COURT MARTIAL

Citation: *R. v. Tait*, 2021 CM 2009

Date: 20210506
Docket: 202040

Standing Court Martial

Asticou Centre
Gatineau, Quebec, Canada

Between:

Sergeant C.A. Tait, Applicant

- and -

Her Majesty the Queen, Respondent

Before: Commander S.M. Sukstorf, M.J.

RESTRICTION ON PUBLICATION

Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court orders that any information that could disclose the identity of the person described during these proceedings as the complainant shall not be published in any document or broadcast or transmitted in any way.

DECISION ON ACCUSED'S APPLICATION SEEKING A REMEDY UNDER SECTION 52 OF THE *CONSTITUTION ACT, 1982* FOR BREACH OF RIGHTS GUARANTEED UNDER SECTION 7 AND PARAGRAPH 11(*d*)

(Orally)

Introduction

[1] On 22 September 2020, the Director of Military Prosecutions (DMP) preferred one charge for an offence contrary to section 130 of the *National Defence Act* (*NDA*) that is sexual assault, contrary to section 271 of the *Criminal Code* against the applicant.

[2] On 11 February 2021, the Court Martial Administrator convened a Standing Court Martial for the trial of the applicant to be held from 12 to 23 April 2021 in 4th Canadian Division Support Base.

[3] Historically, complainants in sexual assault cases were subjected to unfair and irrelevant cross-examination on their prior sexual history. Both the courts and Parliament reacted to eliminate such attacks and the landscape has evolved over the past several decades.

[4] Parliament's initial attempt to exclude all prior sexual history evidence with section 276 of the *Criminal Code* was found unconstitutional by the Supreme Court of Canada (SCC) in *R. v. Seaboyer*, [1991] 2 S.C.R. 577.

[5] Parliament reacted to the *Seaboyer* decision by amending the section 276 regime, incorporating changes that were later upheld in *R. v. Darrach*, [2000] 2 S.C.R. 443.

[6] Section 276 of the *Criminal Code* sets out legislative protection of sexual assault complainants. As such, section 276 is a legislative exclusionary rule that prohibits evidence that the complainant has engaged in other sexual activity (OSA), which is not the subject of the charges, with the complainant or any other person if the evidence is intended to support one or the other of the "twin myths".

[7] The twin myths are: a woman who has consented to sexual activity in the past is more likely to have consented to it on this occasion and, secondly, an unchaste or sexually active woman is less worthy of belief.

[8] In short, an accused may not tender evidence of a complainant's sexual history unless and until the accused meets the admissibility criteria set out in subsection 276(2). Even if the OSA is not being used to support either of the twin myth inferences, OSA is not admissible unless a judge determines that the evidence is of specific instances of sexual activity; 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.

[9] A related issue was the access to and use of a complainant's medical, counselling or other private records that were in the hands of third parties. Parliament enacted a production regime for these third-party records by enacting sections 278.1 through 278.91. The framework set out a process whereby an accused could apply to the court, in advance of a trial, for the production of third party records for vetting and, if relevant, disclosure to the defence. The SCC upheld the constitutionality of this third party records scheme in the case of *R. v. Mills*, [1999] 3 S.C.R. 668.

[10] As the law surrounding sexual assault continued to evolve, concerns regarding private records belonging to the complainant, but in the possession of the accused, started to develop and attract interest.

[11] In *R. v. Osolin*, [1993] 4 S.C.R. 595, one of the issues related to circumstances under which defence can cross-examine a complainant on records that were already in the accused's possession. In *Osolin*, the majority held that where issues arise during the cross-examination of a

complainant in a sexual assault trial, a *voir dire* must be held. The Court also held that the onus was on the defence to demonstrate that the proposed cross-examination was appropriate and a jury would need to be instructed on the proper use of the evidence.

[12] A few years later in *R. v. Shearing*, 2002 SCC 58, the SCC dealt with this same issue again when the accused had the private diary of a complainant in his possession. Defence counsel confronted the complainant with the diary on cross-examination. The trial was adjourned and the complainant retained legal counsel to represent her privacy issues. The Court found that the fact that the diary was in the possession of defence counsel did not extinguish the complainant's privacy interest in its contents. Although the SCC in *Shearing* ordered a new trial because the accused's cross-examination of the complainant had been unnecessarily restricted, it endorsed the holding of a *voir dire* during cross-examination to determine whether cross-examination could occur with respect to the private record and set out the scope of permissible cross-examination.

[13] On 13 December 2018, Bill C-51 was enacted into law. Sections 278.93 and 278.94 of the *Criminal Code* replaced the procedural protocols previously set out in sections 276.1 and 276.2 of the *Criminal Code*.

[14] Bill C-51 amended, among other things, the procedure to determine the admissibility of evidence of OSA of the complainant. In doing so, it also expanded the definition of "sexual activity" to include "any communication made for a sexual purpose or whose content is of a sexual nature."

[15] With respect to records in the possession of the accused that do not relate to "sexual activity" evidence under section 276, a new provision was also implemented, section 278.92, which created a regime to determine the admissibility of private records that are already in the possession of the defendant, over which the complainant has a reasonable expectation of privacy. The nature of this evidence would include such things as emails, texts or other documentary evidence that the accused may have that relates to the complainant.

[16] Both the new and older provisions are attached as Annex A. The amended sections are essentially the same as the repealed sections, with two exceptions. Prior to admitting into evidence or cross-examining any sexual activity other than the sexual activity that forms the subject matter of the charge, or any record that is in the possession or control of the accused relating to a complainant containing personal information for which there is a reasonable expectation of privacy, the complainant has the right to participate in the hearing (see sections 276 and 278.92). Secondly, section 278.94 provides that a complainant "may appear and make submissions" at a hearing held in relation to a defence application under sections 276 or 278.92 and may be represented by counsel.

[17] In addition, subsections 278.94 (2) and (3) establish that:

> (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.

[18] In filing this application, the defendant has indicated that he intends to ask the court to permit the cross-examination of the complainant on evidence of OSA of the complainant that does not form the subject matter of the charge.

[19] Step one of the process has not changed. If an accused seeks to have OSA admitted, the accused must make an application to the trial judge for a hearing to determine admissibility of the OSA (see subsection 278.93(1) of the *Criminal Code*). The defence must submit an application in writing and file an affidavit with detailed particulars of the evidence it seeks to produce and the Crown and Office of the Chief Military Judge must be served at least seven days in advance of the hearing or any shorter interval as ordered.

[20] The first step of the application is held *in camera* pursuant to subsection 278.93(3) and, if the judge is satisfied that the application was made in accordance with subsection 278.93(2), the trial judge shall grant the application and hold a hearing under section 278.94 to determine whether the evidence is admissible under subsection 276(2).

[21] Step two determines whether the evidence is admissible pursuant to section 278.94. Once again, the hearing is *in camera* (see subsection 278.94(1). It is the second step that changed with Bill C-51. Prior to the amendments, the complainant did not participate in a hearing to determine the admissibility of "her" private information or her OSA. The amendments added the right of both the complainant and the complainant's counsel to appear at the hearing to determine admissibility and to "make submissions" (see subsections 278.94(2) and (3)).

