File Number: 39133

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

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT/
RESPONDENT ON CROSS-APPEAL
(Respondent)

- and –

J.J.

RESPONDENT/
APPELLANT ON CROSS-APPEAL
(Applicant)

- and –

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TABLE OF CONTENTS

Page No.

PART I: INTRODUCTION

> *While serious efforts are being made by a range of actors to address and remedy these failings both within the criminal justice system and throughout Canadian society more broadly, this case attests to the fact that more needs to be done. Put simply, we can -- and must -- do better.*[1]

1. Once again, female victims of sexual violence are called upon to justify the statutory provisions that provide modest protections for hard fought rights. This time, it is to defend ss. 278.92 to 278.94 of the *Criminal Code*, which were intended to fill a "legislative gap" that existed within protective provisions of the *Code*. As will be discussed below, legislative provisions did not deal with records in the possession of the accused. This was an oversight that had to be dealt with, and Parliament responded by enacting ss. 278.92 to 278.94.

2. Lower court decisions concerning the validity of the impugned provisions are divided, but four common themes emerged from those that concluded the impugned provisions are invalid: (a) separate representation for the complainant violates a fundamental right that there can only be two parties to a criminal proceeding; (b) disclosure would curtail cross-examination, which must remain unencumbered; (c) the definition of records is too broad, extending beyond those that would perpetuate the twin myths; and (d) disclosure permits the tailoring of evidence.

3. It is Alberta's position that each is fallacious. As will be more fully developed below, there has been a judicial and legislative recognition that sexual violence cases involve the unique challenge of overcoming long held stereotypes and mythology concerning women and children. A 2012 Senate report details how defence strategies are directed at credibility aided by routinely requesting and receiving court orders for a wide variety of records. Apprehension arose that usage of records in open court was discouraging the reporting of crimes.[2] Tanovich discusses defence instructional material teaching how to "*whack*" the complainant through usage of prolonged cross examinations, working in humiliating details. Discrediting the complainant is a central strategy, which can convince a complainant not to proceed further. As one lawyer advised

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[1] *R v Barton*, 2019 SCC 33 at para 1

[2] Senate, Standing Committee on Legal and Constitutional Affairs, "*Statutory Review on the Provisions and Operation of the Act to amend the Criminal Code*" (December 2012)

young counsel, they must seek to "*kill*' the witness in cross-examination.[3] All of this is despite the admonition that it is no longer permissible to "*whack*" the complainant. If the cross examination is for the purpose of "*encouraging inferences pertaining to consent or credibility of rape victims based on groundless myths and fantasized stereotypes, it is improper*".[4]

4. As one author put it, the haunting presence of the deluded or vindictive complainant continues to inform more recent case law.[5] Stereotypes continue and equality rights remain insufficiently recognized. *Osolin* directed that where contentious issues arise, a *voir dire* ensures that a proposed cross examination is appropriate, with a clear duty imposed upon the trial judge.[6] It is not simply a matter of safe-guarding against abusive cross examination.

5. It is Alberta's position that the impugned provisions reflect the correct balancing between an accused's ss. 7, 11(c) and 11(d) *Charter* rights, and the well established ss. 7, 15, and 28 rights that belong to women and children. The provisions ensure a fair trial in a manner that does not permit the continued and distortive usage of myths and stereotypes.

PART II: POINTS IN ISSUE

6. Does the "record screening regime" in ss. 278.92 to 278.94 of the *Criminal Code* violate ss. 7, 11(c) and/or 11(d) of the *Charter of Rights and Freedoms* in a manner that cannot be justified under s. 1 of the Charter?

PART III: STATEMENT OF ARGUMENT

A. The Accused's Charter Rights are not Jeopardized

a) Proper Approach to Resolving Competing Charter Rights

7. The position taken by the Cross-Appellant is that this Court has somehow resiled from the clear established principles that victims enjoy the protection of ss. 7, 15, and 28 *Charter* rights, first established in *O'Connor*, and repeatedly affirmed.[7] In *Dyment* this Court affirmed

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[3] DM Tanovich, "*Whack No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases*" (2013) 45 Ottawa L Rev 495 at 506
[4] *R v Mills*, [1999] 3 SCR 668 at para 90
[5] L Gotell, "*Tracking Decisions on Access to Sexual Assault Complainants' Confidential Records*" (2008) 20 CJWL 111 at 115
[6] *R v Osolin*, [1993] 4 SCR 595 at 671
[7] *R v O'Connor*, [1995] 4 SCR 411

that control over private information is integral to the dignity and integrity of the individual and that retention of control over the purpose and manner of its disclosure is necessary.[8] The Appellant/Respondent on Cross-Appeal describes the evolution of the law which is expressly adopted by Alberta.

8. Competing *Charter* rights require a balancing analysis, firstly in determining what *Charter* rights, and their proper interpretation, are engaged. The right to full answer and defence and a victim's right to privacy and security are to be defined in a manner that does not negate the other.[9] Both rights are informed by the equality rights at play in sexual violence crimes. Neither right is to be taken as absolute. A court cannot presume that legislation is unconstitutional because it differs from the common law. *"[F]rozen concepts"* reasoning has been firmly rejected by this Court;[10] a fact which escaped a number of the lower court decisions.[11]

9. It is imperative to note that in *Dagenais* a s. 24(1) remedy was sought;[12] not a declaration of invalidity pursuant to s. 52, the latter being the source of jurisdiction for such declarations.[13] Lamer, C.J., for the majority, stated that because other avenues were available, "*we need not here decide the issue of the application of the Charter, to publication bans…*".[14] What the court was addressing was a re-interpretation of the common law rules regarding publication bans to conform to *Charter* values, not the validity of a statutory provision.

