SCC File No. 39133

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

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT/
RESPONDENT ON CROSS-APPEAL
(Respondent)

- and -

J.J.

RESPONDENT/
APPELLANT ON CROSS-APPEAL
(Applicant/Defendant)

- and -

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ATTORNEY GENERAL OF CANADA,
ATTORNEY GENERAL OF ONTARIO,
ATTORNEY GENERAL OF SASKATCHEWAN,
ATTORNEY GENERAL OF NOVA SCOTIA, and
ATTORNEY GENERAL OF MANITOBA

INTERVENERS

FACTUM OF THE INTERVENER THE ATTORNEY GENERAL OF MANITOBA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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Part I – Overview and Statement of Facts

A. Overview

1. Despite decades of reforms to address the way in which sexual assault complainants are treated in the justice system, they are still subjected to defence tactics that undermine rather than enhance the truth-seeking function of the trial. These tactics range from cross-examination on irrelevant and personal matters, to victim blaming, to ambushing the complainant with private records. Trial judges have let these tactics continue. Indeed, they uphold and endorse them. As this Court recognized in *Barton*: "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."[1]

2. It is no wonder that sexual violence remains grossly underreported. Complainants continue to be "unduly harassed and pilloried" by "an insensitive justice system."[2]

3. Surprising sexual violence complainants at trial with deeply personal and sensitive records and communications is exactly the type of defence tactic that further victimizes them. Often this tactic is based on myths and stereotypes about how complainants are supposed to behave. Not only does this tactic undermine complainants' constitutional rights to equality, dignity, security and privacy, it erodes public confidence in the administration of justice

4. Parliament implemented reforms to address this tactic by enacting Bill C-51 in 2018. Modeled after the existing section 276 regime, the new legislation comprehensively governs the process for determining when a complainant's private records are admissible at trial. It requires a consideration of relevance of the record and a nuanced balancing to ensure that a record is adduced into evidence only when it has significant probative value that is not substantially outweighed by its prejudice to the proper administration of justice.

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[1] *R. v. Barton*, 2019 SCC 33, para 1.
[2] *R. v. Osolin*, [1993] 4 S.C.R. 595, para 34.

5. Despite this Court's observation in *Darrach* that there is no constitutional right to "defend by ambush,"[3] courts are divided regarding the constitutionality of this regime. Decisions which have found breaches are animated by the concern that the regime undermines cross-examination of the complainant. They fail, however, to consider whether the "defend by ambush" tactic actually assists the court in determining the truth. It does not. Rather, in this context, it is often a tool used to intimidate sexual assault complainants, contributing to their all too common re-victimization.

6. A trial must be fair to all parties, not just the accused. For far too long, complainants of sexual violence have been treated unfairly by our justice system. Properly interpreted, the changes made with Bill C-51 maintain the accused's right to cross-examine while taking into account the legitimate interests of complainants. Our justice system must continue to come to grips with the deep-rooted issues related to sexual assault cases. Public confidence in the administration of justice demands it.

B. Statement of Facts

7. The Attorney General of Manitoba accepts the facts as set out in the factum of the Appellant.

Part II – Issues

1. Did the trial judge err in concluding that the seven day notice requirement in s. 278.93(4) of the *Criminal Code*, R.S.C. 1985, c. C-46 infringes s.7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B of the *Canada Act 1982 (UK)*, 1982 c. 11 and does not constitute a reasonable limit pursuant to s. 1?

[3] *R. v. Darrach*, 2000 SCC 46, para. 55.