[22] After the hearing, the trial judge must determine if the evidence sought, or any part of it is admissible under subsection 276(2) and the judge shall provide reasons for the decision (see subsection 278.94(4)).

[23] On 12 March 2021, the applicant filed a Notice of Constitutional Question on the constitutional validity and applicability of sections 278.93 to 278.94 of the *Criminal Code*.

[24] On 12 March 2021, the applicant also brought a notice of application seeking a declaration pursuant to section 52 of the *Constitution Act, 1982* that sections 278.93 to 278.94 of the *Criminal Code* are of no force or effect because they violate the applicant's *Charter* rights as guaranteed by section 7 and paragraph 11(*d*) and/or any other relief this Court sees fit.

[25] Since the coming into force of the new provisions, trial courts across the country have been divided on the question of whether some or all of the amended provisions pass constitutional scrutiny. There is absolutely no unanimity even within the same provinces and there are no appeal court decisions on the matter. This is the first time this issue is being heard within the military justice system and consequently, this Court does not have to address the issues surrounding judicial comity that other judges were confronted with addressing in other jurisdictions.

[26] On this subject, the case of *R. v. J.J.*, 2020 BCSC 29 was granted leave to appeal by the SCC: *Her Majesty the Queen v. J.J.*, SCC No. 39133 [23 July 2020]. The case of *R. v. Reddick*,

2020 ONSC 7156, has now joined *J.J.*, in the direct appeal to the SCC. The SCC is tentatively set to adjudicate on the issues set out in those appeals in October 2021.

[27] In response to the applicant's Notice and Application, the prosecution took the position that, in order for the applicant to challenge the provisions in question, he had to first disclose the OSA he sought to have introduced.

[28] Relying upon *R. v. Mills*, [1999] 3 S.C.R. 668 at paragraphs 19 and 35 to 42, the applicant argued it was not a necessary prerequisite. In hearing the prosecution's motion to quash the application, the Court agreed with the applicant and accordingly determined there was nothing more required than a reasonable hypothetical before the Court.

[29] The Court benefited from counsel's written and oral submissions on the issue before the Court. In addition, the Court requested that Ms Way, who is an experienced legal counsel representing complainants, appear and make submissions to ensure that the Court is informed of a complainant's perspective.

Positions of the Parties

Defence (Applicant)

[30] The applicant argues that constitutional breaches of an accused's section 7 and paragraph 11(*d*) *Charter* rights arise from the cumulative effect of the following factors:

(a) the significant burden that the accused must meet in order to introduce evidence under section 276;

(b) the extent of evidence and trial strategy that the accused must reveal in order to meet the burden established by section 276;

(c) the advance notice requirement contained at subsection 278.93(4) which obliges the accused to reveal important aspects of his defence well in advance of the complainant's testimony at trial;

(d) the expanded definition of "sexual activity" at subsection 276(4), which now includes any communication made for a sexual purpose or whose content is sexual in nature;

(e) the involvement of the complainant at the admissibility hearing under subsection 278.94(2) and 278.94(3), permitting her to participate in the hearing and be represented by counsel; and

(f) the degree to which the complainant's involvement in the admissibility hearing undermines the vital role of the prosecution.

[31] The applicant further argues that the impugned provisions (subsections 278.94(2) and (3)) state that the complainant is not a compellable witness but may appear and make submissions. He argues that there is no mention of a right to receive materials in advance of the hearing or the right of cross-examination by the complainant or her counsel and guidance is sought on these issues. It is the applicant's position that the interpretation of the impugned provisions play a significant role in the ultimate violation of the accused's rights under section 7 and paragraph 11*(d)* of the *Charter*.

[32] In short, the applicant argues that it is the degree of participation afforded to the complainant in the admissibility hearing, combined with the advance notice requirement that renders the later cross-examination of the complainant ineffective, thereby violating the accused's *Charter* rights.

[33] Consequently, during oral submissions, the applicant also requested that in rendering its decision on the issue of constitutionality of the impugned provisions, that the court also answer the following questions, which counsel argues underpins whether or not the changes render the process constitutional:

(a) What information should the complainant receive – affidavit and application?

(b) What is the prosecution's duty to consult with the complainant – with or without counsel – whether or not she is appearing at the hearing?

(c) Should the complainant be offered any opportunity to attend or participate at Stage 2?

(d) If complainant does have some level of involvement, what should be the extent of her participatory rights?

(e) What is the proper timing for the two stages to be considered?

Prosecution (Respondent)

[34] Conversely, the prosecution submitted that the 2018 Bill C-51 is simply an incremental step to further protect the privacy and dignity rights of victims of sexual violence. In doing so, he argued that Parliament requires that an accused bring an application if they wished to adduce, in a public courtroom, the private documents of a complainant of sexual violence. Parliament further granted the complainant, who is the person most impacted by these documents, standing at that hearing.

[35] The prosecution asked the Court to reject the application. He submitted that the sections 278.93 to 278.94 framework, properly interpreted, respects the accused's *Charter* rights. Further, he submitted that while these provisions have been the subject of significant trial level litigation, the majority of courts have upheld the constitutionality of the impugned provisions, especially as it relates to evidence captured by section 276 of the *Criminal Code*.

[36] He further submitted:

(a) Sections 278.93 and 278.94 are constitutional as they align with the principles of fundamental justice. The provisions achieve the proper balance between the accused's right to make full answer and defence, the complainant's right to privacy, security and equality, and society's interest in encouraging victims of sexual assault to report.

(b) By adding the sections 278.92, 278.93 and 278.94 to the *Criminal Code*, Parliament filled a legislative gap as it pertained to third party records already in the hands of the accused.

(c) The current framework set out in sections 278.93 and 278.94 of the *Criminal Code* captures extrinsic sexual activity in a very similar manner as the prior section 276 regime which was deemed constitutional in *Darrach*. The additional participatory rights of the complainant at the admissibility hearing align it with the framework for adducing third party records not in the hands of the accused (sections 278.1 to 278.91), deemed constitutional in *Mills*.

Issues

[37] The constitutional question before the Court is whether sections 278.93 to 278.94 of the *Criminal Code* infringe section 7 and paragraph 11(*d*) of the *Charter* and, if so, whether they were saved by section 1.

[38] Although the above two provisions relate to the admissibility of evidence of both OSA and records in which the complainant has a reasonable expectation of privacy, in the case at hand, the focus was on the constitutionality of those sections as they relate to the admissibility of evidence of OSA.

Summary of decision

[39] For the reasons that follow, I find that the complainant is entitled to receive the defence's full notice of application and/or factum as well as the sworn affidavit prior to the Stage 2 hearing. I further find that the complainant's and her independent legal counsel's participation at the hearing includes the ability to ask questions of the affiant. The purpose of this type of *voir dire* is to assist and provide the trial judge with the necessary information needed for the judge to make an informed decision on relevancy and no party has the right to exploit it for an improper purpose. Consequently, a trial judge has a duty to limit and control any cross-examination.