10. Similarly, *N.S.* involved a request for an individual remedy - against an order directing removal of her niqab.[15] The *Dagenais/Mentuck* analysis was intended to establish a framework for identifying and resolving conflicting common law rights.[16] No jurisprudence supports the view that a s. 24(1) framework is identical to the s. 52 application in relation to statutory provisions. Neither case involved sexual violence which involves unique challenges.

11. The Cross-Appellant's argument appears to rest upon appealing to this Court to draw the assumption that the only records engaged by s. 276 were those that involved prior sexual

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[8] *R v Dyment*, [1988] 2 SCR 417
[9] *R v Mills, supra* note 4 at para 61
[10] *Ref. re Same-Sex Marriage,* [2004] 3 SCR 698 at para 22
[11] *R v Reddick* 2020 ONSC 7156, *R v Anderson* 2019 SKQB 304
[12] *Dagenais v CBC*, [1994] 3 SCR 835 at paras 44-46
[13] *R v Ferguson*, [2008] 1 SCR 96 rat paras 59, 63
[14] *Dagenais v CBC, supra* note 12 at para 46
[15] *R v N.S.*, [2012] 3 SCR 726 at para 7
[16] *Ibid*

activity; and therefore presumptively inadmissible. The cross-appellant asks this Court to assume that documents in the possession of the accused would never contain material that appeals to myths and stereotypes, and hence should be considered to be presumptively admissible, without judicial screening. That appeal to judicial notice enjoys no support in the evidence or the jurisprudence.

12. *Darrach* confirmed that this Court in *Mills* upheld the constitutionality of provisions controlling the use of personal and therapeutic records, which are *"analogous"* to use of prior sexual activity, and therefore the protections were governed by similar policy considerations. Broader protection was necessary, because, under s. 276, the accused is better able to establish the relevance of sexual activity as compared to other documents, such as personal and therapeutic records. It was necessary, therefore, to have a screening mechanism to ensure relevance and probative value. The principle of fundamental justice necessarily must be interpreted in light of the competing interest in privacy and integrity of the individual.[17]

13. As discussed below, it has long been recognized that a broad range of material appeals to several myths and stereotypes that may serve to distort the truth finding function. A complainant is compelled by law to attend court and compelled by law to answer questions. Refusal would render the complainant susceptible to contempt of court,[18] or incarceration until she is prepared to testify.[19] Yet, her privacy and security rights may well be violated during the course of cross-examination, unless there is a mechanism that ensures that her *Charter* protected rights are enforced. At times, simply asking the question does the damage.

14. *Shearing* concluded that, as a matter of statutory construction, s. 276 did not apply to documents in the possession of the accused. Its express terms made it applicable only to documents in the hands of third parties or the complainant.[20] However, *Shearing* does not stand for the proposition that Parliament could never enact protective legislation for such documents. Indeed, far from establishing a presumption of admissibility, this Court went on to examine how techniques in cross-examination in sexual assault cases have distorted truth and that while, in most instances, the "*adversarial process allows wide latitude to cross-examiners to resort to*

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[17] *R v Darrach*, [2000] 2 SCR 443 at paras 26-29
[18] *Criminal Code* RSC 1985 c. C-46, ss. 698(2), 708; *R v Asselin*, 2019 MBCA 94
[19] *Criminal Code* RSC 1985 c. C-46 s. 545; *Canada Evidence Act* RSC 1985 c. C-5 s. 5(1)
[20] *R v Shearing*, [2002] 3 SCR 33 at paras 94-98

unproven assumptions and innuendo in an effort to crack the untruthful witness, sexual assault cases pose particular dangers."[21] The Court noted that often techniques are used to suggest "*nod nod wink wink*" that women and children are not to be believed.[22]

15. Wakeling described how the common law has provided little protection for complainants, exacerbated by theories expounded by leading academics, such as Wigmore, who posited that females suffered a form of feminine masochism, neurosis, with accusations of rape engendered by personality disturbances. According to those theories, accusations of sexual violence were contrived because of psychic complexes, inherent female defects, diseased derangements or abnormal instincts, and bad social environment.[23]

16. Despite reforms, triers of fact remained suspicious of rape charges, and were sympathetic to the accused particularly if the victim's character was less than flawless. This results in low conviction rates. Bias against the complainant was increased if there was a prior relationship with the accused.[24] The result has been low reporting rates of sexual violence with fear of stigma, humiliation, the barbs and insinuations of the defence, and low conviction rates.[25]

17. Dr. Craig illustrates the realities that face sexual assault complainants in trial courts across Canada.[26] She provides numerous examples of cross-examination that exploits the numerous myths.[27] As recognized by this Court, the investigation and prosecution of sexual assault continues to be plagued by myths.[28] This Court has emphasized the necessity of balancing the interests precisely because cross examination can impact dignity and privacy concerns, requiring a rigid control of the process.[29] The fact that the documents are in the possession of the accused or as some argue, such records are now "public" does not necessarily

