Court 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)

– and –

J.J

Respondent
(Appellant)

– and –

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

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PART I - OVERVIEW

1. Sections ss.278.92 – 278.94 of the *Criminal Code of Canada* (the "*Code*") represent legislative recognition that ss.276 and 278 of the *Code*, had not yet fully met their legislative purpose to balance the rights of accused persons with the need to protect sexual assault complainants in the criminal trial process and to encourage reporting of sexual assaults. Intensely private information of sexual assault complainants, including information contained in records in the possession of the accused, is frequently harnessed to attack the dignity, privacy and equality of complainants. Sexual history continues to infiltrate the prosecution of sexual assault trials at provincial and superior courts across Canada.

2. Accordingly, this appeal engages the *Charter* protected rights of sexual assault complainants and the principles of fundamental justice, which include protecting the security, dignity, and privacy of sexual assault witnesses, encouraging reporting of sexual assault, and protecting the integrity of the trial by excluding evidence that is misleading. The attempt by the Cross-Appellant to downgrade complainants' *Charter* rights and interests to concerns about their "comfort" is troubling: it underscores precisely why the legislative protections under ss.278.92-278.94 of the Code are necessary and should be upheld by this Court.

3. The pushback to the *Bill C-51* amendments has also revealed the continuing precariousness of the protective legislative measures under ss.276 and 278 and the tenaciousness of efforts to undermine them. Not only have the impugned amendments been challenged, but they have been used as an excuse and an opportunity to retrench on over twenty-five years of established law. These retrogressive efforts include recent lower court decisions that have held that sexual history applications should be brought mid-cross (not pre-trial) and to deprive sexual assault complainants of meaningful access to their own counsel.[1]

PART II – QUESTIONS IN ISSUE

4. The Barbra Schlifer Commemorative Clinic will address three issues: (1) Pre-trial vetting of third-party records and digital communications in the possession of the accused accords with the principles of fundamental justice; (2) The common law regime does not adequately protect complainants; and (3) The challenge to complainants' participatory rights is aimed not only at the

[1] *R v. R.S.*, 2019 ONCJ 645; *R v. A.M.* 2020 ONSC 4541

impugned provisions but also at reversing this Court's ruling in *R v. Darrach* and good trial management practices of bringing sexual history applications pre-trial.

PART III – ARGUMENT

(1) Pre-trial Vetting of Third-Party Records and Digital Communications in the Possession of the Accused Accords with the Principles of Fundamental Justice

(i) The Same *Charter* Rights and Interests Protected by 278 are at stake under 289.92

5. The purpose of ss.278 of the *Code* when enacted in 1997 was, as explicitly set out in the preamble, to recognize and protect the ss.7, 8, 15 and 28 *Charter* rights and interests of sexual assault complainants, and to encourage treatment and reporting. These same rights and interests underlie the extension of s.278 protections to records in the possession of the accused over which the complainant has a reasonable expectation of privacy.

6. In an attempt to distinguish between the third-party records regime and the current amendments, the Cross-Appellant asserts that definitionally the only records protected under s.278.1 are those which were never intended for the accused's eyes. This is inaccurate. Medical or educational records of a spouse or child may be seen by an accused in the ordinary course of their lives. Immigration, medical, housing, joint counselling and CAS records are other examples.

7. It is of course undeniably true that disclosure of private records to an accused that were otherwise unseen by him is one possible dignity and privacy violation in a sexual assault trial, but it is not the only one. In *R v. Quesnelle* this Court specifically noted how private information in the context of a criminal trial "will often be exposed in court" and that the *Mills* regime was intended "to limit what it is that a woman/child complainant must be forced to reveal at trial as the price of her access to the criminal justice system" (emphasis added).[2]

8. In some cases, the violence to the dignity and self-worth of the complainant may be caused by disclosure of records to the accused. In other cases, the damage is perpetrated by the public violation of the complainant's privacy, dignity and equality through exploitation of private records in open court - for example, information in open court about self-harm, suicidality, prior abusive relationships (not including sexual abuse), or mental health diagnoses.[3] The principles of