[40] With respect to the Notice of Constitutional Question, I find that sections 278.93 to 278.94 of the *Criminal Code* do not infringe the accused's rights under section 7 and paragraph 11(*d*) of the *Charter* because the statutory procedure set out for the determination of the admissibility of evidence of extrinsic sexual history can be applied in a manner consistent with the principle against self-incrimination, the right to a fair trial and the complainant's rights to privacy and equality. After *Seaboyer*, Parliament specifically provided trial judges with discretion to ensure that they do not exclude relevant evidence whose probative value is not

substantially outweighed by its potential prejudice. The changes enacted with the new provisions in sections 278.93 and 278.94 did not change or remove this discretion.

[41] The SCC has continually reminded trial judges that they hold the ultimate responsibility for enforcing compliance with the mandatory regime. Although the SCC recognized that the "vetting" of such applications pre-trial provide benefit in focusing all parties on the legitimate use of such evidence, it also made it clear that an early ruling on the admissibility of prior sexual activity is not set in stone and there may be circumstances when it is appropriate to reopen and reconsider the application (see *R. v. Barton*, 2019 SCC 33 at paragraphs 65 and 68; *R. v. R.V.*, 2019 SCC 41; *R. v. Goldfinch*, 2019 SCC 38 at paragraph 145).

[42] The SCC also recognized that cross-examination is a key element of the right of an accused to make full answer and defence and a judge's failure to allow relevant cross-examination will almost always be grounds for a new trial. In short, if the defence is denied the right to call and challenge evidence, then it is synonymous to the denial of his right to rely on a defence to which he is legally entitled.

[43] Consequently, a trial judge must exercise her discretion to hear and possibly revisit decisions when the door to admissibility opens or when the appropriate relevance has been established, which sometimes will not occur until after a complainant has testified and the appropriate evidence is before the court.

[44] Unlike the findings rendered in some courts, this Court finds that there is no statutory bar or common law limitation that prevents a trial judge from hearing a section 276 application after a complainant has testified in their examination-in-chief. Further, I find that the purpose and objectives of the legislative regime, including the recent changes, are met by permitting such a mid-trial application.

Law

[45] The concerns raised with respect to the legislative changes ushered in under Bill C-51 are focused on the cumulative effect of all the changes to an accused's section 7 and paragraph 11*(d) Charter* rights which read as follows:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> . . .
>
> **11.** Any person charged with an offence has the right
>
> . . .
>
> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

[46] The applicant seeks relief pursuant to section 52 of the *Constitution Act, 1982*.

> **Primacy of Constitution of Canada**

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> (2) The Constitution of Canada includes
>
> *(a)* the *Canada Act 1982*, including this Act;
>
> *(b)* the Acts and orders referred to in the schedule; and
>
> *(c)* any amendment to any Act or order referred to in paragraph (*a*) or (*b*).
>
> **Amendments to Constitution of Canada**
>
> (3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Analysis

Section 7

[47] As a serving member of the Canadian Armed Forces (CAF), the applicant is entitled to all the protections of the *Charter.* In simple terms, section 7 of the *Charter* permits a decision maker in the military justice system to impose restrictions on the life, liberty and security of its members provided it does so in a way that is not contrary to the principles of fundamental justice. An analysis as to whether or not the sections 278.93 and 278.94 of the *Criminal Code* lead to a violation of the applicant's rights guaranteed under section 7 of the *Charter* involves a two-step assessment:

> (a) Is there an infringement of one of the three protected rights, that is to say a deprivation of life, liberty or security of the person?
>
> (b) Is the deprivation in accordance with the principles of fundamental justice?

[48] The first step of the section 7 analysis is straightforward, as sections 278.93 and 278.94 of the *Criminal Code* have the capacity to deprive the accused of his liberty. If the accused is convicted of sexual assault, he may be sentenced to imprisonment. Insofar as sections 278.93 and 278.94 are applied in a manner that affects conviction, they may deprive him of his liberty.

[49] In *Seaboyer*, McLachlin J. found that the right of an accused to make "full answer and defence" is a principle of fundamental justice, protected by section 7 of the *Charter* as explained, at page 608:

> The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution.

[50] After hearing the submissions of counsel, it became clear that there is no dispute that the accused's right to a fair trial is a principle of fundamental justice. Further, both counsel conceded that the legislation seeks to create conditions that encourage the reporting of sexual offences and

protect the complainant's privacy, which are legitimate goals provided they do not interfere with the accused's right to a fair trial.

[51] The issue that concerns the applicant is that the cumulative effect of the new provisions has destabilized the delicate balance that previously existed. In doing so, it is the applicant's position that the new provisions combined with the advanced notice requirement have tipped the scales too far in protecting a complainant's privacy rights that the section 276 protocol now infringes on the accused's right to a fair trial. The question is whether the trier of fact will be able to get at the truth and properly and fairly dispose of the accused's case.

[52] Consequently, based on the facts of this application and the submissions of counsel, the Court must ask whether the challenged legislation infringes the *Charter* guarantee in its effect arising from the actual consequences of the legislation.

[53] In short, a constitutional challenge under section 7 and the right to a fair trial under paragraph 11(*d*) overlap when the issue to be dealt with relates to overbreadth of the legislation in question. As such, the analysis for both alleged infringements unfolds primarily under one section 7 analysis (see *Darrach*, at paragraph 23).

[54] A determination as to whether or not sections 278.93 and 278.94 of the *Criminal Code* overreaches needs to be analyzed by considering the impact of the provisions on the purpose for which the legislation was implemented. The underlying purpose of the section 276 regime was described most recently by the SCC in *Barton*, the Court also restated the purpose behind the legislation as follows:

> [74] Turning to purpose, the s. 276 regime's objects — which include protecting the integrity of the trial by excluding irrelevant and misleading evidence, protecting the accused's right to a fair trial, and encouraging the reporting of sexual offences by protecting the security and privacy of complainants (see *Seaboyer*, at pp. 605-6; *Darrach*, at paras. 19 and 25) — are fundamental. Giving the s. 276 regime a broad, generous interpretation that does not unduly restrict the regime's scope of application would best achieve these objects.

[55] After a thorough review of the jurisprudence on the issues surfacing from Bill C-51, I find the purpose of the legislative changes themselves which is the focus of this application is to further safeguard the privacy interests of complainants, while upholding a defendant's right to a fair trial. This is best summarized by Doody J. in *R. v. Barakat*, [2019] O.J. No. 705 (Ont. C.J.) as follows:

> [32] The purpose of the amendments in issue before me was, in my view, to strengthen the last of the three subsidiary purposes set out in *Seaboyer*, that of safeguarding the privacy interests of complainants, while upholding a defendant's right to a fair trial. That was made clear by the Honourable Senator Murray Sinclair when he moved third reading in the Senate of Bill C-51. He said:
>
> > Bill C-51's changes safeguard the privacy interests of victims while upholding an accused's right to a fair trial, and they reinforce the long-standing rule that it is never permissible to introduce evidence of prior sexual activity in a criminal trial for the sole purpose of showing that a victim is more likely to have consented to the sexual activity at issue or is less worthy of belief.

[33] In an earlier decision, *R. v. Boyle*, 2019 ONCJ 253, I wrote at para. 3:

> In my view, when Parliament granted the right to complainants to appear and make submissions at the hearing, it did so because it recognized that the complainant's rights and interests could be affected by the decision to be made by the judge. Allowing the complainant the right to appear and make submissions would both give a measure of procedural fairness to the complainant and assist the court by granting it access to submissions from the perspective of one of the persons directly affected by the order.