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[21] *Ibid* at para 121
[22] *Ibid* at paras 119-121
[23] Wakeling, A., *Corroboration in Canadian Law,* Carswell (1977) at 113-116
[24] *Ibid* at 120
[25] *Ibid* at 121-122
[26] Craig, Elaine, "*Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession*" McGill-Queen's University Press, 2018 at 28-60; Craig, Elaine, "*Private Records, Sexual Activity Evidence, and the Charter of Rights and Freedoms*" (2021) 58:4 Alta L Rev [Forthcoming]
[27] Craig, Elaine, "*Putting Trials on Trial" ibid* at 61-75
[28] *R v Goldfinch,* 2019 SCC 38
[29] *R v R.V.,* 2019 SCC 41 at para 8, *R v Goldfinch, ibid* at para 39

mean that the complainant's privacy rights are extinguished. Documents in the possession of the accused was the legislative gap that had to be addressed.

b) Impetus for Reform - Context

(i) <u>The Special Nature of Sexual Violence Trials</u>

> *There is absolutely no evidence to suggest that false allegations are more common in sexual assaults than in other offences; indeed, given the data indicating the strong disincentives to reporting, it seems much more likely that the opposite is true. Nonetheless, myths about the extraordinary need for caution with respect to the credibility of complainants continue to play a role in the prosecution of sexual assaults.*[30]

18. This Court has emphasized that there is a special nature, accompanied by special problems, in sexual violence cases. *Osolin* discusses the continued perpetuation of mythology in sexual violence cases, particularly that of the deceitful complainant. It refers to material used in cross-examination which would be viewed as irrelevant in all other trials.[31]

19. It is in this light that the impugned sections must be considered. Close attention to context is essential, with an eye to the core nature of the social problem that is engaged. It is particularly important that the Court recognize and consider the vulnerability of the group which the legislator seeks to protect, and that group's own subjective fears.[32] Significantly, this Court has recognized the disparate negative impact upon marginalized women, such as aboriginal and disabled women, whose lives are heavily documented, and they therefore may be subjected to unwarranted scrutiny in a manner that distorts truth finding.[33] A major reason for non-reporting remains concern over being re-victimized. Women and children who have been extensively documented are particularly at risk, including aboriginal women, immigrant women, and racialized women.[34]

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[30] *R v Osolin, supra* note 6 at paras 49-50, 93, 168
[31] *Ibid* at para 50
[32] *Thomson Newspapers Co v Canada,* [1998] 1 S.C.R. 877 at paras 87, 90, 111; *Irwin Toy Ltd v Quebec,* [1989] 1 SCR 927 at 987-990, 993, 999
[33] *R v Barton, supra* note 1 at para 55
[34] L Gotell, *supra* note 5 at 115; *R v Mills, supra* note 4 at para 92

(ii) ***Sexual Violence is a Gender-Based Crime***

20. This Court has recognized that sexual violence is gender based,[35] and there should be no retreat from that conclusion. The 2012 Senate Report[36] and the 2018 Statistics Canada report[37] confirm the stark and bleak statistics that indicate: (a) women are ten times more likely than men to be victims; (b) the highest rates are against girls between the ages of 13 and 17; (c) there are high rates of victimization of Aboriginal women; (d) the available statistics stress that under-reporting of sexual assault to police is significantly higher than for other types of crimes; (e) and being younger, having experienced harsh parenting, having been physically or sexually abused by an adult during childhood, and being single, never married, all play a role in experiencing gender-based violence.

(iii) ***The Pervasive Influence of Myths***

> *One of the main reasons women do not turn to the law to respond to their experiences of sexual violence is distrust and fear of the criminal justice process. This is a stunning indictment of our legal response to sexual harm.*[38]

21. Multiple studies establish that shame, guilt, stigma, a perception that they will be blamed, re-victimized, dismissed, not believed, or treated disrespectfully, or a broader sense of societal normalization of inappropriate or unwanted sexual behaviour, are key contributors to victims' under-reporting of sexual violence to police. Victim reluctance is reinforced by the negative, and sometimes traumatizing experiences, described by other victims who have spoken with police or have participated in the criminal justice system.[39]

22. The Cross-Appellant and others complain that the impugned provisions do not directly relate to the twin myths. However, as judicially recognized, **several** myths serve to impermissibly detract from a complainant's evidence, fueled by an unwarranted view of female

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[35] *R v Barton, supra* note 1; *R v Goldfinch supra* note 28 at para 37
[36] Senate Report, *supra* note 2 at 8-9
[37] A Cotter & L Savage, "*Gender-based violence and unwanted sexual behaviour in Canada, 2018*: *Initial Findings from the Survey of Safety in Public and Private Spaces,"* Release Date: December 5, 2019
[38] Craig, Elaine,"*Putting trials on trial" supra* note 26 at 3
[39] "*Gender-based violence and unwanted sexual behaviour in Canada, 2018" supra* note 37

victims as being inherently deceitful.[40] As put by the majority in *Mills*, the twin myths are but two of the more notorious examples of mythology in relation to complainants.[41] This Court has recognized that historically the accused could distort the trial process by sullying the complainant's character.[42]

23. Cross examination remains the most distressing part of the trial experience. One study demonstrated that across time periods the focus remained on targeting personal traits or inferring ulterior motives by questioning the complainant's manner of dress, dramatization of things, prior relationships, kissing other men, giving out their telephone numbers and/or intoxication. Tactics are used that leverage rape myths invoking stereotypes about typical behavior.[43] These tactics are successful because the complainant is often the only witness to the event.[44]

(iv) <u>Privacy and Participatory Rights are to be Protected</u>

> *The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of Charter rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the Charter was meant to foster.*[45]

(v) <u>Privacy</u>

24. Privacy once invaded can seldom be regained.[46] At the same time, as per the majority in the 2019 *Mills* decision, there is a difference between a subjective expectation of privacy and one that is objectively reasonable.[47] The impugned sections are confined to those records for which there is a reasonable expectation of privacy, not just the lower subjective expectation threshold.[48]

