Court File No. 39133

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

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

- and -

J.J.

RESPONDENT

AND:

CRIMINAL TRIAL LAWYERS' ASSOCIATION, BARBARA SCHLIFER COMMEMORATIVE CLINIC, CRIMINAL LAWYERS' ASSOCIATION, INDEPENDENT CRIMINAL DEFENSE ADVOCACY SOCIETY, WEST COAST LEGAL EDUCATION AND ACTION FUND AND WOMEN AGAINST VIOLENCE AGAINST WOMEN RAPE CRISIS CENTRE, CANADIAN COUNCIL OF CRIMINAL DEFENCE LAWYERS, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF MANITOBA

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PART I - OVERVIEW AND POSITION ON QUESTIONS ON APPEAL

1. This appeal addresses the constitutionality of s 278.92 of the *Criminal Code* insofar as it applies to complainant records that are not "sexual activity" evidence captured by s 276. The Criminal Trial Lawyers' Association [CTLA] contends that rather than "respecting the competing constitutional interests at play in a sexual assault trial",[1] s 278.92 blatantly contravenes well-established constitutional norms. Most notably, it violates the right to silence by compelling the defence to provide information before trial about probative evidence it plans to adduce. It then requires the defence to demonstrate that such evidence is *significantly* probative before it can be tendered, contradicting the constitutional requirement that relevant evidence adduced by the accused be admitted liberally in order to protect against the risk of wrongful conviction.

PART II - POSITION WITH RESPECT TO APPELLANT'S QUESTIONS

2. The Appellant relies heavily on this Court's decision in *R v Darrach*[2] in support of its contention that the legislation is *Charter* compliant. In response, the CTLA submits that:

a. The *Charter* permits courts and Parliament to compel limited disclosure from the defence only where the proof in question is: (a) presumptively inadmissible; (b) part of a *voir dire* where the accused bears the burden of proof; or (c) provided after the Crown has closed its case.

b. *Darrach* applies this approach, recognizing that tactical burdens to disclose defence evidence can be imposed because sexual activity evidence is presumptively irrelevant and highly prejudicial. It does not support a conclusion that s 278.92 is constitutional;

c. The requirement that the accused demonstrate the "significant" probative value of affected records contravenes the constitutionally mandated approach to evidence tendered by the defence, which is to admit such proof unless whatever probative value possessed is *substantially* outweighed by its prejudicial effect.

PART III – STATEMENT OF ARGUMENT

a. *The Law of Evidence and the Right to Silence*

3. The Appellant contends that the right to silence is unaffected by the Code's requirement for records in the accused's possession to be turned over before trial along with "particulars" about how the evidence will be used. Their argument ignores important decisions guaranteeing the

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[1] Appellant's Factum, para. 8.
[2] *R v Darrach*, 2000 SCC 46.

accused's right to remain silent, however. Nowhere does it mention Cory J's statement in *R v Chambers*[3] that "there is no obligation resting upon an accused person to disclose either the defence which will be presented or the details of that defence before the Crown has completed its case." Nor is there comment on Lamer CJ's judgment in *R v P(MB)*,[4] holding that:

> [A]n accused is under no obligation to respond until the state has succeeded in making out a *prima facie* case against him or her. In other words, until the Crown establishes that there is a "case to meet", an accused is not compellable in a general sense (as opposed to the narrow, testimonial sense) and need not answer the allegations against him or her.
>
> The broad protection afforded to accused persons is perhaps best described in terms of the overarching principle against self-incrimination, which is firmly rooted in the common law and is a fundamental principle of justice under s. 7 of the *Canadian Charter of Rights and Freedoms* . As a majority of this Court suggested in *Dubois v. The Queen*, [1985] 2 S.C.R. 350, the presumption of innocence and the power imbalance between the state and the individual are at the root of this principle and the procedural and evidentiary protections to which it gives rise.
>
> Before trial, the criminal law seeks to protect an accused from being conscripted against him- or herself by the confession rule, the right to remain silent in the face of state interrogation into suspected criminal conduct, and the absence of a duty of disclosure on the defence: *R. v. Hebert*, [1990] 2 S.C.R. 151. With respect to disclosure, the defence in Canada is under no legal obligation to cooperate with or assist the Crown by announcing any special defence, such as an alibi, or by producing documentary or physical evidence.
> …
>
> All of these protections, which emanate from the broad principle against self-incrimination, recognize that it is up to the state, with its greater resources, to investigate and prove its case, and that the individual should not be conscripted into helping… fulfil this task.

