

CANADA / JUDGMENT

R. v. J.J.

2020 BCSC 29

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. J.J.,

2020 BCSC 29

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Registry: New Westminster

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v.

J.J.

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Before: The Honourable Madam Justice Duncan

Reasons for Judgment on the Constitutionality of ss. 278.92-278.94 of the Criminal Code

Counsel for the Crown:

L. Ruzicka

A. Blunt

Counsel for the Accused:

A. Yusuf

Place and Dates of Hearing:

New Westminster, B.C.

October 7, 2019

December 9-10, 2019

Place and Date of Judgment:

New Westminster, B.C.

January 6, 2020

Introduction

- [1] On January 6, 2020, I pronounced the result of this application. These are my reasons. They may be shared with counsel engaged with similar applications.
- [2] The accused, J.J., is charged with sexual assault, contrary to s. 271 of the Criminal Code. His counsel, Mr. Yusuf, is in possession of communications between J.J. and the complainant. Mr. Yusuf wants to use those communications on cross-examination of the complainant; however, he says those communications meet the definition of a record in s. 278.1 of the Criminal Code and as a result he must apply to have the communications admitted as relevant to an issue at trial pursuant to ss. 278.92, 278.93 and 278.94.
- [3] These sections came into force on December 13, 2018 as part of Bill C-51. For ease of reference, I will refer to them as the "accused in possession" sections.
- [4] The sections require that, where the defence wishes to tender records that are in the possession of the accused and in which the complainant has a privacy interest, the defence must make an application for a ruling on their admissibility. The application must be made on seven days' notice to the Crown, unless the trial judge permits a shorter period. The admissibility hearing is in camera, but the complainant is permitted to attend and be represented by counsel.
- [5] The defence argues that these provisions breach the accused's right to a fair trial under s. 7 of the Charter, the right against self-incrimination under s. 11(c) and the right to make full answer and defence under s. 11(d).
- [6] Crown Counsel, Ms. Ruzicka, takes the position that the provisions represent an incremental step in the evolution of legislation designed to address the uniquely disadvantaged situation faced by sexual assault complainants. Sexual assault complainants have historically been subjected to irrelevant, unfair and stereotypical attacks on their character and credibility. Parliament's approach to the issue of how a complainant's records in possession of the accused must be dealt with is fair to both the complainant and the accused, and is constitutionally sound.

- [7] While the Crown initially took the position that Mr. Yusuf had to disclose the record in order to challenge the provisions in question, Ms. Ruzicka pointed out that this is not a necessary pre-requisite to a Charter challenge: *R. v. Mills*, [1999] 3 S.C.R. 668 at paras. 19, 35-42. Accordingly, the records in question are not before me.

The sections in issue

- [8] A record is defined in s. 278.1 as:

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.

- [9] This is the same definition of record that applies to applications by an accused for records in the possession of a third party under s. 278.2. In *Mills*, the majority upheld this definition of record as one that was carefully tailored to respect a complainant's privacy rights, while still providing an accused person access to private records that may be relevant to an issue at trial.

- [10] Mr. Yusuf did not argue this definition was overbroad, but I note that *Mills* was decided before communication through text messages or other similar electronic means became the norm.

- [11] An accused person facing trial for one of a list of enumerated offences, including sexual assault (s. 271), may not use records that fall within the s. 278.1 definition unless the judge determines, in accordance with procedures set out in ss. 278.93 and 278.94, that the evidence is admissible under s. 276 (relating to evidence of the complainant's sexual activity) or in any other case, 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.

- [12] Mr. Yusuf did not advance an argument that s. 278.1, as drafted, is overbroad for capturing evidence that does not fall within the definition of other sexual activity in s. 276.

- [13] The factors a judge must take into account in determining admissibility are enumerated in s. 278.92(3):

- (a) the interests of justice, including the right of the accused to make a full answer and defence;
- (b) society's interest in encouraging the reporting of sexual assault offences;
- (c) society's interest in encouraging the obtaining of treatment by complainants of sexual offences;

- (d) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (e) the need to remove from the fact-finding process any discriminatory belief or bias;
- (f) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (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
- (i) any other factor that the judge, provincial court judge or justice considers relevant.

[14] The application process is prescribed in s. 278.93:

278.93 (1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 278.94 to determine whether evidence is admissible under subsection 276(2) or 278.92(2).

- (2) An application referred to in subsection (1) must be made in writing, setting out detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial, and a copy of the application must be given to the prosecutor and to the clerk of the court.
- (3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.
- (4) If the judge, provincial court judge or justice is satisfied that the application was made in accordance with subsection (2), that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice and that the evidence sought to be adduced is capable of being admissible under subsection 276(2), the judge, provincial court judge or justice shall grant the application and hold a hearing under section 278.94 to determine whether the evidence is admissible under subsection 276(2) or 278.92(2).