Bell J. agreed with that conclusion in *R. v. E.A.*, 2020 ONSC 6657 at para. 26.

Analysis

[56] In assessing the application of the accused, the Court conducted its analysis by examining the following questions:

(a) What information is a complainant entitled to receive – affidavit and application – and when?

(b) What are the complainant's participatory rights?

(c) Is there flexibility in the timing of hearing such applications?

What information is a complainant entitled to receive – affidavit and application and when?

[57] As referenced earlier, the applicant noted that subsection 278.94(2) stipulates that a complainant can appear and make submissions. Further, she is entitled to be represented by legal counsel; however, the legislation does not stipulate what materials a complainant or her counsel should receive prior to exercising this right.

[58] The applicant contends that the complainant's right to participate in the Stage 2 hearing must be restricted in order to protect the applicant's *Charter* rights. Although counsel for the applicant stated that the notice was not an application for direction, she recognized that the constitutionality was predicated somewhat on understanding what rights a complainant is actually entitled to with the impugned provisions. Consequently, she asked the Court to interpret what the complainant is to receive in terms of disclosure, as well as to clarify her participation rights, including those of her counsel in terms of the ability to "appear and make submissions" pursuant to section 278.94 of the *Criminal Code*.

[59] The applicant acknowledged that such an application would include the defence counsel's submissions on the relevance of the materials it seeks to admit which will disclose the applicant's theory or trial strategy. It is the applicant's position that putting this information in the hands of the complainant prior to her testimony is problematic on a number of levels.

[60] The applicant argued that being compelled to reveal his strategy is especially harmful if he wishes to introduce evidence previously unknown to the complainant or if he wishes to allege a motive to fabricate, which is a defence that would rely heavily on an effective cross-examination.

[61] Although there was some suggestion by the applicant that to protect his *Charter* rights, a complainant should be provided with a redacted version of the defence's application, I do not find this position to be persuasive. In her submissions, Ms Way explained that a section 276 application for OSA is essentially asking the court for permission to air the details of some of the most intimate aspects of the complainant's life, being her sexual experiences that do not relate to the facts before the court, and have them discussed in open court. So to suggest that the complainant should not be provided the full details of the defence's application runs counter to what Parliament intended to do in protecting the rights of a complainant. She would be expected to make her submissions without the appropriate context thus denying the court of the best evidence to ensure that the pursuit of truth is achieved.

[62] The requirement to provide the complainant with the full application particulars for the Stage 2 hearing has been decided in a number of other decisions, including *R. v. Barakat*, [2019] O.J. No. 705 (Ont. C.J.), at paragraph 7; *R. v. A.M.*, 2020 ONSC 1846 as well as *in R. v. Marrello*, [2020] O.J. No. 3617 at paragraph 15. Justice Maxwell, as he then was, in *Marrello* explained his reasons as follows:

> **79** For the reasons that follow, I find that R.R.'s counsel must be provided with a complete copy of the application record, including the communications which are the subject of the hearing, and the facta. I come to this conclusion for several reasons.
>
> **80** First, preventing the complainant from having a complete copy of the application materials is incongruous with Parliament's clear intention to give complainants the right to "appear" at a hearing under s. 278.94 of the *Code*. The purpose of the hearing is to hear submissions on the admissibility of records, which necessarily means the applicant will discuss the communications and his arguments as to their relevance to an issue on the trial. The plain wording of s. 278.94 states that the complainant has the option to be present at the hearing.
>
> **81** It must have been understood by Parliament that giving complainants the right to appear on the hearing would result in the complainant being privy to all the information presented and arguments advanced on the hearing. It would be illogical, and inconsistent with Parliament's intention, to interpret the complainant's participation rights in such a way that she can hear the information during the hearing, but not see or read it in advance of the hearing.
>
> **82** Second, in granting complainants the right to appear at the s. 278.94 hearing with counsel, Parliament granted complainants the right to effective assistance of counsel. Effective assistance of counsel necessarily requires access to the evidence and arguments, including the ability to share information with the client to obtain instructions. It is not the role of the Crown or the defence to determine that a complainant can adequately present her views concerning her privacy and dignity rights on partial information. Nor can it be expected that complainant's counsel can present helpful and complete submissions based on a general summary of the communications in question. There may be important context that only the complainant can explain and provide to the court, through counsel. The specific content of the records may be the catalyst the complainant requires to identify and articulate what privacy and dignity concerns arise.
>
> **83** In my view, giving the complainant only partial or summarized information about the records diminishes the complainant's ability to make meaningful submissions and risks the complainant being relegated to making submissions which are generalized and of limited use to the court. Other courts have come to a similar conclusion: *Boyle*, at para. 32; *R.S.#2*, at para. 22.

> **84** Similarly, restricting access to the application record and facta asks complainant's counsel to make submissions about the complainant's privacy and equality interests in the abstract, without knowing the legal arguments being advanced, or the purported relevance of records. This again creates the risk that the complainant or her counsel will be forced to resort to generalized submissions, or present arguments which are not responsive or misconstrue how the records will be used, if admitted.

[63] Similarly, in *R. v. Simon*, 2019 ABPC 186, at paragraphs 55 to 58, the Court also concluded that the complainant should be granted access to the full application record. In that case, the Court observed, at paragraph 56, that Parliament specifically prescribed that there could be three counsel at the hearing.

[64] After an exhaustive legislative analysis in *R. v. Boyle*, 2019 ONCJ 11 (*Boyle "1"),* Doody J. at paragraph 43 relying upon the SCC position in *Darrach*, found "the complainant is entitled to see the application record of the defendant sufficiently in advance of the hearing to allow her to prepare and make meaningful submissions."

[65] Prior to the enactment of the new provisions, in *Darrach*, the SCC addressed whether a complainant is entitled to learn the contents of the accused's affidavit filed in support of a section 276 application in. At paragraph 55, Gonthier J. wrote:

> 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.

[66] I am most persuaded by the decisions of the aforementioned cases and similarly find that Parliament intended for a complainant to have the full application materials.

[67] Although I find that the complainant is entitled to see the application of the defendant sufficiently in advance of the Stage 2 hearing to allow her to prepare and make meaningful submissions, I emphasize that it is not required until after Stage 1 has been completed. This is the same conclusion that Doody J. came to in *Boyle "1"*. He found that:

> Parliament's omission of an obligation to serve the complainant with the s. 276 record when it is served on the prosecutor – before the first stage hearing – was deliberate. Parliament did not intend that it be served on the complainant at that time. The "implied exclusion" of service of the record <u>at that time</u> was intentional. The maxim applies.
> [Emphasis in original.]

[68] In short, I am of the belief the complainant has no role or rights at the first stage.

What are the complainant's participatory rights?

What should be the extent of the complainant's participatory rights? What is meant by section 278.94(2), which gives the complainant the right to "appear and make submissions"?

[69] There has been significant concern raised in all arenas as to what is included in a complainant's right to appear and make submissions.

