SCC File No. 39133

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant (Respondent on Cross-Appeal)

- and –

J.J.

Respondent (Appellant on Cross-Appeal)

- and -

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PART I – OVERVIEW AND POSITION ON QUESTIONS ON APPEAL

1. If something in the accused's possession is a "record" under s. 278.1 of the *Criminal Code,* it is now presumptively inadmissible in a sexual offences trial. To rely on this evidence, the accused must notify the Crown and complainant of its "detailed particulars" and go through a hearing at which the complainant has standing to "appear and make submissions". The stakes are high, and the consequences for the accused are severe. For these reasons, accused persons across the country are bringing motions for directions seeking judicial guidance on whether their materials qualify as "records" under s. 278.1. The result has been a patchwork of decisions and excessive delay in an already burdened criminal justice system. This appeal presents this Court with the opportunity to provide nationwide guidance in this difficult area.

2. The CLA's primary position is that the records framework created by Bill C-51 is unconstitutional because it violates the right to a fair trial (under ss. 7 and 11(d) of the *Charter*) and the principle against self-incrimination (under s. 7 of the *Charter*). But as part of the constitutional analysis, the Court must determine the scope of the legislation. The CLA therefore submits that the legislation should be interpreted in a manner that respects the text, context, and limited purpose of the Bill C-51 amendments. More specifically, the CLA submits:

i. Electronic communications between an accused and a complainant are not "records" under s. 278.1 of the *Criminal Code.*

ii. Where "records" are concerned, an accused should only be put to the burden of a s. 278.93 application where the accused seeks to tender the record into evidence, and not where the accused merely seeks to adduce the information in the record.

iii. If a s. 278.93 application is brought and the court decides to hold a hearing under s. 278.94, the complainant has a limited right to "appear and make submissions". This does not include the right to cross-examine the accused.

iv. Where an accused seeks a ruling on whether material in their possession meets the definition of "records" such that a s. 278.93 application is required, a complainant does not have standing during that process.

PARTS II & III – STATEMENT OF ISSUES AND ARGUMENT

A. Electronic communications between the accused and complainant are not "records" under s. 278.1

3. Section 278.1 defines "record" as "any form of record that contains personal information for which there is a reasonable expectation of privacy". The section then lists several examples of such records, including "medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information". If something is not a "record", then there is no need to bring a pre-screening application under s. 278.93 before adducing it in evidence.

4. The scope of the term "record" in s. 278.1 should be carefully delineated. As the court held in *R. v. A.M.*, such determinations carry "great consequences" for an accused: the material becomes presumptively inadmissible and may ultimately be disclosed to the complainant before trial.[1] Given what is at stake for the accused, care should be taken to ensure that s. 278.1 does not overshoot its purpose. For the reasons given below, the CLA submits that "records" do not include electronic communications between the accused and complainant.

5. *First*, the text, context, and legislative history of the "records" definition in s. 278.1 suggest that it was intended to capture records of the complainant that happen to fall into the possession of the accused (such as those explicitly listed in the provision, *e.g.*, medical records, employment records, or personal journals and diaries). It was *not* intended to capture communications that the complainant voluntarily exchanged with (and intended for) the accused—communications that would continue to be available to accused persons through their own computer, phone, or telecommunications accounts.

6. Section 278.1 does not refer to electronic communications (nor even to personal correspondence) in the definition of "record". Instead, all listed records are ones for which there is either a professional obligation regarding confidentiality (*e.g.*, medical records or child adoption

[1] *R. v. A.M.*, 2020 ONSC 1846, at paras. 38, 63, 121; *R. v. W.M.*, 2019 ONSC 6535, at para. 55.

records)[2] or which are intended exclusively for the complainant's own use and review (*e.g.*, personal diaries). Electronic communications *intended for* the accused's use and review do not fall into either of these categories.