[15] The hearing is governed by s. 278.94:

278.94 (1) The jury and the public shall be excluded from a hearing to determine whether evidence is admissible under subsection 276(2) or 278.92(2).

- (2) The complainant is not a compellable witness at the hearing but may appear and make submissions.
- (3) The judge shall, as soon as feasible, inform the complainant who participates in the hearing of their right to be represented by counsel.

- (4) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part of it, is admissible under subsection 276(2) or 278.92(2) and shall provide reasons for that determination, and
 - (a) if not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;
 - (b) the reasons must state the factors referred to in subsection 276(3) or 278.92(3) that affected the determination; and
 - (c) if all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.

[16] For ease of reference, s. 276(2) states:

- (2) In proceedings in respect of an offence referred to in subsection (1), evidence shall not be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 278.93 and 278.94, that the evidence
 - (a) is not being adduced for the purpose of supporting an inference described in subsection (1);
 - (b) is relevant to an issue at trial; and
 - (c) is of specific instances of sexual activity; and
 - (d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[17] Section 278.95 contains a comprehensive ban on publication of the contents of the application, evidence taken, information given or representation made at a hearing and reasons for judgment.

The history of legislation

[18] The landscape of sexual assault litigation in the criminal courts has evolved over the past few decades. The need for the prosecution to prove that the complainant reported at the earliest opportunity (the "recent complaint" doctrine) has been abolished. Complainants are no longer routinely confronted with their sexual history without a stringent examination of whether or not it has any relevance to the proceedings.

[19] While Parliament's initial attempt at absolute exclusion of prior sexual history evidence was found unconstitutional in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, its second, more nuanced effort was upheld in *R. v. Darrach*, 2000 SCC 46.

- [20] A related issue in sexual assault proceedings was access to and use of the complainant's medical or counselling records in the hands of third parties. Parliament responded by enacting ss. 278.1 through 278.91. These provisions set out a framework for an accused to apply to the court, in advance of a trial, for production of third party records to a judge for vetting and, if relevant detail is discovered, disclosure to the defence. This legislation was found to be constitutionally sound in *Mills*, *supra*.
- [21] As the law respecting third party records and the complainant's prior sexual history was evolving, concerns regarding private records belonging to the complainant, but in the possession of the accused, emerged in the case law. This raised questions about how the courts ought to deal with these records where the accused intended to use them in sexual assault trials.
- [22] In *R. v. Osolin*, [1993] 4 S.C.R. 595, the competence of the 17-year-old sexual assault complainant to testify under oath was questioned. Her mental health records were before the court. Defence counsel sought leave to cross-examine the complainant on the records. The trial judge refused and the matter was appealed.
- [23] In the Supreme Court of Canada, Cory J. acknowledged that reasonable limitations may be placed on the cross-examination of complainants in sexual assault trials, because the right to cross-examine has never been unlimited (at para. 29). Limitations focussed on the prevention of cross-examination to feed damaging and unfounded stereotypes about sexual assault victims were deemed permissible. The rights of complainants were taken into account by the Court in its analysis of how and in what circumstances an accused person could cross-examine on records already in the possession of the defence.
- [24] In *Osolin*, the majority held that where contentious issues arise concerning the cross-examination of a complainant in a sexual assault trial, a voir dire should be held. In those cases, the defence would have to demonstrate that the proposed cross-examination was appropriate and if it was allowed, the jury would be instructed on the proper use of the evidence.
- [25] Despite Parliament's focus on other aspects of legislation governing sexual assault, there was no immediate legislative response to the issue concerning the complainant's private records in *Osolin*. Subsequently, the Supreme Court of Canada considered the issue in *R. v. Shearing*, 2002 SCC 58. The accused had possession of a diary belonging to KWG, one of the complainants, which she had left behind when she moved out of the accused's house. The diary contained personal information, but no notes about any sexual contact with the complainant.

[26] Defence counsel confronted KWG with the diary on cross-examination, arguing it was relevant because there was nothing in it about the alleged sexual assaults or mistreatment by her mother, which she had alleged in her evidence. KWG retained counsel and demanded the return of the diary. The trial judge refused to permit an unfettered cross-examination on the contents of the diary, or more accurately, the lack of any notations in it that the sexual assaults alleged had occurred.

[27] In the Supreme Court of Canada, Binnie J., for the majority, referred to the complainant's privacy interest in the diary, recognizing that its possession by defence counsel did not extinguish the complainant's privacy interests in its contents. The majority determined that the trial judge was correct to curtail cross-examination but that he should have applied the test articulated in *Osolin*: whether the cross-examination would prejudice the complainant in a manner that substantially outweighed its potential probative value to the accused, at para 109.

