Citation: *R. v. D.L.B.*, 2020 YKTC 8

Date: 20200206
Docket: 16-00531
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Ruddy

REGINA

v.

D.L.B.

Publication of information that could identify the complainant or a witness is prohibited pursuant to section 486.4 of the *Criminal Code*.

Appearances:
Ludovic Gouaillier & Lauren Whyte — Counsel for the Crown
Vincent Larochelle — Counsel for the Defence

RULING ON *CHARTER* APPLICATION

Introduction

[1] RUDDY T.C.J. (Oral): The applicant, D.L.B., is facing charges of sexual interference contrary to ss. 151 and 152, and common assault contrary to s. 266 of the *Criminal Code*. The offences are alleged to have occurred in 2010-2011, when the complainant, M.H., was D.L.B.'s stepdaughter. D.L.B. was charged in November 2016. This case has had a troubled history, with the matter being set for trial on four separate occasions, each resulting in an adjournment. Most recently, the matter was set to proceed from June 12 – 14, 2019.

[2] At a case management meeting on May 9, 2019, counsel for the applicant advised that he is in possession of records, as defined in s. 278.1, in which the complainant may have a privacy interest. He further indicated his intention to challenge the constitutionality of the scheme set out in ss. 278.92-278.94 of the *Criminal Code* in relation to the admissibility of any such records (the "Impugned Provisions"). The applicant filed formal Notice of *Charter* Application (the "Application") on May 13, 2019, in which he asserts that the Impugned Provisions violate his rights under ss. 7, 11(b), and 11(d) of the *Charter*.

[3] Counsel for the applicant has not disclosed the specific nature of the records in his possession. It was agreed that he need not file a written application setting out the particulars of the evidence and its expected relevance as required by s. 278.93(2), as doing so would effectively defeat the purpose of the constitutional challenge. (Support for this approach is found in *R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 36-42). It is my understanding, however, that the records do not include sexual activity evidence that would fall within the ambit of s. 276 and s. 278.92(2)(a).

[4] Counsel for both the applicant and the respondent have filed extensive written arguments and supporting materials setting out their respective positions. Oral argument was heard on September 24, 2019.

History of the Law of Evidence in Sexual Assault Trials

[5] The Impugned Provisions came into force on December 18, 2018; however, they cannot be considered without reference to the extensive history that has developed in relation to the production and admissibility of evidence in sexual offence trials.

[6] Historically, an accused was not precluded from adducing evidence of a complainant's prior sexual history, and using such evidence to support the inferences that a female complainant was, by virtue of prior sexual activity, (1) more likely to have consented to the sexual activity at issue, and (2) less worthy of belief. These inferences have come to be known as the "twin myths". Other, more subtle rape myths impacting on credibility assessments of sexual assault complainants have also been acknowledged, including that only "bad girls" are raped, that "real" victims react in expected ways, and that delayed reporting is a negative factor in assessing credibility.

[7] In 1982, Parliament enacted "rape shield" provisions restricting the ability of defence counsel to adduce evidence of a complainant's prior sexual activity in s. 276. In 1991, the Supreme Court of Canada struck down s. 276 in *R. v. Seaboyer*, [1991] 2 S.C.R. 577. The Court acknowledged the laudable goal of abolishing reliance on outmoded, sexually-based myths and stereotypes. However, they found that the provision, in creating a blanket prohibition, went beyond what was required and had the effect of also rendering inadmissible evidence essential to legitimate defences, in violation of an accused's fundamental right to a fair trial, contrary to ss. 7 and 11(d) of the *Charter*. The Court developed common law rules to govern the admissibility of prior sexual conduct evidence.

[8] Parliament codified the common law rules set out in *Seaboyer* in 1992 in a new version of s. 276, mandating a two-stage procedure for determining the admissibility of prior sexual conduct evidence. An accused must first make a written application setting out the particulars of the evidence and its expected relevance, and provide a copy of the application to the Crown. If the judge determines that the evidence is capable of

admission, step two requires an *in camera* hearing to determine admissibility with consideration of factors enumerated in s. 276(3). In 2000, the Supreme Court of Canada, in *R. v. Darrach*, 2000 SCC 46, upheld the constitutionality of the new s. 276 regime.

[9] In 1995, the Supreme Court of Canada addressed the question of production of a sexual assault complainant's private records held by a third party in *R. v. O'Connor*, [1995] 4 S.C.R. 411. In 1997, Parliament enacted ss. 278.1-278.9 setting out a two-step procedure, similar to the s. 276 regime, to govern defence applications for production of third party records. Step one required the accused to file a written application for production of the record with notice to the Crown, the complainant, and the person holding the record. An *in camera* hearing is held to determine if the record should be produced to the judge for review. If the judge orders production, stage two requires the judge to examine the record to determine whether it should be produced to the accused, and may hold another hearing on the issue. At both stages, the judge must consider factors enumerated in s. 278.5(2). The complainant has standing to make submissions at any stage one or stage two hearing. In 1999, the Supreme Court of Canada upheld the third party record regime in *Mills* notwithstanding that it varied in approach from that set out by the Court in *O'Connor*.

[10] In 2002, the Supreme Court of Canada addressed the use of a complainant's records in the possession of the accused in *R. v. Shearing*, 2002 SCC 58. The accused sought to cross-examine the complainant on her diary, which was then in the accused's possession. The complainant sought an adjournment to retain counsel, who then argued that the complainant had not waived her privacy interest in the diary. She

sought its return to her and argued defence should be required to seek production of the diary in accordance with s. 278.3. On appeal, the Supreme Court held that the third party record regime did not apply to records already in the accused's possession, but endorsed the holding of a *voir dire* to determine admissibility and the scope of any permissible cross-examination in relation to the diary.