25. Defence is not required to disclose every aspect of its case or what their witnesses [if any] might say, or what questions they might put to the complainant. Factors that help determine whether a reasonable privacy interest exists include: the subject matter of the information or

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[40] *R v Ewanchuk*, [1999] 1 SCR 330 at paras 82, 95
[41] *R v Mills*, *supra* note 4, at para 119
[42] *R v Barton*, *supra* note 1 at para 55
[43] S Zydervelt et al, "*Lawyers Strategies for Cross-examining Rape Complainants: Have we moved beyond the 1950s?*", 2016 Brit J Crim at 1
[44] *Ibid* at 12-16. See also, M Shaffer, "*The Impact of the Charter on the Law of Sexual Assault: Plus ca Change, Plus C'est La Meme Chose (2012)*", 57 SCLR 337 at 338, 346-348
[45] *Ref re same sex marriage*, *supra* note 10 at para 46
[46] *R v O'Connor supra* note 7 at para 119
[47] *R v Mills*, 2019 SCC 22 at paras 78, 99
[48] *R v Reeves*, 2018 SCC 56 at para 32; *Marakah v R*, 2017 SCC 59 at para 11

communications; identities of the participants, the potential that the material will reveal core personal information, control, ownership, or possession. No single factor is dispositive but each are considered to determine whether a reasonable expectation of privacy exists.[49]

26. Physical possession by another party is not to be equated with loss of a reasonable expectation of privacy.[50] There may be a reasonable expectation that information remain confidential to the persons to whom it was divulged, and restricted to the purposes for which it was divulged, even if distributed to others. Privacy has been disentangled from its roots in property, such that privacy rights are not inconsistent with another person's possession. A property interest may reinforce a claim of reasonable expectation but loss of physical possession or ownership will not necessarily defeat a person's privacy in the information.[51] The Cross-Appellant's position would require a retreat from these well-established principles.

27. The pervasive usage of technology is changing our perceptions of privacy. As recognized in *Vu* the digital and internet age raises the question whether the traditional legal framework requires updating in order to protect the unique privacy interests that are at stake.[52] *Vu* recognized that we live in a time of profound technological change and innovation that has revolutionized our daily lives. Individuals can converse with family on the other side of the world, browse vast stores of human knowledge and information over the Internet, or share a video, photograph or comment about their experiences with a legion of friends and followers. Devices providing this freedom also generate immense stores of data about our personal lives. GPS technology allows tracking; and the private digital devices record, not only core biographical information, but conversations, photos, browsing interests, purchase records, and leisure pursuits. Digital footprints permit reconstruction of life events, relationships with others, likes and dislikes, our fears, hopes, opinions, beliefs and ideas. Digital devices are windows to our inner private lives. Therefore, as technology changes, our law must also evolve.[53]

28. This becomes particularly important in sexual violence cases for, as reported by Statistics Canada in 2016-17, over 80 percent of reported sexual assaults occur between people who know one another in some way. In other words, most complainants will have some kind of relationship

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[49] *Marakah v R, ibid* at paras 17- 44
[50] *R v Mills, supra* note 47 at paras 108-127
[51] *R v Shearing, supra* note 20 at paras 88-92
[52] *R v Vu,* 2013 SCC 60 at para 1
[53] *Ibid; R v Fearon,* 2014 SCC 77 at para 102; *Marakah v R, supra* note 48 at para 86

with the accused.[54] Many victims are between the ages of 13 and 17 making the potential for usage of technology ever greater. This magnifies the need to expand our notions of what is in "possession" and recognize that privacy rights, as protected by the *Charter*, may not be measured by the scale of physical possession. Given the pervasive electronic monitoring of one's life and the spread of information through technology, the potential for breaching privacy rights has grown exponentially. The impugned legislation is one moderate, tempered attempt to fill a legislative gap that left legitimate privacy rights exposed, because of a statutory gap.

(vi) Participatory Rights

29. The Cross-Appellant and others incorrectly conflate party status and participatory rights. The concept that a complainant may have independent counsel to assert a *Charter* right is not as remarkable as the Cross-Appellant and others suggest. It has been accepted that independent counsel may be necessary to ensure that rights are properly protected. Consultation rights were afforded by an older version of s. 276. However, *Darrach* was not dealing with the broader question of limited participation in a trial where a witness' rights are being affected, as other courts have. Courts recognized that participation rights may be necessary where a witnesses' rights are jeopardized. While at common law it was discretionary, the more that rights were engaged, the more likely the participatory right was granted.[55]

30. As explained by Young, participatory rights, in order to protect *Charte*r rights, have been afforded.[56] The Manitoba Court of Appeal in *R. v. G.P.J.* [57]concluded that, for the purpose of an application under s. 278.3 of the *Criminal Code*, a complainant is entitled to the assistance of counsel where her constitutional rights are in the balance. That included participation during her cross examination but confined to the issue of the admissibility of the records. Participation on a limited issue is not the same as being a party.[58]

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[54] *R v Goldfinch, supra* note 28 at para 45

[55] See for example: *R v Wang*, 2002 CarswellOnt 4931 at paras 3-8; *Re B*, 1976 CarswellNWT 1 at paras 2-4; *Re Harkat*, 2009 FC 1050 at para 6; *R v Chase*, 1982 CanLII 304 (BC SC); *Vapor Canada Ltd. v MacDonald (No. 2)*[1971] CarswellNat 243 at paras 4-5; *B.C. Securities Commission v Branch*, [1995] 2 SCR 3 at para 22

[56] Young, Alan N, *Crime Victims and Constitutional Rights*, 2004 29 CLQ 432; see also Sankoff P, *The Portable Guide to Witnesses (3d)*, 2014 Carswell at 11.1

[57] *R v G.P.J*, 2001 MBCA 18 at paras 48-50

[58] *A.(L.L.) v B.(A)*, A.(L.L.) v B.(A), 1995 CanLII 542 (ON CA) at para 9; this case was appealed but not on this issue.