[28] In applying this test, Binnie J. said:

119 The courts have recognized, no doubt belatedly, that certain techniques of cross-examination traditionally employed in sexual assault cases have distorted rather than advanced the search for truth. This case illustrates one of the problem areas. The omission to record some piece of information is only probative if there is a reasonable expectation that such a record would be made [citations omitted]. A pilot's log will record relevant flight information, because that is its purpose, but not what he or she had to eat for breakfast over the Atlantic Ocean. Hospital records will include medical observations but not what television station the patient happened to be watching that evening. What was objectionable about the defence approach here was that it overlooked (or perhaps resolutely resisted) the need to lay before the jury a rational basis for the inference it ultimately wished to draw, namely that the non-recording of a certain type of information was circumstantial evidence that the alleged abuse never happened.

120 The problem lies in the unspoken and unproven premise. KWG was obviously under no legal or other duty to record such observations. She clearly did not follow a regular practice of making such entries because no entries of any kind of abuse were made. All sides agree that the diary entries were "mundane". Why assume that a diary devoted to "mundane" entries would necessarily report on episodes of physical and sexual abuse? On what logical basis would such a non-record give rise to an inference of testimonial deficiency or fabrication? In the absence of some evidentiary basis for the premise that abuse ought to have been recorded, the result of allowing the cross-examination to proceed as proposed by the defence ("the entire contents are fair game") would be to allow the defence to go to the jury at the end of the trial and to point to the absence of entries in an effort to suggest - nod nod wink wink - that women and children who are sexually and physically abused do not suffer in silence, but must and do confide their inner hurt even if only to their private diaries.

121 While in most instances the adversarial process allows wide latitude to cross-examiners to resort to unproven assumptions and innuendo in an effort to crack the untruthful witness, sexual assault cases pose particular dangers. Seaboyer, Osolin and Mills all make the point that these cases should be decided without resort to folk tales about how abuse victims are expected by people who have never suffered abuse to react to the trauma: Mills, *supra*, at paras. 72, 117-19; R. v. D.D., [2000] 2 S.C.R. 275, 2000 SCC 43, at para. 63. This is the law and the trial judge was right to apply it.

[29] The majority allowed the appeal from conviction on the counts involving KWG and ordered a new trial on the basis that the trial judge had unduly limited cross-examination on the diary.

[30] In December 2012, the Senate Standing Committee on Legal and Constitutional Affairs issued its final report on the third party records provisions, entitled Statutory Review on the Provisions and Operation of the Act to amend the Criminal Code (production of records in sexual offence proceedings). The Committee noted the decision in *Shearing* and concluded there was no logical reason to deny individuals who were sexually victimized by persons with access to their personal records the same protection afforded to other individuals who had the protection of the third party records process. The Committee recommended legislative amendments to provide a process and limitations on the use of private records of this nature by accused in sexual assault trials (Recommendations 3 and 4, pp. 41-42).

[31] In this case, the Crown cited examples of individuals charged with sexual offences who may have access to, if not possession of, records in which a complainant may have a reasonable expectation of privacy: a psychologist, a teacher, an employer or even a parental figure.

[32] In early 2016, the trial of Jian Ghomeshi for several counts of sexual assault took place in Ontario. Defence counsel cross-examined the complainants extensively on communications they had with the accused after the alleged sexual assaults, using those communications to contradict elements of the complainants' evidence-in-chief as well as for other purposes. Ghomeshi was ultimately acquitted and the outcome of the case, as well as the defence use of the complainants' communications, was the subject of comment by at least one Senator when the proposed accused in possession provisions were discussed in the Senate.

[33] Senator McIntyre referred to submissions by representatives of the defence bar to the Senate committee, expressing concern about the limitations presented by the proposed accused in possession legislation, and asked Senator Sinclair for his response:

Senator Sinclair: Thank you for the question.

The issue was raised as to whether that element impinges upon the right to a fair trial of the accused. As a general principle, I do not see it doing that at all.

This measure requires that an accused person, who is in possession of records that they wish to use to cross-examine a complainant at trial, must give notice that they intend to use those records and what those records are, and then a judge must rule on their ability to use those records to cross-examine the complainant. The complainant then has the right to appear, with or without counsel, to argue about the potential usage of those records. What that is, in effect, is a requirement for an accused to disclose the documents that they have in hand.

This issue arose in Ghomeshi, as you may remember, where texts were produced in the course of the trial that had been exchanged between the complainant and the accused, and they had not been disclosed to the prosecutor either by the complainant or by the accused, and the prosecutor was caught short by not knowing them. In addition to that, the complainant herself was not aware of some of the texts. However, regardless of that, the court ruled on their admissibility and allowed cross-examination to occur.

