

SCC File No. 39133

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/Defendant)

- and -

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LAWYERS and INDEPENDENT CRIMINAL DEFENSE ADVOCACY SOCIETY**

INTERVENERS

- AND -

SCC File No. 39516

(ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF JUSTICE FOR ONTARIO)

A.S.

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

(Style of cause continued next page)

**ADDENDUM to the FACTUM of the INTERVENER
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(Pursuant to the Order of Justice Côté of July 30, 2021)**

(Style of cause continued from previous page)

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PART I – OVERVIEW OF THE POSITION AND FACTS

Overview

1. Protecting the privacy, dignity, security, and equality of sexual assault complainants is an important societal interest. Parliament pursued that objective in legislation concerning both sexual history evidence and adducing records in the possession of the accused. When viewed in light of this objective, as well as the need to preserve the integrity of the trial process, the impugned provisions are not overbroad. The Crown is not always best placed to defend the complainant's interests. The impugned provisions require that complainants be informed of their right to be represented by counsel. Allowing them to have access to the information the defence seeks to adduce favours their meaningful participation in the admissibility hearing. There is no constitutional right to surprise the complainant in cross-examination. Moreover, the provisions have sufficient flexibility to allow courts to apply them in a way that preserves the *Charter* rights of the accused. There is no breach of the accused's fair trial rights and the legislation strikes an appropriate balance.

Facts

2. Canada takes no position on the facts.

PART II – ISSUES

3. As in the companion appeal of *J.J.*, Canada supports the position that the impugned provisions are consistent with s. 7 and 11(d), or in the alternative that they are reasonable limits under s. 1 of the *Charter*.

PART III – ARGUMENT

The purpose of the impugned provision includes the protection of the complainant’s privacy, security, dignity, and equality

4. Laws may be overbroad where they are rational in part, but capture some conduct that bears no relation to their purpose.¹ Thus, in order to assess whether legislation is overbroad, its purpose must be articulated. A court should consider statements of purpose in the legislation; the text, context, and scheme of the legislation; and extrinsic evidence such as legislative history and evolution.²
5. These elements here reveal that the aim of Parliament, in addition to preserving the integrity of the trial process, is also to protect the privacy, security, dignity and equality of sexual offence complainants. It does so by providing a procedure whereby the evidence or records at issue can be admitted after a judicial determination in which the interests at stake are heard and balanced.
6. The application judge identified the legislative purpose too narrowly, describing it as “... to curtail irrelevant cross-examination and evidence promoting myths and stereotypes associated with sexual assault complaints.”³ However, when text, context, and scheme are properly considered, the legislative purpose also includes protecting the privacy, dignity, security and equality of sexual offence complainants.
7. The objectives of preserving the trial process from myths and stereotypes, protecting complainants’ interests, and balancing them against full answer and defence were already outlined in AG Canada’s factum in *JJ*. The overbreadth challenge in the present appeal requires further consideration of complainants’ interests.

¹ *Canada (Attorney General) v. Bedford*, [2013 SCC 72](#) at paras. 111-113.

² *R. v. Safarzadeh-Markhali*, [2016 SCC 14](#) at para. 31.

³ *R. v. Reddick*, [2020 ONSC 7156](#) at para. 49.

8. The relevant context surrounding sexual offences includes the gendered nature of sexual violence, the shockingly low reporting rates and the history of invasive and irrelevant cross-examination on intimate subjects.⁴ Further, as recognized by this Court, many victims of sexual assault, who are predominantly women, are reluctant to come forward because of the justified fear of being “unduly harassed and pilloried to the extent of becoming a victim of an insensitive judicial system.”⁵
9. Applications in respect of sexual activity evidence, third-party records, and records in the possession of the accused raise similar concerns. Legislative purposes identified in *Mills* and *Darrach* also animated the impugned legislation. In *Mills*, this Court identified purposes of the legislation enacting sections 278.1-278.91 as the preservation of an accused’s access to private records that may be relevant to an issue on trial, while protecting the right to privacy of complainants and witnesses to the greatest extent possible.⁶ In *Darrach*, this Court found that purposes of the legislation enacting section 276 to be the protection of the integrity of the judicial process, the complainant’s privacy and dignity rights, and the accused’s right to make full answer and defence.⁷ This Court has underscored the importance of these objectives in the sexual assault context on several occasions.⁸
10. The legislation includes a list of factors that a judge must consider when determining the admissibility of a record. These factors include:
 - a. the interests of justice, and specifically the right of the accused to make a full answer and defence [s. 276(3)(a) and s. 278.92(3)(a)];

⁴ *R. v. Goldfinch*, [2019 SCC 38](#) at para. 37.

⁵ *R. v. Osolin*, [\[1993\] 4 S.C.R. 595](#) at p. 669.