Part III – Argument

A. Treatment of Sexual Assault Complainants in the Justice System

8. The mistreatment of sexual assault complainants has been long-standing. Recently, in *Barton*, Moldaver J. issued a call to action to all actors in the justice system:

> 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.[4]

9. Historically, there were no restrictions placed on the ability of defence to adduce evidence concerning the complainant's sexual activity. Such evidence was used to support twin myth inferences. As these twin myths severely distort the truth-seeking function of the trial process and undermine the administration of justice, Parliament created a statutory framework for the consideration of sexual activity evidence through sections 276 to 276.4, which was subsequently found to be constitutionally compliant by this Court in *Darrach*.[5]

10. Similarly, historically there was no restriction on using private records of a sexual assault complainant during a trial. In 1995, this Court in *O'Connor* recognized that complainants have a constitutionally protected privacy right in these records. As a result, it set out a process through which an accused could apply for production of records in the hands of third parties that balanced the competing *Charter* rights – that is, the complainant's right to privacy against the accused's right to full answer and defence.[6] Parliament responded by incorporating L'Heureux-

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[4] *R. v. Barton*, *supra*, para. 1. (Emphasis added.)
[5] *R. v. Darrach*, *supra*, paras. 71-72.
[6] *R. v. O'Connor*, [1995] 4 S.C.R. 411, paras. 17-34.

Dubé, J.'s dissent into a new regime under sections 278.1 to 278.9 of the *Criminal Code*. The constitutionality of this regime was upheld by this Court in *Mills*.[7]

11. While the production of third party records was codified and provided complainants with protection from unwarranted intrusion into their private records, there was no protection from defence counsel surprising them with these private records during the trial or limitations on the extent to which they could be used.

12. This issue was first addressed in *Osolin*, a case where the mental health records of the 17-year old complainant had been previously admitted to determine her competency to testify. Defence counsel then sought to use them in cross-examination during the trial.[8]

13. This Court held that the trial judge should have allowed defence to cross-examine on aspects of the records, noting specifically that these records were already in evidence.[9] Importantly, however, this Court recognized that this issue engages a complainant's equality rights under section 15 and 28 of the *Charter*. Sexual assault is an offence primarily committed against women by men. Moreover, complainants have privacy rights related to their personal records.[10] Cross-examination of a complainant "can only be undertaken for proper purposes and its ambit may well be restricted,"[11] particularly when it engages stereotypes and myths. "Contentious issues" should be resolved in a *voir dire* to ensure a fair trial and to avoid "putting the complainant's lifestyle and reputation on trial."[12]

14. A similar issue was addressed in *Shearing*, where this Court examined the extent to which a complainant could be cross-examined in relation to her diary that was in the possession

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[7] *R. v. Mills*, [1999] 3 S.C.R. 668, para. 146.
[8] *R. v. Osolin*, *supra*, para. 39.
[9] *Ibid*, paras. 42-43.
[10] *Ibid*, paras. 34, 42-43.
[11] *Ibid*, para. 47.
[12] *Ibid*, para. 38.

of the defence. Following a *voir dire* where the complainant had counsel, the trial judge limited the cross-examination of the complainant based on *O'Connor*.[13]

15. Although this Court found the trial judge had unduly restricted cross-examination, it recognized that some restrictions are appropriate:

> It has been increasingly recognized in recent years, however, that cross-examination techniques in sexual assault cases that seek to put the complainant on trial rather than the accused are abusive and distort rather than enhance the search for truth. Various limitations have been imposed. One of these limits is the privacy interest of the complainant, which is not to be needlessly sacrificed.[14]

16. In a *voir dire*, the trial judge must consider whether cross-examination creates prejudice to the complainant that substantially outweighs the potential probative value to the accused. In making this assessment, consideration must be given to whether cross-examination relies on rape myths and "folk tales about how abuse victims are expected by people who have never suffered abuse to react to the trauma."[15]

17. Despite these efforts, myths and stereotypes continue to pervade sexual assault trials. For example, in *C.A.M.*, defence counsel advanced arguments at trial and on appeal that invoked the myth and stereotype regarding the expected behavior of a complainant. The Manitoba Court of Appeal unequivocally rejected the argument, cautioning:

> Trial judges have a heavy responsibility to ensure that counsel do not introduce the spectre of such forbidden reasoning into a trial. If that occurs in a jury trial, it should be answered by a timely and appropriate instruction to the jury (see *R v Barton*, 2017 ABCA 216 at paras 1, 159-61). In judge-alone trials, judges must not succumb to drinking from such a poisoned chalice in their assessment of credibility.[16]

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[13] *R. v. Shearing*, 2002 SCC 58, paras. 85-86, 102.
[14] *Ibid*, para. 76; see also para. 119. (Emphasis added.)
[15] *Ibid*, paras. 109, 121.
[16] *R. v. C.A.M*, 2017 MBCA 70, para. 51; see also paras. 25, 45-50, 52-53. See also *R. v. A.R.J.D.*, 2018 SCC 6, para. 2.