4. These decisions affirm the long-standing principle that individuals cannot be compelled to assist in their own prosecution, and that they have no obligation to do *anything* until the Crown has closed its case. This is not an incidental part of the trial process or restricted to exceptional circumstances. It is the *status quo* in Canadian criminal prosecutions, and has been for centuries.

5. Nonetheless, as the Appellant points out, the rule is not absolute. The law of evidence, which controls the admission of proof into any proceeding, occasionally imposes *limited* obligations on parties to justify questioning or evidentiary admission. These are not pre-trial compulsions like s 278.92, and they are more minimally intrusive overall, but the accused does have to occasionally

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[3] *R v Chambers*, [1990] 2 SCR 1293 at 1319.
[4] *R v P(MB)*, [1994] 1 SCR 555 at 577, 578 and 579.

reveal parts of its strategy or proposed proof if it wishes to tender certain types of evidence or ask certain questions in cross-examination. For example, the defence cannot elicit hearsay from a Crown witness without first explaining what inferences it seeks to draw from the evidence (to show that it is not hearsay), or what makes the statement reliable and necessary. The right to silence is not impacted because the burden of tendering hearsay lies on the person adducing it. As such, the defence *must* explain the relevance of the statement in question, and how it affects the defence, even though the Crown has not yet closed its case.

6. Building on this idea, the Appellant helpfully refers to eight situations where the accused "may be required to provide disclosure of some aspect of their defence if they wish to raise a reasonable doubt".[5] Examined closely however, *none* support the Appellant's contention that the right to silence should yield – or is unaffected – by s 278.92. Instead, each reflects the fact that the right to silence is not compromised if the defence must provide details: (a) on a *voir dire* where the accused bears the burden of proof; (b) after the Crown has closed its case; or (c) in respect of evidence that is presumptively inadmissible because of its inherently prejudicial qualities

7. Two of the Appellant's cited examples fall into category (a). These actually have nothing to do with "rais[ing] a reasonable doubt" at all. If the accused wishes to challenge a matter under the *Charter*, or contest the legitimacy of a wiretap, it makes sense that remaining silent is not an option given the burden of proof and the fact that the *voir dire* resolving the matter has no impact on guilt.

8. The Appellant next cites three rules that purportedly impose "disclosure" requirements in spite of the right to silence: section 657.3 of the *Code* (expert evidence), *Corbett* applications and alibi evidence. The first two examples fall into category (b). Notice requirements for expert evidence and *Corbett* applications are sensibly not required until the close of the Crown case, which complies with the "case to meet" principle expressed in *P(MB)*. There is *no* legal requirement to provide notice of an alibi. It is a true "tactical" choice.

9. The remaining examples come from category (c), which recognizes a party's obligation to adduce particulars if it attempts to tender evidence that is inherently prejudicial. With respect to

[5] Appellant's Factum, para 117.

third party suspect evidence, this Court explained in *R v Grant*[6] that "where [defence] evidence refers to a factual matrix beyond the offence charged, its relevance to a fact in issue or an available defence may be less clear. In such circumstances, the gate-keeping role of the trial judge may require her to determine whether the evidence is logically relevant and connected to a defence that has an air of reality." Evidence of a victim's bad character is similarly controlled. As Martin J.A. recognized in *R v Scopelitti*,[7] "since evidence of prior acts of violence by the deceased is likely to arouse feelings of hostility against the deceased [the trial judge must be able to scrutinize] whether the proffered evidence has sufficient probative value… to justify its admission." Both categories address a type of proof that *poses a serious risk of prejudicing the trial if admitted without screening*. The Appellant also mentions s 30 of the *Canada Evidence Act*, which involves hearsay and the business records exception. Again, the law understandably requires the accused to show a basis for admissibility if the evidence would otherwise be excluded because of its unreliable nature.

10. In summary, none of these examples provide support for the argument that disclosure can simply be compelled from the defence without restriction or whenever a compelling policy reason arises. On the contrary, they demonstrate compliance with the notion that the courts and Parliament alike are permitted to request limited disclosure *if* the accused wishes to tender evidence *that is presumptively irrelevant or has a serious potential to prejudice the trier of fact.*

b. *This Court's Decision in* R v Darrach *Does Not Support s 278.92*

11. In the absence of any comparable common law evidentiary rule that permits the abrogation of the right to silence, the Appellant unsurprisingly relies heavily on this Court's decision in *R v Darrach*.[8] The reasoning proceeds by analogy. Since *Darrach* concluded that the right to silence was not unfairly impacted by the s 276 regime that compelled pre-trial particulars, s 278.92 should be treated similarly. Like all analogies, however, the ability to extend *Darrach* to this scenario depends upon whether the principles from that case apply. The CTLA suggests they do not.