31. Similarly, in *Bernardo,*[59] status was granted to independent counsel, but confined to the single issue of an application for a publication ban. In *A.(L.L.),*[60] it was stated that, while rules of natural justice are most often discussed in the context of administrative law, the rules were originally developed in the criminal law context. Both the complainant and the Crown had a direct interest in making representations, the rules of *audi alteram partem* require that both be heard. In *Monkman* there was separate representation on the issue of production of records. As the court noted in that case, it was the complainant who risks losing her privacy and security rights.[61]

32. The 2012 Senate Report concluded that the person best able to assert and defend their right to privacy is the complainant. The Report emphasized that in an adversarial system the prosecutor is not the lawyer for the complainant and that, at portions of a trial the interests of the Crown and complainant may diverge. Personal rights may be engaged and the interests of the complainant and the Crown are not always aligned.[62] This accords with policy directives emphasizing that the Crown is not to be taken as acting for the complainant.[63]

33. Interestingly, the Report notes that the proposition that the complainant have separate representation was supported by a wide variety of witnesses, including defence counsel, who all "*emphasized repeatedly that the most effective way for complainants to protect their privacy, security and equality interests is to have their own lawyer.*[64]

34. In *Stoddart,* [65]the Ont. CA noted that s. 15 *Charter* is the only provision in the *Charter* that grants rights to "*every individual"* as opposed to "*everyone*". According to this decision the Crown is not an individual for the purpose of s. 15. While a Crown attorney is a live human being the attorney is not participating as an individual but as representative of the Crown which in turn represents the state.[66] The personal nature of s. 15 rights was emphasized in *R v Church of Scientology*. The court observed that the personal nature of such rights has been repeatedly

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[59] *R v Bernardo*, 1995 CanLII 7434 (ON SC) at paras 29-32
[60] *A.(L.L.) v. B.(A)*, [1995] 4 SCR 536 at paras 27-28
[61] *R v Monkman*, 2007 MBQB 6 at para 13
[62] *Senate Report, supra* note 2 at 26
[63] Alberta,*"Victims of Crime Protocol," February 2007* at 34*; Law Society of Alberta Code of Conduct*, 2020 V1 at 5.1-4
[64] *Senate Report, supra* note 2 at 26 f/n 103
[65] *R v Stoddart,* (1987) 37 CCC (3d) 351
[66] *Ibid* at 6-8

affirmed. Therefore the accused had no standing.[67]

35. The case law to date has indicated that a s. 15 right must be advanced by or on behalf of the individual affected by a potential breach of that right.[68] In *Kokopenace* the Supreme Court held that the accused could not assert a right to advance a s. 15 claim on behalf of Aboriginal on-reserve residents who were potential jurors. The court held that if a challenge is to be raised, there must be an opportunity for those persons to be heard.[69]

36. In *R v C.(J.G.)* the Ont. SC was confronted with a situation in which a third party, in possession of records, applied for an order requiring the accused to pay legal costs for independent representation. The court granted the order finding that in the particular case there was a legitimate privacy interest to be considered and that "*(t)he Crown cannot and should not be expected to represent the privacy and equality interests of complainants and other third parties*".[70] In *Shearing*, the trial court permitted separate representation to assert and defend the complainant's privacy interest in a diary.[71] In *G.P.J.*, the Manitoba Court of Appeal stressed that the roles of counsel for the complainant and the Crown must not be combined, and that there must not be the appearance that the Crown and the complainant share a common purpose in seeking the conviction of the accused.[72]

37. The position of the Cross-Appellant and others, by conflating the concepts of party and limited participatory rights, would eliminate a procedural necessity that has been provided for the protection of witnesses even without statutory intervention. While it is true that the granting of independent representation was discretionary at common law, the impugned provisions explicitly recognize that a woman's ss. 7, 15 and 28 rights are engaged in sexual violence cases. Therefore, both by common law and the impugned provisions, independent representation is appropriate. The Cross-Appellant's position would eliminate that protection that exists even without the impugned provisions.

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[67] *R v Church of Scientology*, (1997) 33 O.R. (3d) 65 at para 127
[68] See for example: *Stinson v B.C.*, 1999 BCCA 761 at paras 11, 14-15; *Metis National Council of Women v Canada*, [2006] FCA 77, leave to appeal ref'd. 2006 CarswellNat 2477
[69] *R v Kokopenace*, 2015 SCC 28 at para 128
[70] *R v C.(J.G.)*, [2003] O.J. No. 2274 (SC) at para 8
[71] *R v Shearing*, *supra* note 20 at para 86
[72] *R v G.P.J*, *supra* note 57 at paras 55-58

(vii) ***Legitimate Cross-examination is not Curtailed***

38. It is asserted that the provisions requiring disclosure would effectively curtail cross examination by forewarning the complainant of the defence strategy, permitting her to structure her testimony to meet the challenge. This reasoning is, with respect, entirely reminiscent of the stereotypic, mythological reasoning that complainants are by their nature deceitful and prone to fabrication. This Court has explicitly rejected the notion that sexual assault complainants are more likely to fabricate stories based on "ulterior motives" and are therefore less worthy of belief than complainants in other cases.[73]