7. This approach is consistent with the legislative history of Bill C-51. The origins of this legislation are found in the 2012 report by the Senate Standing Committee on Legal and Constitutional Affairs concerning the third-party records *Mills* regime for sexual assault cases.[3] The report made several recommendations in response to scenarios where therapeutic records might fall into the hands of an accused without a *Mills* application. It also made recommendations based on *R. v. Shearing*,[4] in which the accused sought to adduce the personal diary of the complainant that he came to possess without a *Mills* application. Thus, Bill C-51 sought to address the clear gap in the law where an accused comes into possession of a record that they would otherwise have required an application to access, regardless of how "mundane" the information may be.[5] These were the concerns driving the creation of Bill C-51, not concerns about the misuse of electronic communications voluntarily exchanged by the complainant with the accused.[6]

8. *Second*, although s. 8 jurisprudence interpreting the phrase "reasonable expectation of privacy" is informative, it is not completely transferable to the s. 278.1 context.[7] Privacy is not an

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[2] For example, in *R. v. Marakah*, 2017 SCC 59, at paras. 138-139, Moldaver J. (dissenting but not on this point) noted that the reason complainants have a reasonable expectation of privacy in police records under s. 278.1 is because police are professionals who are reasonably expected to safeguard personal information.

[3] Standing Senate Committee on Legal and Constitutional Affairs, 20th Report, December 2012, pp. 17-20.

[4] *R. v. Shearing*, 2002 SCC 58.

[5] *Ibid*, at para. 148; *R. v. B.G.*, 2021 ONSC 2299, at para. 27.

[6] In this regard, the description of Bill C-51 as creating the "Ghomeshi rules" is a misnomer.

[7] Daniel Brown and Jill Witkin, *Prosecuting and Defending Sexual Offence Cases* (Toronto: 2020), 2nd Ed., Emond Montgomery Publications, p. 338, Book of Authorities, Tab 2 ("BOA"). See also *R. v. Quesnelle*, 2014 SCC 46, at para. 28, and *R. v. S.W.*, 2015 ONCJ 562, at para. 18. See also *B.G.*, *supra*, at para. 23, citing *S.W.* with approval in the post-Bill C-51 context.

all-or-nothing right.[8] Instead, it is a protean concept that takes on its meaning from its surrounding circumstances.[9] These circumstances include the party seeking access to the information and the use to which that information will be put.

9. In the context of the "records" regime in ss. 278.1, 278.92-278.94, the party seeking to access the information is the accused, and the use to which it would be put is to make full answer and defence to criminal allegations of sexual assault. The accused would be using electronic communications with the complainant to respond directly to allegations that the complainant has made to police—allegations containing information to which the communications relate. In some cases, the complainant may have even turned over some of the very same (or related) electronic communications to police.[10] The complainant could not have expected their communications with the accused to remain private in these circumstances.[11]

10. The relationship between an accused and a complainant is necessarily adversarial. As Davies J. stated in *W.M.*, "[j]ust as it would not be reasonable for [the accused] to expect [the complainant] to keep information about him private that would enhance the reliability and credibility of her testimony it is not, in my view, reasonable for [the complainant] to expect that [the accused] will continue to keep [evidence private] which might advance his defence".[12] Where the accused already has the information, "there is no concern about a fishing expedition, as the information is already known. Any concern about misuse of the information will be governed by the already existing rules of evidence."[13] In other words, requiring a s. 278.93 application in these circumstances would "shut the barn door after the horse had escaped".[14]

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[8] *Quesnelle*, *supra*, at para. 29.

[9] *R. v. Tessling*, 2004 SCC 67, at para. 25.

[10] The CLA takes the position that disclosed electronic communications certainly would not require a s. 278.93 application. See, for example, *R. v. McFarlane*, 2020 ONSC 5194.

[11] *R. v. X.C.*, 2020 ONSC 410, at para. 68, BOA, Tab 1; *A.M.*, *supra*, at para. 100.

[12] *W.M.*, *supra*, at para. 50. See also *R. v. Mai*, 2019 ONSC 6691, at para. 25; *A.M.*, *supra*, at paras. 116-117; *X.C.*, *supra*, at para. 67, BOA, Tab 1. See *contra* *R. v. M.S.*, 2019 ONCJ 670, at paras. 63-71.

[13] *A.M.*, *supra*, at para. 116.

[14] *Shearing*, *supra*, at para. 89.