⁶ *R. v. Mills*, [\[1999\] 3 S.C.R. 668](#) at para. 96.

⁷ *R. v. Darrach*, [2000 SCC 46](#) at para. 3.

⁸ *R. v. Osolin*, *supra* note 5 at p. 669; *M. (A.) v. Ryan*, [\[1997\] 1 S.C.R. 157](#) at para. 30; *R. v. Mills*, *supra* note 6 at paras. 77-93; *R. v. Shearing*, [2002 SCC 58](#) at paras. 110, 164; *R. v. Barton*, [2019 SCC 33](#) at para. 68, *R. v. Goldfinch*, *supra* note 4 at para 1, *R. v. R.V.*, [2019 SCC 41](#) at para. 67.

- b. society's interest in encouraging the reporting of sexual assault offences [s. 276(3)(b) and s. 278.92(3)(b)];
 - c. the need to remove from the fact-finding process any discriminatory belief or bias [s. 276(3)(d) and s. 278.92(3)(e)];
 - d. the potential prejudice to the complainant's personal dignity and right to privacy [s. 276(3)(f) and s. 278.92(3)(g)]; and
 - e. the right of the complainant and of every individual to personal security and to the full protection and benefit of the law [s. 276(3)(g) and s. 278.92(3)(h)].
11. These factors signal that Parliament intended to impose a screening procedure for both sexual activity evidence and for records in the possession of an accused and to give complainants a voice in that respect. Sexual assaults involve a significant intrusion into the victim's personal sphere, both physically and psychologically.⁹ A vulnerability vis-à-vis further intrusions understandably follows.¹⁰ The screening procedure established by the impugned provisions seeks to ensure that the privacy of complainants is taken into account before their personal information is disclosed in court. It also seeks to preserve complainants' dignity by protecting them from potentially demeaning use of that evidence, at least until the said information is found by the court to be admissible. It seeks to protect their security by reducing the potential added trauma of the process, which in turn also encourages better reporting.¹¹ Finally, the process seeks to provide equal protection of the law to women, who suffer the vast majority of sexual assaults.¹²
12. The parliamentary record points in the same direction. The legislation had its genesis in the 2012 final report on Bill C-46 by the Standing Senate Committee on Legal and Constitutional Affairs. This Bill, enacted in 1997, created the procedure governing the production of third-party records set out in sections 278.1–278.91 of the *Criminal Code*. As noted at

⁹ *R. v. Goldfinch*, *supra* note 4 at para. 37.

¹⁰ *M. (A.) v. Ryan*, *supra* note 8 at para. 30.

¹¹ *R. v. R.V.*, *supra* note 8 at para. 33.

¹² *R. v. Osolin*, *supra* note 5 at p. 669; *R. v. Goldfinch*, *supra* note 4 at para. 37.

paragraph 16 of Canada's written submission on the *J.J.* appeal, the Standing Committee's statutory review of the Bill identified a pressing problem: the unfettered use of complainants' personal information where it already happened to be in the hands of their alleged sexual aggressors.¹³ The challenged provisions address this concern.

13. In 2018, the Minister of Justice shed light on the provisions' purpose:

Together, Bill C-51's proposed sexual assault amendments reflect the critical need to respect all interests in a criminal trial: the rights of the accused; the truth-seeking function of courts; *and the privacy, security and equality interests of the victim.*

[...]

In drafting this Bill we sought to ensure that we always consider in the back of our minds the balance required, as I said in my comments, in terms of the rights of the accused to full answer and defence, *and of ensuring that we respect and provide dignity to victims of sexual assault.*¹⁴

14. The text, context, scheme and history of the legislation reveal that its purpose is not only to safeguard the integrity of the trial process, but also to protect the privacy, security, dignity, and equality of sexual offence complainants. It does so by ensuring that sexual activity evidence or private records in which the complainant has a reasonable expectation of privacy are not needlessly adduced at trial, while also providing a procedure whereby the evidence or records can be admitted if they meet the test set out in section 278.92(2).

The definition of record is not overbroad when viewed in light of the legislation's objectives

15. Screening records that engage a sexual offence complainant's reasonable expectation of privacy is connected inextricably to the purposes of the legislation. The application judge held that the legislation is overbroad because some records, such as financial records or a

¹³ Senate, Standing Senate Committee on Legal and Constitutional Affairs, "Statutory Review on the Provisions and Operation of the *Act to amend the Criminal Code (production of records in sexual offence proceedings)* ([December 2012](#)), pp. 18-20.

¹⁴ Senate, *Standing Committee on Legal and Constitutional Affairs*, 42nd Leg., 1st sess., ([20 June 2018](#)), emphasis added.

personal letter to a third party, are captured by the filtering procedure but contain no references to sexual activity.¹⁵ The judge concluded that the screening procedure includes records unconnected to the purposes of the legislation. However, if it is accepted that the purpose of the legislation includes the protection of sexual offence complainants' privacy, dignity, security and equality, then screening records that engage the complainant's reasonable expectation of privacy, even if they do not contain sexual activity information, is directly related to the legislation's purpose.

