SUPREME COURT OF YUKON

Citation: *R v Farah*, 2021 YKSC 36

Date: 20210722
S.C. No. 19-01509
Registry: Whitehorse

BETWEEN

HER MAJESTY THE QUEEN

RESPONDENT

AND

ABDIRAHMAN FARAH

APPLICANT

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

Before Justice K. Wenckebach

Counsel for the respondent	Amy Porteous and Lauren Whyte
Self-represented	Abdirahman Farah
Counsel for the purpose of cross-examination of the complainant	Casey St. Germain

REASONS FOR DECISION

INTRODUCTION

[1] Mr. Abdirahman Farah is charged with sexual assault and touching for a sexual purpose a person under the age of 16, contrary to ss. 271 and 151 of the *Criminal Code*, RSC, 1985, c. C-46 (the "*Code*").

[2] Mr. Farah has in his possession text messages that he and the complainant sent to each other, and intends on adducing them at trial. However, under ss. 278.92-94 of

the *Code* (the "Regime"), Mr. Farah is required to bring an application to determine their admissibility.

[3] Mr. Farah has brought a *Constitution Act, 1982*, *Canadian Charter of Rights and Freedoms* ("*Charter*") challenge to the Regime. He argues that the Regime violates ss. 7, 11(c) and 11(d) of the *Charter*, and is not saved by s. 1.

[4] Mr. Farah has not brought the application or filed the text messages. Crown counsel agrees that he is not required to do so in order to challenge the Regime's constitutionality.

ISSUES

[5] Based on Mr. Farah's submissions, I have formulated his challenges to the constitutionality of the Regime as follows:

a) the definition of "record" under s. 278.1 is overbroad, and therefore violates s. 7 of the *Charter*;

b) the Regime infringes an accused's right to silence under s. 7 and his right against self-incrimination under s. 11(c) of the *Charter* by requiring the accused to disclose evidence before the closing of the Crown's case; and

c) the Regime infringes his rights to a fair trial under s. 11(d) of the *Charter* through:

    i) the disclosure requirements on the accused;

    ii) the threshold for the admission of evidence;

    iii) the notice period; and

    iv) the participation of the complainant in the application.

[6] I conclude that the Regime does not violate ss. 7, 11(c) or 11(d) of the *Charter*.

LAW

Criminal Code Provisions

[7] Section 278.92-.94 provide that where criminal proceedings involve charges of sexual assault or other similar charges, and an accused seeks to introduce as evidence records in which the complainant has a reasonable expectation of privacy, then the accused must apply to the court to determine whether the evidence is admissible.

Charter

[8] 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.

[9] Section 11(c) provides that a person charged with an offence has the right not to be compelled to be a witness in proceedings against the person in respect of the offence.

[10] Section 11(d) provides that any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by and independent and impartial tribunal.

[11] Sections 11(c) and (d) are principles of fundamental justice under s. 7. As a result, an analysis under s. 7 resolves the challenges to ss. 11(c) and (d) as well (*R v Darrach*, 2000 SCC 46 ("*Darrach*") at para. 23).

[12] There is a two-part analysis in a s. 7 inquiry:

1) Is there an infringement of one of the three protected interests, that is to say, is there a deprivation of life, liberty or security of the person?
2) If so, is the deprivation in accordance with the principles of fundamental justice?

[13] The parties are in agreement that Mr. Farah's liberty interests are at stake. As a result, the issue to be determined is whether the Regime deprives Mr. Farah's liberty interests in accordance with the principles of fundamental justice.

[14] The parties are also in agreement that it is not only Mr. Farah's interests that must be taken into account when conducting the *Charter* analysis. The complainant's right to privacy and equality must be considered as well. The Supreme Court of Canada has provided guidance on how *Charter* interests must be examined where, as here, different rights are in conflict. The Court said, in *R v Mills*, [1999] 3 SCR 668 ("*Mills*") at para. 21:

> … *Charter* rights must be examined in a contextual manner to resolve conflicts between them. Therefore, unlike s. 1 balancing, where societal interests are sometimes allowed to override *Charter* rights, under s. 7 rights must be defined so that they do not conflict with each other. The rights of full answer and defence, and privacy, must be defined in light of each other, and both must be defined in light of the equality provisions of s. 15.