The process does not impinge upon the right to a fair trial because, in my view, it is simply a requirement that the accused must disclose, as they do in some other circumstances as well. For instance, if they have evidence of an alibi, they must disclose the evidence of an alibi. I recognize that counsel who made submissions to us at committee say there is a distinction between an alibi defence and cross-examining on documents, and I accept that. Nonetheless, it's the same idea; it's the same principle.

They also argue that it impinges upon the accused's right to silence, but it does not do that because an accused does not have to testify either during the proceeding regarding the documents nor does an accused have to testify at all in the trial. It is his lawyer who can use those documents if the trial judge determines they can be used for cross-examination purposes. So the accused's right to silence is not impinged by that requirement.

[Emphasis added]

[34] On December 13, 2018, Bill C-51 came into force, and the provisions that are challenged before me became law.

Decisions applying the new regime outside the Charter context

[35] In *R. v. R.M.R.*, 2019 BCSC 1093, MacNaughton J. determined that text message communications between an accused and a complainant were subject to the new process in s. 278.92, MacNaughton J. held:

[36] After reviewing the legislative records, I am satisfied that the amendments implementing the s. 278.92 regime contemplate that text message communications between an accused and a complainant would be subject to the new process. That was the intended effect of Parliament in enacting these new procedural requirements. Further, the legislative intent of the new regime was to address a perceived gap in the protection of privacy interests of complainants, and other witnesses, when private records are already in the hands of the accused and the s. 278.3 two-stage process did not apply.

- [37] The inclusion of examples in s. 278.1 of the type of records which contain personal information for which there is a reasonable expectation of privacy does not, in my view, limit the type of records contemplated to the examples given. The definition is inclusive, and whether a document is a record is to be decided in the context of the privacy interests in a specific case.
- [38] In this case, I find that D.H. has a reasonable expectation of privacy with respect to the text messaging records between herself and R.M.R.. They contain personal information in the form of communications between her and R.M.R. over a period of time. The messages include the parties' thoughts, feelings, details of their daily activities, preferences, friendships, and social interactions. These communications were sent between the two of them and were not intended to be shared with the public. While it is possible that R.M.R. could have taken a screenshot of a text message from D.H., and shown it to someone else, absent an express waiver of D.H.'s privacy interest in the texts, or an order under s. 278.1, he should not be permitted to share them with a jury and, ultimately, the public.
- [39] I find that in this case, the text messages between D.H. and R.M.R. are "records" under s. 278.1 and are, therefore, subject to the new requirements under s. 278.92.
- [36] The accused sought to use the text messages in evidence to support his view of how the romantic relationship with the complainant had developed. He argued that the messages tended to refute the suggestion that he was pursuing the disinterested complainant, and that as a result he resorted to drugging her in order to have sexual intercourse with her. The text messages could also support the suggestion that the complainant had consumed alcohol causing memory lapses on earlier occasions, unrelated to anything the accused had done, and that her memory lapse on the night of the alleged assault was not due to anything he had done.
- [37] Finally, the text messages refuted the complainant's account that she was surprised to see the accused on the date of the alleged sexual assault, given that she said in the messages that she would be seeing him later.
- [38] MacNaughton J. determined, after considering the enumerated factors in s. 278.94, that the evidence was admissible because it was relevant to at least one issue at trial and its significant probative value was not substantially outweighed by the danger of prejudice to the proper administration of justice. The records were admitted only for the purposes of impeaching the complainant's evidence, as proof of prior inconsistent statements and to establish facts relevant to the determination of the timing and circumstances under which the two first met and the timing and circumstances of other meetings between them.
- [39] Another case of note concerning the operation of the new regime is *R. v. M.S.*, [2019] O.J. No. 4866. Chapman J. was not asked to rule on the constitutionality of the provisions, but presided over a hearing in which she was provided with the evidence the defence intended to use at trial and asked to determine if it was subject to s. 278.91.