[11] In 2018, Parliament repealed ss. 276.1-276.5, replacing them with ss. 278.92-278.94. While the procedure remains substantially the same, in relation to evidence of a sexual nature, more importantly, for the purposes of this Application, the new provisions extend the two-stage procedure in relation to sexual activity evidence to any record relating to a complainant that may be in the accused's possession, essentially filling the "gap" highlighted by the *Shearing* case.

The Relevant Sections

[12] With the amendments that came into force on December 18, 2018, the admissibility of sexual activity evidence, governed by s. 276, has remained largely the same as under the previous scheme upheld in *Darrach*, but with some notable changes:

- An additional condition for admissibility has been added in s. 276(2)(a) requiring a judge to be satisfied that the evidence of sexual activity is not being adduced for the purpose of supporting an inference of one of the twin myths;
- Section 276(4) indicates that "sexual activity" now includes "any communication made for a sexual purpose or whose content is of a sexual nature";
- The procedure for seeking to adduce sexual activity evidence, previously set out in ss. 276.1 and 276.2, is now governed by ss. 278.93 and 278.94;

- The two-stage procedure is largely unchanged; however, s. 278.94(2) and (3) now allow the complainant, while still not a compellable witness, to make submissions and to be represented by counsel on any admissibility hearing.

[13] As noted, the most significant change, for the purposes of this decision, is the requirement that the admissibility of any record relating to the complainant, that the accused has in his or her possession, is to be governed by the same process as the admissibility of "sexual activity" evidence.

[14] Section 278.92 makes any records relating to the complainant in the accused's possession presumptively inadmissible in any trial involving a sexual offence, regardless of whether the record is sexual in nature. Section 278.1 defines a record as follows:

> 278.1 For the purposes of sections 278.2 to 278.92, "record" means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

[15] The test for admissibility of records not falling within the s. 276 definition is set out in s. 278.92(2)(b), namely "that the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice". Factors to be considered with respect to admissibility are set out in s. 278.92(3):

> (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account
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> (a) the interests of justice, including the right of the accused to make a full answer and defence;
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> (b) society's interest in encouraging the reporting of sexual assault offences;
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> (c) society's interest in encouraging the obtaining of treatment by complainants of sexual offences;
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> (d) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
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> (e) the need to remove from the fact-finding process any discriminatory belief or bias;
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> (f) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
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> (g) the potential prejudice to the complainant's personal dignity and right of privacy;
>
> (h) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
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> (i) any other factor that the judge, provincial court judge or justice considers relevant.

[16] With the exception of subsection (3)(c), a new addition specific to records, these factors are identical to those enumerated in s. 276(3).

[17] Stage one of the two-stage process is set out in s. 278.93, which requires the accused to file a written application setting out detailed particulars of the evidence and its relevance to an issue at trial. The application must be given to the prosecutor and the clerk of the court at least seven days prior. If the judge is satisfied that the evidence is capable of being admissible, an *in camera* hearing is held under s. 278.94, stage two

of the process. The complainant is not a compellable witness, but has the right to be represented by counsel and has standing to make submissions.

Issues

[18] The Application raises the following issues in relation to the constitutionality of ss. 278.92 through 278.94:

> 1. Do the Impugned Provisions violate the applicant's s. 11(b) right to a trial within a reasonable time?
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> 2. Is s. 278.92 arbitrary or overbroad in its effect contrary to s. 7 of the *Charter*?
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> 3. Does the procedure set out in ss. 278.93 and 278.94 violate the applicant's right to silence and right to make full answer and defence contrary to ss. 7 and 11(d) of the *Charter*? and
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> 4. If the answer to any of the issues set out in numbers 1 through 3 is yes, are the Impugned Provisions saved by s. 1 of the *Charter*?

[19] The onus is on the applicant to establish, on a balance of probabilities, that the Impugned Provisions infringe his rights under the *Charter*. If successful, the Crown bears the burden of establishing that the law is justified under s. 1.

[20] It should be noted that, as a judge of a statutory court, my jurisdiction does not extend to striking down unconstitutional legislation, pursuant to s. 52 of the *Constitution Act,* 1982. I am empowered to determine constitutionality when it is properly before me in any given case, but my authority extends only to a finding that the unconstitutional legislation is invalid and of no effect with respect to the particular case in which the argument is made (see *R. v. Lloyd*, 2014 BCCA 224). The law would otherwise continue to be in full force and effect.

Issue 1: s. 11(b)

[21] I will address the unreasonable delay argument first as, in my view, it is the least compelling of the arguments advanced, and the most easily disposed of.

[22] The applicant argues that the Impugned Provisions create a complex mechanism that will result in unreasonable delay, particularly where the complainant chooses to retain counsel. He further argues that the process will inevitably result in adjournments bifurcating trials, as the defence will likely wait to the last possible opportunity to make the application in order to retain a tactical advantage. This delay, he submits, is contrary to the applicant's *Charter* guarantee of a trial within a reasonable time as set out in s. 11(b).

[23] It is a practical reality that courts in Canada are facing increasingly complex proceedings as the law continues to evolve. To further complicate matters, management of this added complexity must respect the presumptive time limits established by the Supreme Court of Canada in *R. v. Jordan*, 2016 SCC 27, in relation to the accused's s. 11(b) right to be tried within a reasonable time.