[15] There have been numerous decisions analysing the constitutionality of the Regime, including from the Territorial Court of Yukon (*R v DLB*, 2020 YKTC 8). Some decisions upheld the constitutionality of the Regime (*R v Whitehouse*, 2020 NSSC 87) while some found the Regime to be unconstitutional (*R v Reddick*, 2020 ONSC 7156). A third group determined that it would be unconstitutional to require an accused to make their application under the Regime prior to trial (*R v JJ*, 2020 BCSC 29). These decisions inform my analysis.

ANALYSIS

a) the definition of "record" under s. 278.1 is overbroad, and therefore violates s. 7 of the *Charter*;

[16] The overbreadth analysis asks whether there is a rational connection between the purpose of the legislation and its impacts. In *Bedford v Canada (Attorney General)*, 2013 SCC 72 ("*Bedford*"), the Supreme Court of Canada stated at para. 112:

> Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. … (emphasis already added)

[17] Legislation is only overbroad if there is no connection between the legislation's purpose and its effects. As such: "[t]he standard is not easily met." (*Bedford* at para. 119)

[18] The first step in determining whether legislation is overbroad is to identify its purpose. A law's purpose may be determined by assessing three factors: statements about the purpose in the legislation; the text, context and scheme of the legislation; and extrinsic evidence, such as legislative history (*R v Safarzadeh-Markhali*, 2016 SCC 14 at paras. 24 and 31).

[19] The Crown says that the purpose of the Regime is to safeguard the integrity of the trial process and the dignity, equality and privacy interests of sexual offence complainants. Mr. Farah agrees.

[20] Mr. Farah says, however, that the legislation is overbroad. He argues that the definition of records is so broad that it may include records in which the complainant has a low privacy interest. In accordance with the Regime, however, an accused would be required to disclose a record and the reasons why the accused believes the record to be relevant. The accused's *Charter* rights would be infringed even though the

complainant's privacy interests would be minimally impacted, if at all. There is, therefore, a lack of connection between the legislation's purpose, and some of its effects.

[21] The Crown says that the Supreme Court of Canada's decision in *Mills* is dispositive on this issue. Although *Mills* concerned the production of documents under ss. 278.2-.8 rather than admissibility, it is still analogous, as the procedures for determining production and admissibility are the same on the salient points.

[22] The definition of record for the purposes of ss. 278.2-.8 is the same as the definition of records for the purposes of the Regime. In response to the argument that the definition of record is too broad, the Court in *Mills* states that the only records subject to the Regime are those in which there is a reasonable expectation of privacy. This creates a balance between the accused's right to access private records which might be relevant to the trial with the rights of the subjects of the records.

[23] Moreover, the definition of records is only the starting point of the process for determining its constitutionality. It is the procedures used that ultimately determine whether the provisions are constitutional.

[24] The Crown contends that the principles in *Mills* are directly applicable to the Regime. The only records that are subject to the scheme are those in which the complainant has a reasonable expectation of privacy. This means that, contrary to Mr. Farah's submission, records in which the complainant has less privacy interest would not be subject to the scheme. The accused would be at liberty to introduce records in which the complainant has a lesser privacy interest at trial as they would other evidence.

Purpose of the Regime

[25] Taking into account the text and context of the legislation, I am in broad agreement with the parties, although I would add some nuance in defining the purpose. In this case, the context of the legislation, and particularly, the context of related provisions, and the language of the provisions in the Regime are most helpful in determining the purpose of the Regime.

[26] With regard to the context of the legislation, ss. 276 and 278.2-278.8 are related to the Regime. It is therefore useful to review those provisions.

[27] Section 276 of the *Code* was enacted in 1992, and replaced the previous iteration of s. 276, which had been struck down as unconstitutional in *R v Seaboyer*, [1991] 2 SCR 577 ("*Seaboyer*"). Section 276 limits the use of evidence of a complainant's sexual history during the course of trials in which sexual offences are at issue.

[28] The constitutionality of s. 276 was challenged in *Darrach.* There the Supreme Court of Canada determined that the purpose of s. 276 was to protect an accused's right to a fair trial, to protect the security and privacy of witnesses and to address society's interest in encouraging reporting sexual assaults (para. 25).

[29] It also affirmed the principle that evidence that relies on the twin myths that women with sexual experience are more likely to consent and less worthy of belief is irrelevant and should not be admitted at trial. The Court upheld the constitutionality of s. 276.