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[2] *R v. Quesnelle* 2014 SCC 46 at paras. 14 and 35; *R v. Mills* [1999] 3 S.C.R. 668 para. 74.
[3] *R. v. S.L.*, 2020 ONSC 497 at para. 21

fundamental justice furthered by careful pre-trial examination of such potentially invasive and/or misleading evidence, apply with equal force regardless of whether the record is or isn't in the "possession" of the accused. Understood from the perspective of the dignity and humanity of the complainant and the integrity of the trial process, part of the purpose of the pre-trial admissibility regime is "to prepare the witness for a potential intrusion into her privacy."[4]

9. It has been suggested to the Court in this appeal that the *Charter* rights and interests engaged in the amendments are of lesser importance than under the *Mills* regime because the records are not compelled by subpoena. While compulsion by subpoena was certainly an issue and consideration in *R v. Mills*, the Court was more broadly concerned with privacy, dignity and equality rights and the risks to the integrity of the trial process, arising from the invasive and discriminatory exploitation of information in private records.

10. Further, as recent high-profile cases in Alberta have confirmed[5], the complainant is always potentially a compelled witness in a sexual assault trial. She attends court subject to a subpoena herself. The Crown may determine that her evidence for the prosecution is necessary in the public interest, even if she no longer wishes to participate. The risk and reality of compulsion to testify in a trial where highly private records in the possession of the accused may be revealed and exploited, should not be understated or dismissed as illusory in practice.

11. There is no "seismic shift" in requiring accused persons to disclose private records in their possession for the purposes of pre-trial vetting. Whether under the third-party records regime or s.278.92, the disclosure of the defence theory as to why the records are relevant, relates only to the private information's relevance, not the defence case overall.

ii) Pre-trial Vetting of Third-Party Records in the Accused's Possession is Constitutional

12. Enumerated records (such as medical, counselling, or CAS records) and other third-party records (such as police occurrence reports) clearly engage the fundamental privacy, equality and dignity rights and interests of complainants. The private nature of these records in a sexual assault trial is not diminished simply because these records are in the possession of the accused.

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[4] *R v. Darrach*, [2000] 2 S.C.R. 443 at para. 9.

[5] R v. Khaery, 2014 ABQB 676; *R v. Blanchard* ; Janice Johnston, CBC News "'I'm the victim and I'm in shackles': Edmonton woman jailed while testifying against her attacker", June 5, 2017

13. Most sexual assault complainants are violated by someone known to them such as: a father, uncle, teacher, health professional, religious leader, or intimate partner. The more dependent the complainant is on the accused and/or the stronger the relationship of trust, the more likely the accused is to be in possession of her private (third party) records. For example, a woman with a disability or newcomer/sponsored immigrant may be reliant on her spouse, or service provider to take her to medical appointments or assist with various forms of documentation. A father, uncle or abusive or controlling partner, may have access to documents whether as of "right" (e.g. as a parent entitled to school and CAS records) or due to their position of power, authority, trust or control. In all of these circumstances, the context of inequality that informs any "voluntariness" of sharing records with the accused by the complainant cannot be ignored. The complainant may have little to no real choice. In addition, in our current society in which complainants continue to be dismissed and vilified, family or community dynamics, such as were present in the case of *Shearing*, may also result in private records being provided to the accused by persons in the complainant's family or community.

14. The artificial distinction between production and admissibility prior to the correction by the legislature in 2018 under Bill C-51, privileged an accused's position of power by which he frequently came into possession of the records in the first place. The legislative amendment ensures that those most dependent and disempowered, such as children, migrant women, women with disabilities, abused women, are not offered lesser protection.

(iii) Complainants May have a Reasonable Expectation of Privacy in Digital Communications in the Possession of the Accused

15. The Cross Appellant's challenge to the pre-trial admissibility hearing is aimed at all records in the possession of the accused. However, the real battleground in the caselaw involves digital communications between the accused and the complainant.