18. Additionally, the "defence by ambush" technique continues. Complainants are often surprised with their electronic communications or other private records at trial. For example, the notorious *Ghomeshi*[17] trial was a spectacle during which the complainants were ambushed with personal electronic communications between them and the accused. While defence counsel may argue that the ambush was necessary so as to avoid the complainants' tailoring their evidence resulting in a wrongful conviction, a close review of the trial judge's decision would suggest otherwise. After media accounts of the "ambush technique," two of the complainants disclosed their post-offence contact with the accused just prior to testifying. Even with advance warning of this technique and the opportunity to tailor their evidence, the trial judge disbelieved them, relying on inconsistencies in the various accounts they provided, their failure to disclose relevant and material information in their first police statements and the implausibility of their explanations.[18]

19. Tendering private records at trial, including electronic communications, impacts the complainant's privacy rights and will often invoke reliance on myths and stereotypes, such as those relating to avoidant behavior or expected behavior of a sexual assault complainant.[19] For example, in *Osolin*, the defence indicated that cross-examination regarding the complainant's mental health records would relate to "what kind of person the complainant is."[20] Indeed, the third party record regime upheld in *Mills* was a response to the commonplace practice "for defence counsel to seek the private records of complainants in order to attack the complainant through invasive (and often inappropriate) credibility probing[.]"[21] Importantly, it was meant "to limit what it is that a woman/child complainant must be forced to reveal at trial as the price of her access to the criminal justice system[.]"[22]

20. Dealing with this issue unexpectedly mid-trial is highly problematic. It can result in the proceedings being delayed to enable the complainant to obtain legal advice. It also forces trial

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[17] *R. v. Ghomeshi*, 2016 ONCJ 155.
[18] *Ibid*, paras. 56-57, 67-68, 79-81, 87, 94, 114, 117-118, 137-138.
[19] See, for example, *R. v. A.L.*, 2020 BCCA 18, paras. 251-252.
[20] *R. v. Osolin*, *supra*, para. 44.
[21] *R. v. Quesnelle*, 2014 SCC 46, para. 14. (Emphasis added.)

judges into the unenviable position of making significant decisions without notice. Balancing the accused's right to a fair trial against the complainant's recognized *Charter* rights to equality, dignity, security and privacy is no easy task and takes time, delaying the proceedings. This "defend by ambush" technique also serves to seriously undermine public confidence in the administration of justice by creating the impression that it is the complainant rather than the accused who is on trial.

B. Bill C-51 and its Interpretation

21. Sections 278.92 to 278.96 were introduced by Parliament to create a statutory framework to consider the admissibility of a complainant's private records. They have a threefold purpose:

- ensure that the rights of the complainant to privacy, dignity, equality and security of the person are considered and upheld;
- improve complainant and community confidence in the criminal justice system, increasing reporting and prosecution of sexual offences; and
- protect the integrity of the trial process by ensuring that evidence which is not probative, is misleading or is rooted in myths and stereotypes does not distort the fact finding process.[23]

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[22] *Ibid*, citing "When Privacy is not Enough: Sexual Assault Complainants, Sexual History Evidence, and the Disclosure of Personal Records," (2006) 43 Alta.L.Rev. 743, p. 745.

[23] See, for example:

> *House of Commons Debates*, 42nd Parliament, 1st Sess (15 June, 2017) at 12807 (Mr. Marco Mendicino, Parliamentary Secretary to the Minister of Justice and Attorney General of Canada);
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> *House of Commons Debates*, 42nd Parliament, 1st Sess (11 December, 2017) at 16218-16219 (Mr. Marco Mendicino, Parliamentary Secretary to the Minister of Justice and Attorney General of Canada);
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> Senate Standing Committee on Legal and Constitutional Affairs. Jody Wilson-Raybould, former Minister of Justice and Attorney General of Canada, June 20, 2018.