39. The reasoning relies heavily upon myths about sexual assault complainants. There is no evidence that being forewarned has a deleterious effect on the trial process. There is no evidence that in civil proceedings, where mutual disclosure is the rule rather than the exception, that the mutual disclosure has had a stifling effect on cross examination. The very existence of re-trials suggests that an accused can receive a fair trial, even after the accused has disclosed his entire case and the complainant is aware of all the materials the accused intends to use in cross-examination. In contrast to the myth-based reasoning, *Darrach* held that a production application should be made prior to the *voir dire* "*in part to allow consultation with the complainant*".[74]

40. The Crown cannot use cross-examination to infer that, because an accused has received full disclosure, he has structured or tailored his evidence to meet the Crown's case - a constitutional right cannot be turned into a negative.[75] Yet, when a complainant is provided a procedure to protect her *Charter* rights, the first assumption that is leapt to is that she will script her evidence, notwithstanding she has taken an oath. Such reasoning creates a double standard, effectively denying her rights designed to ensure that her privacy is not violated except in accordance with fair procedures.[76]

41. A neutral judicial officer must determine whether the material is being used contrary to the collateral issue rule.[77] *O'Connor* held that relevance in its true sense cannot be presumed

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[73] *R v Seaboyer*, [1991] 2 SCR 577 at 613-614
[74] *R v Darrach, supra* note 17 at para *55*
[75] *R v Bouhsass* (2002) 169 CCC (3d) 444 at para 12; *R v Gahan*, 2014 NBCA 18 at paras 15-21; *R v Mohamad*, 2018 ONCA No 6302 at para 182
[76] *R v Mills, supra* note 47 at para 21
[77] *R v O'Connor, supra* note 7 at para 194

from the mere existence of a record, and that a right to privacy must be considered even where the complainant does not have possession, to ensure that the privacy rights are protected and that material is not used in a solely speculative, fanciful, disruptive, unmeritorious, obstructive or time consuming way.[78] A litigant may desire to use every scintilla of information to discredit or shake a witness, but when other perspectives are considered, the picture changes.[79] A court must consider whether the issues are collateral. One should not be able to avoid the collateral issue rule simply because one has had production or possession of a record.[80]

42. In *R v S.B.* the trial judge allowed cross examination of the complainant utilizing a video of her and the accused engaging in anal intercourse, and text messages between the complainant and a person with whom she was having an affair. The Court of Appeal unanimously agreed that the trial judge erred in allowing this, as much of it, including the video, was irrelevant to the substantive issues, and were collateral. The Court of Appeal held that the material should have been screened beforehand, for otherwise, by allowing its usage, the damage had been done.[81] Despite the error, the majority held that inconsistencies in several areas of testimony warranted dismissing the Crown appeal; whereas the dissent would have ordered a new trial for the evidence that was utilized in the cross examination was pernicious and directed to myths.[82] This Court adopted the dissent position and allowed the Crown appeal.[83]

43. Possession is not the test for determining whether a *Charter* right is engaged. Rather, it is the nature of the information. There is no right to information that is irrelevant or would distort the truth finding function. There must be a full appreciation of the myths and stereotypes related to sexual violence crimes to ensure that reasonable limitations are placed upon the cross examination of a complainant. This is to ensure that she does not simply become another victim of an insensitive judicial system.[84]

44. This Court has held that a hearing can be reopened at any stage of the trial if circumstances change, such as where there is contradictory evidence from the complainant.[85]

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[78] *Ibid* at paras 12, 17-18, 109, 142-143; 161-182.
[79] *Ibid* at para 194
[80] *Ibid* at para 161
[81] *R v S.B.*, [2016] NJ No 158 at paras 11-15, 26-30, 63**;** Craig, *supra* note 27 at 78-83
[82] *R v S.B.*, *ibid* at paras 101, 107
[83] *R v S.B.*, 2017 SCJ No 16 at para 1
[84] *R v Mills*, *supra* note 4 at paras 74-78, 89-90
[85] *R v Barton*, *supra* note 1 at para 65

This was intended to provide trial fairness to the accused and to ensure that there are safeguards in place to ensure that confrontation remains a viable option for the defence. It is not the case that defence disclosure is never required. While alibi notice and expert evidence notice provide parallels, this Court said that the closer parallel is to *Corbett* applications in which the accused must give notice of the evidence it seeks to introduce and explain its relevance.[86]

45. Given the pervasive electronic monitoring of one's life and the spread of information through technology, the potential for breaching privacy rights has grown exponentially. The impugned legislation is one moderate, tempered attempt to fill a legislative gap that left legitimate privacy rights exposed.

