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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Interveners

FACTUM OF THE INTERVENER,
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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview: Cross-examination, Acquittals, and an Unconstitutional Response

1. The importance of cross-examination, particularly in cases where the guilt or innocence of an accused is to be determined by the credibility and reliability of a single witness, cannot be understated. As Major and Fish JJ. aptly put it in *R v Lyttle*,[1]:

> Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be *no other way* to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed. [Emphasis in original]

2. The trial decision of *R v Ghomeshi*[2] exemplifies in stark terms the significant difference an effective cross-examination can make. In a trial consisting of three civilian complainants and no defence evidence, Justice Horkins made the following concluding remarks about how the cross-examination (on non-s.276 records) affected his view of the evidence:

> [132] At trial, each complainant recounted their experience with Mr. Ghomeshi and was then subjected to extensive and revealing cross-examination. The cross-examination dramatically demonstrated that each complainant was less than full, frank and forthcoming in the information they provided to the media, to the police, to Crown counsel and to this Court.
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> * * * *
>
> [137] Each complainant was confronted with a volume of evidence that was contrary to their prior sworn statements and their evidence in-chief. Each complainant demonstrated, to some degree, a willingness to ignore their oath to tell the truth on more than one occasion. It is this aspect of their evidence that is most troubling to the Court.
>
> [138] The success of this prosecution depended entirely on the Court being able to accept each complainant as a sincere, honest and accurate witness. Each complainant was revealed at trial to be lacking in these important attributes. The evidence of each complainant suffered not just from inconsistencies and questionable behaviour, but was tainted by outright deception.

3. Justice Horkins acquitted Mr. Ghomeshi and the acquittals were not appealed. Nonetheless, the federal government responded to the cross-examination that led to the acquittals by adding ss.278.92 to 278.94 to the *Criminal Code* ("*Code*") to significantly restrict the admissibility and use of non-s.276 records in the possession of the defence. Parliament

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[1] *R v Lyttle*, 2004 SCC 5 at para 1, [2004] 1 SCR 193.
[2] *R v Ghomeshi*, 2016 ONCJ 155, 27 CR (7th) 17.

ultimately approved these significant changes included in *Bill C-51* and officially presented them as minor amendments to the *Code* "Third Party Records" regime.[3] Yet one of the Bill's sponsors revealed in Parliament that it was the *Ghomeshi* trial, and the desire to provide complainants and the Crown with advance notice of cross-examination on records, that was top of mind.[4]

4. Generally speaking, the new "Accused in Possession of Records" provisions have three essential features. First, s. 278.92 established a new requirement on the defence to vet admissibility, in advance of their use, of all non-276 records in the possession of the defence in which a complainant may have a reasonable expectation of privacy and which the defence seeks to adduce in evidence. Second, a detailed procedural process was set out for this new requirement to obtain an advance admissibility ruling for non-276 records, a process that included granting the complainant standing and counsel (ss. 278.93 and 278.94). Third, this new procedural process was also made applicable to the well-established section 276 applications to admit other sexual activity evidence. The former 276 procedures were repealed.

5. The Canadian Council of Criminal Defence Lawyers/Conseil Canadien des Avocats de la Défense ("the CCCDL/CCAD") was permitted to intervene in *JJ* with respect to the alleged violations of ss. 7 and 11(d) and in particular, to argue that the impugned provisions violate the accused's constitutional right to cross-examine requiring they be struck down insofar as they apply to non-s.276 records. The parties appear to agree the constitutionality of the impugned provisions, insofar as they apply to s. 276 evidence, was not placed in issue at trial.

6. An accused has a constitutional right to cross-examine a sexual offence complainant without unwarranted constraint. The impugned provisions impose unprecedented and ultimately unconstitutional constraints on that cross-examination in a purported effort to protect non-constitutional privacy interests of complainants. The trial judge recognized this and the concomitant breach of JJ's right to a fair trial, but ultimately granted an inappropriate remedy.

Facts

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[3] *Charter Statement - Bill C-51*, Appellant's Legislative History.
[4] *R v J.J.*, 2020 BCSC 29 at para 32-33 ["*JJ Breach*"]; *R v Boyle* 2019 ONCJ 226 at para 18.