16. The flexible definition of a "record" is in keeping with Parliament's original intention. As noted by the then Parliamentary Secretary to the then Minister of Justice during a 1997 debate in the House of Commons in respect of the enactment of the third-party records production regime, "[t]he definition is capable of encompassing a variety of records in any form and adapting to new situations that present themselves in the future."¹⁶ New types of records, such as text messages, may engage strong privacy interests. As McLachlin C.J. observed in *R. v. Marakah*, it is difficult to think of a type of conversation or communication that is capable of promising more privacy than text messaging.¹⁷
17. Not every document will attract a reasonable expectation of privacy and fall under the definition of "record". Lower courts have identified a number of factors to assist in the analysis. These include the content of messages, whether communications were intended to be publicly shared or kept private, the manner in which messages or records were sent or kept and who has control over them, and the nature of the relationship between the parties to messages.¹⁸ The concept of reasonable expectation of privacy is sufficiently flexible to allow courts to avoid concerns that the legislation would unduly overreach.

¹⁵ *R. v. Reddick*, *supra* note 3 at paras. 46-49.

¹⁶ *House of Commons Debates*, No. 158 ([April 17, 1997](#)) at 1025 (Gordon Kirkby).

¹⁷ *R. v. Marakah*, [2017 SCC 59](#) at para. 35.

¹⁸ See e.g. *R. v. R.M.R.*, [2019 BCSC 1093](#) at para. 38; *R. v. M.S.*, [2019 ONCJ 670](#) at para. 50.

The role of the Crown is not always synonymous with protecting the complainant's interests

18. Paragraphs 50–53 of Canada's submissions in *J.J.* set out that a complainant's involvement in the admissibility hearing does not violate the principle of prosecutorial independence. A brief addendum to that submission is necessary in light of the reasons of the application judge in *A.S.* suggesting that the Crown's involvement in the process is sufficient to protect the interests of sexual offence complainants without the need to give them a separate voice.
19. The application judge viewed the interests of the Crown and the complainant's interests as indistinguishable. As he phrased it, "... when justice is done, the complainant's interests are protected."¹⁹ He suggested that the Crown could protect the interests of the complainant by witness preparation, objecting to irrelevant evidence, and seeking to eliminate stereotypical views and submissions from the trial process.

Missing from this analysis is a recognition of the significance of the complainant's interests, for which the Crown is not always in the best position to advocate strongly given its role in prosecuting the offence. The Crown may focus on the elements that can affect the result of the trial. Allowing the complainant to meaningfully participate in the hearing resolves this tension and provides the court with a valuable perspective on the interests of the complainant.

Sharing the information with complainants favours their meaningful participation

20. Parliament considered it essential to give a voice to complainants in the process. Although they are not made a full party to the proceedings, subsection 278.94(2) allows complainants to appear and make submissions at the admissibility hearing. Subsection 278.94(3) also states that complainants must be informed of their right to be represented by counsel. Subsection 278.93(2) does not state that the complainant must be served with the application – only the Crown and the Court. However, the Crown will typically provide complainants with the information, which facilitates their participatory rights.

¹⁹ *R. v. Reddick*, *supra* note 3 at paras. 119.

21. While this also has the effect of giving the complainant knowledge of the evidence ahead of possibly being cross-examined on it at trial, this Court already ruled that there is no constitutional right to ambush a witness.²⁰ Thus, the strategic benefit the defence may see in surprising a witness does not outweigh the complainant's right to meaningfully participate in the admissibility hearing. As this Court previously recognized, the right to full answer and defence gives the accused the right to a fair trial, but does not give him the right to the most favourable process that can be imagined.²¹
22. Should the defence wish to argue in an exceptional case that the disclosure made to the complainant before the admissibility hearing should be more limited, the legislation is sufficiently flexible to permit this. For instance, though it may be rare, the defence could seek an order to redact parts of the information being shared with the complainant.

The right of the complainant to be represented by counsel does not breach the *Charter*

23. The fact that the complainant's initial reaction to the proposed evidence may occur during exchanges with her own counsel and be subject to privilege does not offend the accused's fair trial rights. Respondent Reddick argues that prior to Bill C-51, the complainant would be provided with the proposed evidence directly by the Crown, and immediate reactions emanating from the complainant would have to follow the *Stinchcombe* disclosure rules.²² The application judge made similar findings.²³
24. The change is not as stark as this argument suggests. Even under the previous regime, nothing prevented a complainant from seeking legal representation. Also, in situations where a complainant is assisted by a victim services worker, some of the communications with the Crown could occur with the victim services worker acting as an intermediary between Crown counsel and the complainant. It was not mandatory for the Crown to consult the complainant at the admissibility stage and if it did occur there was nothing prescribing the manner in

²⁰ *R. v. Darrach*, *supra* note 7 at para. 55.