12. *Darrach* is an important constitutional decision, but the holding of constitutional validity rests largely upon the fact that evidence covered by s 276 is *presumptively irrelevant* and admitting

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[6] *R v Grant*, 2015 SCC 9 at para 21.
[7] *R v Scopelitti* (1981), 63 CCC (2d) 481 at 497, 1981 CanLII 1787 (Ont CA).
[8] *R v Darrach*, 2000 SCC 46.

it without scrutiny risks leading the trier of fact to an incorrect conclusion. As such, compelling the accused to bring an application with particulars does not impact the right to silence for the reasons mentioned above: because *no one has an unfettered right to adduce irrelevant or prejudicial evidence*. Where evidence possesses inherently prejudicial qualities, a party hoping to tender such proof must first be able to demonstrate its relevance and probative value. Requiring that a criminal defendant do so is *not* a violation of the right to silence.

13. Contrary to the Appellant's submission, *Darrach* does *not* provide unbridled licence to impose similar obligations in any desired scenario. Instead, the decision is specifically tied to the type of evidence being considered. As Gonthier J. explained at a critical juncture, s 276 is "designed to exclude irrelevant information and only that relevant information that is more prejudicial to the administration of justice than it is probative." He later reiterated that:

> Evidence of prior sexual activity is of limited admissibility: it is admissible for some purposes but not others. This is because it is of limited relevance. In particular, as the Court put it in *Seaboyer*, "there is no logical or practical link between a woman's sexual reputation and whether she is a truthful witness" or whether she is more likely to have consented to an alleged assault.[9]

14. The presumptive irrelevance of sexual activity evidence and the need for screening is a frequent theme in this Court's jurisprudence. In *R v Goldfinch*,[10] Karakatsanis J reiterated this point, writing at length about the way sexual activity evidence reinforced "concrete social prejudices" and caused "concrete harms… to the victims of sexual assault". She reiterated the role played by s 276(1), noting that it establishes an absolute bar against "twin-myth inferences". As for evidence tendered under s 276(2), "that evidence is presumptively inadmissible unless the accused satisfies" the requirements of that section. In a concurring judgment, Moldaver J pointed out how s 276 advances key trial process goals by ensuring that inherently prejudicial evidence is excluded unless the accused first satisfies the court that admission is warranted:

> The s. 276 regime is sometimes viewed as a zero-sum game pitting the rights of the complainant against those of the accused. But in my respectful view, this is a mischaracterization. The s. 276 regime is designed to respect and preserve the rights of *both* complainants and accused persons by excluding evidence which would undermine the legitimacy of our criminal justice system and inhibit the search for truth, while allowing for the admission of evidence which would enhance the legitimacy of our criminal justice

[9] *Ibid* at paras 43, 45.
[10] *R v Goldfinch*, 2019 SCC 38 at para 37.

> system and promote the search for truth. In this way, the regime seeks to promote the integrity of the trial process as a whole – a concept that is essential to the public's faith in the criminal justice system.[11]

15. These decisions recognize the special character of sexual activity evidence. Like hearsay and bad character evidence, it is a species of proof that *seldom* advances the search for truth. For this reason, added procedures to restrict admissibility – including compelled disclosure – are justified to guard against prejudice.

16. The Appellant relies heavily on a passage from *Darrach* where the Court held that the right to silence was unaffected because the "compulsion" to provide disclosure was only "tactical". Gonthier J noted that "the accused is not forced to testify by s 276. Nor is he coerced by the state in any way that engages Charter protection… In applications under s 276, there is free and informed consent when the accused participates... He knows that he is not required to do so.[12]". But this statement did not stand in isolation. Gonthier J also remarked that the "tactical pressure" was justified *because* "it is a basic rule of evidence that the party seeking to introduce evidence must be prepared to satisfy the court that it is relevant and admissible", reiterating that "evidence of prior sexual activity is of limited admissibility".[13] He later noted that "section 276 does not require the accused to make premature or inappropriate disclosure to the Crown".[14] But again, the conclusion that such disclosure is not "premature or inappropriate" was because of the *type of evidence* at stake:

> Section 276 is most often used in attempts to substantiate claims of an honest but mistaken belief in consent. To make out the defence, the accused must show that "he believed that the complainant communicated consent to engage in the sexual activity in question" (*Ewanchuk, supra,* at para. 46 (emphasis in original)). To establish that the complainant's prior sexual activity is relevant to his mistaken belief during the alleged assault, the accused must provide some evidence of what he believed at the time of the alleged assault. *This is necessary for the trial judge to be able to assess the relevance of the evidence in accordance with the statute. It is an essential part of the legislative scheme which provides a means by which the accused may establish the relevance of the evidence he chooses to put forward*.[15]

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[11] *Ibid* at para 81.
[12] *R v Darrach*, 2000 SCC 46 at para 49.
[13] *Ibid* at para 46.
[14] *Ibid* at para 55.
[15] *Ibid* at para 59 [Emphasis added].