7. The CCCDL/CCAD relies on the facts as set out set out in the Factums of the Appellant/Respondent ("AGBC") and Respondent/Cross-Appellant ("JJ").

PART II – INTERVENER POSITION ON QUESTION IN ISSUE

8. With respect to the question in issue on the appeal/cross-appeal as framed by JJ at p. 4 of his Factum, the CCCDL/CCAD agrees with JJ that the combined effect of the provisions of ss. 278.92 through 278.94 of the *Criminal Code,* insofar as they apply to non-s.276 records, ("the impugned provisions"), violate the accused's constitutional rights to cross-examine, to a fair trial, and to silence in ss. 7, 11(c) and 11(d) of the *Charter* such that they should be declared of no force or effect.

PART III – ARGUMENT

The accused has the constitutional right to full cross-examination without unwarranted constraint.

9. The accused's right to make full answer and defence is recognized by this Court as a "pillar" of the criminal justice system[5] but its principal supporting buttress is the age-old right to challenge the Crown's witnesses through cross-examination.[6]

10. While the right to cross-examination is always critical, cross-examination is all the more crucial to the accused's ability to make full answer and defence when credibility is the central issue in the trial: "It is the ultimate means of demonstrating truth and of testing veracity."[7]

11. *R v Osolin*[8] gave constitutional recognition and protection to the right of cross-examination as a principle of fundamental justice critical to the fairness of the accused's trial. Yet, however fundamental, the right of cross-examination is not absolute. It must conform to the basic principle that all evidence must be relevant in order to be admissible, and the probative value of evidence adduced in cross-examination must be weighed against its prejudicial effect.[9]

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[5] *R v Stinchcombe,* [1991] 3 SCR 326 at p. 336.
[6] *Lyttle* at para 2; *R v Osolin,* [1993] 4 SCR 595 at p. 664.
[7] *Osolin* at p. 663.
[8] *Osolin* at p. 662 and 665; *Lyttle* at para 43.
[9] *Osolin* at p. 665-666; *Lyttle* at para 44.

12. Nonetheless, this court pronounced in *Lyttle*, that "the right of an accused to cross examine witnesses for the prosecution - without significant and unwarranted constraint - is an essential component of the right to make full answer and defence" that had to "be jealously protected and broadly construed."[10] In view of *Lyttle*, limitations on the right to cross-examine that amount to significant and unwarranted constraints infringe s.7 of the *Charter*.

13. Owing to the constitutional stature of the right to cross-examine, this Court held in *Lyttle* that an accused can cross-examine about unproven facts without an independent evidentiary foundation as long as there is a good faith basis for the question. As noted by Professor Stuart, *Lyttle* was a defining moment in the ascendancy of the right to full cross-examination[11].

14. All of these fundamental principles relating to the constitutional right to cross-examine were recently unanimously endorsed by this Court in *R v R.V.*[12].

The constitutional right to cross-examination overwhelms privacy in this context.

15. The provisions of ss. 278.92 to 278.94 are expressly directed at the protection of a sexual offence complainant's privacy. Their operation is triggered by the defence being in possession of "records" in which the complainant may have a "reasonable expectation of privacy" and which the defence intends to "adduce" in cross-examination. Records in the possession of the defence that do not attract the requisite privacy interest do not require the prior judicial vetting demanded by these provisions. (In a sexual offence prosecution they would be few in number.)

16. It can be seen then, that in the context of this constitutional challenge, the competing interest is the privacy interest of sexual offence complainants.[13] While it is an important interest regularly taken into account in assessing the limits on cross-examination, the protection of complainant privacy when s. 8 of the *Charter* is not engaged is not an equivalent fundamental

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[10] *Lyttle* at para 2, 41 and 44.

[11] Don Stuart, *Lyttle Annotation* (Apr 2004) 17 CR (6th) 3-4. Professor Stuart noted that, "Lyttle is of enormous import" for criminal trials. In his view, in balancing the right to cross-examination against the need for judicial control of abuse by counsel - "the Court clearly comes down on the side of favouring full cross-examination." Book of Authorities, "BOA" Tab 3.

[12] *R v R.V.*, 2019 SCC 41, 436 DLR (4th) 265.