²¹ *R. v. McClure*, [2001 SCC 14](#) at para. 40; *R. v. Lyons*, [\[1987\] 2 S.C.R. 309](#) at p. 362.

²² *R. v. Stinchcombe*, [\[1991\] 3 S.C.R. 326](#).

²³ *R. v. Reddick*, *supra* note 3 at paras. 65, 99-100.

which it would occur or the mode of communication that would be used. Crown counsel would not necessarily have an opportunity to see a complainant's live reaction to the proposed defence evidence, even assuming that such a reaction would occur. Meanwhile, under the new regime, the Crown might still speak to the complainant before counsel is involved and it is also possible that complainant may choose not to retain counsel.

25. Further, as stated previously, there is no constitutional right by the accused to adduce unexpected evidence to provoke the live reaction of a witness at trial. Similarly, the accused has no constitutional right to compel the complainant to confer with the Crown in hopes of making her initial reaction subject to disclosure under *Stinchcombe*. If the circumstances lead to such a communication between the Crown and the complainant it is subject to disclosure, but this does not mean that the accused has a right to have such communication necessarily occur.
26. The legislation merely underlines that complainants may make submissions at the admissibility hearing and must be informed by the judge of their right to be represented by counsel. The legislation is silent regarding the information to be shared with the complainant, the manner of its sharing, and how any privilege issues, if they may arise, are to be addressed. As already noted, the nature of any sharing could be affected by court orders sought by the defence. Further, it may be observed that the common law rules governing solicitor-client privilege and the innocence at stake exception were stated by this Court in the context of a sexual assault case in *R. v. McClure*.²⁴ It remains open to accused persons to invoke this exception or to argue that the common law should evolve in any given direction. The legislation in no way impedes judicial powers in the above regards.

²⁴ *R. v. McClure*, *supra* note 21. See also *R. v. Brown*, [2002 SCC 32](#).

PART IV – COSTS

27. The Attorney General of Canada does not seek costs and requests that costs not be ordered against him.

PART V – REQUEST FOR PERMISSION TO MAKE ORAL ARGUMENT

28. The Attorney General of Canada requests permission to make oral submissions not exceeding 10 minutes.

ALL OF WHICH is respectfully submitted.

Montréal, September 9, 2021



for:

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M^e Lauren Whyte
Department of Justice Canada
Counsel for the Intervener
Attorney General of Canada**

PART VI – TABLE OF AUTHORITIES

<u>Jurisprudence</u>	<u>Paragraph(s)</u>
<i>Canada (Attorney General) v. Bedford</i> , 2013 SCC 72	.....4
<i>M. (A.) v. Ryan</i> , [1997] 1 S.C.R. 157	.....9,11
<i>R. v. Barton</i> , 2019 SCC 33	.....9
<i>R. v. Brown</i> , 2002 SCC 32	.....27
<i>R. v. Darrach</i> , 2000 SCC 46	.....9,22
<i>R. v. Goldfinch</i> , 2019 SCC 38	.....8,9,11
<i>R. v. Lyons</i> , [1987] 2 S.C.R. 309	.....22
<i>R. v. Marakah</i> , 2017 SCC 59	.....16
<i>R. v. McClure</i> , 2001 SCC 14	.....22
<i>R. v. Mills</i> , [1999] 3 S.C.R. 668	.....9
<i>R. v. M.S.</i> , 2019 ONCJ 670	.....17
<i>R. v. Osolin</i> , [1993] 4 S.C.R. 595	.....8,9,11
<i>R. v. Reddick</i> , 2020 ONSC 7156	.....6,15,19,24
<i>R. v. R.M.R.</i> , 2019 BCSC 1093	.....17
<i>R. v. R.V.</i> , 2019 SCC 41	.....9,10
<i>R. v. Safarzadeh-Markhali</i> , 2016 SCC 14	.....4
<i>R. v. Shearing</i> , 2002 SCC 58	.....9
<i>R v. Stinchcombe</i> , [1991] 3 S.C.R. 326	.....24,26
<u>Doctrine and other documents</u>	
Senate, Standing Senate Committee on Legal and Constitutional Affairs, “Statutory Review on the Provisions and Operation of the <i>Act to amend the Criminal Code (production of records in sexual offence proceedings)</i> (December 2012)”12

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Paragraph(s)

Senate, *Standing Committee on Legal and Constitutional Affairs*, 42nd Leg., 1st sess., ([20 June 2018](#))13

House of Commons Debates, No. 158 ([April 17, 1997](#))
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