16. Digital communications (e.g. texts, snapchat, email, Facebook and Instagram direct messages) between a witness and any person *other than the accused* have long been recognized as attracting a reasonable expectation privacy. Accused must bring a s.278 application to compel production to the Court and disclosure to the accused where these records are held by other

persons.[6] In the context of digital communications between the complainant and a third party, the expectation of privacy is not lost simply because the recipient could breach the complainant's privacy and disseminate the digital record further, such as by providing it to the accused. Communications with the accused are similarly private. As Professor Craig notes: "it would be incoherent for the same provision of the *Criminal Code* to define the same record differently depending on its possessor."[7]

17. Particularly in a cultural and social context in which the most intimate communications are increasingly recorded in digital form, communications between, for example, intimate partners, spouses and close friends in a context of trust and confidence do not lose their protection as private records because one party could in theory breach that trust. The Court should make clear that a "risk analysis" does not categorically exempt digital records from the definition of "private" records under s.278.1 and s.278.92.[8] Similarly, this appeal is an opportunity for this Court to clearly reject lower court decisions that suggest that a complainant who accesses justice by reporting her father/close friend/intimate partner/therapist/spiritual leader/etc. to the police, suddenly loses any privacy in digital communications with the accused because the parties are now in an 'adversarial relationship.'[9]

18. Digital communications whose contents are sexual in nature are categorically subject to a pre-trial admissibility hearing. Given the frequency with which sexual violence is perpetrated against intimate partners, digital communications between a complainant and an accused will often include content that risks distorting the trial process and/or harming the complainant in a manner similar to the potential prejudicial impact of sexual communications. For example, as with sexual communications, discussions about childhood physical abuse, addictions, or other mental health challenges, risk invoking discriminatory myths and causing unnecessary privacy and dignity intrusions. The legislative purpose as set out in s.276(2)(3), s.278.3(4) and s.278.92(3) is not

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[6] *R v. Ghomeshi*,, *R v. Tanasijevic* [2020] O.J. No. 566 at paras. 2, 9, 10; and *R. v. B.S.* 2021 OCJ (April 14, 2021, unreported).
[7] Elaine Craig, "Private Records, Sexual Activity Evidence, and the *Charter of Rights and Freedoms*" 2021 58:4 Alberta Law Review pgs 6 - 29 (forthcoming) at p.4 ("Craig 2021").
[8] See *R v. McKnight*, 2019 ABQB 755 at 37-38.
[9] See cases at para. 24, fn 51 and 52 to the factum of the AG Ontario, January 23, 2021.

limited only to eradicating stereotypical reasoning, but includes dignity and privacy concerns more generally as they impact this uniquely targeted category of witness.

19. One need look no further than the digital records in *R v. J.J.*, involving photographs of the complainant's naked body, to confirm the private and sometimes highly prejudicial nature of the contents of digital communications.

(iv) The impact of the pre-trial admissibility regime on the accused's rights is constitutional

20. In assessing the constitutionality of a pre-trial admissibility regime as it relates to these digital communications, lower court decisions that have struck down ss.278.92-278.94 or have narrowed their application, have failed to fully recognize the competing rights and principles of fundamental justice at stake and have very significantly overstated the impact of the regime on the accused's right to full answer and defence, and in particular the accused's right of cross-examination.[10] The Clinic relies on the submissions of other interveners and Attorneys General to elaborate the point that in most cases, little to nothing is lost by pre-trial vetting of private information because the purported inconsistency has already crystallized or it is in any event impermissible to use private information to set up an inconsistency that doesn't already exist.