22. Subsection 278.92(1) requires an accused to bring an application if he wishes to adduce a "record" relating to the complainant that is in his possession.[24] It states:

> **278.92(1)** Except in accordance with this section, no record relating to a complainant that is in the possession or control of the accused – and which the accused intends to adduce – shall be admitted in evidence in any proceedings in respect of any of the following offences or in any proceedings in respect of two or more offences at least one of which is any of the following offences: . . .

23. Under section 278.1 a record includes "any form of record that contains personal information for which there is a reasonable expectation of privacy." While the records specifically listed in the section fall within the scope of the legislation, difficulties arise regarding other non-identified items. In particular, following *Marakah,*[25] courts have struggled with determining when electronic communications between the complainant and others (including the accused) fall within the ambit of this section.

24. Various factors have been identified to assist with this determination:

- the content of the messages and whether they convey "the parties' thoughts, feelings, details of their daily activities, preferences, friendships and social interactions,"[26]
- whether the record or information found in the record is similar to those enumerated in section 278.1 or contains information that is similar to sexual activity evidence,[27]
- the intended use of the communications (kept private or publicly shared),[28]
- the manner in which the messages or records were sent or kept and who has control over them,[29]

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[24] Cases have interpreted "adduce" to include cross-examination on the record's contents. See, for example, *R. v. Brown*, 2019 ONSC 1335, paras. 7, 11; *R. v. Boyle*, 2019 ONCJ 226, paras. 38-39, 47-48; *R. v. M.S.*, 2019 ONCJ 670, para. 22.

[25] *R. v. Marakah*, 2017 SCC 59.
[26] *R. v. R.M.R.*, 2019 BCSC 1093, para. 38.
[27] *R. v. M.S., supra*, para. 50.
[28] *Ibid*.

- how the records were obtained,[30]
- the nature of the relationship between the parties to the messages,[31]
- the policy implications of finding that there is no reasonable expectation of privacy.[32]

25. Applying these factors, courts have generally taken a restrictive approach declining to find that there is a reasonable expectation of privacy in the records at issue.[33]

26. Parliament limited the application of Bill C-51 to those records for which there is a reasonable expectation of privacy. An interpretation of "record" that limits its meaning to records similar in nature to those specifically identified in section 278.1 or for which there would clearly be an objective expectation of privacy is consistent with the intention of the section.

27. Under subsection 278.92(2), a "record" is inadmissible unless the court rules otherwise in accordance with the requirements for admissibility set out in subsection 278.92(2) and the process set out in sections 278.93 and 278.94. This creates a mandatory process whereby the evidence is presumptively inadmissible unless it has been ruled admissible pursuant to these sections.

28. Under subsection 278.92(2), for records other than those that fall under section 276, the evidence must be relevant to an issue at trial "and [have] significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice." Subsection 278.92(3) lists the factors the court must consider when determining admissibility, which are identical to those listed under s. 276(3) but with the addition of: "society's interest in encouraging the obtaining of treatment by complainants of sexual offences" (s. 278.92(3)(c)), which is found in the third party records regime under s. 278.5(2)(g).

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[29] *R. v. White*, 2020 ONSC 1808, para. 12; *R. v. W.M.*, 2019 ONSC 6535, para. 41.
[30] *Ibid*; *R. v. M.S.*, *supra*, para. 50.
[31] *R. v. White*, *supra*, para. 12; *R. v. W.M.*, *supra*, para. 41.
[32] *Ibid*.
[33] See, for example, *R. v. Navia*, 2020 ABPC 20, paras. 98-101; *R. v. White*, *supra*, paras. 14-19; *R. v. Mai*, 2019 ONSC 6691, paras. 25-26, 31-32; *R. v. A.M.*, 2020 ONSC 1846, para. 109.