[24] It is without question that the procedure set out in ss. 278.93 and 278.94 is an added complexity that will result in some delay; however, it is one of many procedures established in legislation and at common law that must be managed in any given case. Canadian courts have developed, and continue to develop, case management strategies to ensure that such applications are managed as efficiently as possible, within *Jordan* time limits.

[25] In my view, there is nothing in this particular procedure that suggests that its operation will inevitably result in constitutionally unreasonable delay in all or even the majority of cases where it must be followed. Indeed, courts have been managing very similar procedures in relation to the admissibility of sexual activity evidence and the production of third party records for some time.

[26] For these reasons, I fail to see how the procedure set out in ss. 278.93 and 278.94 can be said, on its face, to be a violation of an accused's right to a trial within a reasonable time. Whether its impact, in practice, may result in unreasonable delay is an issue to be decided on a case by case basis.

Issue 2: Arbitrary and Overbroad

[27] The applicant submits that s. 278.92 is both arbitrary and overbroad in its effect in violation of s. 7 of the *Charter*. Pursuant to s. 7, "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". The Crown concedes that the applicant's liberty rights are at stake; therefore, s. 7 is engaged.

[28] The s. 7 analysis must first consider the purpose of the Impugned Provisions, and then consider the interrelationship between the purpose of the legislation and its effect, in determining whether the impact of the Impugned Provisions falls afoul of the principles of fundamental justice (see *R. v. Safarzadeh-Markali*, 2016 SCC 14).

[29] In defining the purpose of the Impugned Provisions, counsel are in relative agreement. Crown submits that the purpose can be defined as: "to safeguard the

integrity of the trial process and the equality, security, and privacy interests of sexual assault complainants". The applicant agrees that the purpose is to protect the privacy rights of sexual assault complainants, but takes the position that the phrase "protect the integrity of the trial process" is too general. He asserts that reference to protecting the integrity of the trial process should include reference to the "twin myths" as the particular evil the Impugned Provisions are aimed at addressing. Accordingly, he suggests adding the phrase, "in light of the stereotypical reasoning in sexual assault trials linked to rape myths".

[30] There are no statements of purpose with respect to the enactment of the Impugned Provisions, but reference can be had to the extensive legislative and common law history, in inferring the legislative intent of this next step in the evolution of the law of evidence in sexual assault trials. Furthermore, as noted by Crown, the aforementioned list of factors in s. 278.92(3) is instructive in relation to assessing purpose.

[31] I am satisfied that the purpose can be generally defined as protecting the privacy and equality rights of complainants in sexual assault trials by removing from the fact-finding process any evidence whose intended use is to support an inference of one or both of the twin myths.

[32] In *Canada (Attorney General) v. Bedford*, 2013 SCC 72, the Supreme Court of Canada described the principles of fundamental justice in the context of a s. 7 analysis in para. 96 as follows:

> The *Motor Vehicle Reference* recognized that the principles of fundamental justice are about the basic values underpinning our constitutional order. The s. 7 analysis is concerned with capturing inherently bad laws: that is, laws that take away life, liberty, or security of the person in a way that runs afoul of our basic values. The principles of fundamental justice are an attempt to capture those values. Over the years, the jurisprudence has given shape to the content of these basic values. In this case, we are concerned with the basic values against arbitrariness, overbreadth, and gross disproportionality.

[33] The applicant asserts that the effect of the Impugned Provisions is both arbitrary and overbroad.

Arbitrary

[34] Arbitrariness is "used to describe the situation where there is no connection between the effect and the object of the law" (see *Bedford* at para. 98). The applicant argues that the Impugned Provisions are arbitrary in their impact primarily because, he asserts, an accused could cross-examine a complainant on the information contained in a record, without producing the record itself, making the presumptive inadmissibility of the record as set out in the Impugned Provisions arbitrary.

[35] This argument does not persuade me that the Impugned Provisions are indeed arbitrary in their effect. While the Impugned Provisions make a record presumptively inadmissible, they do not preclude admissibility. Rather they provide a screening procedure to assess admissibility. Efforts to elicit evidence orally are equally subject to the rules of admissibility. It would seem to me that where a record would be ruled inadmissible through the screening process, the information contained in the record itself would equally run afoul of the rules of admissibility.

Overbroad

[36] The applicant argues that the Impugned Provisions are overbroad in their effect, as they capture any record relating to the complainant. He submits that the focus is on the type of evidence rather than the purpose for which it is tendered, noting that the evil to be addressed is not the use of the evidence but the misuse of it for irrelevant or misleading purposes.

[37] The respondent takes the position the Impugned Provisions are not overbroad as they are limited by the "reasonable expectation of privacy" qualifier. Furthermore, the respondent argues that the question of overbreadth has effectively been resolved by the Supreme Court of Canada in *Mills*.

[38] In *Bedford*, the Supreme Court of Canada defines "overbreadth" in para. 101 as when "the law goes too far and interferes with some conduct that bears no connection to its objective".

[39] While the applicant has not challenged the constitutionality of s. 278.1, as the definition section, s. 278.1 sets out the scope of records captured by the Impugned Provisions, and must, therefore, be considered in assessing the impact of the Impugned Provisions.