[70] The applicant submitted that the involvement of the complainant as a participant at the hearing permits the complainant or her counsel to test the accused's evidence well in advance of trial. The applicant argued that there is a risk that, without necessarily intending to mislead the Court, she will alter her testimony to account for the defence's evidence, bolster her credibility or to fill holes in an incomplete version of events.

[71] The Court noted that the applicant did not challenge the complainant's right to independent legal advice and, in fact, went so far as to fully endorse this right. The issue that was raised by the applicant was not the ability of the complainant to have her own legal advice, but rather it was the extent of the participatory rights of the complainant and her counsel in cross-examining the accused on his application that attracts concern. Once again, there is legislative authority for a complainant and her counsel to appear and make submissions, but there is no reference to the right for the complainant or her counsel to cross-examine the affiant on the application at the Stage 2 hearing.

[72] Relying upon the case of *Reddick*, the applicant argued that if the complainant and her counsel are permitted to cross-examine the accused on his affidavit, there is a real risk that the complainant will usurp the prosecution's duty to evaluate the admissibility of evidence, to test it and ultimately determine how to treat the evidence in the prosecution's case. He suggests that to hand the wheel over to the complainant on such a critical aspect of the trial's conduct is to fundamentally change how a sexual assault trial is conducted. He argues that it is the prosecution that is in charge of the prosecution because of its quasi-judicial and impartial role as a minister of justice. It is the applicant's position that the complainant is partisan and therefore cannot be offered the same standing.

[73] However, Ms Way submitted that by giving the complainant her own voice through legal counsel, the role of the prosecution is actually enhanced, permitting the prosecution to focus on advocating in the public interest. In the past, the prosecution wore two hats which was challenging. The SCC decisions in *Barton* and *Goldfinch* reflect the challenge the prosecution faced when their role of running the trial conflicted with protecting the privacy of an individual complainant.

[74] As the applicant argued, a complainant's interests are partisan, while the prosecution is required to be impartial, which further supports the need for the complainant to have her privacy interests advocated by a third party at the hearing. A complainant and her counsel will be specifically invested in preserving the complainant's privacy interests while the prosecution is required to consistently assess the public interest and the overall evidence in his case.

[75] To illustrate how this change was for the better, Ms Way provided multiple examples as to how the interests of the prosecution and the complainants diverge. One example is that the prosecution will know more about the case as a whole and is in a more advantageous position to represent the public interest. Similarly, when the complainant has independent legal advice, she can share with her lawyer private relevant information that would not otherwise have been shared with the prosecution.

[76] With that being said, I reject the suggestion that the ability of a complainant's legal counsel to ask questions about the admission of her intimate sexual activity or other highly private moments necessarily means that they will engage in a broad and robust cross-examination to test the accused's defence. The Court finds that it is inconsistent with the intent of Parliament to suggest that the complainant and her counsel can appear and make submissions but they are not entitled to ask questions or even seek clarity.

[77] It is incumbent on the trial judge to manage the court and control the cross-examination on the *voir dire* as it does throughout the trial. Similar to what occurs in a *Garofoli* application (see *R. v. Garofoli*, [1990] 2 S.C.R. 1421), there must be limits placed on the range of cross-examination and this is the trial judge's responsibility.

[78] Consequently, it is important to go back to first principles and remind ourselves of what Lamer C.J. explained at paragraph 10 in *R. v. Underwood*, [1998] 1 S.C.R. 77:

> [T]he purpose of this *voir dire* is not "defence disclosure." It creates no independent rights in the Crown, and, therefore should not be treated as an excuse for the Crown to deeply probe the case for the defence... The point is to provide the trial judge with the information he or she needs to make an informed decision, but the Crown has no right to require more than that.
> [Emphasis in original.]

[79] With the purpose of the *voir dire* placed in context, it is clear that it is incumbent on the trial judge to tightly limit the evidence and any cross-examination to the pivotal issues that the trial judge needs in order to make a decision on the narrow issue that is before the court. With this context and with the fact that the testimony given in the *voir dire* is protected by section 13 of the *Charter*, the risk to an accused is clearer. What this means is that the testimony of an accused cannot be tendered later by the prosecution to try to incriminate an accused, it can only be used to challenge a defendant's credibility.

[80] Similarly, a judge can order that the prosecution conduct its cross-examination first, leaving no requirement for a complainant's lawyer to engage further. As Ms Way pointed out, if a complainant's counsel does seek to cross-examine, then it is limited to the four corners of the affidavit and it is not a broad invitation to test other waters.

[81] In the *Boyle "1"* decision, Doody J. examined the relevant principles of statutory interpretation which must guide an analysis in interpreting the statutory language in subsection 278.94(2). At paragraph 27, he cited the Ontario Court of Appeal's decision in *R. v. Stipo*, 2019 ONCA 3 in which the Court reiterated that statutory intent cannot be founded on the wording of the legislation alone. In short, the words of the enactment must be "read in their entire context

and in their grammatical and ordinary sense harmoniously" and together with that scheme, object, and intention.

[82] In *R. v. Boyle*, 2019 ONCJ 253 (*Boyle "2"*), Doody J. then examined this issue at length before concluding that the right to appear and make submissions does include the right to cross-examine:

> **[14]** The defendant submits that it is fundamentally unfair that he be subject to double cross-examination. I do not accept this. Accused persons who choose to testify are often cross-examined by more than one person. Examples are multiple accused cases and prosecution by both the Federal and the Provincial Crown counsel on a single information or indictment. Parliament decided that the complainant's interests are different than the Crown's and she should be heard and her interests considered. That does not mean that the cross-examination of the Crown and the complainant can be duplicative. I will not allow that. Nor will I allow them to stray beyond what is at issue on this application as the Supreme Court of Canada warned about in *R. v. Darrach*, [2000] 2 SCR 443, 2000 SCC 46 at paragraph 64.

[83] In coming to his decision, Doody J. provided an excellent summary of the jurisprudence that existed at the time he rendered his decision:

> **[5]** The issue is whether the words "appear and make submissions" include the right to cross-examine the defendant on the affidavit he swore in the s. 276(2) application. When read in that context, I conclude that they do. I realize that I said in paragraph 40 of my January 13th decision that at first blush the language did not seem to give complainants the right to lead evidence or cross-examine. I have now read the cases provided by Mr. Carter and considered the issue fully.
>
> **[6]** I start with the proposition that the right to appear and make submissions must be meaningful. Parliament has decided that the complainant's perspective is important to the issue in this application and the court should take that perspective into account. Her perspective may require evidence to flush out her submissions. Submissions made without evidence are often of limited use. And Parliament wanted to ensure her rights to privacy were protected, and that may require that certain things be brought out by cross-examination.
>
> **[7]** Similar language in other statutes has been held to give rise to rights to call evidence and cross-examine. In *American Airlines, Inc. v. Canada (Competition Tribunal)*, [1989] 2 FC 88, 1988 CanLII 5706 (FCA), the Federal Court of Appeal was considering s. 9(3) which provided that:
>
> > Section 9(3) of the *Competition Tribunal Act* authorizes any person, with leave of the tribunal, to 'intervene ... [and] make representations ...'.
>
> **[8]** Strayer, J. sitting as a member of the tribunal, held that this did not include the right to call evidence or cross-examine. The Court of Appeal reversed, holding that the word "representations" included relying on facts as well as argument. More importantly, as Justice Iacobucci, as he then was, held, the context and nature of the proceedings under the *Competition Act* supported a broad interpretation that allowed interveners to inform the Tribunal of the ways in which matters complained of impacted on them. The court held that that permitted interveners to play a wider role than simply presenting an argument, and that that interpretation was a fairer way of treating interveners. Justice Iacobucci held, on behalf of the Court of Appeal, that the Tribunal had discretion using the language I have quoted to allow interveners to call evidence and cross-examine.
>
> **[9]** In the case of *Ammazzini v. Anglo American PLC*, 2016 SKCA 164 (CanLII), the Saskatchewan Court of Appeal held that on a class certification motion a representative plaintiff in a competing class action could file evidence. The statute gave him the right to "make submissions" at the certification hearing. At paragraphs 46 to 48, the Court of Appeal held that applying the