21. Further, implicit in the assertions that the pre-trial application for use of digital communications is unconstitutional, is the assumption that the complainant herself does not have copies of the records or is unaware of their existence or their contents. While this may be true in many cases, the context of systemic inequality that informs this reality should be given careful attention. Due to the intimate violation of sexual assault and its mental health effects on victims, it is not uncommon for complainants to delete digital communications relating to the accused from their devices, as a matter of coping and survival. In other contexts, such as abusive or controlling partners, the complainant may not have exclusive access to her accounts, which may have been deleted or tampered with against her will. Similarly, women with disabilities or who experience barriers arising from language or migration status or who are entirely dependent on the accused for their housing or access to the internet, may have limited ability to preserve these communications.

22. The strategic advantage that the Cross Appellant seeks to preserve– an attempt to surprise complainants with texts and emails of which they are unaware or unfamiliar – is often premised on

[10] See, Craig 2021.

systemic inequities and power dynamics that enable an accused to have possession of communications to which the complainant no longer has access.

23. The principles of fundamental justice are advanced by judicial intervention at the pre-trial stage. Advance screening of, for example, a digital communication about a complainant's use of fertility treatments, her expressions of self-harm, her deep fear of crowds, her eating disorder, her hatred of her father because of his abuse of her mother, is appropriate and in the interests of equality and fundamental justice, before any question is put to a complainant in front of a jury, to see if she will minimize or even lie out of humiliation, shock or fear, about what may well otherwise be a distant and irrelevant set of facts.

(v) Lower Courts Need Clarity and Direction from this Court in order to avoid procedural delays and consistent application of the amendments

24. The lack of clarity with respect to the scope of protection for digital communications in the possession of the accused has led to a third or preliminary procedural layer in these applications by way of motions for directions, particularly in Ontario. These motions for directions represent growing pains under the newly enacted regime and can be largely eliminated by this Court confirming that private digital communications are protected under s.278.1 and s.278.92 and through this Court's further guidance and direction. It is also submitted that to date, the 'motion for directions' has been employed as an end-run around the legislation to avoid any disclosure to the complainant and her counsel.

25. In clarifying the application of the impugned provisions, this Court could confirm that private digital communications between a complainant and accused are categorically caught, and could provide directions on the rare circumstances where the interests of justice would dictate in favour of a mid-trial application (such as where identity is an issue).

26. A second possibility is for this Court to uphold the approach to determining REP in digital communications as proposed by Justice Chapman in *R v. M.S.*[11], and to provide clear guidelines to defence counsel as to which types of information are or aren't protected, so that motions for direction will be required only in the rare case. Digital communications that contain information related to mental health, suicidality, prior physical abuse and deeply personal feelings and fears are

[11] *R v. M.S.* 2019 ONCJ 670.

caught by the regime. Similarly, digital communications in which the complainant's body appears should be categorically caught by the regime, even if the accused asserts (on their own assessment) that the record is not sexual in nature or for a sexual purpose. The risk of images being sexualized or otherwise prejudicing the proceeding is sufficiently high that judicial pre-screening is essential.

27. This Court could also provide direction as to the types of communications not caught by s.278.1 and 278.92-278.94, such as scheduling emails or exchanges about mundane matters. As well, the Court could address the rare circumstances at the other end of the spectrum, for example the case where the complainant provides a prior inconsistent statement to the accused that the sexual assault did not happen, as examples of cases where the interests of justice would dictate a mid-trial rather than pre-trial application.

(2) The Common Law Regime Does not Protect the Rights and Interests at Stake

28. The Cross-Appellant argues that the *Shearing/Seaboyer* regime adequately protects complainants' rights and interests. This is not correct. The common law regime does not provide the types of protections Parliament sought fit to create under Bill C-51.