[40] Section 278.1 defines "record" not just in relation to the Impugned Provisions, but also in relation to applications for the production of third party records. In assessing the constitutionality of the third party record regime in *Mills*, the Supreme Court of Canada

expressly considered whether the definition of record in s. 278.1 was overly broad in its application, finding at para. 99:

> The response to these claims is to remember that the legislation applies only to records "for which there is a reasonable expectation of privacy" [page731] (s. 278.1 (emphasis added)). Only documents that truly raise a legally recognized privacy interest are caught and protected: see R. v. Regan (1998), 174 N.S.R. (2d) 230 (S.C.). The Bill is therefore carefully tailored to reflect the problem Parliament was addressing -- how to preserve an accused's access to private records that may be relevant to an issue on trial while protecting, to the greatest extent possible, the privacy rights of the subjects of such records, including both complainants and witnesses. By limiting its coverage to records in which there is a reasonable expectation of privacy, the Bill is consistent with the definition of s. 8 privacy rights discussed above. Moreover, as will be discussed below, the mere fact that records are within the ambit of Bill C-46 will not, in itself, prevent the accused from obtaining access to them. Applied in this way, ss. 278.1 and 278.2(1) will not catch more records than they should, and are not overly broad.

[41] I am mindful of the fact that the *Mills* decision was rendered in 1999, at a time when electronic communication and social media were in their infancy. The enumerated list in s. 278.1 references several types of records, such as medical, psychiatric, and counselling records to name a few, all of which are objectively very personal and sensitive in nature and would clearly attract a very high expectation of privacy. On the spectrum of one’s expectation of privacy, it is difficult to equate personal health records with text messages.

[42] Yet in 2017, the Supreme Court of Canada, in *R. v. Marakah*, 2017 SCC 59, determined that text messages can attract a reasonable expectation of privacy. The case did not involve a sexual assault or s. 278.1, but in 2019, the BC Supreme Court, in *R. v. R.M.R.*, 2019 BCSC 1093, held that text messages between an accused and

complainant in a sexual assault trial constituted records within the meaning of s. 278.1, and therefore were subject to the screening process set out in the Impugned Provisions.

[43] Recognizing the much broader range of records being captured by s. 278.1 in the digital age, I have serious questions about whether the *Mills* assessment of the breadth of s. 278.1's application would be the same today. That being said, I am also mindful of the fact that the Court in *Mills* went on to say, at para. 100, that it was the fairness of the procedure not of the definition that was at issue:

> It must also be remembered that the definition of records in ss. 278.1 and 278.2(1) simply establishes the starting point for the analysis proposed by the Bill. Documents falling within the ambit of these provisions, after being subject to the legislative regime, may or may not be ordered to be disclosed to the accused. It is therefore the procedures established by the Bill and not the spectrum of records subject to these procedures that will determine the fairness or constitutionality of the legislation. If the legislative regime fairly provides access to all constitutionally required documents, then the spectrum of records brought under the Bill, if in keeping with the Bill's objectives, cannot be challenged.

[44] In the result, in my view, I am constrained by binding Supreme Court of Canada authority and must conclude that I cannot find that the scope of records captured by s. 278.1 make the Impugned Provisions overbroad in their application. The issue then is whether the procedures set out in ss. 278.93 and 278.94 operate in a manner that fairly respects the rights of the accused under ss. 7 and 11(d), the remaining issue to be decided.

Issue 3: Right to Silence and to make Full Answer and Defence

[45] The applicant asserts that the Impugned Provisions do not operate fairly as they violate his right to remain silent and to make full answer and defence, procedural rights

falling within the ambit of s. 7 of the *Charter*, which, in turn, is a breach of his interrelated right to a fair trial guaranteed under s. 11(d). More specifically, he says that the Impugned Provisions violate an accused's right to silence and to make full answer and defence by forcing the accused to reveal his hand prior to trial and to disclose possible defences prior to deciding which to advance. The accused is effectively forced to highlight frailties in the Crown's case, allowing the Crown to solidify or correct its case with the help of the accused.

[46] The respondent takes the position that there is no violation of ss. 7 or 11(d), noting that similar arguments have been advanced and rejected by the Supreme Court of Canada in both *Darrach* and *Mills* in relation to strikingly similar procedural regimes. Both decisions made it clear that an accused has no right to defend by ambush. In effect, the respondent says that constitutionality of the regime has already been addressed and there is no compelling reason to treat records relating to the complainant that are in the accused's possession any differently than evidence of prior sexual activity or production of third party records.

Related case law

[47] The Impugned Provisions have been the subject of constitutional challenges advancing similar arguments in courts across the country, with mixed results.

[48] Three cases out of Ontario, *R. v. (A.)F.,* 2019 ONCJ 391, *R. v. A.C.*, 2019 ONSC 4270, and *R. v. C.C.*, 2019 ONSC 6449, dismissed constitutional challenges primarily on the basis there was no compelling reason to treat private records in the possession of the accused any differently than evidence of prior sexual activity. *(A.)F.* and *A.C.*

appear to relate to records that would fall within the definition of s. 276. In *C.C.*, however, the records included Facebook posts and messages authored by the complainant that were not sexual in nature. Indeed, the records apparently related to a non-sexual offence the accused was also facing. Nonetheless, Raikes J. found that admissibility of the record was subject to the screening procedure, and held the procedure to be constitutional noting that the right to make full answer and defence did not include the right to ambush the complainant with sensitive, and potentially embarrassing, personal information.

[49] At the other end of the spectrum, the decisions of *R. v. A.M.*, 2019 SKPC 46, *R. v. Anderson*, 2019 SKQB 304, and *R. v. J.S.*, [2019] A.J. No. 1639 (A.B.Q.B.), each found the Impugned Provisions to be unconstitutional, on the basis that the disclosure requirements and the resulting effect on the accused's right to cross-examine violated ss. 7 and 11(d) of the *Charter*.