[30] The provision was followed by the enactment in 1997 of ss. 278.2-278.8 of the *Code*, which governs the production of third-party records to accused in sexual assault proceedings.

[31] These provisions were challenged in *Mills*. The Supreme Court of Canada described the purpose of the provisions in a similar fashion to *Darrach*. It stated at para. 113

> … Parliament sought to preserve an accused's access to private records that may be relevant to the defence in a sexual offence proceeding while protecting, to the greatest extent possible, the privacy rights of complainants and witnesses. …

[32] The court further identified that the problems needing to be addressed in sexual assault trials go beyond confronting the twin myths. It stated that evidence should not be misused to "whack" a complainant and cited with approval the decision in *R v Osolin*, [1993] 4 SCR 595, where Cory J., writing for the majority on this issue, said: "… A complainant should not be unduly harassed and pilloried to the extent of becoming a victim of an insensitive judicial system" (p. 669).

[33] In both *Darrach* and *Mills*, then, the Supreme Court stated that the purpose of the provisions at issue was to balance the rights of the accused to a fair trial with the rights of complainants to privacy, security and equality. In *Darrach*, as well, the court added that a purpose of the provision was to promote society's interests in reporting sexual assaults.

[34] While s. 276 covered evidence of sexual activity, and ss. 278.2-278.8 covered third-party documents, it became apparent that there existed a gap in the legislation

concerning documents in which the complainant has a privacy interest, and which are in the possession of the accused.

[35] In *R v Shearing*, 2002 SCC 58 ("*Shearing*"), the court addressed the common law process for admissibility of these documents.

[36] In the Senate, the Standing Committee on Legal and Constitutional Affairs conducted a review of ss. 278.2-278.8. It discussed the legislative gap, and made recommendations on legislative amendments (Senate, Standing Senate Committee on Legal and Constitutional Affairs, "Statutory Review on the Provisions and Operation of the *Act to amend the Criminal Code (production of records in sexual offence proceedings*)" (December 12, 2012)).

[37] In 2018, ss. 278.92-278.94 were enacted to fill this gap.

[38] The Regime is therefore related to ss. 276 and 278.2-278.8 and arises from the same context as those provisions. The decisions in *Darrach* and *Mills* can thus provide guidance on the purpose of the Regime.

[39] Turning from context to text, the Regime specifies factors that the court shall take into account when determining whether the evidence should be admitted. These factors, found at s. 278.92(3) are:

> (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 to privacy;
>
> (h) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law;
>
> …

[40] S. 278.92(3) outlines the purposes of the Regime. Like ss. 276 and 278.2-.8, it emphasizes the importance of the rights of the accused and of the complainants, as well as society's interests in the processes and outcomes of criminal justice proceedings.

[41] Both parties also referred to extrinsic evidence about the purpose of the Regime. In his submissions, Mr. Farah referenced Senator Murray Sinclair's statements about the mischief Parliament was seeking to address by enacting the Regime. Crown counsel, likewise, referred to statements made by the then Minister of Justice, Jody Wilson-Raybould, to the Senate about the purpose of the provisions.

[42] I do not rely on extrinsic evidence in determining the purpose of the Regime. Although statements made in the legislature about the purpose of the legislation introduced is admissible as evidence, caution should be used when using these materials as an interpretive aid. In *Frank v Canada (Attorney General)*, 2019 SCC 1 ("*Frank*"), the minority, though not on this issue, stated:

> [136] Our Court has also warned about the "inherent unreliability" and "indeterminate nature" of speeches and statements made by legislators as a means of discerning

> legislative purpose. … While records of these statements are admissible, we have *repeatedly* emphasized that they will usually be of limited reliability and weight. (emphasis already added; citations omitted)

[43] A statement made by the Minister responsible for the legislation can be given more weight than statements made by a Senator during the course of Senate hearings. (*Frank,* para. 133). Here, however, it is unnecessary to turn to extrinsic evidence. The context of ss. 276 and 278.2-.8 and the language of the Regime itself provide ample information upon which to determine the purpose of the provisions. Given this, statements made by Parliamentarians are not necessary to determine the purpose of the Regime.

[44] I conclude that the purpose of the Regime is to balance the rights of the accused to a fair trial, with the right of the complainant to privacy, equality and dignity and to promote society's interest in reporting sexual assaults. There is, as well, an overarching purpose: to address unwarranted and often discriminatory methods used in conducting and deciding criminal proceedings in which sexual assault is an issue.