11. Granted, this Court held in *Marakah* that individuals have a reasonable expectation of privacy over the contents of their electronic communications. But the context there was very different. In *Marakah*, the party seeking the information was the State, not a private individual with whom the communications were exchanged. This Court held that while individuals may have a reasonable expectation of privacy in their communications *vis-à-vis* the *police*, they accept the risk that the *recipient* of the messages may disclose them to third parties.[15] Where the intended recipient is the accused, it follows that the accused should be able to use those text messages to defend themselves against allegations made by the sender of the messages.[16]

12. *Third*, an accused's right to a fair trial and right to silence weigh against interpreting "record" to include electronic communications between an accused and a complainant. In today's digital world, sexual encounters are often accompanied by some form of electronic communication between the participants to the sexual activity. If all electronic communications between the accused and complainant are "records", the accused would be required to "pre-vet" their cross-examination material (and therefore litigation strategy) with the court, Crown, and complainant in most sexual assault trials.

13. Section 278.93(2) requires that the accused disclose "detailed particulars" of the "records" in a pre-screening application. Although this provision does not mandate disclosure of the records themselves, the accused must show "significant probative value that is not substantially outweighed by the danger of prejudice" to establish admissibility under s. 278.92(2). In practice, this will require the accused to disclose the substance of the records to clear the admissibility hurdle. This procedure has a profoundly negative impact on the right to a fair trial under ss. 7 and 11(d) of the *Charter*, and the principle against self-incrimination under s. 7. Its reach should be limited even if it is not struck down.

14. To be clear, just because an electronic communication is not a "record" does not mean that it avoids scrutiny under ss. 278.93-278.94. If the electronic communication is evidence of other sexual activity as defined by s. 276, then a s. 278.93 application and s. 278.94 hearing will be required before the defence is permitted to ask questions about the contents of the communication.

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[15] *Marakah*, *supra*, at para. 40.

[16] See also *R. v. Mills*, 2019 SCC 22, at para. 51 (per Karakatsanis J.).

A pre-screening hearing makes sense in the case of "other sexual activity evidence" because that is the type of evidence most likely to raise concerns about myths and stereotypes. However, where the electronic communications do not involve other sexual activity—but instead relate to the sexual activity that is the subject of the charge or involve non-sexual communications—it strikes at the heart of the right to a fair trial to require the accused to pre-vet these communications with the court, Crown, and complainant before using them in cross-examination. The definition of "records" should not be so broadly construed.

15. For all of these reasons, this Court should hold that electronic communications between the accused and complainant are not "records" under s. 278.1. This determination should be categorical—that is, it should not matter whether the accused and complainant are discussing highly intimate subjects like sexual activity or mundane matters of daily life. Consistent with this Court's longstanding s. 8 jurisprudence, the reasonable expectation of privacy analysis should be content neutral.[17] The court may consider the relationship between the parties to the communication (*e.g.*, accused and complainant)[18] because that is the *context* of the communication. But the *contents* of the communication are irrelevant. Otherwise, accused persons will need to routinely bring motions for directions in every case involving electronic communications to determine which messages do and do not qualify as "records". These motions would need to be argued on a message-by-message or conversation-by-conversation basis.[19] Where the accused and complainant had a prior relationship, the volume of potentially relevant electronic communications would be enormous. The motions would be unwieldy, and the delay substantial. Both principle and pragmatism counsel against such an approach.

B. A s. 278.92 application should only be required where the accused "adduces" the record by putting it into evidence

16. In the event that the defence materials are held to be a "record", s. 278.92(1) states that "no record relating to a complainant that is in the possession or control of the accused—*and which the accused intends to adduce*—shall be admitted in any [sexual offence proceedings]" (emphasis added). Consistent with its plain wording, this provision should be interpreted to require a s. 278.93

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[17] *Marakah*, *supra*, at para. 48.
[18] *Mills* (2019), *supra*, at para. 25.
[19] See, for example, *X.C.*, *supra*, at para 70, BOA, Tab 1.

application only where an accused intends to introduce a copy of the actual record into evidence.[20] An application should not be required where an accused intends only to ask questions about the *information* contained in a record (*e.g.*, by asking the complainant a question about their text messages with the accused in cross-examination).[21]