[50] The decisions of *R. v. A.R.S.*, 2019 ONCJ 645, and *R. v. J.J.*, 2020 BCSC 29, articulate a middle ground, holding that the disclosure requirement violates the right to silence, but that the Impugned Provisions can be saved by eliminating any requirement that the accused disclose the particulars of the evidence and its anticipated relevance before the complainant has testified in chief.

Analysis

[51] The analysis under s. 7 is a contextual one, which must consider more than the rights of the accused. As noted in *Mills*, at paras. 61 through 63:

> 61 At play in this appeal are three principles, which find their support in specific provisions of the Charter. These are full answer and defence, privacy, and equality. No single principle is absolute and capable of trumping the others; all must be defined in light of competing claims. As Lamer C.J. stated in Dagenais, supra, at p. 877: "When the protected rights of two individuals come into conflict ... Charter principles require a balance to [page714] be achieved that fully respects the importance of both sets of rights." This illustrates the importance of interpreting rights in a contextual manner -- not because they are of intermittent importance but because they often inform, and are informed by, other similarly deserving rights or values at play in particular circumstances.
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> 62 The respondent's right to liberty under s. 7 of the Charter is engaged because he faces the possibility of imprisonment. The question therefore becomes whether the procedure outlined in ss. 278.1 to 278.91 of the Criminal Code violates the principles of fundamental justice. To answer this we must determine what the relevant rights are. First of all, the denial of the accused's ability to make full answer and defence implicates s. 7. An unreasonable search and seizure of a complainant's records, however, violates the complainant's right to privacy protected under s. 8. As this Court made clear in Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, at p. 502, both of these rights are instances of the "principles of fundamental justice" enshrined in s. 7. Insofar as the rights at stake all fall within ss. 7 to 14, the "principles of fundamental justice" provide a useful context for defining these rights in light of each other.
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> 63 Considered in the abstract, these principles of fundamental justice may seem to conflict. The conflict is resolved by considering conflicting rights in the factual context of each particular case. Therefore, we do not say that a complainant's right to be free from an unreasonable search and seizure may be justifiably infringed by the accused's right to make full answer and defence or vice versa. Rather, part of what defines both a reasonable search or seizure and full answer and defence is a full appreciation of these principles of fundamental justice as they operate within a particular context.

[52] As in *Mills* and *Darrach*, the competing interests to be balanced in this case are full answer and defence, privacy, and equality, with the added interest of the accused's right to remain silent.

[53] Consideration of the complainant's equality interest requires consideration of the very troubled history of the treatment of sexual assault complainants in the criminal

justice system. It is undisputed that personal information of complainants, particularly evidence of prior sexual activity, has systematically been used to import rape myths and stereotypes in an effort to undermine both character and credibility. It is also undisputed that this continues to be a significant problem within the system. Recently, Moldaver J. noted at para. 1 of *R. v. Barton*, 2019 SCC 33:

> We live in a time where myths, stereotypes, and sexual violence against women -- particularly Indigenous women and sex workers -- are tragically common. Our society has yet to come to grips with just how deep-rooted these issues truly are and just how devastating their consequences can be. Without a doubt, eliminating myths, stereotypes, and sexual violence against women is one of the more pressing challenges we face as a society. 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.

[54] Efforts to address the inequality in the treatment of sexual assault complainants have focussed on the development of screening procedures designed to consider the complainant's right to privacy in the determination of admissibility of evidence in which the complainant has a reasonable expectation of privacy. It must be remembered, however, that what is at issue is not the use of the complainant's personal information, but the misuse of it in a way that distorts the truth-seeking function.

[55] Proper use of private information is often essential to the accused's right to make full answer and defence.

[56] Consideration of the accused's right to a fair trial, on the other hand, must acknowledge that fundamental justice requires a fair trial, but not a trial with the most favourable procedures imaginable. (see *Mills* at para. 72; *Darrach* at para. 55; and *R. v.*

Goldfinch, 2019 SCC 38). The accused's right to make full answer and defence is also not unlimited. The accused does not have the right, for example, to call evidence that is irrelevant, misleading, or reliant on myths and stereotypes.

[57] With these caveats, the protected interests of the accused at issue are the right to silence and the right to make full answer and defence with particular focus on the right of cross-examination.

[58] The critical importance of the right to silence and the principle against self-incrimination was articulated by the Supreme Court of Canada in *R. v. P.(M.B.)*, [1994] 1 S.C.R. 555, at paras. 36 and 37:

> 36 Perhaps the single most important organizing principle in criminal law is the right of an accused not to be forced into assisting in his or her own prosecution: M. Hor, "The Privilege against Self-Incrimination and Fairness to the Accused", [1993] *Singapore J. Legal Stud.* 35, at p. 35; P. K. McWilliams, *Canadian Criminal Evidence* (3rd ed. 1988), at para. 1:10100. This means, in effect, that an accused is under no obligation to respond until the state has succeeded in making out a *prima facie* case against him or her. In other words, until the Crown establishes that there is a "case to meet", an accused is not compellable in a general sense (as opposed to the narrow, testimonial sense) and need not answer the allegations against him or her.
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> 37 The broad protection afforded to accused persons is perhaps best described in terms of the overarching principle against self-incrimination, which is firmly rooted in the common law and is a fundamental principle of justice under s. 7 of the *Canadian Charter of Rights and Freedoms*. As a majority of this Court suggested in *Dubois v. The Queen*, [1985] 2 S.C.R. 350, the presumption of innocence and the power imbalance between the state and the individual are at the root of this principle and the procedural and evidentiary protections to which it gives rise.