29. Section 278.93 requires that the application be made in writing, set out detailed particulars, and be served on the Crown and the court at least seven days in advance of a hearing or such shorter period "in the interests of justice." If the trial judge is of the view that the procedural requirements have been met and that the evidence is capable of being admissible under s. 276(2), then the trial judge shall grant the application and hold a hearing.

30. In some cases, such as *R.S.*, the court has held that, where defence may wish to impeach the complainant using a record, the application "can only be brought during cross-examination after the foundation for contradiction is established" and that it "need not be exceptional." [34]

31. With respect, such an approach undermines the purpose of the regime. It allows the defence to surprise the complainant mid-trial with her private records, claiming only that they needed to wait for the contradiction to "crystallize." Moreover, it circumvents subsection 278.94(2) which provides that the complainant is not a compellable witness in the hearing ordered under section 278.94.

32. This approach will inevitably lead to adjournments of the trial as the complainant, under the new regime, is entitled to make submissions and be represented by counsel if a hearing is ordered.

33. The court in *M.S.* sets out a better approach, finding that an application should only be brought with less than seven days notice "where circumstances have changed or for some other reason the interests of justice require that they do so in exceptional cases only in exceptional circumstances."[35]

34. If, through cross-examination, the accused elicits <u>new</u> information that provides a foundation for the application that had not existed previously, the evidentiary ruling can be

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[34] *R. v. R.S.*, 2019 ONCJ 645, paras. 85, 89; see also *R. v. A.M.*, 2020 ONSC 4541, paras. 97, 100.
[35] *R. v. M.S.*, *supra*, para. 107.

revisited.[36] As well, if cross-examination provides an unanticipated foundation for the application, the accused is able to bring it. These situations will be relatively rare.

35. Section 278.94 outlines the procedural requirements for the second stage where a hearing is ordered. The complainant is not a compellable witness but she has the right to be represented by counsel and to appear and make submissions at the hearing.

36. Several Ontario cases have allowed defence counsel to file an application for directions prior to making an application under the new regime, for advance consideration as to whether there is a reasonable expectation of privacy in the record.[37] *A.M.,*[38] for example, creates an eight-step procedure that contemplates factors such as:

- An application by the accused must be brought seeking a ruling as to whether or not the material is a "record" as defined by s. 278.1 of the *Criminal Code*. The complainant is not entitled to notice or to participate at this stage.
- Disclosure of the material is not required until after a determination has been made. Instead, "the accused must summarize the content of the material in order to provide the Crown with sufficient knowledge upon which to make the argument." The summary may include information about "the nature and type of material[,]" all parties involved and their relationship, "how and when the material came into the possession of the accused[,]" timing of the material, whether it was to be kept private or shared, and if shared, with who, whether it contains information typically found in an item listed in s. 278.1, whether it "could constitute other sexual activity[.]"
- The material will be a sealed exhibit at the hearing. The judge may review the material and may provide supplementary information to permit the Crown to make submissions.
- This hearing should be conducted in camera, and there should be a publication ban.

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[36] *Ibid*. See also *R. v. O'Connor*, *supra*, para. 147.
[37] See, for example, *R. v. W.M.*, *supra*, paras. 11-28; *R. v. Mai*, *supra*, paras. 9-15; *R. v. A.M.*, 2020 ONSC 1846, para. 70.
[38] *R. v. A.M.*, 2020 ONSC 1846, para. 70.

37. As is evident, this pre-determination adds a layer of complexity to the proceedings that was not contemplated by Parliament when it enacted Bill C-51. It is contrary to the purpose and intent of the legislation and serves only to prolong the resolution of the case.

38. If defence is unsure whether the material they propose to use falls within the statutory scheme, they should bring an application under section 278.93 for a hearing with sufficient information in an affidavit for an adjudication of the issues. Arguably, if the complainant has no reasonable expectation of privacy in the record, the trial judge can simply decline to order a hearing to determine the admissibility of the evidence on the basis that the section does not apply.