[13] *R v Anderson*, 2019 SKQB 304. ["*Anderson 2019*"] at para 12.

principle of justice on par with the cross-examination right of the accused. This court highlighted this constitutional reality in *R v Seaboyer*[14], distinguishing between the right to a fair trial – expressly identified by the Court as a principle of fundamental justice – and protection of complainant privacy described only as a "legitimate goal" provided it "not interfere with the primary objective of fair trial"[15]. *Osolin* reflected a similar approach.[16]

17. This Court held in *R v Shearing*[17], that the issue of the use and admissibility of a document in the possession of the defence, even one to which a privacy interest may attach, does not involve the state's coercive power to compel production and therefore, unlike *R v Mills,*[18] any privacy interest a complainant may have in that document does not engage s. 8 of the *Charter.* To the extent this court's decision in *R v Darrach*[19] suggested a complainant may have a privacy right independently anchored in s. 7 of the *Charter*, this Court's subsequent decision in *Shearing* said that had not been determined.[20]

18. *Shearing* also made the important point that at the stage where a court is considering the admissibility of evidence already lawfully in the possession of the defence, the privacy interest has, to a large extent, already escaped. In making that point, this Court expressly relied on the statement of L'Heureux-Dube J, in *R v O'Connor*[21]: "The essence of privacy is that once invaded, it can seldom be regained."[22]

19. Admittedly, despite the facts that the privacy interest at issue may not engage s. 8 of the *Charter* and that the information in question may no longer be as private as perhaps originally intended, complainants retain privacy interests that can affect the proper limits on cross examination, even in respect of non-s.276 evidence[23].

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[14] *R v Seaboyer*, [1991] 2 SCR 577 at p. 608.
[15] See also *Seaboyer* at para 617: "the constitutional right to a fair trial must take precedence".
[16] *Osolin* at p. 669.
[17] *R v Shearing*, 2002 SCC 58 at para 95, [2002] 3 SCR 33.
[18] *R v Mills* [1999] 3 SCR 668.
[19] *R v Darrach*, 2000 SCC 46 at para 25, [2000] 2 SCR 443.
[20] *Shearing* at para 110.
[21] *R v O'Connor,* [1995] 4 SCR 411.
[22] *Shearing* at para 105.
[23] *Shearing* at para 76-77, *Osolin,* at p. 669 and 671

20. Yet, as succinctly stated in *Lyttle*: "Just as the right of cross-examination itself is not absolute, so too are its limitations."[24] Just as the right to make full answer and defence does not include the right to use information that would only distort the truth-seeking goal of the trial process, equally, the protection of complainant privacy cannot frustrate the truth-seeking goal of sexual offence trials.

21. It was made abundantly clear in *Seaboyer*, and confirmed in *Osolin*, *Mills,* and *Shearing:* the protection of complainant privacy, however laudable, cannot take precedence over the accused's constitutional right to a fair trial.[25] This is not about ensuring perfect trials for the accused. The primacy of the fair trial right, while it certainly benefits the accused, is about ensuring the overarching societal goals to search for the truth and prevent the conviction of the innocent.[26] As explained below, the legitimate privacy interests of complainants do not warrant the significant constraints which the impugned provisions impose on the right to cross-examine on non-s.276 records in sexual offence trials.

An accused is entitled to challenge the complainant in cross-examination without advance notice.

22. The position of an accused who denies the complainant's accusation was aptly summarized by Binnie J. in *Shearing* :[27]

> The appellant stood before the court accused of crimes by numerous complainants but he was presumed to be innocent of each and every count. All of the alleged sexual misconduct, by its very nature, was in private. At trial, it was his word against the credibility of his accusers, individually and (by virtue of the similar fact evidence) collectively. If the complainants were untruthful about what happened in the privacy of their encounters, the most effective tool he possessed to get at the truth was a full and pointed cross-examination. [Emphasis added]

23. The impugned provisions severely blunt the cross-examination tool and render it ineffective. They require an accused, who wishes to cross examine a complainant on records in the possession of the defence that relate to the complainant, to provide the complainant with

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[24] *Lyttle* at para 45.
[25] *Seaboyer* at pp 608, 617; *Osolin* at p 669; *Mills* at para 94; *Shearing* at para 130-132, 150.
[26] *Seaboyer* at pp 606-07, 608, 620-21; *Lyttle* at para 2, 41; *Shearing* at para 132; *R v Anderson* 2020 SKQB 11 ["*Anderson 2020*"] at para 12.
[27] *Shearing* at para 76.