- [40] Chapman J. found that judicial inspection at this threshold stage could be seen as part and parcel of the first stage of the process. She accepted the records in question on a USB stick under seal, without disclosure to the Crown, but observed that her assessment of the relevance of the records was hampered by the fact that she knew nothing about the allegations expected to be made at trial.
- [41] In the result, Chapman J. determined that all text messages, social media postings, photos or videos that involved any sort of discussion of sexual activity and/or sexual innuendo required an application be brought prior to their admission into evidence. Subject to additional information or context, she found a reasonable expectation of privacy in text messages between the complainant and the accused.
- [42] Chapman J. reviewed some of the developing jurisprudence in Ontario, in particular a decision that Mr. Yusuf relies on in the application before me, *R. v. A.R.S.*, 2019 ONCJ 645. In that case, Breen J. determined that a statutory provision that compels disclosure of impeachment material to a complainant in advance of cross-examination violated s. 7 of the Charter, even material which comprised sexual history evidence or prior intimate records. He essentially read down the statutory provisions to permit the defence to bring an application under s. 278.93 at a time of its choosing, even during cross-examination of the complainant.
- [43] Chapman J. opined that such an interpretation would defeat the spirit and intent of the legislation and lead to significant trial management mischief. It was inconsistent with the manner in which evidence of the complainant's sexual conduct history is routinely managed through pre-trial applications. As well:
- [97] If the 7 days notice requirement stipulated in the Criminal Code means that the defence can bring their application at the close of the complainant's evidence then what is the point in the stipulation of 7 days? Realistically this would mean that many sexual assault trials would take place on a bifurcated basis. First the complainant would testify in-chief. Then the application would be brought. And then the application would be heard and decided at stage one. At that point, the trial would be adjourned to facilitate the complainant's right to obtain counsel. The trial would then resume at some later point with a stage 2 hearing. Then, once that is argued and decided, the trial will continue. This is unmanageable and not at all what Parliament intended.
- [44] In response to the defence concern that an application prior to trial would put the complainant on notice of the defence strategy, Chapman J. observed there are other ways in which a complainant may learn of the defence trial plan, such as when a third party records application is made, where a mistrial has occurred or where there is a re-trial following an appeal. An additional potential benefit of vetting the issue prior to trial might well be to enhance the truth-seeking function of a trial by avoiding the ambush of a complainant with private records, including photographs, in a public trial. Chapman J. observed that time requirements in *R. v. Jordan* militate in favour of pre-screening the issue instead of

bifurcating and potentially delaying trials.

- [45] Ms. Ruzicka added a consideration to the list of benefits Chapman J. attributed to a pre-trial application: the fact that in British Columbia, the Crown is required to apply the charge approval standard throughout the prosecution and the potential that a record in the possession of the accused might affect the Crown's decision to proceed.
- [46] In *R. v. W.M.*, 2019 ONSC 6535, the trial judge took a much narrower view of record than either MacNaughton J. or Chapman J. The trial judge found that Facebook messages did not engage the twin myths or contain the complainant's personal information and, to the extent that they did, the complainant willingly shared the information, knowing she was creating an electronic record the accused could share with others.

The Charter sections in issue

- [47] The defence asserts the new provisions breach ss. 7, 11(c) and 11(d) of the Charter.
- [48] Section 7 provides that 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.
- [49] Section 11(c) guarantees that any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence.
- [50] Section 11(d) guarantees the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. It overlaps some of the broad guarantees in s. 7.
- [51] The Crown notes that where the accused alleges a breach of both ss. 7 and 11(d), the analysis should generally take place under s. 7. That section requires an applicant to demonstrate 1. A deprivation of life, liberty or security of the person and 2. That the deprivation does not accord with the principles of fundamental justice. The Crown acknowledges that the accused's liberty interest is engaged, given the potential for imprisonment on conviction.
- [52] The accused bears the burden of demonstrating a Charter breach on a balance of probabilities. If a breach is established, the Crown seeks the opportunity to justify the breach under s. 1 of the Charter by adducing evidence.

The Defence Position

- [53] The defence argues that s. 278.92 violates the accused's Charter rights in a number of ways. Mr. Yusuf refers to it as compelled disclosure of the defence brief before the Crown has made out a *prima facie* case. With rare exceptions, the defence is not required to provide any disclosure to the Crown. The exceptions are alibi, a substantive defence at common law, and expert evidence, pursuant to the Criminal Code.