Purpose and Effect

[45] I conclude that the Regime is not overbroad. I base my decision on the reasoning in *Mills*.

[46] The definition of "record", found at s. 278.1, is the same in *Mills* as here. In order to fall under s. 278.1 a record must contain personal information for which there is a reasonable expectation of privacy. The definition enumerates some of the kinds of documents or communications that would be considered records under s. 278.1. Although not specifically identified in the provision, the parties agree that the definition includes texts and emails.

[47] In *Mills*, the court considered whether the definition of "record" was overbroad. It stated at para. 99:

> … the legislation applies only to records "for which there is a *reasonable* expectation of privacy". 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 (NSSC). 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 … (emphasis already added).

[48] This statement is equally applicable to the Regime. As the Regime catches only those records in which there is reasonable expectation of privacy, documents or communications in which the complainant has questionable or limited privacy interests are not subject to the Regime. They are not disclosed to the complainant and the accused is free to adduce the evidence at trial subject to the ordinary rules of admissibility.

[49] A part of Mr. Farah's argument is that records in which there is a more limited expectation of privacy will be subject to the Regime. In stating this, Mr. Farah seems to assume that whether a complainant has a reasonable expectation of privacy in a record is determined during the course of the application made under the Regime.

[50] In my opinion, this interpretation is not correct. The requirement that the complainant have a reasonable expectation of privacy in the evidence is part of the definition of record itself. If there is little or no expectation of privacy in the document or communication, then it simply is not subject to the Regime. The determination as to whether the complainant has a reasonable expectation of privacy in the communication or document would arise *before* the accused makes an application under the Regime.

[51] There is no procedure in the *Code* for determining whether a record is a record for the purposes of s. 278.1. This did not arise in the application, and so it is outside the ambit of this decision to assess the steps to be used in such a process. It is sufficient to note that courts have begun to address the process to be used for making this decision so that records that have an insufficient level of privacy are not caught by the Regime (*R v Navia*, 2020 ABPC 20; *R v WM*, 2019 ONSC 6535; *R v Nirlungayuk*, 2021 NUCJ 8).

b) the Regime infringes an accused's right to silence under s. 7 and his right against self-incrimination under s. 11(c) of the *Charter* by requiring the accused to disclose evidence before the closing of the Crown's case

[52] Under s. 278.93(2), where an accused seeks to admit a record into evidence in which the complainant has a reasonable expectation of privacy, the accused must make an application in writing, with detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to the trial. The application must be filed and provided to the Crown at least seven days before the application is to be heard (s. 278.93(4)). The complainant is also given standing to make submissions in the application (s. 278.94(2)).

[53] Mr. Farah argues these aspects of the Regime violate his right to silence and right against self-incrimination. He states that, in obligating him to provide detailed particulars of the evidence he intends to adduce and to explain its relevance to the proceedings, the legislation requires him to disclose his case. The obligation that he provide seven days' notice effectively requires him to make the application before the

trial commences. He is therefore required to disclose his case before the Crown has closed its case.

[54] *Darrach*, which found that s. 276 does not violate the right against self-incrimination because the accused is not legally required to provide evidence, is distinguishable and was directed at situations in which an accused is raising an affirmative defence.

[55] The Crown says that the Regime does not require the accused to bring the application as a pre-trial motion. However, as it is better that the application be brought as a pre-trial motion, the accused may, through the application, disclose part of their case before the trial.

[56] However, while an accused should most times bring the application before the trial commences, doing so does not violate s. 7 or s. 11(c). The Crown argues that *Darrach* is binding on me. *Darrach* did not limit the application of s. 276 only to situations in which the accused is raising an affirmative defence. Moreover, there seems no principled reason to distinguish affirmative defences from other circumstances.

[57] It is unnecessary for me to determine if the Regime requires the accused to bring an application before the trial. I agree with the Crown, even if not required, it is preferable in many circumstances to determine an application under the Regime before trial. There will be occasions, then, when an accused will bring the application before the Crown closes its case.

[58] I also agree with the Crown that *Darrach* is not distinguishable and is therefore binding on me.