(vii) Significant Probative Value is a Recognized Admissibility Standard

46. This test's rationale, in light of the mythology surrounding female complainants, was first advanced in *O'Connor* where both the dissent and majority concluded that a higher threshold is justified.[87] In *Darrach* a unanimous court defined "*significant probative value*" for the purposes of criminal trials and, as defined, ruled that it was constitutional.[88] That standard was again recognized in *Barton*[89] and *R.V.*[90] Therefore, the right to cross examination is not unlimited, given the dignity, privacy and equality rights. Wide ranging questioning is not permitted.[91]

47. As explained in *Darrach*, "*significant*" simply means that the evidence is not to be so trifling as to be incapable, in the context of all of the evidence, of raising a reasonable doubt. This standard is not a departure from the conventional rules of evidence.[92] The words "*significant probative value that is not substantially outweighed by the danger of prejudice*" simply serves to direct judges to the serious ramifications of the use of this evidence for all parties in these cases.[93]

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[86] *R v Darrach, supra* note 17 at para 65
[87] *R v O'Connor supra* note 7 at paras 22-23 per Lamer CJ and Sopinka JJ; paras 142-143, 155-156 per L'Heureux-Dube J and 2 others*;* para 190, per Cory and Iacobucci JJ; para 191, per McLachlin J
[88] *R v Darrach, supra* note 17 at paras 38-40
[89] *R v Barton, supra* note 1 at para 61
[90] *R v R.V., supra* note 29 at para 60
[91] *R v Goldfinch, supra* note 28 at paras 39-47, 67-68
[92] *R v Darrach, supra* note 17 at para 39
[93] *Ibid* para 40 (emphasis added)

B. The Impugned Legislation is Fully Justifiable

> *The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of Charter rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the Charter was meant to foster.*[94]

(i) Government Objectives

48. Alberta acknowledges that this Court has stated, in general, that s. 7 violations are difficult to justify.[95] Equally, however, this Court has stated that sexual violence crimes involve unique challenges and issues. In an Alberta Q.B. decision, *R v CMG*, it was observed that the "*use of myths and stereotypes also threatens the constitutional rights of complainants and engages their rights to life, liberty and security of their person, as well as their sex equality rights: section 7, 15 and 28 of the Canadian Charter of Rights and Freedoms*."[96] It recognized that usage of distortive evidence led to the under-reporting of sexual offences.

49. There is no dispute that the objectives of the impugned legislation are pressing and important: (a) to reinforce protections for complainants throughout the trial process, while preserving trial fairness for the accused by establishing a similar process to determine admissibility [filling a gap]; (b) ensuring that victims of sexual assault and gender-based violence are treated with compassion and respect; (c) encouraging reporting of sexual assault crimes; and (d) ensuring women's equality, privacy and security rights by countering myths and stereotypes, including myths about the reliability and vindictiveness of women who make complaints.[97] These have been previously confirmed as valid objectives for the purpose of s. 1, particularly in light of the pervasive discrimination and violence against women and children prompting international action through Conventions obligating states, such as Canada, to ensure that rights are balanced equally.[98]

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[94] *Ref. re Same-Sex Marriage, supra* note 10 at para 46
[95] *R v Bedford*, 2013 SCC 72 at para 129
[96] *R v CMG*, 2016 ABQB 368 at para 62
[97] *R v Ewanchuk* [1999] 1 SCR 330; Department of Justice, *"Charter Statement Bill C-51:An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act,"* Tabled in House of Commons, June 6, 2017
[98] *Convention on the Elimination of all Forms of Discrimination against Women*, 18 December 1979, Can TS 1982 no 31, (ratified by Canada 10 Dec 1981); *Convention on the Rights of the Child*, 20 November 1989, Can TS 1992 no 3 (ratified by Canada 13 December 1991; see also J

(ii) Rational Connection

50. The proportionality analysis has three stages: (a) rational connection between the objectives and the means chosen, (b) minimal impairment, and (c) proportionality - a balance between salutary and deleterious effects.[99] For proportionality, the court must balance the interests of society with those of individuals and groups.[100] Proportionality does not require perfection for s. 1 only requires that the limit be "*reasonable*".[101] None of the rights are absolute and courts must balance competing *Charter* rights and other values essential to a free and democratic society such as equality and a respect for the inherent dignity of all human beings.[102]

51. In *Seaboyer* the majority concluded that "*rape-shield*" legislation was rationally connected to the valid objective of excluding unhelpful and potentially misleading evidence. In *O'Connor* the societal interest in encouraging the reporting of sexual assault was affirmed.[103] In *Mills,* stress was placed upon societal interest in truth finding, the protection of privacy rights, and the need to prevent re-victimization of the complainant.[104] *Darrach* expressly affirmed that reporting of crimes is encouraged through the protection of the security and privacy of complainants and witnesses in sexual violence cases. Trial fairness is enhanced by procedures that exclude misleading evidence.[105]

(iii) Minimal Impairment

> *Historically, no limits were placed on the defence's ability to adduce evidence of a complainant's prior sexual activities. Such evidence was routinely used to malign "the character of the complainant, distort the trial process, and undermine the ability of the criminal justice system to effectively and fairly try sexual allegations"… Subjecting the complainant to humiliating or prolonged examination and exploiting assumptions about "communication, dress, revenge, marriage, prior sexual history, therapy, lack of resistance and delayed disclosure" was commonplace*[106]

Gordon and A Gordon, "*The role and rights of victims of crime in adversarial criminal justice systems",* Victims' Commissioner for England and Wales, December 2020.

[99] *R v Oakes*, [1986] 1 SCR 103 at paras 69-70

[100] *Ibid*

[101] *Saskatchewan v Whatcott*, [2013] 1 SCR 467 at para 78

[102] *Ibid* at paras 64, 66

[103] *R v O'Connor, supra* note 7 at para 158

[104] *R v Mills, supra* note 4 at para 91

[105] *R v Darrach, supra* note 17 at paras 19-20

[106] *DM Tanovich, supra* note 3

52. Minimal impairment means that the limit on the right is reasonably tailored to the objective. It is only when there are alternative, less harmful means of achieving the government's objective in a real and substantial manner that a law should fail the minimal impairment test.[107] Simply because a court might conceive of an alternative that might better tailor objective to infringement does not suffice.[108] As expressed by this Court, what will be as little as possible will vary depending on the government objective and the means available to achieve it, requiring a court to balance the interests of society with those of individuals.[109]

53. The impugned sections seek to prevent the serious harm that occurs in sexual violence trials, not just in terms of the distortion of truth seeking, but in light of the serious harm to complainant. The impugned provisions simply afford these same participatory rights to complainants in cases where the accused is already in possession of the complainant's private "records". Doing anything less would fail to truly achieve Parliament's goal of "filling the gap" in the protections previously afforded to those complainants. The sections are confined to sexual violence crimes, and are tailored to the particular problems that have long been recognized.