[59] The Supreme Court of Canada addressed the right to silence and the accused's right to test the Crown's evidence through cross-examination in *R. v. R.V.*, 2019 SCC 41, at paras. 38 through 41:

> 38 Individuals charged with criminal offences are presumed innocent until proven guilty. As a result, an accused has the right to call the evidence necessary to establish a defence and to challenge the prosecution's evidence: *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 663. "Full answer and defence" is a principle of fundamental justice, protected by s. 7 of the *Canadian Charter of Rights and Freedoms*. In *Seaboyer*, McLachlin J. explained, at p. 608:
>
> > The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution.
> >
> > …
> >
> > In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled.
>
> 39 Generally, a key element of the right to make full answer and defence is the right to cross-examine the Crown's witnesses without significant and unwarranted restraint: *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, at paras. 1 and 41; *Osolin*, at pp. 664-65; *Seaboyer*, at p. 608. The right to cross-examine is protected by both ss. 7 and 11(*d*) of the *Charter*. In certain circumstances, cross-examination may be the only way to get at the truth. The fundamental importance of cross-examination is reflected in the general rule that counsel is permitted to ask any question for which they have a good faith basis -- an independent evidentiary foundation is not required: *Lyttle*, at paras. 46-48.
>
> 40 However, the right to cross-examine is not unlimited. As a general rule, cross-examination questions must be relevant and their prejudicial effect must not outweigh their probative value: *Lyttle*, at paras. 44-45. In sexual assault cases, s. 276 specifically restricts the defence's ability to ask questions about the complainant's sexual history. By virtue of s. 276(3), full answer and defence is only one of the factors to be considered by the trial judge; it must be balanced against the danger to the other interests protected by s. 276(3). These additional limits are necessary to protect the complainant's dignity, privacy and equality interests: *Osolin*, at p. 669; see also *R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 61-68. They

> also aim to achieve important societal objectives, including encouraging the reporting of sexual assault offences: s. 276(3)(b).
>
> 41 Thus, the fact that the accused's ability to make full answer and defence requires that the complainant be cross-examined is not the end of the analysis. The scope of the permissible questioning must also be balanced with the danger to the other interests protected by s. 276(3), including the dignity and privacy interests of the complainant.

[60] In considering the interplay between the privacy rights of the complainant and the accused's right to a fair trial in the context of the Impugned Provisions, the applicant has centered his concerns on the disclosure requirement. As noted, s. 278.93 requires the accused to disclose, upon seven days' notice, the particulars of the evidence in the accused's possession and its relevance to the proceedings, in other words, how the accused intends to use the evidence. On its face, this disclosure is clearly contrary to the right to silence. It is well settled that the accused has no obligation to disclose his or her case to the Crown in advance of the Crown presenting a case to meet.

[61] Defence disclosure obligations are extremely limited in our criminal justice system because of the right to silence. The respondent points to the requirements to disclose an alibi defence and expert reports as two situations in which an accused is required to make disclosure to the Crown; however, I would note these two situations differ significantly in their impact from the disclosure required by the Impugned Provisions.

[62] With respect to an alibi defence, firstly, it relates to the assertion of an affirmative defence as opposed to impeachment of the Crown's case, and secondly, the accused is not barred from advancing an alibi defence if he or she opts not to disclose to the Crown; though non-disclosure will go to weight.

[63] With respect to expert evidence, s. 657.3(3) requires advance disclosure by defence of the expert's name, field of expertise, and qualifications 30 days prior to trial. Disclosure of the expert's report or opinion, however, is not required until after the Crown has closed it's case.

[64] Most importantly, neither the alibi or the expert witness disclosure requirement has the potential to change the way in which the evidence comes out, undermining the accused's right to make full answer and defence.

[65] The same cannot be said of the Impugned Provisions. Where the records in the accused possession relate to impeachment, disclosure not just to the Crown, but to the very witness the defence will be seeking to impeach runs a very real risk of the disclosure influencing how the evidence comes out. As noted by Henning J. in *A.M.*, there is a reason that witnesses are excluded from the courtroom until such time as they are called to testify.

[66] The respondent suggests that the risk is minimal as the witness can be cross-examined on the prior knowledge of the defence strategy and how it may have influenced the evidence. This is certainly an option and one with some hope of success where the accused is seeking to impeach the witness on something said in a prior statement, but where use of the record to impeach the witness requires that the accused lay a foundation through cross-examination, prior knowledge of the accused's strategy will very likely make impeachment efforts meaningless. As noted by Breen J. in *A.R.S.* at paras. 70 and 71:

> 70 The integrity of a witness and the credibility of their testimony are brought into question when they gain access to relevant information prior to testifying. This concern is entrenched in our criminal law and informs investigative practices, trial procedure and evidentiary rules. The tainting of witnesses, by any means, undermines the truth seeking function of the trial.
>
> 71 In response, the prosecution argues that the extent to which the testimony of a complainant has been influenced by access to the application record can be revealed in cross-examination. Cross-examination may well prove adequate where the impeachment potential of the record is based on inconsistencies between the contents of the record and the complainant's prior statements to police. A complainant who deviates from a prior statement to avoid contradiction can be cross-examined on the prior statement and face the suggestion that their change in position is attributable to knowledge gained from access to the defence application record. The situation is far different, however, where the foundation for contradiction must be established in cross-examination. A witness who has knowledge of the content of the defence brief "is in a position to tailor his or her evidence" and "escape the grasp of contradiction".