[59] In *Darrach*, the Supreme Court cited with approval the Ontario Court of Appeal when it stated, in *R v Boss* (1988), 30 OAC 184 (ONCA) at 198:

> [47]…the tactical obligation which an accused may feel to testify does not constitute a legal obligation or compulsion to testify. The use of the word 'compelled' in s. 11(c) indicates to me that the section is referring to legal compulsion. … The decision whether or not to testify remains with the accused free of any legal compulsion.

[60] The Court went on to say:

> [49] The accused is not forced to testify by s. 276. Nor is he coerced by the state in any way that engages *Charter* protection. Coercion to testify violates the principle against self-incrimination, but as Lamer C.J. defined it "[c]oercion … means the denial of free and informed consent" (*R v Jones*, [1994] 2 S.C.R. 229, at p. 249, cited in *White, supra,* at para. 42). In *White*, *supra*, at para. 76, Iacobucci J. found that "[i]f a declarant gives an accident report freely, without believing or being influenced by the fact that he or she is required by law to do so, then it cannot be said that the statute is the cause of the declarant's statements." In applications under s. 276, there is free and informed consent when the accused participates in order to exculpate himself. He knows that he is not required to do so.

[61] Other courts have considered these statements and have found *Darrach* to be distinguishable. They note that in *Darrach* the Court stated that evidence of prior sexual history would most often be adduced in cases where the defence was raising honest but mistaken belief in consent. The decision, therefore, implicitly addressed the question of the right against self-incrimination in cases dealing with affirmative defences (*R v RS*, 2019 ONCJ 645 at para. 65).

[62] I do not agree with these decisions. In *Darrach* the Supreme Court of Canada stated, at para. 51:

> The tactical pressure on the accused to testify at the *voir dire* under s. 276 is neither a burden of proof nor an evidentiary

> burden. It derives from his desire to raise a reasonable doubt about the Crown's case by adducing the evidence of the complainant's prior sexual activity. The sole purpose of this *voir dire* is to establish the admissibility of the evidence he proposes to call. As Dickson J. (as he then was) put it, "[i]t is axiomatic that the *voir dire* and the trial itself have distinct functions. The function of the *voir dire* is to determine admissibility of evidence" (*Erven v. The Queen*, [1979] 1 S.C.R. 926, at p. 931). If the evidence is found to be admissible under s. 276, it may then serve to satisfy the evidentiary burden of adducing a factual basis for a defence (such as honest but mistaken belief in consent) or to raise a reasonable doubt about an element of the offence, but that is a different matter altogether. [emphasis added]

[63] The Court therefore explicitly recognized that the s. 276 process could be used in circumstances other than those of affirmative defences.

[64] Additionally, the court in *Seaboyer* identified a number of legitimate reasons why an accused may adduce evidence of a complainant's sexual activity which were not affirmative defences (para. 106).

[65] Finally, the court's statement that s. 276 arises most frequently in defence of mistaken belief in consent is made when it is discussing the nature of the evidence needed to meet the requirements of s. 276 (para. 59). This statement is not linked to the reasoning with regard to the right against self-incrimination.

[66] The Supreme Court of Canada's decision in *Darrach* is, I find, binding on me. In order for the right against self-incrimination to be violated, there must be a legal obligation on the accused to provide evidence. Here, the Regime does not compel the accused to provide evidence. It does not violate the accused's right against self-incrimination.

c) the Regime infringes his rights to a fair trial under s. 11(d) of the *Charter*

[67] Mr. Farah submits that his right to a fair trial is infringed in four ways: by imposing disclosure requirements on the accused; by establishing a threshold for admission of evidence that is too high; by imposing a notice period on the accused; and by giving the complainant standing in the application.

i) the disclosure requirements on the accused

[68] Mr. Farah states that the disclosure requirements contained in s. 278.93(2) not only violate his right to silence, but also affect his ability to have a fair trial. He says, firstly, that these requirements are unprecedented in criminal proceedings. Secondly, providing disclosure to the complainant removes the element of surprise, thus diminishing the effectiveness of cross-examination. The proceedings may also be impacted because a complainant's evidence may be tainted. When a complainant is given advance notice of the evidence to be called and why it is being called, they may, consciously or unconsciously, change their evidence.

[69] The Crown says that the disclosure requirements are not unprecedented. The Crown acknowledges that cross-examination may, at times, be less effective and that a complainant's testimony could be tainted through advance disclosure of the evidence the accused is intending on adducing. However, the procedures required for a fair trial are not necessarily perfect procedures. Rather, the legislation must balance the interests of the accused with that of the complainant. As in *Darrach* and *Mills*, the legislation has adequately balanced the rights of the complainant and those of the accused.