29. Take for example the use by an accused of a psychiatric record or an email conversation of its contents in the accused's possession mid-trial. Under the *Shearing* regime, the complainant will be confronted in open court with a most intimate and private document. The harm to her may be profound. She will have been irreversibly deprived of the ability to prevent and/or prepare for and minimize the shock and harm of this exposure. The complainant, a lay person on the stand, is in no position of power to object to the use of the record or assert her rights. Assuming the Court or Crown steps in to identify the complainant's privacy rights before she answers any questions (which mid-trial in the thick of things does not reliably happen), the complainant is then faced with months of delay as she retains counsel or she may waive her rights to get the trial over with. It is a rare complainant who, mid-cross, doesn't desperately want the experience to be over. Complainants should not be forced to choose between protecting their rights and enduring the brutality of months of delay and being held over under cross. Further, inevitably, the Cross-Appellant's proposal will involve skirmishes on a case-by-case basis on whether the record in question is sufficiently private to engage a complainant's right to standing, whether the Crown can represent the complainant's rights, and the scope of the complainant's standing to make submissions on admissibility and relevance. The Cross-Appellant's proposal makes no sense from

a trial management perspective, will increase mid-trial disruptions, and does not comport with the principles of fundamental justice in protecting the complainant's privacy, dignity and humanity.

30. The common law regime, however, *is* relevant insofar as it is arguably a complete answer to the suggestion that s.278.92 creates a higher and constitutionally impermissible standard for admissibility of private records, because it requires these records to have "significant probative value", as opposed to simply "probative value." Particularly following this Court's admonition to "do better" in the 2019 trilogy, "probative value" and "prejudicial effect" under the common law must account for the myriad detrimental ways in which introduction of private records may impact a complainant and the interests of justice, and as such must be balanced against the admission of the record in a manner that would draw on all of the factors listed in s.278.92(3).[12] Put in practice, a highly private record must have significant probative value to meet even the common law threshold in sexual assault cases.

(3) Complainant's Right to Counsel does not unconstitutionally impact Accused's Rights

31. The Cross-Appellant submits that complainants' right to standing and counsel under s.278.92 is unconstitutional because he is constitutionally entitled to demeanor evidence when he first confronts the complainant with deeply private records mid-cross examination. Even under the common law model in *Shearing*, a complainant should not be required to answer any questions about the private record until such time as she has retained counsel and a *voir dire* held.[13] Nevertheless, the Cross-Appellant argues that he is constitutionally entitled to explore the complainant's explanations of the (supposedly) "different version" of events upon learning of the private record, presumably on the stand and before the complainant has been permitted to assert her privacy and dignity rights and retain counsel.

32. In the face of complainants' entitlement to standing and counsel under ss.278.92 in both records and sexual history applications, certain lower courts have now ruled that not only 'records in the possession of the accused' applications but also sexual history applications should be brought mid-trial and not pre-trial, because the complainant is otherwise tainted by access to the defence theory of the case.

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[12] *R v AL* 2020 BCCA 18 at para 221 – 223, 258
[13] *R v. Shearing* 2002 SCC 58 at paras. 86 and 102; see also A (LL) v. B (A), [1995] 4 SCR 536

33. The theory of the case as it relates to the relevance of private records and evidence of other sexual activity has been available to complainants since 1997 in third party records applications and since at least 2000 through indirect notice to complainants of the contents of sexual history applications. Further, in neither case has the accused been entitled to access the complainant's initial reactions to this information.

34. The objection by the Cross-Appellant to the fact that complainants may have privileged conversations with their counsel beyond the reach of the accused is not an argument about the constitutional rights of the accused, but a revealing admission of a preference that complainants not benefit from preparation by counsel in advance of trial at all.

35. Mid-trial applications significantly undermine complainant's right to counsel and put the courts in an uncomfortable and undesirable position of directing constraints on counsel's communications with their clients, preventing discussion of any "proposed relevance of the evidence or the anticipated defence strategy."[14] This constraint causes a distortion of the legal issues, pretends that the relevance of the other sexual activity or private records can be meaningfully separated out from consideration of the complainant's privacy, dignity and equality rights, and constitutes a deprival of effective and meaningful access to counsel for complainants.

