of s. 278.93 applications. It also has the power pursuant to subsection 278.94(4) to shorten the seven-day delay. It is the exercise of judicial discretion that will thus determine whether an application brought mid-trial is allowed, in light of all the circumstances. If the discretion is improperly exercised in a given case, an appeal of the verdict by the accused may lie, but the legislation cannot be declared unconstitutional as a result of how judicial discretion is exercised.[37]

56. Defence counsel may be well advised to be proactive by filing their s. 278.93 applications in advance in light of what they already know from the record, including complainant's statements to the police. If they wait until mid-trial, they may be denied an adjournment by the Court exercising its trial management powers, keeping in mind that the bifurcation of trials is not the preferred course given the difficulties in rescheduling, especially for jury trials.

57. It is not necessary to determine in advance the situations that could lead judges to exercise their discretion so as to allow a s. 278.83 application to be brought mid-trial in order to rule on the constitutionality of the legislation. It is sufficient to recognize that the legislation does not set aside such discretion.

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[37] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 at paras. 77, 130-139; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at pp. 188, 197, 200-201; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 53; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at para. 5; *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919 at para. 71; *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 at para. 114.

C. In the alternative, the impugned provisions are justified under section 1

58. As the Respondent (Appellant on cross-appeal) has failed to make out a violation of his *Charter* rights, an analysis under section 1 of the *Charter* is unnecessary. If this Court disagrees, however, the impugned provisions ought to be saved as a reasonable limit justified under section 1.

59. A law may be saved under section 1 – even in the face of a violation under section 7 – where it is justified on the basis of compelling social interests impacting the public good.[38] In this case, it is. A proper application of the *Oakes* test drives this conclusion.

60. An infringement of the *Charter* is justified under section 1 where the law has a pressing and substantial objective, and the means chosen are proportional to that objective. A law is proportionate where the means adopted are (1) rationally connected to the law's objective, (2) minimally impairing of the right in question, and (3) the law's salutary effects outweigh its deleterious effects.[39]

61. There should be no question that the objective of the impugned provisions – to safeguard the integrity of the trial process and the equality and privacy interests of sexual offence complainants – is pressing and substantial. Recent judgments from this Court leave no room for doubt on this question.[40]

62. The means chosen by Parliament to further this objective are also proportionate:

    i. Correcting the deficiency in respect of the procedural protections accorded to those complainants whose private records happen to have fallen in the hands of the accused,

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38 *R. v. Safarzadeh-Markhali*, 2016 SCC 14 at para. 57.
39 *R. v. Safarzadeh-Markhali*, 2016 SCC 14 at para. 58.
40 *R. v. Goldfinch*, 2019 SCC 38 at para. 37; *R. v. Barton*, 2019 SCC 33 at para. 1.

while preserving the accused's ability to adduce that personal information at trial if probative is rationally connected to Parliament's objective.

ii. The impugned provisions minimally impair an accused's *Charter* rights by doing no more than what is reasonably required to better protect the rights of complainants (unlike, for example, an absolute exclusion of the record at issue without consideration of the interests of justice or the accused's right to full answer and defence).

iii. The beneficial effects of the impugned provisions outweigh the impact of any resulting restrictions on the rights of the accused. The impact on the applicant is not substantial as he retains the ability to adduce relevant evidence and to meaningfully challenge the complainant's evidence through cross-examination.

63. In these circumstances, the broader societal interests considered under a section 1 analysis tip the balance in favour of a finding of constitutionality.

PART IV – COSTS

64. The Attorney General of Canada does not seek costs and requests that costs not be ordered against him.

PART V – REQUEST FOR PERMISSION TO MAKE ORAL ARGUMENT

65. The Attorney General of Canada requests permission to make oral submissions not exceeding 10 minutes.

Montréal, January 27, 2021

Marc Ribeiro

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PART VI –TABLE OF AUTHORITIES

Jurisprudence ***(cont'd)*** **Paragraph(s)**

Doctrine