> principles in the *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1988 CanLII 837 (SCC) case, keeping in mind the purpose of the legislation, and I am quoting from paragraph 48 of the decision:
>
> > Again, the answer seems quite straightforward. A purposeful and liberal view of the word 'submissions' bearing in mind the Legislature's evident purpose in amending the *Act*, leads inevitably to the conclusion that s. 5.1 comprehends an entitlement to file evidence.
>
> **[10]** The only limitation imposed by the Court of Appeal was that the evidence to be filed must relate to the purpose for which he was allowed to appear, that is whether it would be preferable to allow claims to be determined by the other class action rather than the one initiated in Saskatchewan.
>
> **[11]** More importantly, the same conclusion has been reached by cases considering the same language in s. 278.4(2) dealing with s. 278 applications. In *R. v. Monkman*, 2007 MBQB 6, Schulman, J. of the Manitoba Court of Queen's Bench held that the right of the complainant to appear and make submissions included the right to cross-examine. In fact, he held that the Crown had only a limited right to do so. I would not agree with that.
>
> **[12]** In *R. v. N.W.P.*, 2000 NWTSC 22, Vertes, J. of the Northwest Territories Supreme Court held that the right of the complainant and the record-holder under s. 278 to appear and make submissions implied that if they wanted to rely on facts they had to adduce them in evidence. A right to adduce evidence goes hand in hand with the right to cross-examine.

Timing - Is there any flexibility in the timing of hearing such applications?

[84] After having decided that the complainant is entitled to receive the full application and has full participatory rights at the Stage 2 hearing, the timing of the *voir dire* becomes essential to the analysis on the overall constitutionality of sections 278.93 and 278.94.

[85] The applicant acknowledges that giving the complainant standing in a section 276 hearing provides the complainant with a voice (through herself or counsel) to speak specifically as to how the admission of the evidence personally impacts her.

[86] The applicant acknowledges that this is a laudable goal, but argues that it is its combination with the existing advance notice provisions that violates the rights of the accused and renders the cross-examination ineffective. Further, there is no argument that a section 276 application will be required in the instant case, but in light of all the participatory rights of the complainant, the applicant questions how the application can be considered pre-trial without violating his rights.

[87] The applicant vigorously argued that if the complainant receives the accused's application pre-trial, it will reveal potentially critical information about the evidence the accused wishes to introduce, how that evidence will be used, the relevance of the evidence to the accused's case and the strategy of the defence.

[88] Further, the applicant argues that the complainant being able to cross-examine the accused on evidence that will later be put to the complainant is a profound violation as it would render a later cross-examination of the complainant completely ineffective. The applicant contends that the ability of the complainant to conduct a cross-examination in advance of the trial permits the complainant not just to hear the evidence, but to test it.

[89] It is my assessment that the underlying reasons and analysis conducted in *Reddick* are predicated on the assumption that an admissibility *voir dire* under section 278.94 must be conducted as a pre-trial application. Justice Akhtar explains why the timing for serving notice of such applications cannot be "read down" or interpreted as being held after the direct examination of a complainant.

> Delaying the Voir-Dire
>
> [67] In order to overcome some of these difficulties, the courts in *R.S.* and *J.J.* purported to "read down" the provisions by postponing the s. 276 voir-dire to the end of the complainant's evidence in chief.
>
> [68] With respect, and for the following reasons, I do not agree with this approach.
>
> [69] First, even though the judges sought to "read down" the sections in modifying the process in those cases, their preferred option of delaying the voir-dire is, in my view, a "re-write" of the section which explicitly states that the accused's affidavit must be provided 7 days prior to trial.
>
> [70] The route taken by the courts in *R.S.* and *J.J.* defeat both the spirit and purpose of the section which finds its roots in *Darrach*. As Chapman J. observes in *R. v. M.S.*, 2019 ONCJ 670, at para. 81, "such an interpretation would defeat the spirit and intent of the legislation and lead to significant trial management mischief". This re-writing of the legislation is an encroachment on Parliamentary territory.
> [My emphasis.]

[90] For the reasons that follow, after a review of the competing jurisprudence on the issue of timing and based on this Court's analysis, I find that this specific assumption by Akhtar J., that section 276 applications may only be heard pre-trial, is not supported by either leading SCC and appellate jurisprudence nor by the strict interpretation of the *Criminal Code* provisions at issue. Most particularly, the position adopted in *Reddick* rings hollow given that the SCC specifically cautioned trial judges in the trilogy of cases, being *Barton*, *Goldfinch* and *R.V.*, of their responsibility to exercise their discretion to re-hear an application mid-trial in order to ensure that an accused's right to make full answer and defence are not frustrated.

[91] The relevant subsection 278.93(4) of the *Criminal Code* related to the filing of a section 276 application reads as follows:

> **Judge may decide to hold hearing**
>
> **(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).
> [My Emphasis.]

[92] The plain reading of the legislation situated directly below the subheading, "Judge may decide to hold hearing", requires that the application be provided seven days prior, which I can

only interpret as being the hearing of the application that the judge decides to hold, not the trial itself. In fact the legislation does not specify at all when it must be heard either pre-trial or mid-trial. It does state at subsection 278.93(3) that it should be held in the absence of the jury, which suggests that Parliament did not limit when it is to be held. Importantly, the provision also specifically provides discretion for the trial judge to shorten that time interval in the interests of justice with "or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice." The requirement for judges to exercise this judicial discretion is peppered throughout jurisprudence at both the trial and appellate levels. In fact, when judges have not exercised the discretion provided by the legislation, appeal courts and the SCC have been quick to remind trial judges of this requirement.
[My emphasis.]