- [54] The complainant's right to be present at the in camera hearing, and to be represented by counsel, virtually guarantee that the time-honoured right to contradict a witness by cross-examining on prior inconsistent statements is extinguished, thereby imperiling fair trial interests. A complainant has the opportunity to know what the defence may ask about and to tailor responses in anticipation of cross-examination on inconsistencies, as one example.
- [55] The defence does not advocate for an unfettered right to cross-examine a complainant on records in which a reasonable expectation of privacy may be found, but by the end of submissions took the position that the relevance assessment mandated by the new provisions should be left until after the complainant's evidence-in-chief is completed, consistent with the approach of Breen J. noted earlier in these reasons.
- [56] Mr. Yusuf also argues that the accused may be compelled to incriminate himself having to prove, in advance of the complainant's testimony, evidence which establishes his identity as the alleged perpetrator but also casts doubt on other elements of the Crown's case. In other words, in a case where the complainant may be unsure about identifying her alleged assailant, that gap could well be filled by evidence tendered at the hearing.
- [57] The defence urges me to follow decisions in which the legislation has been struck down:
- R. v. A.M., 2019 SKPC 46: Henning J. found some of the provisions violate ss. 7 and 11(d) of the Charter and are not saved under s. 1. The Crown has applied for certiorari as this is a decision of a provincial court. The heart of the finding in A.M. was that disclosure to the complainant of application materials may permit the modification of evidence prior to trial and reduce the force of cross-examination. The judge also referred to the principle that witnesses are excluded from the courtroom until they testify as a rationale for striking down some of the provisions.
 - R. v. Anderson, 2019 SKQB 304: Rothery J. determined that the complainant's privacy rights associated with records in the accused's possession must give way to the accused's right under ss. 7 and 11(d) of the Charter, "that is, an unencumbered cross-examination. The balance is incontrovertibly in the accused's favour", at para. 22.
 - R. v. J.S. (19 November 2019), Edmonton 170876635Q1 (ABQB): Sanderman J. struck down the legislation for violations of ss. 7 and 11(d). He found that it forced the accused to make disclosure to the Crown before trial, which was unprecedented, and reveal how that evidence may be used at trial, which raised the danger of a complainant structuring evidence. Sanderman J. also found the test for admissibility (significant, probative value) was, in effect, too high and overall the legislation went too far. He recognized there is no unfettered right to cross-examine a complainant and articulated the approach from Osolin and Shearing as applicable.
- [58] Mr. Yusuf relies on A.R.S., the decision of Breen J. referenced earlier in my reasons and advocates this approach to resolving the Charter violation in this case. I observe that by circumventing the strict timing requirements of advance notice to the Crown and complainant, this avenue is a halfway house between striking down the legislation in its entirety and upholding the legislation.

- [59] The Crown submits that the decisions striking down the legislation do not fully consider the applicable Charter principles or seat the provisions in the proper context. Ms. Ruzicka maintains that the right to a fair trial and the right to make full answer and defence do not include the right to defend by ambush and there have always been limitations on cross-examination.
- [60] The Crown directed me to a number of decisions from Ontario where constitutional challenges were dismissed, most notably:
- R. v. F.A., 2019 ONCJ 391 - ss. 7, 11(c), 11(d) and 15 challenges dismissed.
 - R. v. A.C., 2019 ONSC 4270 - ss. 7 and 11(d) challenges dismissed.
 - R. v. C.C., 2019 ONSC 6449 - ss. 7 and 11(d) challenges (right to make full answer and defence, right to fair trial, overbreadth) dismissed.
- [61] Ms. Ruzicka reiterates judicial commentary on the limits to cross-examination in the context of sexual assault prosecution. Beginning with Osolin, Cory J. said it was only right that reasonable limitations be placed on cross-examination of a complainant to prevent harassment and risking making the complainant the victim of an insensitive system: para. 66.
- [62] In Darrach, the Court said "the right to make full answer and defence does not include the right to defend by ambush" (at para. 55), although I note that the evidentiary context in that case involved an affirmative defence of consent rather than evidence tendered to impeach or contradict.
- [63] Additionally in Mills, which involves private records of the complainant, the Court said that the right to make full answer and defence does not include the right to information that would only distort the truth-seeking goal of the trial process: para. 90.
- [64] In the context of s. 276 protections, Karakatsanis J. in R. v. R.V., 2019 SCC 41 commented that, while generally a key element of the right to make full answer and defence is the right to cross-examine Crown witnesses without significant and unwarranted restraint, per R. v. Lyttle, 2004 SCC 5, Osolin and Seaboyer, the right to cross-examine is not unlimited:
- [40] 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.
- [65] Other decisions from the Supreme Court of Canada, most recently *R. v. Goldfinch*, [2019] S.C.J. 38, have held that an accused does not have the right to adduce irrelevant evidence or misleading evidence to support illegitimate inferences or distort the truth-seeking function of a trial. Nor can they adduce evidence that relies on or feeds myths and stereotypes about how sexual assault complainants are supposed to act, even if the evidence is exculpatory. This is because the fairness of the trial process is analyzed from the point of view of fairness in the eyes of the community and the complainant as well as the accused.
- [66] This view was expressed in *Mills* where the majority said of s. 7:
- 72 [The] principles of fundamental justice do not entitle the accused to "the most favourable procedures that could possibly be imagined": *R. v. Lyons*, [1987] 2 S.C.R. 309, per La Forest J., at p. 362. This is because fundamental justice embraces more than the rights of the accused. For example, this Court has held that an assessment of the fairness of the trial process must be made "from the point of view of fairness in the eyes of the community and the complainant" and not just the accused: *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155, per Cory J., at p. 198. In a similar vein, McLachlin J., in *Seaboyer*, *supra*, at p. 603, stated:
- The principles of fundamental justice reflect a spectrum of interests, from the rights of the accused to broader societal concerns. Section 7 must be construed having regard to those interests and "against the applicable principles and policies that have animated legislative and judicial practice in the field" (Beare, [[1988] 2 S.C.R. 387], at pp. 402-3 per La Forest J.). The ultimate question is whether the legislation, viewed in a purposive way, conforms to the fundamental precepts which underlie our system of justice.
- [67] The Crown also emphasizes the comments of Karakatsanis J. in *Goldfinch* regarding the exclusion of evidence and trial fairness:
- [30] the law of criminal evidence begins with the general principle that all relevant and material evidence is admissible. The right to a fair trial does not, however, guarantee the most favourable procedures imaginable: the accused's right to make full answer and defence is not automatically breached whenever relevant evidence is excluded (*R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 64; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443, at para. 24; *Mills*, at para. 75). A fair trial also requires that no party be allowed to distort the process by producing irrelevant or prejudicial evidence (*Darrach*, at para. 24).