[70] Moreover, the Crown says that the Court should be cautious in concluding that a complainant will change their testimony upon knowing the evidence the accused intends to adduce and the reasons for it. Historically complainants in criminal sexual assault proceedings were less likely to be believed than complainants in other criminal proceedings. Any assessment of the risk that the complainant's testimony will become tainted by the accused's disclosure must be careful not to be affected by myths and stereotypes.

[71] I find that requiring the accused to disclose particulars about the evidence he is seeking to adduce and the reasons he seeks to adduce them does not violate his right to a fair trial.

Whether the Process is Unprecedented

[72] The requirement that the accused provide particulars of the evidence he seeks to produce and explain the relevance to the issues is not unprecedented. Sections 276 and 278.3, with regard to third party records, imposes the same requirements on an accused.

Effectiveness of Cross-Examination

[73] The right to cross-examine is constitutionally protected, and an accused must have the ability to cross-examine a witness "without significant and unwarranted constraint" (*R v Lyttle*, 2004 SCC 5 at para. 41).

[74] For an accused, cross-examination may be the only way that they can challenge the Crown's case, and may be the sole method for instilling a reasonable doubt in the trier of fact. This is even more so in cases of sexual assault, where the complainant may be the only witness to testify.

[75] Mr. Farah argues that, in giving the complainant advance notice of the evidence he seeks to adduce and why he seeks to adduce it, he is robbed of the ability to surprise her with evidence contrary to her testimony while cross-examining her. The question then is whether the right to surprise a witness is a fundamental part of cross-examination.

[76] In *Darrach*, the court addressed whether the element of surprise forms an essential part of cross-examination. The court stated, at para. 55:

> … 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 a full answer and defence does not include the right to defend by ambush. …

[77] The court's statement can be read in two ways. On the one hand, the court could be limiting its comment to cases in which an accused is seeking to introduce evidence of the complainant's prior sexual activity. Evidence of prior sexual activity is presumptively inadmissible, and so should not form a part of the accused's cross-examination toolbox. On the other hand, the statement that "the right to make a full answer and defence does not include the right to defend by ambush" is not qualified in anyway. The court could have intended to apply the statement more broadly.

[78] Sections 278.2-.8 also require that the accused provide particulars identifying the record and its relevance at trial to the Court and Crown. The Supreme Court upheld the constitutionality of ss. 278.2-.8 in *Mills*, but I do not believe *Mills* is applicable here. The court in *Mills* did not address whether advance disclosure of documents has an impact on the accused's rights during cross-examination. This is not surprising, as ss. 278.2-.8 concern production of documents, not admissibility. The link between production and

cross-examination is not sufficiently proximate to permit a useful analysis of the constitutional effects of production on potential cross-examination.

[79] The Supreme Court of Canada has not otherwise explicitly addressed whether the element of surprise is integral to the right to a fair trial. In determining whether it is a necessary component of cross-examination, I will look at the circumstances in which the element of surprise arises, the impact its use has on the effectiveness on cross-examination, and the impact its use has on the truth-seeking function of the trial.

[80] At its core, cross-examination is the eliciting of evidence from opposing witnesses through oral questions and answers. Thus, not every cross-examination includes the element of surprise. Similarly, impeachment does not always involve surprise, as impeachment can and does arise out of inconsistencies between a witness' testimony and statements that they know the accused may refer them to in court, such as their police statements or testimony at preliminary inquiries. The element of surprise that Mr. Farah refers to is the ability to present to a witness a piece of evidence contradicting the witness' testimony, and that witness does not expect to be produced. Taking a witness by surprise occurs, therefore, in discrete circumstances.

[81] Although the opportunity to surprise a witness arises only where specific conditions are present, this does not mean that the opportunity to surprise a witness arises infrequently. As Mr. Farah points out, given society's use of technology, many communications between friends and acquaintances occur over email, text and social media. Where the complainant and accused are known to each other, therefore, there is a good likelihood that there are written communications between them. This increases the likelihood that an accused will have access to, and will want to adduce, evidence in

which the complainant has a reasonable expectation of privacy. Moreover, evidence of this nature may form a large part of an accused's defence. An accused may, therefore, reveal most or all their case through an application under the Regime.