detailed notice of the records[28] and to establish, in the face the complainant and perhaps his/her counsel, the relevance, probative value and lack of substantial prejudicial effect of the said records. Critically, these may be the very records with which the accused hopes to challenge the credibility of the complainant, and such argument, as part of a pre-cross-examination motion involving the complainant, unjustifiably gives the complainant a window into the theory of the defence and the impending attack on his or her credibility and allows her/him to tailor evidence in chief and/or cross. Worse still, the legislation gives the complainant a say on what material he/she will be cross-examined on. All of this significantly diminishes the accused's ability to challenge the credibility and reliability of the complainant through cross-examination at trial.

24. As pointed out by counsel for JJ, the impugned provisions are the antithesis of a trial judge's order "excluding Crown witnesses except while testifying". Such orders are regularly made to protect the integrity of the trial. It is well accepted that witnesses with advance notice of the opposing side's evidence are in a position to tailor their evidence.[29] In holding that the impugned provisions in the non-s.276 context were invalid under s. 52 of the *Charter* and would not be applied in the trial, the judge in *R v A.M.* stated:[30]

> The evidence of a complainant is almost always crucial and central in any trial relating to sexual assault. Mandatory disclosure to the prime witness in a prosecution reaches to the center and integrity of the trial process in such cases. [Emphasis added]

25. Non-s.276 records relating to the complainant in the possession of the defence are often going to be used to challenge the complainant's credibility. *Ghomeshi* is a prime example of this.[31] By definition, they do not touch on other sexual history evidence that could be "misused" by a trier of fact.

26. The provisions of the *Canada Evidence Act*, specifically allow cross-examination on prior written statements without having to show the witness the prior statement in advance.[32]

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[28] *Code* s. 278.93(2), 278.94(2); *R v Boyle*, 2019 ONCJ 232 at para 10; *R v FA*, 2019 ONCJ 391 at para 64.
[29] *R v White* (1999), 42 OR (3d) 760 at para 20 (CA); *R v RS*, 2019 ONCJ 645 at para 69-71.
[30] *R v A.M.*, 2019 SKPC 46, 56 CR (7th) 389 at para 38.
[31] See, for example, the comments of the *Ghomeshi* trial judge at paras 37-39 and 82-85.
[32] *Canada Evidence Act* RSC 1985 c. C-5, s.10.

27. In the context of the truth-seeking goal of the trial process, advance notice to the complainant of the defence plan to challenge his/her evidence in cross-examination on non-276 records serves no legitimate purpose but will almost certainly blunt what is often the only really tool the accused has to get at the truth – a full and pointed cross-examination.[33]

The impugned provisions create a presumption of inadmissibility and deprive the accused of the right to establish probative value through cross-examination.

28. The impugned provisions further constrain the right of cross-examination by legislating a presumption of inadmissibility of defence evidence relating to non-s.276 records and by barring the defence from establishing the necessary probative value through the cross examination of the complainant. The position of the AGBC (and other AG interveners) that the impugned amendments codify *Osolin* and *Shearing* is untenable.

29. The impugned provisions turn the constitutional position on admissibility of cross-examination on its head. That is, as explained in *Shearing,* the default position on admissibility is that the accused is allowed to proceed with cross-examination on records in his possession, whereas the default position of the impugned provisions is that the evidence contained in such records is inadmissible and the accused is not entitled to proceed with cross-examination.[34]

30. *Shearing* established and *RV* confirmed that uncertainty of result does not deprive a line of questioning of its probative value.[35] However, *Lyttle* underscores that is not uncommon for counsel to have a good faith basis for a set of facts, without being able to prove the facts other than through cross-examination. For those accused who may be unable to establish probative value without cross-examination, the impugned provisions deny the use of the evidence.