Analysis

- [68] It is indisputable that complainants in sexual assault cases have historically been subjected to unfair and irrelevant cross-examination. Consequently, Parliament has responded with legislation to govern access to, and admissibility of, evidence at a sexual assault trial. The goal is the eradication of myth-based attacks on complainants.
- [69] The Crown has characterized the legislative response in ss. 278.92 - 278.94 as Parliament stepping in to address a gap concerning records in possession of an accused person in which a complainant has a privacy interest. The question before me is not whether the gap needed to be filled, but whether the measures enacted are respectful of the range of stakeholder rights in a s. 7 inquiry, or the rights of the accused under ss. 11(c) and/or (d) of the Charter.
- [70] The accused is entitled to a fair trial, not a perfect trial or the fairest trial possible. Society has an interest in the trial process, and the complainant's privacy and equality rights must also be weighed in the balance. In my view, if the provisions are read to require an application be made on seven days' notice and held before the complainant testifies in chief, the proper balance of those competing rights cannot be achieved.
- [71] Reading the provisions to require seven days' notice would mean the defence must disclose evidence and related strategy before the Crown has made out a case to meet. It compels the defence to disclose detailed particulars of evidence that may affect the ability of the defence to cross-examine a witness on the foundational elements of credibility and reliability. The record in question may have nothing to do with sexual conduct and a tenuous or non-existent connection to the perpetuation of myths and stereotypes concerning sexual assault complainants.
- [72] The majority of sexual assault cases involve individuals who are known to each other. Many prosecutions solely rely on the evidence of a complainant. The danger that the complainant's evidence may be tailored, consciously or unconsciously, is not illusory. This is why witnesses are almost invariably excluded from the courtroom until they have given their evidence.
- [73] I acknowledge Ms. Ruzicka's point that in reality a complainant may learn about the defence strategy in a variety of other ways, such as after a mistrial in which a complainant has completed her evidence or at a re-trial following an appeal. But this is a separate considerations, outside the challenge to the provisions before me which requires de facto disclosure of detailed particulars of the defence case and its strategy. Legislation must be Charter compliant.

- [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.
- [76] A hypothetical example illustrates the difficulty with a strict application of the seven-day notice provision in the legislation. A complainant alleges she is sexually assaulted at a costume party. All of the men are dressed the same and wearing cartoon character masks. The complainant tells police that the individual who sexually assaulted her was wearing a Mickey Mouse mask. She does not tell police he has a prominent tattoo on his chest, although she describes how he took his shirt off before he sexually assaulted her.
- [77] The accused is arrested in the aftermath of the party, wearing a Mickey Mouse mask. He gives his lawyer a "selfie" of himself and the complainant smiling and embracing. His shirt is unbuttoned and a prominent tattoo can be seen in the photograph. Both the complainant and the accused may have a privacy interest in the photograph, which was not shared with anyone else. The photograph is sufficiently banal that it does not raise any issue about the application of s. 276(2).
- [78] The accused wants to use the photograph to cross-examine the complainant on her failure to notice and describe the tattoo. There was no preliminary hearing in the matter, so the defence has not had an opportunity to probe the complainant's description of her alleged attacker under oath.
- [79] The accused in possession procedure results in the complainant's privacy interest in the photograph prevailing over the accused's fair trial rights by requiring an evidentiary hearing on seven days' notice at which the defence has to provide detailed particulars of the evidence and its relevance.
- [80] The complainant, having notice of the evidence in the defence possession, learns of the existence of the tattoo and its importance to the defence before direct examination. Her evidence on direct examination may be consciously or unconsciously affected by knowing the defence strategy in advance. The complainant may be able to provide an explanation on direct examination for her failure to note the tattoo in her statement to police, or she may purport to recall the tattoo, having had her memory refreshed by the relevance hearing.