Conclusion

36. Each progressive amendment to the sexual assault provisions of the *Code* has been met with resistance and backlash. Bill C-51 is no different. Hyperbolic assertions about the 'evisceration' of the right to cross-examination through advance notice of private records or other sexual activity are not borne out on closer and contextual examination. As in past challenges, the defence bar's criticism of Bill C-51: "overstates the impact of these provisions on the accused's right to a fair trial and understates the competing interests to be balanced in the constitutionality of this regime."[15]

PART IV – SUBMISSIONS ON COSTS & PART V - ORDER

37. Barbra Schlifer Commemorative Clinic does not seek costs and asks that no order be made against it. This Intervener takes no position on the outcome of this appeal.

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[14] *R v. A.R.S.* [2019] OJ. No. 6275 at para.23, see also unreported direction to counsel mid-trial, Clinic's BOA.

[15] Craig 2021, *Private Records* at p.4 and pp. 6-29 re impact on cross-examination.

PART VI – SUBMISSIONS ON PUBLICATION

38. N/A

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

Per: _____
Joanna Birenbaum
Counsel for the Intervener,
Barbra Schlifer Commemorative Clinic

PART VII – AUTHORITIES

Caselaw

No.	Authority	Paragraph Reference
1.	A(LL) v. B(A), [1995] 4 SCR 536	31
2.	*R v AL*, 2020 BCCA 18	30
3.	*R v. A.M.*, 2020 ONSC 4541	3
4.	*R v. A.R.S.* [2019] OJ. No. 6275	35
5.	*R v. B.S.*, 2021 OCJ (April 14, 2021, unreported)	16
6.	*R v. Darrach*, [2000] 2 S.C.R. 443	4, 8
7.	*R v. J.J.*, 2020 BCSC 29	19
8.	R v. Khaery, 2014 ABQB 676	10
9.	*R v. M.S.*, 2019 ONCJ 670	26
10.	*R v. McKnight*, 2019 ABQB 755	17
11.	*R v. Mills*, [1999] 3 SCR 668	7, 9
12.	*R v. Quesnelle*, 2014 SCC 46	7
13.	*R v. R.S.*, 2019 ONCJ 645	3
14.	*R v. S.L.*, 2020 ONSC 497	8

No.	Authority	Paragraph Reference
15.	*R v. Seaboyer*, [1991] 2 S.C.R. 577	28
16.	*R v. Shearing*, 2002 SCC 58	13, 28, 29, 31
17.	*R v. Tanasijevic* [2020] O.J. No. 566	16

Secondary Sources

No.	Secondary Source	Paragraph Reference
1.	Elaine Craig, "Private Records, Sexual Activity Evidence, and the *Charter of Rights and Freedoms*" 2021 58:4 Alberta Law Review at pgs 6 - 29	16, 20, 36
2.	Janice Johnston, CBC News "'I'm the victim and I'm in shackles': Edmonton woman jailed while testifying against her attacker", June 5, 2017	10
3.	Court Direction to Counsel, December 7, 2020.	35

Statutes, Regulations, Rules, etc.

No.	Statute, Regulation, Rule, etc.	Section, Rule, Etc.
1.	*An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, SC 2018, c 29 | *Bill C-51, 1st Sess, 42nd Leg*	Generally
	Loi modifiant le Code criminel et la Loi sur le ministère de la Justice et apportant des modifications corrélatives à une autre loi, LC 2018, c 29 | *Projet de loi C-51, 1re sess, 42e légis*	Généralment
2.	*The Constitution Act, 1982, Schedule B to the Canada Act* 1982 (UK), 1982, c 11 | *Part I Canadian Charter of Rights and Freedoms*	s.7, s. 8 s. 15 s. 28
	Loi constitutionnelle de 1982, Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11 | *Partie I Charte Canadienne des droits et libertés*	s.7, s. 8 s. 15 s. 28
3.	*Criminal Code*, R.S. C. 1985, c. C-46	Preamble s. 278 s.278.1 s.278.92 s. 278.93 s. 278.94
	Code criminel, LRC 1985, c C-46	Preamble s. 278 s.278.1 s.278.92 s. 278.93 s. 278.94

PART VII – STATUTES, REGULATIONS, ETC.

See Part VI above.