54. The approach taken with respect to independent representation accords with the personal nature of *Charter* rights. Young asserts that independent representation also accords with international obligations.[110] The use of specialized legal advocates to support victim-survivors through the legal and courtroom aspects of the criminal justice process is a wide-spread (though not universal) practice in the European Union and other international jurisdictions that has been found to reduce secondary victimization and improve conviction rates.[111] The use of special Victim Counsel for sexual assault victims under the US military justice system was proven to be very effective, with over 90% of participants being extremely satisfied with the advice and support received.[112]

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[107] *Hutterian Bretheren v Alberta,* 2009 SCC 37 at para 55; See also, *R v Bryan,* 2007 SCC 12 at paras 42-43; *Saskatchewan v Whatcott, supra* note 101 at para 101
[108] *R v Bryan, ibid* at para 42
[109] *Irwin Toy Ltd. v Que., supra* note 32 at para 78
[110] A Young, *supra* note 56
[111] STUDY, *Overview of the Worldwide Best Practices for Rape Prevention and for Assisting Women Victims of Rape,* Directorate-General for Internal Policies, Policy Department, Citizen's Rights and Constitutional Affairs, European Parliament
[112] Canadian Intergovernmental Conference Secretariat, *Reporting, Investigating and Prosecuting Sexual Assaults Committed Against Adults – Challenges and Promising Practices in Enhancing Access to Justice for Victims,* at 5.4.5.

55. The impugned sections recognize that there is a wide variety of documents or material that may attract an expectation of privacy such as a shared computer [as in *Reeves*[113]], or electronic communication including texting which the Supreme Court has said is inherently meant to be private. A parent accused of sexual abuse of a child may well have access to medical reports, counseling/therapy reports, school reports and child welfare reports, simply because of their position of authority over the complainant. Records may include erroneous or inaccurate information, or documents the complainant/witness has had no part in creating, or documents that are highly subjective, such as police occurrence reports, therapy records, etc. As previously indicated, particularly vulnerable women will have widespread documentation and are particularly subject to attack in a potentially unfair manner.

(iv) Balancing Salutary and Deleterious Effects

56. The mischief Parliament addressed in enacting s. 276 remains with us today. Sexual assault is still among the most highly gendered and underreported crimes.[114] As time passes, our understanding of the profound impact sexual violence can have on a victim's physical and mental health only deepens. Parliament enacted s. 276 to address concrete social prejudices that affect trial fairness as well as the concrete harms caused to the victims of sexual assault. Throughout their lives, survivors may experience a constellation of physical and psychological symptoms including: high rates of depression; anxiety, sleep, panic and eating disorders; substance dependence; self-harm and suicidal behaviour.

57. A Department of Justice study *"estimated the costs of sexual assault at approximately $4.8 billion in 2009, an astonishing $4.6 billion of which related to survivors' medical costs, lost productivity (due in large part to mental health disability), and costs from pain and suffering. The harm caused by sexual assault, and society's biased reactions to that harm, are not relics of a bygone Victorian era."*[115]

58. *Goldfinch* contains a lengthy discussion about the approach to be taken to s. 276. The same approach must be taken with respect to ss. 278.92 to 278.94. These provisions protect the integrity of the trial process, while respecting the proper limits of cross-examination. It also

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[113] *R v Reeves, supra* note 48
[114] *R v Goldfinch, supra* note 28
[115] *Ibid* at para 37

seeks to limit the harm to complainants, not just in terms of conceptual *Charter* rights, but in terms of the personal harm that results from trials as they are currently conducted. The potential for promoting the reporting of sexual violence and for making it safe for complainants to seek help outweighs any limitations placed on the defence – limitations which have been previously approved by the Supreme Court, but will now be extended to information in the hands of the accused.

(v) Conclusion

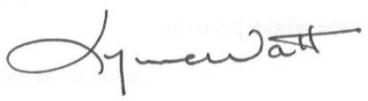
59. The Intervener submits that the request for a declaration of invalidity of ss. 278.92 to 278.94 of the *Criminal Code* be denied.

PART IV: COSTS

60. The Attorney General of Alberta seeks no costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Edmonton, Alberta, this 23rd day of April, 2021.



for:

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4	*Dagenais v CBC*, [1994] 3 SCR 835	9
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6	*Irwin Toy Ltd v Quebec*, [1989] 1 SCR 927	19, 109
7	*Marakah v R*, 2017 SCC 59	24, 25, 27
8	*Metis National Council of Women v Canada*, [2006] FCA 77, leave to appeal ref'd. 2006 CarswellNat 2477	35
9	*R v Anderson* 2019 SKQB 304	8
10	*R v Asselin*, 2019 MBCA 94	13
11	*R v Barton*, 2019 SCC 33	1, 19, 20, 22, 44
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13	*R v Bernardo*, 1995 CanLII 7434 (ON SC)	31
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