17. A close reading of this Court's decision in *Darrach* reveals that constitutionality was largely premised on the inherently prejudicial nature of sexual activity evidence. In such circumstances disclosure legitimately serves to overcome the presumption of irrelevance. But the right to silence cannot yield in other circumstances or it would effectively cease to exist. As the Respondent has pointed out, if the Appellant's understanding of *Darrach* is correct, and decisions to adduce relevant evidence can simply be construed as "tactical" choices that have no impact on the right to silence, *there is no logical end to what can be required of the accused*.[16] After all, the accused is *never* obliged to cross-examine or advance a defence. If they wish to take the "tactical" step of doing so, what would stop Parliament from abolishing the "right" to silence altogether and forcing defendants to reveal all prospective questioning and evidence and have it vetted prior to trial?

18. In contrast to s 276 evidence, which is a class of proof with demonstrably prejudicial qualities, "records" from a complainant are not a species of evidence with levels of probative value or prejudicial effect that are measurable in the abstract. Since the term applies to any form of record that contains private personal information it will invariably contain a mixture of irrelevant, highly probative, low probative *and* even strongly prejudicial information. Because of this variability, it is impossible to treat "records" like hearsay, bad character or sexual activity evidence and conclude that they are sufficiently prejudicial as a class to warrant abridging the right to silence.

c. *The Constitutional Approach to the Exclusion of Defence Evidence*

19. In *R v Seaboyer*,[17] the Supreme Court concluded that Crown evidence should be excluded if "…its probative value is outweighed by the prejudice which may flow from it." But the Court was

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[16] Respondent's Factum, paras 115-117. The Attorney General of Nova Scotia makes this point even more overtly in its factum at paragraph 78, suggesting that "requiring advance notice of… the Complainant's records does not amount to a breach of the right against self-incrimination. The accused is not obliged to make the application; he makes the tactical decision to make the application… to challenge the Crown's case, raise a defence, or both. The accused simply must ensure the records are truly admissible." If this is correct, it is difficult to see how *Chambers* and *P(MB)* remain good law, since this reasoning can be applied to *any* type of defence evidence. See similarly Attorney General of Canada Factum, para 43.

[17] *R v Seaboyer*, [1991] 2 SCR 577 at 609.

careful *not* to apply the same standard to defence evidence. Instead, the Court held that such evidence should only rarely be excluded because it is "a fundamental tenet of our judicial system that an innocent person must not be convicted". As such, "the prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law.[18]" This differential approach has been affirmed numerous times by this Court.[19]

20. The evidentiary standard for defence evidence described in *Seaboyer* flows from the presumption of innocence and operates as an essential safeguard against wrongful conviction. Absent the ability to adduce defence evidence, the right to a fair trial is meaningless. As McLachlin J noted in *Seaboyer*, the "right of the innocent not to be convicted is dependent on the right to present full answer and defence", which in turn "depends on *being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution*."[20] Therefore, "[a] law which prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law justifying the exclusion runs afoul of our fundamental conceptions of justice and what constitutes a fair trial."[21]

21. The unbalanced standard favouring the admission of defence evidence qualifies as a principle of fundamental justice, either on its own or as a component of the right to make full answer and defence. Not only is this evidenced by the majority reasoning in *Seaboyer* itself, but also by the numerous lower court decisions that have referred to the *Seaboyer* standard as providing a foundation for a "s. 7 *Charter* principle of fundamental justice that relevant defence evidence can only be excluded in certain limited circumstances.[22]"

22. Section 278.92 violates this constitutional principle by forbidding the admission of evidence unless the accused can show that such proof possesses "significant" probative value. In the process, this standard creates a *presumption* of inadmissibility.[23] It matches the prior wording of s 276(2),