31. In *Shearing,* while acknowledging the law prohibits the use of stereotypical assumptions in cross-examination, this Court ruled that the trial judge should have permitted the accused to cross-examine on the absence of entries in the complainant's diaries about sexual assault and abuse.[36] The Court drew a distinction between assuming, based on stereotypical thinking, the truth of the premise (that if abuse occurred it would have been recorded) and demonstrating

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[33] *AM* at paras 36 to 40; *RS* at para 70; *Anderson 2020* at para 10.
[34] *Shearing,* at paragraph 104
[35] *Shearing* at para 145; *R.V.* at para 62.
[36] *Shearing* at paras 120-121; 122, 150.

through cross-examination, the truth of the premise.[37] While the defence was rightly precluded from the former, the defence cannot be precluded from the latter.

32. Thus, *Shearing* and *Lyttle* hold that where a good faith basis exists, defence counsel must be permitted to try to establish even the necessary factual premise through the cross-examination itself, unless, as per *Osolin*, a privacy interest or other concern is of such magnitude as to substantially outweigh the accused's fair trial right to cross-examine on the records[38]. In *Shearing*, this Court held the privacy concerns about the complainant's diary fell short of precluding the disputed cross examination.

33. Finally, *Shearing,* also made the critical point that the necessary protections for a complainant's privacy should not render those accused of sexual offences into "second class litigants". Rather, those protections simply mean that:

> [T]he defence has to work with facts rather than rely on innuendoes and wishful assumptions. This means in turn that the defence should not be prevented from getting at the facts.[39] [Emphasis added]

34. The impugned provisions run afoul of this *Shearing* admonition. Requiring the accused to establish significant probative value prior to cross-examination may deny the use of evidence in his/her possession that could prevent conviction. This prevents the accused from "getting at the facts", completely contrary to the ruling in *Shearing.*

Conclusion

35. In *Groia v LSUC*[40] this Court made three points about trials that are equally applicable to the criminal law sphere and the attempt to accommodate privacy:

- "The trial process in Canada is one of the cornerstones of our constitutional democracy."
- "To achieve their purpose, it is essential that trials be conducted in a civilized manner."
- "By the same token, trials are not — nor are they meant to be — tea parties. … Care must be taken to ensure that…resolute advocacy and the right of an accused to make full answer and defence are not sacrificed at the altar of civility." [Emphasis added.]

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[37] *Shearing* at para 146.
[38] *Shearing* at para 150.
[39] *Shearing* at para 122.
[40] *Groia v Law Society of Upper Canada*, 2018 SCC 27 at paras 1-3, [2018] 1 SCR 772.

36. The trial judge in *R v J.J.* appears to have accepted the essence of the CCCDL/CCAD's argument in concluding the legislation "hobbles the development and execution of trial strategy on core issues of credibility and reliability."[41] However, she limited her finding of a *Charter* violation to the seven day notice requirement in 278.93(4) and thus went on to remedy the violation by "reading down" the provision to delay the need for the application until after the complainant's evidence in chief.[42] The *JJ* read down remedy does not alleviate in any way the central flaw in the legislation that exists and which she identified. It simply delays the violation.

37. The Courts in *A.M.*, *R v Anderson*, *R v J.S.*[43], *R v. D.L.B.*[44] and *R v Reddick*[45] all concluded, among other holdings, that this central flaw of the impugned provisions violated the right to cross-examination with respect to non-s.276 records which necessitated they be ruled invalid/struck down. Rothery J. in *Anderson* held the impugned provisions "eviscerate the most valuable tool available to the defence in a sexual assault trial".[46] The CCCDL/CCAD agrees.

PART IV – SUBMISSIONS AS TO COSTS

38. The CCCDL/CCAD seeks no costs and asks that none be awarded against it.

PART V – ORDER REQUESTED

39. The CCCDL/CCAD makes no further submissions on the ultimate order to be made.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 16 day of April 2021.

John M. Williams, Thomas P. Hynes, Rosellen Sullivan
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[41] *J.J. [Breach]* at para 84.
[42] *J.J. [Breach]* at para 90; *R v J.J.*, 2020 BCSC 349 ["*JJ s.1*"] at para 2, 21.
[43] *R v J.S.*, [2019] AJ No 1639 (ABQB) (breach), BOA, Tab 1, [2020] AJ No 515 (ABQB) (s. 1), BOA Tab 2.
[44] *R v. D.L.B.*, 2020 YKTC 8.
[45] *R v Reddick* 2020 ONSC 7156.
[46] *Anderson* 2019 at para 21.

PART VI – TABLE OF AUTHORITIES

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