17. Witnesses are generally permitted to give evidence about things said to them in conversation provided the evidence is relevant and otherwise admissible. In *Marakah*, this Court described text communications as an "electronic conversation". It follows that the *information* contained in a record—a conversation taking place in electronic form—can be used in court even where the *record itself* is not admitted in evidence.[22] Indeed, in *R. v. Mills* (2019), this Court held that even if the Crown were not permitted to tender screenshots of conversations as evidence because they were obtained unlawfully, the Crown "could still call the officer to testify about what the accused said and the written record could be used to refresh the officer's memory".[23]

18. Failure to adopt this approach would itself result in illogical consequences. Where electronic communications are exchanged between an accused and a complainant, both participants to the conversation have independent knowledge of what was communicated. It would be nonsensical to suggest that the accused could not use this knowledge in their defence merely because they happen to also possess copies of the communications, but they would be permitted to ask the questions if they were no longer in possession of the records.[24] This could not be what Parliament intended when it chose the word "adduce" in s. 278.92(1).

C. The complainant's right to "appear and make submissions" at a s. 278.94 hearing does not include the right to cross-examine

19. Where the defence brings an application under s. 278.93 to determine the admissibility of a "record", a hearing may be held under s. 278.94. In the event of a hearing, s. 278.94(2) allows a complainant to "appear and make submissions" at stage two of the admissibility process. Some courts have interpreted this section as conferring a right on the complainant to not only appear and

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[20] *X.C.*, *supra*, at paras. 30, 58-62, BOA, Tab 1.
[21] See, for example, *R. v. Boyle*, 2019 ONCJ 226, at paras. 24-28; *M.S.*, *supra*, at para. 22. [22] *X.C.*, *supra*, at para. 59, BOA, Tab 1. See also *R. v. Fliss*, 2002 SCC 16, at para. 12.
[23] *Mills* (2019), *supra*, at para. 54 (per Karakatsanis J.).
[24] *X.C.*, *supra*, at para. 60, BOA, Tab 1.

make submissions, but also to cross-examine the accused in the pre-screening hearing.[25] The CLA asks this Court to categorically reject that interpretation. In short, "[t]he right to make submissions is just that and no more".[26]

20. *First*, the plain language of s. 278.94(2) does not grant a complainant the right to cross-examine an accused. It would have been easy enough for Parliament to provide for that explicit right, yet it chose not to do so.[27] Where Parliament has intended to confer a right of cross-examination in the *Criminal Code*, it has unambiguously included that language. For example, s. 672.5(11) relates to the rights of parties at Review Board disposition hearings, and it grants parties the right to "call witnesses and cross-examine any witness".[28] Thus, even when referring to the rights of parties—who would traditionally have the right to call evidence and cross-examine witnesses—the language of that section carefully spells out their participatory rights. This language stands in sharp contrast to the language of s. 278.94(2), which says nothing about a right to cross-examine for a third-party complainant.

21. Support for this approach is also found in the Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs. Responding to a concern that the Bill C-51 amendments would give complainants standing to make decisions about how a prosecution should proceed, Minister Wilson-Raybould stated that "[t]his isn't a right to standing".[29] The complainant's participatory rights should therefore be something short of full standing before the court (which would ordinarily include the right to make submissions *and* examine witnesses). They should include nothing more than what the statutory language provides: the right to "appear and make submissions".

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[25] See, for example, *R. v. Boyle*, 2019 ONCJ 253 and *R. v. Monkman*, 2007 MBQB 6. See *contra* *B.G.*, *supra*, where Harris J. held that s. 278.94 does not confer a right of cross-examination to the complainant.

[26] *B.G.*, *supra*, at para. 36.

[27] *Ibid*, *supra*, at paras. 45-46.

[28] See also *Ibid*, at para. 46, which reviews other sections of the *Criminal Code* that provide the right to cross-examine a witness.

[29] Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue No. 47, June 20, 2018, 47:84.