[93] In *R. v. Harris*, 1997 102 OAC 374, Moldaver J.A., as he then was, noted that during the pre-trial application to admit a prior incident of sexual activity, the trial judge had refused to admit an incident that had occurred between the complainant and the accused on the Tuesday evening prior to the alleged sexual assault. However, upon a review of the evidence, Moldaver J.A. noted "once the complainant testified, the door to admissibility was opened for an altogether different reason."[My emphasis.] He then summarized the situation as follows:

> [41] It will be recalled that in her evidence in-chief, the complainant testified that prior to the March 4th weekend, her relationship with the appellant was a platonic one. Apart from his attempts to kiss her on the way to Pettawawa [*sic*] and at Sassy's Pub, she testified that there had been nothing of a sexual nature between them and that she had made it known to the appellant that she was not interested in a sexual relationship. That is why, according to the complainant, she was shocked when the appellant broached the subject of sex upon their return to the motel room.
>
> [42] By testifying as she did, the complainant placed the nature of her relationship with the appellant in issue. Accordingly, in order to be able to make full answer and defence, the appellant was entitled to lead evidence designed to rebut the complainant's testimony.
>
> [43] In *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 at pp. 409-410 (S.C.C.), McLachlin J. for the majority set out five examples where evidence of prior consensual sexual conduct on the part of the complainant is admissible, the fifth being "evidence tending to rebut proof introduced by the prosecution regarding the complainant's sexual conduct." In my view, the proposed evidence of the Tuesday night incident falls squarely within this category because it served to rebut the complainant's assertion that she and the appellant had not engaged in sexual conduct prior to the weekend of March 4th.
> [My emphasis.]

[94] In *Harris*, Moldaver J.A. recognized the need for defence to file their applications and judges to hear them when the appropriate relevance has been established, which sometimes will not occur until after a complainant has testified and the appropriate evidence is before the Court. He described the dilemma as follows:

> [37] This illustrates the dilemma that trial judges face when they are called upon to make evidentiary rulings on a record that is fragmented and incomplete. In these situations, trial judges rely heavily on counsel to supply the missing links needed to arrive at a proper ruling. If counsel are less than diligent in their task or even worse, less than forthright, this is likely to skew the trial judge's reasoning process and result in rulings that later prove to be legally unsound, thereby raising the prospect of a mistrial.

> [38] Given the vagaries that all too often exist when trial judges are asked to make "advance" evidentiary rulings, it seems to me that as a matter of prudence, apart from perhaps stating a tentative view, trial judges should resist making final rulings until such time as they are required to do so. Experience suggests that as the trial progresses, issues raised at the outset of the proceedings have a tendency to either disappear or get resolved. Those that remain outstanding are likely to be brought into much sharper focus as the evidence unfolds. To be certain, where the proposed evidence is likely to have a significant impact on the outcome of the trial, an ounce of prevention is worth a pound of cure and trial judges would be well advised to refrain from making conclusory rulings until such time as they are required to do so.
>
> [39] The case at hand serves to illustrate the point. Had the trial judge waited to make his final ruling on the Tuesday night incident until after the complainant had completed her evidence in-chief, he would have been in a much better position to assess its admissibility.
> [Footnote omitted.]

[95] In *Harris*, Moldaver J.A. expressly clarified the concern that underlies the defence arguments before the Court, "The significance of that evidence cannot be underestimated and the opportunity to lead it was essential to the appellant's right to a fair trial and to avoid a possible miscarriage of justice."

[96] Importantly, in the SCC decisions rendered after the coming into force of the amended provisions, Moldaver J. purposefully reminded trial judges of their continuing duty as the gatekeeper for ensuring the necessary balance in protecting a complainant's rights and an accused's rights to a fair trial, which in some cases includes the requirement to reconsider earlier pre-trial decisions made on a section 276 application when the relevancy becomes apparent.

[97] In *R.V.*, the application judge rendered his decision on the pre-trial 276 application at a *voir dire*, then he invoked section 669.2 of the *Criminal Code* (that he could no longer continue to preside over the case) which meant that the trial proceeded under a different judge. At trial, when requested by defence to reconsider the section 276 application, the trial judge refused under the belief that a mid-trial application could not be considered.

[98] In *R.V.*, at paragraph 42, the Court wrote:

> Here, the Crown introduced evidence of the complainant's pregnancy and virginity to corroborate her testimony that the assault occurred. In his s. 276 application, R.V. sought to challenge that inference by questioning the complainant about her sexual activity from June 1st to July 1st, 2013 in order to determine "whether any other individual could have impregnated the complainant" [Reference omitted.]

[99] As Moldaver J. concluded at paragraph 57 of R.V., in light of the Crown's evidence led in chief, the legal situation shifted and the issue of relevancy was clear.

> [57] In *Seaboyer*, McLachlin J. noted that the complainant's other sexual activity "may be relevant to explain the physical conditions on which the Crown relies to establish intercourse or the use of force, such as semen, pregnancy, injury or disease": p. 614. L'Heureux-Dubé J., writing in dissent, agreed that where the Crown contends that physical consequences such as pregnancy were caused by an assault, the defence may adduce sexual history evidence in rebuttal: p. 682.

[100] At paragraph 83 of *R.V.*, Moldaver J. found that "given the application judge's refusal to grant the application, the evidence that emerged at trial would likely have constituted a material

change of circumstances, justifying a re-consideration." In short, the decision in *R.V.* reaffirms that there is a continuing duty for the trial judge to consider a section 276 application within the main trial. Trial judges must be sensitive to the evidence led and be open to reconsidering a request from the defence if the relevance for which they are seeking to question a complainant is established in evidence.

[101] Also, in *Barton*, the SCC specifically recognized that a pre-trial ruling may need to be reconsidered particularly if the accused seeks its admissibility in order to cross-examine a complainant for credibility purposes:

> [65] Finally, a ruling on the admissibility of prior sexual activity evidence under s. 276 is not necessarily set in stone. There may be circumstances in which it would be appropriate for the trial judge to reopen a s. 276 ruling and hold a new hearing to reconsider the admissibility of prior sexual activity evidence. By way of illustration, where a complainant makes a statement to the police that prior sexual activity occurred but later contradicts that evidence in her testimony at trial, that contradictory testimony would open the door to the defence bringing a renewed s. 276 application seeking to have the prior sexual activity evidence admitted for credibility purposes (see *R. v. Crosby*, [1995] 2 S.C.R. 912; *R. v. Harris* (1997), 118 C.C.C. (3d) 498 (Ont. C.A.)), despite an initial ruling of inadmissibility. This is but one example. There may be other circumstances in which it would be appropriate for the trial judge to reopen a s. 276 ruling and hold a new hearing to reconsider the admissibility of prior sexual activity evidence.

[102] After having surveyed the guidance from the SCC, including the purpose for the section 276 regime and the corresponding new provisions, and the range of jurisprudence on the question of timing, I adopt the view of Christie J. set out in *R. v. A.M.*, 2020 ONSC 4541 as follows:

> [42] It is the view of this court that it is not the timing of these applications, but rather the requirement for the application itself that achieves these purposes and objectives. This type of evidence, whether it involves a record already in the hands of the accused or not, is presumptively inadmissible. This type of evidence will not be permitted unless and until a judge makes a determination that it is permissible pursuant to the factors set out in the legislation. This type of evidence will not be permitted without notifying the complainant of the details of the application, providing the complainant with sufficient time before being required to respond, and allowing the complainant the opportunity to speak directly to the court, either personally or through counsel, on issues impacting privacy, security, dignity and equality interests.
>
> [43] The threshold issue of when this application must be brought and the ultimate issue of whether the records are admissible are two discreet inquiries. Merging the consideration or the interests involved for each stage would be problematic and must be avoided. There is no argument in the case at bar that the application will not be required. The only argument is when that application will need to be determined.