[67] Similarly, in *J.S.*, Sanderman J. said at paras. 24 and 25:

> 24 The dynamics of the trial are changed. When the accused is required to provide details in relation to evidence - evidence possessed by the defence that is likely to be used for purpose of impeaching the complainant well in advance of the trial the accused's right to a fair trial is potentially compromised. Any time a witness is provided with information in relation to the accused's strategy on cross-examination and how the witness' evidence will be challenged gives the witness the opportunity to colour their evidence to avoid contradiction. The cross-examination may well be rendered ineffective. Orders for the exclusion of witnesses are made in order to ensure that the evidence of a witness is not effected by the evidence given by others before they testify.
>
> 25 It is not absurd to suggest that there is a real potential for the structuring of evidence from a complainant if the complainant is given in advance of their testimony material that will be used by the accused to attack the reliability of the testimony. Knowing of the tactics to be employed by the accused can lead to the structuring of evidence to meet the attack. The potential for restricting the efficacy of the basic tool of counsel for the accused is real.

[68] Both cases highlight the critical importance of some element of surprise in ensuring an effective cross-examination. The respondent asserts that this element of surprise effectively amounts to a defence by ambush, noting that the case law is clear that an accused has no constitutional right to ambush the complainant.

[69] However, proper impeachment through cross-examination is not, in my view, the equivalent of defence by ambush. The former is an entirely legitimate and appropriate tactic in defending an accused on a criminal charge. Defence by ambush as defined by the Supreme Court of Canada, in cases like *Darrach*, relates to ambushing the complainant with misleading evidence intended to put the complainant on trial by evoking one of the twin myths. It is untenable to suggest that an accused cannot use records, which may or may not take a complainant by surprise, for the legitimate purpose of testing the complainant's credibility, the very goal of cross-examination.

[70] The respondent also counters with the argument that there are other ways that an accused's strategy may be brought to the attention of the complainant, such as in the circumstances of a retrial. This argument was referenced as persuasive in the *(A.)F.* decision. However, I fail to see how the two situations can be equated. If the complainant were to learn the defence's strategy during an initial trial, resulting in either a mistrial or an appellate order for a new trial, there would be a record of the complainant's initial testimony, under oath, which could be utilized in the event of a deviation in the complainant's evidence. Furthermore, I would note the comments of Duncan J. in the *J.J.* decision in response to this argument at paras. 74 and 75:

> 74 To maintain that the impugned sections do not violate the *Charter* because there are other ways a complainant may learn about the defence

> strategy is somewhat analogous to the Crown's argument in *R. v. Nur*, 2015 SCC 15, where the constitutionality of mandatory minimum sentences for firearms offences was in issue. The argument was advanced that the exercise of prosecutorial discretion to proceed summarily to avoid mandatory minimums could save an otherwise unconstitutional sentencing provision.
>
> 75 McLachlin CJC, for the majority, rejected the argument, observing that it could lead to an unfair and uneven application of the law and did not accord with Parliament's responsibility to enact constitutional laws for the people of Canada, at paras. 85-91. Relying on the contention that there are other ways a complainant can learn of the defence strategy to save the constitutionality of the accused in possession provisions could render a similar mischief.

[71] Finally, the respondent points to the disclosure requirements in place in relation to s. 276 applications, and third party record applications as being similar to that imposed by the Impugned Provisions, requirements that have been upheld by the Supreme Court of Canada. In my view, there are distinct differences between the three situations.

[72] With respect to s. 276 applications, it must be remembered that *Darrach* upheld a requirement to disclose particulars of prior sexual activity, information that is extremely personal and highly sensitive, and in which a complainant has a high level of expectation of privacy. Notwithstanding the fact that recent amendments have expanded the s. 276 definition of sexual activity to include information of a sexual nature in a variety of different formats, the fact remains that the unifying factor for all types of evidence that will fall within s. 276 is the sexual nature of the evidence. Sexual activity evidence goes to the very root of the problem that Parliament is trying to redress – namely, attempts to raise the inference that a complainant is more likely to have consented or less worthy of belief by virtue of prior sexual activity. While there may be

instances where prior sexual activity can be legitimately put before the court, there are sound policy reasons, given the well-documented danger of its improper use, to require an accused to demonstrate that such evidence is not being proffered for an improper purpose.

[73] With respect to third party records, I am mindful of the fact that the same definition of records applies to both situations; however, there are distinct differences. Firstly, in the third party record scheme, the record is not in possession of the accused. *Mills* made it clear the third party record scheme is not to be used to support fishing expeditions. Accordingly, basic logic requires the accused to disclose particulars of what he or she is seeking to satisfy the court that the request for production is legitimate. Secondly, the third party record scheme envisions the production of records from third parties who are, by and large, required to maintain formal records and keep them confidential, such as government departments or health professionals. Such records, again, are extremely sensitive and attract a high expectation of privacy. As noted in *Mills*, access to such records raises questions about the s. 8 rights of the complainant to be secure against unreasonable search and seizure.

[74] Records already in the possession of the accused, by contrast, do not raise questions about the s. 8 rights of the complainant. Indeed, the Supreme Court of Canada, prior to the enactment of the Impugned Provisions, found in *Shearing*, that the third party record scheme does not apply to records already in the possession of the accused.

[75] This is not to suggest that loss of possession extinguishes a complainant's privacy interests in a record (see *R. v. Osolin*, [1993] 4 S.C.R. 595 and *Shearing*), but simply that the absence of s. 8 implications changes the character of the complainant's privacy interest that must be balanced against the rights of the accused.

[76] In addition, as previously noted, the definition in s. 278.1 is now being interpreted as including electronic communications and social media posts even when they are not sexual in nature. Such informal "records" are the very records that an accused is most likely to be in possession of, and the primary relevance of such records will predominantly be impeachment. In my view, such records, while still being records relating to the complainant for which there is a reasonable expectation of privacy, nonetheless do not attract the same level of expectation of privacy as would attach to confidential health or counselling records.