[82] There is no doubt, as well, that it can be highly effective to catch a witness by surprise with evidence that is inconsistent with their testimony. This can help to create reasonable doubt in the decision-maker.

[83] Moreover, there is legitimate concern that a witness with advance notice of not only the evidence the accused seeks to adduce but its relevance to trial will shape their evidence, either consciously, or unconsciously, to respond to the evidence. This can reduce the effectiveness of cross-examination. There is also the possibility that a complainant's testimony will become tainted by the disclosure.

[84] While the potential negative impact of advanced disclosure on the accused's ability to cross-examine the complainant cannot be dismissed, the impact of advance disclosure of evidence on the truth-seeking function of the trial is mixed. In *R v Stinchcombe,* [1991] 3 SCR 326 (*"Stinchcombe"*), the Supreme Court of Canada discussed what impact disclosure has on the truth-seeking function. It stated at 335:

> Refusal to disclose is also justified on the ground that the material will be used to enable the defence to tailor its evidence to conform with information in the Crown's possession. For example, a witness may change his or her testimony to conform with a previous statement given to the police or counsel for the Crown. I am not impressed with this submission. All forms of discovery are subject to this criticism. There is surely nothing wrong in a witness refreshing his or her memory from a previous statement or document. The witness may even change his or her evidence as a result. This may rob the cross-examiner of a substantial advantage but fairness to the witness may require that a trap not be laid by allowing the witness to testify without the benefit of seeing contradictory writings

> which the prosecutor holds close to the vest. The principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all relevant material.

[85] In *Stinchcombe* the court was discussing the rights of the accused to Crown disclosure, and because of this the statement above is not completely applicable in considering disclosure to a complainant. Nevertheless, I take *Stinchcombe* as recognizing that disclosure need not impede the truth-seeking function of a trial, but may assist it.

[86] In addition, in sexual assault trials a complainant who is testifying is likely to become flustered and confused when confronted while on the stand with records containing private information that they could not anticipate would arise. This was described by Chapman J. in *R v. MS*, 2019 ONCJ 670 at paras. 104-105:

> … The cross-examination in question necessarily involves private, sensitive, and/or sexual material. The potential for humiliation, in having your intimate communications and photos produced in a public courtroom, under intense stress and scrutiny [as written]. It would be unreasonable to expect a complainant, testifying about an embarrassing and personal subject matter, to respond logically, coherently and calmly when confronted with such material out of the blue. Mechanisms that serve to impede the process by causing unnecessary anxiety to the witness do not advance the truth-finding process.
>
> Private records, or evidence of sexual history, when put to a complainant with inadequate prior notice, logically invites a response that is generated by fear, humiliation, confusion or anxiety, and not one that is comprehensive and responsive, and conducive at getting at the truth. …

[87] Any witness may benefit from having their memory refreshed through the disclosure of evidence. This benefit may increase for sexual assault complainants, as

they would be able to consider the evidence outside of a stressful and anxiety-provoking environment.

[88] As a result, the effect of disclosing the evidence to be adduced, and the relevance of the evidence to the issues is that the effectiveness of cross-examination may sometimes be reduced. It may taint the complainant's testimony and, at times, impede the truth-seeking process. It may however, at other times assist the truth-seeking function.

[89] There are ways to compensate for potentially tainted testimony. The accused can examine the complainant on the impact advance disclosure of evidence had on them. Courts deal with the possibility that a witness' evidence has been tainted from time to time (*R v Buric* (1996), 28 OR (3d) 737 (ONCA)). In appropriate circumstances the court can give less weight to testimony that has been tainted, or provide instructions to the jury about weighing potentially tainted evidence.

[90] Finally, trial fairness encompasses not only the interests of the accused, but also those of the complainant and the community (*Mills,* para. 72). In the assessment of trial fairness, I recognize that sexual violence continues to occur too often in our society (*R v Barton*, 2019 SCC 33 ("Barton") at para. 1). Myths and stereotypes and the use of cross-examination to humiliate complainants continue to affect criminal proceedings (*Barton*; "The Inhospitable Court," *University of Toronto Law Journal*, (Spring 2016), 66, University of Toronto Press at 204-207). The problems Parliament sought to address when it enacted ss. 276 and 278.2-.8 more than 20 years ago persist to this day. These issues I must also take into account in determining whether the Regime violates the accused's right to a fair trial.