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[18] *Ibid* at 611.
[19] See eg *R v Grant*, 2015 SCC 9 at para 19; *R v Goldfinch*, 2019 SCC 38 at para 32.
[20] *R v Seaboyer*, [1991] 2 SCR 577 at 608 [Emphasis added.]
[21] *Ibid* at 609.
[22] *R v J(P)*, 2015 ONSC 6427 at para 20. See also *R v AL*, 2020 BCCA 18 at paras 219-220; *R v Samaniego*, 2020 ONCA 439 at para 147; *R v Clarke* (1998), 129 CCC (3d) 1, 1998 CanLII 14604 at para 33 (Ont CA); *R v Pereira*, 2008 BCSC 184 at para 106.
[23] *R v Darrach*, 2000 SCC 46 at para 40.

which was upheld in *Darrach*. But once again, *Darrach* provides no support for extending this approach because conformity with constitutional requirements stemmed from the nature of the evidence and the fact that "the legislation enhances the fairness of the hearing *by excluding misleading evidence from trials of sexual offences*. It preserves the accused's right to adduce relevant evidence that meets certain criteria and so to make full answer and defence.[24]"

23. This approach was reinforced throughout the judgment. Gonthier J. recognized that "[t]he word "significant" was added by Parliament but it does not render the provision unconstitutional by raising the threshold for the admissibility of evidence *to the point that it is unfair to the accused*.[25]" Again, this must be read in context. Immediately after, Gonthier J explained that:

> The context of the word "significant" in the provision in which it occurs substantiates this interpretation. Section 276(2)(c) allows a judge to admit evidence of "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice" (emphasis added). The adverb "substantially" serves to protect the accused by raising the standard for the judge to exclude evidence once the accused has shown it to have significant probative value. In a sense, both sides of the equation are heightened in this test, which serves to direct judges to the serious ramifications of the use of evidence of prior sexual activity for all parties in these cases.
>
> In light of the purposes of s. 276, the use of the word "significant" is consistent with both the majority and the minority reasons in *Seaboyer*. Section 276 is designed to prevent the use of evidence of prior sexual activity for improper purposes. The requirement of "significant probative value" serves to exclude evidence of trifling relevance that, even though not used to support the two forbidden inferences, would still endanger the "proper administration of justice". The Court has recognized that there are inherent "damages and disadvantages presented by the admission of such evidence" (*Seaboyer*, *supra*, at p. 634). As Morden A.C.J.O. puts it, evidence of sexual activity must be significantly probative if it is to overcome its prejudicial effect. The *Criminal Code* codifies this reality.
>
> By excluding misleading evidence while allowing the accused to adduce evidence that meets the criteria of s. 276(2), s. 276 enhances the fairness of trials of sexual offences. Section 11(d)… is [not] necessarily breached when the accused is not permitted to adduce relevant information that is not "significantly" probative, under a rule of evidence that protects the trial from the distorting effects of evidence of prior sexual activity.[26]

24. Prior to the enactment of s 278.92, s 276 was the *only* evidentiary rule that imposed a presumption of inadmissibility *exclusively* upon defence evidence. The enhanced hurdle for

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[24] *Ibid* at para 21 [Emphasis added].
[25] *Ibid* at para 38 [Emphasis added].
[26] *Ibid* at paras 40-42 [Emphasis added].

admission was deemed acceptable, because, as noted above, the elevated standard of probative value "serves to direct judges to the serious ramifications of the use of evidence of prior sexual activity for all parties in these cases.[27]"

25. It is also telling that section 276(1) includes a blanket prohibition upon the use of sexual activity evidence for the purpose of perpetuating the "twin myths". Enhanced scrutiny is further justified because of the clear risk that this type of evidence will advance these prejudicial concerns. But section 278.92 has *no absolute prohibitions*, because private records are not a "category" of evidence that has inherently prejudicial aspects. To be sure, *some* records will be problematic. In *Osolin*, Justice L'Heureux Dube recognized that therapeutic records could pose the risk of prejudice in some cases. In *Mills*, the Court mentioned that counselling records could invite improper reasoning about the sort of person who would require therapy. But this does not mean that "records" as a class are inherently prejudicial, irrelevant or likely to advance myths.

PART IV - SUBMISSIONS ON COSTS

26. The CTLA seeks no costs and asks that no costs be awarded against it.

PART V - ORAL ARGUMENT

27. As per Côté J.'s order dated March 5, 2021, the CTLA will present oral argument not exceeding five minutes at the hearing.

All of which is respectfully submitted this 12th day of April, 2021.

SIGNED BY:

PETER SANKOFF	**WILLIAM J. VAN ENGEN**
Counsel for the Intervener	Counsel for the Intervener

[27] *Ibid* at para 41.

PART VI - TABLE OF AUTHORITIES

CASES