- [81] I acknowledge that there appears to be nothing in the legislation to suggest that the accused cannot draw the complainant's attention to the fact that she was present at the relevance hearing and had knowledge of her omission of the tattoo in her statement to police. In other words, the unfairness of having to lay the defence cards on the table in advance of the complainant testifying in chief could arguably be ameliorated by pointing this fact out to the trier of fact. But in my respectful view, this is cold comfort to an individual charged with a serious criminal offence.
- [82] At its heart, a strict reading of the timing provisions in the legislation substantially alters the traditional paradigm of confronting a witness with contradictory evidence to defend oneself by replacing it with a relevance hearing in advance of a witness's testimony. Civil trial procedures concerning mutual document disclosure appear to have been grafted onto a criminal trial where the interests of the Crown, the complainant and the accused are not concerned with financial compensation but with the potential of a criminal conviction.
- [83] With all due respect to Senator Sinclair's comments about the apparent undesirability of the Crown being surprised by some of the cross-examination in the Ghomeshi trial on texts which had not been disclosed to the prosecutor, either by the complainant or the accused, this is not an unusual occurrence in a criminal trial. The defence has never been required to hand over its brief to the Crown in advance of the trial.
- [84] The ability to impeach a witness is a fundamental tool in any barrister's toolbox. It has been effectively removed by a strict application of this legislation, particularly in cases where the parties are known to each other and have been in communication, before or after the alleged sexual assault. The legislation does not prevent an unfair ambush of a sexual assault complainant by defence counsel seeking to advance an affirmative defence of consent or honest but mistaken belief in consent, as was the case in Darrach, or with therapeutic records, as in Mills; rather, it hobbles the development and execution of trial strategy on core issues of credibility and reliability.
- [85] Fundamentally, the provisions give the complainant's privacy rights primacy over the accused's fair trial rights when the notice requirements are strictly applied. As observed by the majority in Mills at para. 94, where the information contained in a record directly bears on the right to make full answer and defence, privacy rights must yield to the need to avoid convicting the innocent.
- [86] Earlier in these reasons, I referred to the decision of Breen J. in A.R.S. Breen J. conducted his analysis of the Charter challenge to the impugned sections on the basis that they compelled defence disclosure of impeachment material to a complainant, in advance of cross-examination. He found that the sections, applied in that manner, compromised the accused's trial fairness interests and the accused's right against self-incrimination under s. 7 of the Charter. Notwithstanding these findings, Breen J. determined that the legislation could be applied in a manner that did not result in Charter violations by doing away with the notice requirement and permitting the accused to apply for a relevance ruling during cross-

examination.

- [87] I am mindful of Chapman J.'s concerns that Breen J.'s approach would result in the bifurcation of a sexual assault trial. The other decisions from Ontario in which these provisions were upheld express similar concerns. I acknowledge that permitting the accused to wait to make an application for admissibility until after the complainant has completed examination-in-chief may well lead to some scheduling difficulties. At the same time, the relevance of the proposed cross-examination may become clearer for the trial judge after hearing the complainant's evidence-in-chief, facilitating an expedited and more informed ruling, or the defence may determine not to make the application at all.
- [88] The process envisioned is not substantially different from the procedure in Shearing, albeit with legislated rather than common law considerations. To reduce the disruption of the trial, defence counsel should advise the trial judge, or the judge at a pre-trial conference, that an application to admit records in possession of the accused may or will be made at trial so that the complainant is aware of the possibility of such an application and of the right to retain counsel.
- [89] While I have some concerns about the complainant's right to be present and represented at the admissibility hearing, this is consistent with both third party record and prior sexual history applications. I am not satisfied, on the basis of the argument before me, that this constitutes a breach of the accused Charter rights if the admissibility application comes after the complainant's direct examination.

Conclusion

- [90] In all the circumstances, I find that the accused's fair trial rights under s. 7 of the Charter are violated by the requirement to apply on seven days' notice for a hearing concerning the admissibility of records that may meet the definition of a record in s. 278.1 of the Criminal Code. The requirement compels disclosure of defence evidence and unduly truncates the right to make full answer and defence by providing the complainant and the Crown with an advance preview of defence evidence and tactics before examination-in-chief is completed and a case to meet has been established.
- [91] Ms. Ruzicka pointed out that Breen J. did not invite a s. 1 hearing to determine if the legislation could be saved in a manner other than by doing away with the requirement for notice. The Crown is at liberty to contact Scheduling to arrange for a hearing concerning s. 1 or for directions concerning written submissions on s. 1, bearing in mind that the next set of applications in this proceeding is set for January 30 and February 6 and that the trial is scheduled to proceed later in February.

"Duncan J."

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