22. *Second*, granting a complainant expanded standing at the admissibility hearing stage is inconsistent with the participatory rights traditionally extended to third parties in criminal matters.[30] As a minister of justice, the Crown is responsible for consulting with third parties such as complainants and advancing their interests in court.[31] The criminal law has thus been highly skeptical of granting standing to third parties themselves for fear that this would create two prosecutors, both aligned against the accused—especially because the second prosecutor (*i.e.*, the third party) is not bound by the quasi-judicial duties of the Crown. Instead, the second prosecutor would be free to zealously advance their private, partisan interests.[32]

23. *Third*, allowing cross-examination of an accused at the admissibility hearing stage would have perverse effects. The complainant would be able to cross-examine the accused with material that they have never seen because the complainant is not subject to the Crown's disclosure obligations.[33] The complainant would also be able to cross-examine the accused on their impeachment materials before the accused has had the opportunity to do the same to the complainant. This process violates an accused's right to know the "case to meet".[34]

D. A complainant does not have standing at a motion for directions

24. Finally, given the uncertainty surrounding the definition of "record" in s. 278.1, many accused persons have brought motions for directions to determine whether the electronic communications in their possession qualify as "records" such that a s. 278.93 application is

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[30] Cases that have concluded otherwise have been wrongly decided. For example, *R. v. Boyle*, 2019 ONCJ 253 and *R. v. Monkman*, 2007 MBQB 6 both rely on *American Airlines, Inc. v. Canada (Competition Tribunal)*, 1988 CanLII 5706 (FCA). However, it is inapt to compare complainant standing to interventions in Federal Court under the *Competition Act* because of the limited standing traditionally extended to third parties in criminal matters.

[31] *Boyle*, *supra*, at paras. 14-17; *R. v. A.C.*, 2019 ONSC 4270, at para. 68; *R. v. Simon*, 2019 ABPC 186, at para. 48.

[32] *B.G.*, *supra*, at para. 47; *R. v. United States*, (2004) 184 C.C.C. (3d) 427 (Ont. S.C.J.), at para. 20; *R. v. Reddick*, 2020 ONSC 7156, at para. 120.

[33] *R. v. Boyle*, 2019 ONCJ 253, at para. 15.

[34] *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 102.

required.[35] If such motions continue to be required in the future, this Court should clarify that the complainant has no standing to appear and make submissions at this stage.

25. As mentioned above, the only provision that grants the complainant participatory rights is s. 278.94(2). This arises at stage two of the admissibility process after the judge has received a s. 278.93 application in respect of "records" and decided to hold a hearing under s. 278.94. It follows that the complainant should have no standing at stage one of the process (*i.e.*, consideration of the accused's application under s. 278.93),[36] let alone on a motion for directions to determine whether a s. 278.93 application is required.

26. Granting the complainant standing at the motion for directions stage subverts the legislative process, requiring the defence to alert the complainant to evidence that may not ultimately require a s. 278.93 application.[37] If a document is not a record, the complainant should have no right to be made aware of this evidence in advance of cross-examination or to appear and make submissions on its admissibility.[38]

PARTS IV & V – SUBMISSIONS ON COSTS AND ORDER SOUGHT

27. The CLA makes no submissions as to costs. The CLA takes no position on the disposition of the appeal.

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[35] See, for example, *X.C.*, *supra*, BOA, Tab 1; *A.M.*, *supra*; *W.M.*, *supra*; *R. v. Ekhtiari*, 2019 ONCJ 774; *M.S.*, *supra*.

[36] *R. v. G.E.*, 2020 ONCJ 448, at paras. 37-38; *R. v. Roland*, 2020 BCPC 130, at para. 21. As the court stated in *Roland*, at para. 31, the fundamental purpose of stage one of the s. 278.92 process is "to ensure the expedition's vessel does not leave the dock, potentially disrupting the trial process and causing needless anxiety, if not harm, to the complainant, until the judge is satisfied that there is a valid reason to embark on the expedition."

[37] *G.E.*, *supra*, at para. 49.

[38] *Ibid*, at para. 10. See also *A.M.*, *supra*, at para. 31.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 16th DAY OF APRIL, 2021.

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PARTS VI – TABLE OF AUTHORITIES

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