39. There is case law that suggests that the accused ought not to be forced to provide the complainant with the entirety of the record relating to the application.[39] This concern is based on the premise that it may impact the accused's cross-examination of the complainant. With respect, this Court in *Darrach* dismissed similar concerns in the context of an application under section 276:

> Section 276 does not require the accused to make premature or inappropriate disclosure to the Crown. For the reasons given above, the accused is not forced to embark upon the process under s. 276 at all. As the trial judge found in the case at bar, if the defence is going to raise the complainant's prior sexual activity, it cannot be done in such a way as to surprise the complainant. The right to make full answer and defence does not include the right to defend by ambush. The Crown as well as the Court must get the detailed affidavit one week before the *voir dire*, according to s. 276.1(4)(*b*), in part to allow the Crown to consult with the complainant. The Crown can oppose the admission of evidence of sexual activity if it does not meet the criteria in s. 276. Neither the accused's s. 11(*c*) right not to be compelled to testify against himself nor his s. 11(*d*) right to be presumed innocent are violated by the affidavit requirement. This is borne out by the way in which the admissibility procedure operates.[40]

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[39] See, for example, *R. v. R.S.*, 2019 ONCJ 877, para. 18. For a contrary view, see *R. v. Simon*, 2019 ABPC 186, paras. 55-58; *R. v. J.E.*, 2019 NLSC 134, para. 76; *R. v. F.A.*, 2019 ONCJ 391, paras. 63-64.

[40] *R. v. Darrach*, *supra*, para. 55. (Emphasis added.)

40. Sections 278.93 to 278.96 provide an orderly process to determine the admissibility of this evidence, which necessarily includes whether it falls within the scope of "record" set out in section 278.1.

C. Trial by Ambush is Not a Principle of Fundamental Justice

41. One of the underlying promises of a constitutional democracy is that justice will be administered equally, impartially and fairly to all. The *Charter* recognizes that both complainants and accused persons have rights and interests which must be balanced in the criminal justice system.

42. Substantive equality requires that where complainants of crimes such as sexual offences have historically been harmed by the machinery of justice, special measures are needed to ensure justice is done for those complainants. Such measures must recognize the potential harm that can be inflicted by the justice system, and must balance the rights of the complainants and accused persons in a substantively fair way.

43. This Court has long acknowledged that serious injustice plagues sexual assault cases.[41] By allowing complainants a voice on issues directly impacting their privacy, security, dignity and equality interests, Parliament has attempted to remedy the fact that the justice system continues to inadequately protect these interests.

44. The new regime does not require an accused to disclose all documents and materials in his possession, nor is he required to disclose the entirety of his trial strategy. It applies only to those records for which the complainant has a reasonable expectation of privacy.

45. Moreover, the evidentiary foundation for an application under s. 278.92 will vary depending on the nature of the record and the anticipated issues at trial. The application process does not require the accused to produce the document. Rather, an accused must provide

[41] See, for example, *R. v. Mills*, *supra*, paras. 58, 90-91; and *R. v. Barton*, *supra*, para. 1.

sufficient evidence to establish that the contents of the record are relevant and to support the probative value of the record balanced against its prejudicial effect.

46. This required evidentiary foundation already exists under the s. 276 regime and the third party record regime in s. 278.2. In *Darrach*, this Court found the s. 276 procedure where an accused "reveals the evidence he intends to call for his case" in order to allow "the trial judge properly to apply the factors relevant to his request" is "consistent with a 'scrupulously fair' trial that observes the case-to-meet principle."[42]

47. Moreover, comparing the s. 276 *voir dire* in *Darrach* with the *Corbett* application at issue in *Underwood*, this Court observed that the purpose of the *Corbett* hearing was not "defence disclosure," and should not be treated as the Crown deeply probing into the defence case. Rather, the point was "to provide the trial judge with the information he or she needs to make an informed decision." The Court held: "This is also true of the *voir dire* to admit evidence of prior sexual activity."[43] Similarly, this is true of the s. 278.92 *voir dire* concerning a complainant's private records.