[77] This is not to say that an accused would never be in possession of records with a high level of expectation of privacy, nor that an accused would never attempt to use less formal records in his or her possession for improper purposes, but the proportionate likelihood of this happening is dramatically less than formal third party records or evidence of prior sexual activity.

[78] In the result, I am satisfied that the applicant has established that the Impugned Provisions infringe his right to silence and his right to make full answer and defence. I agree with the words of Rothery J. in *Anderson* at para. 22 as follows:

> The nature of this offence is one that usually occurs in private, without any witnesses other than the complainant and the accused. Often, it is a case of "she said, he said" (or in this trial, "he said, he said"). The defence must

> be permitted to test the veracity of a complainant, within the constraints of cross-examination as articulated in *Lyttle* and *R.V.* That is, the complainant's questions must be relevant, and their prejudicial effect must not outweigh their probative value. The complainant's privacy rights associated with records in the accused's possession must give way to the accused's rights under ss. 7 and 11(d) of the *Charter*, that is, an unencumbered cross-examination. The balance is incontrovertibly in the accused's favour.

[79] In concluding that the Impugned Provisions infringe the applicant's right to silence and right to make full answer and defence contrary to ss. 7 and 11(d) of the *Charter*, I have considered whether the halfway position advanced in the *A.R.S.* and *J.J.* decisions is a workable solution to render the Impugned Provisions constitutional in their application. There is a certain attraction to the position; however, I am loathe to adopt it, as, in practice, it would necessitate full hearings on the admissibility of every record even where the record is clearly admissible and proffered for a legitimate purpose, resulting in needless delay.

[80] This does not mean, however, that a mechanism is not necessary to address admissibility with respect to records attracting a high expectation of privacy or where there are indicators that the evidence is being elicited for an improper or misleading purpose. In this regard, I again agree with Rothery J. in the *Anderson* decision in para. 24 where he references the *Shearing* decision as providing that important mechanism:

> A complainant is not left without a remedy if these impugned sections of the *Criminal Code* are rendered unconstitutional. Any records that hold a high degree of privacy that somehow make their way into the accused's possession, as was the situation in *Shearing*, can be addressed in the same manner as outlined in *Shearing*. That is, the trial judge holds a *voir dire*, with the complainant and counsel present, to determine the admissibility of that record.

Standing of Complainant

[81] The final component of the applicant's argument that the Impugned Provisions violate his right to a fair trial relates to the fact the complainant is given standing to make representations at the admissibility hearing under the Impugned Provisions. In particular, the applicant raises concerns about the fact the complainant is given standing to make representations but is not compellable and therefore cannot be cross-examined on any factual considerations raised by submissions.

[82] In considering the constitutionality of the complainant's role in the admissibility hearing, I find the following comments by Breen J. at paras. 81 and 82 of *A.R.S.* to be persuasive:

> 81 A sexual assault complainant's privacy is acutely impacted by testifying at a criminal trial. Historically the law has discriminated against such witnesses, who are most frequently women or children. This mistreatment has resulted in a loss of confidence in the legal system and a widespread reluctance on the part of victims to seek the protection of the law. Affording complainants standing and a right to counsel will improve the quality of justice by ensuring that courts fully appreciate the impact of evidentiary rulings on the privacy interests of witnesses. Extending natural justice to complainants enhances the confidence of complainants and the public in the administration of justice.
>
> 82 Third parties are routinely afforded standing in criminal proceedings when their rights are engaged. Indeed, complainants enjoy such rights in relation to applications for production of private records. Moreover, in *Shearing* the Court implicitly approved of a complainant's participation in the admissibility *voir dire*.

[83] It must be remembered that the hearing is on the issue of admissibility rather than the credibility of the record in question. Accordingly, I would expect submissions from all parties including the complainant to be focussed on the question of

admissibility. I fail to see how the accused's rights would be prejudiced with the proposed role of the complainant in the hearing. Accordingly, I am not satisfied that the applicant has demonstrated a violation in this regard.

Section 1

[84] Having found the Impugned Provisions infringe the applicant's ss. 7 and 11(d) rights, the final question to be addressed is whether the Impugned Provisions are saved by s. 1 of the *Charter*. Section 1 provides that the rights guaranteed in the *Charter* are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

[85] The *Oakes* test stands for the proposition that an otherwise unconstitutional provision can be saved under s. 1 where the law has a pressing and substantial objective and the provision is proportionate to that objective. Proportionality requires the provision to be rationally connected to the law's objective, minimally impairing of the right in question, and the law's salutary effects must outweigh its deleterious effects.

[86] The legislative objective of protecting the privacy interests of complainants in sexual assault trials with a view to eliminating reliance on the twin myths or discriminatory stereotypes is clearly a laudable one; more so when one considers the lengthy history of unfair treatment of complainants in sexual assault trials. In the face of the acknowledged persistence of myths and stereotypes distorting the fact-finding process, it is not difficult to conclude that the Impugned Provisions are rationally connected to the law's objective.

[87] However, in my view the Impugned Provisions result in a major impairment of an accused's right to silence and right to make full answer and defence, to such an extent that I am not persuaded that the Crown has demonstrated that the law's salutary effects outweigh its deleterious effects. I am not satisfied that the Impugned Provisions are saved by s. 1. Consequently, I find that the Impugned Provisions are invalid in their application to the case at bar.

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RUDDY T.C.J.