[91] A procedure that requires the accused to disclose evidence and the relevance of the evidence to the complainant can have a negative impact on the accused. It is not sufficient to find that there may be a negative impact, however, as the accused is not entitled to the most favourable procedures imaginable (*Mills*, para. 72). Here, balancing the factors, I conclude that requiring the accused to disclose the evidence and its relevance to the proceedings does not deprive the accused of a fair trial.

ii) the threshold for the admission of evidence

[92] The threshold for admission of the evidence the accused seeks to adduce is whether: "… 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." (s. 278.92(2)(b)). Mr. Farah states that the threshold for admission of evidence is too high, thus violating his right to a fair trial.

[93] Crown counsel says that the threshold for admission of evidence does not violate the *Charter*. She says that the Supreme Court of Canada dealt with this exact issue in *Darrach*. Crown counsel submits that the standard is that the evidence "… not to be so trifling as to be incapable, in the context of all the evidence, of raising a reasonable doubt" (*Darrach* para. 39, quoting *R v Darrach* (1998), 38 OR (3d) 1 (ONCA) at para. 48). This is not very high or different than other thresholds for the admission of evidence.

[94] The language of s. 276 is the same as the language of the Regime, and there is no reason to distinguish *Darrach*. I therefore find that the threshold for admission of evidence is not so high as to render it unconstitutional.

iii) the notice period

[95] Section 278.93 requires that the accused provide notice and the application materials to the Crown and the court seven days before the hearing.

[96] Mr. Farah submits that, if he is required to bring his application before trial, then the requirement that he provide the materials in advance violates his right against self-incrimination. If he may bring the application after the Crown has closed its case, the right against self-incrimination is no longer at issue. Mr. Farah says that, therefore, there are two aspects to the consideration of whether the notice period is constitutional. First is whether an application under the Regime must occur before the trial; second is its constitutionality.

[97] It is not necessary for me to determine whether an accused is required to bring the application before the trial commences. I have already found that the Regime does not violate the accused's right against self-incrimination because the Regime does not compel an accused to disclose evidence. So, even if the notice period effectively requires the accused to bring the application before trial, this requirement does not offend the *Charter*.

iv) the participation of the complainant in the application

[98] Section 278.94(2) provides that the complainant has the right to appear and make submissions at the hearing for admissibility. Under s. 278.94(3), the judge has the obligation to inform the complainant of their right to counsel.

[99] Mr. Farah submits that permitting the complainant to participate in a hearing that concerns the admissibility of evidence undermines the role of the Crown and infringes on his right to a fair trial.

[100] The Crown asserts that no constitutional issue arises by giving the complainant standing in an application under the Regime.

[101] I find that giving the complainant standing does not violate the *Charter*.

[102] In *Shearing*, the accused had in his possession the complainant's diary and sought to question her on it during cross-examination. The trial judge conducted a *voir dire* to determine admissibility, and the complainant, with her counsel, took part in the *voir dire*. In its decision, the Supreme Court of Canada implicitly approved of the procedure.

[103] I also adopt the words of Perkins-McVey J. from *R v El-Zoheiry,* unreported, when, in addressing this issue, she stated:

> [135] I do not see how the presence of counsel for the complainant in any was [as written] diminishes the role or importance of the Crown in the trial proper on in the s. 278.94 Admissibility hearing [as written] The court relies on Crown counsel to act in the public interest and balance many competing interests in exercising its discretion. The system depends on that. I do not see how it makes a difference that Crown Counsel and Counsel for the complainant may take opposing views. Their role is to make submissions to the Court. They are not the decision makers.

CONCLUSION

[104] The interests at stake are significant to the accused, to the complainant, and to society. A principal element of criminal trial proceedings is that a person should not be found guilty for an offence they did not commit. The proceedings and principles of criminal law have been developed to ensure that this does not occur. Legislative changes to criminal procedure must be scrutinized to ascertain that they do not deprive an accused of a fair trial.

[105] However, the criminal justice system encompasses more than the rights of the accused. Complainants in sexual assault proceedings also have the right to privacy, dignity and equality. Along with these individuals, society has an interest that criminal proceedings reach just results.

[106] The Regime does not infringe on the accused's rights to a fair trial. Instead, it balances the accused's right with those of the complainant. I conclude that the Regime does not violate ss. 7, 11(c) or 11(d).

_____
WENCKEBACH J.