48. Notice requirements and standing do not render cross-examination ineffective. With respect, as discussed above, "defence by ambush" using the complainant's private records is a dubious tactic that puts the complainant on trial and serves to undermine the administration of justice.

49. A complainant must provide a full and detailed account of events to police before a charge is laid through the process of reporting the incident and making a statement. If she has omitted relevant information or has provided an account that is contradicted by her private records, this will impact her credibility at trial.

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[42] *R. v. Darrach, supra*, para. 65, citing *R. v. Underwood*, [1998] 1 S.C.R. 77, paras. 6-11.
[43] *Ibid.*

50. The s. 278.92 regime permits cross-examination where the evidence has "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice," a balancing identical to that contained in section 276 and upheld in *Darrach*.[44]

51. Arguably, advance notice – even when the records are private electronic communications – may enhance the truth-finding function of the trial. For example, written communications may be taken out of context or altered. These communications may have occurred years ago. A complainant who is ambushed at trial with these communications may not be able to recall the context of the communication or even verify that these communications are accurate, depriving the court of useful information and testimony.

52. There is a difference in kind between oral communications and written communications. For instance, written communications preserve everything that was said – including information that may not be relevant to the trial. In the same text communication where there is relevant information, a complainant may discuss her thoughts or feelings about school, her employer or her family. This information is irrelevant to the trial. Advance screening of the communication ensures that only the relevant and probative parts of the written communication are adduced. It also affords the trial judge the opportunity to ensure that impermissible myths and stereotypes are not engaged.

53. Other records, such as the records specifically identified in section 278.1, contain highly sensitive and personal information. Ambushing complainants with their personal journals or therapy records that have found their way into the hands of the defence is simply unfair. Not only may this tactic give rise to impermissible cross-examination on the basis of myths and stereotypes, but it represents a significant intrusion on the complainant's privacy and dignity. The principles of fundamental justice enshrined in section 7 of the *Charter* not only protect the rights of an accused, but also the security and privacy interests of the witnesses.[45]

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[44] *R. v. Darrach, supra*, paras. 38-43.
[45] *Ibid*, paras. 24 - 25.

54. In *Mills*, this Court observed:

> The history of the treatment of sexual assault complainants by our society and legal system is an unfortunate one. Important change has occurred through legislation aimed at both recognizing the rights and interests of complainants in criminal proceedings, and debunking the stereotypes that have been so damaging to women and children, but the treatment of sexual assault complainants remains an ongoing problem. If constitutional democracy is meant to ensure that due regard is given to the voices of those vulnerable to being overlooked by the majority, then this court has an obligation to consider respectfully Parliament's attempt to respond to those voices.[46]

55. Trust in the trial process to address misconceptions based on myths and stereotypes requires reliance "on the rules of evidence, statutory protections, and guidance from the judge and counsel to clarify potential misconceptions and promote a reasoned verdict based solely on the merits of the case."[47] Likewise, public trust in the trial process requires that complainants be treated fairly. Statutory protections like those enshrined through Bill C-51 are a progressive step to address the treatment of complainants of sexual assault by our justice system.

Part IV – Costs

56. The Intervener does not seek costs and asks that costs not be awarded against it.

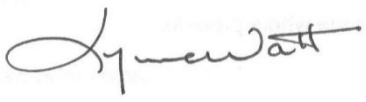
[46] *R. v. Mills*, *supra*, para. 58. (Emphasis added.)
[47] *R. v. Find*, 2001 SCC 32, para. 104. (Emphasis added.)

Part V – Order Sought

57. Bill C-51 is in-step with other constitutionally accepted legislation and is aimed at filling a legislative gap that allowed complainants' constitutionally protected privacy rights to be ignored. It is a positive step in the evolution of sexual assault law. The Intervener asks this Court to uphold the impugned sections.

58. The Intervener requests the right to present oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 26th day of January, 2021.



for:

Jennifer Mann and Charles Murray
Counsel for the Intervener,
The Attorney General for Manitoba

Part VII – Table of Authorities and Legislation

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Other Documents	**Cited at Paragraph No.**
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