[103] Further, in *Shearing*, the SCC made it clear that in terms of timing a *voir dire* must be held prior to cross-examination. It also made clear that in responding to the attempt by defence to admit private records, a complainant is to be provided standing and permitted to have independent legal counsel to make submissions to ensure that her voice is heard. Interestingly, it was also the case of *Shearing* where the SCC also found that the trial judge unnecessarily curtailed the accused's cross-examination of a complainant. In short, the SCC recognized that judges also need to be alert to the fact that the cross-examination itself might establish the foundation for wider relevance of topics on cross-examination (see *Shearing* at paragraph 146).

This further emphasizes the need for judges to be constantly vigilant to the changing landscape of the evidence as it unfolds.

[104] I accept that there is a risk for a complainant to tailor their evidence after reading the defence's application pre-trial, but I also believe that complainants take their oaths seriously, and would not want their personal credibility doubted based on an underlying mistrust that their evidence has been tailored simply because they saw the defence application before their direct examination.

[105] In summary, I agree entirely with the comments of Christie J., in *A.M.* at paragraph 109 as to how a complainant can still be appropriately protected from being surprised or ambushed prior to cross-examination:

> The timing of the application is not what serves to protect the complainant from being ambushed or surprised. It is the application itself and all of the protections it brings. It is of note that the legislation does not even refer to notice to the complainant or the timing of any notice. The complainant is entitled to have her voice heard and to have a judicial determination made before being confronted with this type of evidence.

[106] The applicant argues that an effective cross-examination depends on the ability of a witness to give an honest and forthright response to a question without a view towards how that question fits into an overall theory or strategy. I also agree that the importance of cross-examination in a criminal case cannot be understated. At paragraph 86 of *R.V.,* Moldaver J. wrote:

> Cross-examination is undoubtedly a key element of the right to make full answer and defence. This Court has held that sometimes "there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed": *Lyttle*, at para. 1 [Emphasis in original.]; see also *Osolin*, at p. 663. Thus, as a general rule, counsel "may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition": *Lyttle*, at para. 48. Because it is difficult to predict what lines of questioning counsel might pursue and what evidence may have emerged had cross-examination been permitted, a failure to allow relevant cross-examination will almost always be grounds for a new trial: *Shearing*, at para. 151; *Crosby*, at para. 20; *Osolin*, at pp. 674-75.
> [Second underlining, my emphasis.]

[107] The SCC, in *R. v. Lyttle*, 2004 SCC 5, stated:

> [1] Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be *no other way* to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed.
>
> [2] That is why the right of an accused to cross-examine witnesses for the prosecution – without significant and unwarranted constraint – is an essential component of the right to make full answer and defence.
> [Emphasis in original.]

[108] More recently, the SCC in *Shearing* at paragraph 76 highlighted not just the importance of cross-examination, but also clarified the balance that must be attained in addressing a crime that unfolds almost always in complete privacy.

> The critical importance of cross-examination is not doubted. The appellant stood before the court accused of crimes by numerous complainants but he was presumed to be innocent of each and every count. All of the alleged sexual misconduct, by its very nature, was in private. At trial, it was his word against the credibility of his accusers, individually and (by virtue of the similar fact evidence) collectively. If the complainants were untruthful about what happened in the privacy of their encounters, the most effective tool he possessed to get at the truth was a full and pointed cross-examination. The general principle was stated in *Seaboyer*, *supra*, *per* McLachlin J., at p. 611: [My emphasis.]
>
> > Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be convicted. It follows from this that the prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law. [Emphasis in original.]
> >
> > 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. This was explored by Cory J. writing for the majority in *Osolin*, *supra*, at pp. 669 and 671, as follows:
> >
> > > A complainant should not be unduly harassed and pilloried to the extent of becoming a victim of an insensitive judicial system. Yet a fair balance must be achieved so that the limitations on the cross-examination of complainants in sexual assault cases do not interfere with the right of the accused to a fair trial.
> > >
> > > . . .
> > >
> > > In each case the trial judge must carefully balance the fundamentally important right of the accused to a fair trial against the need for reasonable protection of a complainant, particularly where the purpose of the cross-examination may be directed to "rape myths".
> > > [Emphasis in original.]

[109] In most cases of sexual assault, the complainant will have had some kind of relationship with the accused and, in many cases, they may have served closely together in the military environment. Consequently, there will likely be significant shared experiences and background between them, including communications.

[110] The applicant submitted that the accused will need to ask himself if he should risk revealing his trial strategy and permit the complainant to prepare in advance or simply not attempt to introduce evidence that could prove his innocence for fear that its value will be diminished, not to mention its impact on the overall trial strategy when the complainant receives advance notice.

[111] Ultimately, as a trial judge, I am required to balance the defence's request to admit evidence of OSA that may be fundamental to him making full answer and defence, while at the

same time discharging my duty of protecting the complainant and the integrity of the court martial process from prejudicial reasoning. This duty as a trial judge is challenging when provided with ideal submissions on clear relevance. However, if counsel hold back information for fear of disclosing too much, including their theory and strategy, given the concerns articulated, the challenge is magnified and a trial judge runs the risk of having to render a decision in a vacuum which may end up requiring the judge to reconsider the decision again when the relevance is established in evidence.

[112] I appreciate that the nature of sexual assault generally occurs in private and consequently a finding will most often turn on credibility. There is generally only one witness whose testimony will be central to the prosecution's case. Consequently, I find that pursuant to the interests of justice, in most cases, the trial judge is in a better position to render a decision that is the most fair and balanced for both the complainant and the accused if they hear the application after the complainant's testimony in chief.

[113] In light of all these reasons, and my responsibility to uphold the enhanced protection of a complainant, I find that any rigidity by a judge that section 276 applications can only be heard pre-trial exposes the fairness of the trial to significant jeopardy and potential mischief that risks infringing an accused's rights. Further, I can find no legislative or common law impediment to these applications being served on a complainant mid-trial, nor can I find any legislative authority that requires such an application to be held pre-trial.

[114] Consequently, I find that there is sufficient judicial discretion in the legislation to permit a trial judge to conduct the necessary balance of ensuring that the application is heard at a time that preserves all the participatory rights that Parliament intended for complainants, while still ensuring an accused's right to a fair trial. I note that this Court's view is consistent with the finding of Christie J., at paragraph 60 of *A.M.*:

> [60] It is the view of this court that requiring pre-trial disclosure of the defence's cross-examination material, versus allowing for mid-trial disclosure of the material, unnecessarily infringes the applicant's rights set out above because of the danger that it will render the cross-examination ineffective. A witness with full advance notice of impeachment material is in a position to tailor their evidence to fit the disclosure. In the case at bar, the witness is a sexual assault complainant whose testimony is central to the prosecution's case. Therefore, any unnecessary risk of tainting the complainant's testimony that occurs by requiring the defence to proceed with a s. 276 application before trial can be fatal to a fair trial.

[115] As Christie J., further wrote in *A.M.*:

> [110] The only difference that results from the timing of this application being mid-trial is that the complainant would not know the detailed particulars of the communications prior to giving her evidence in chief. There would be no opportunity to tailor the evidence in chief to line up with the text messages. This is in everyone's best interests. This is fundamental to the search for truth and the fair trial rights of the accused. Use of prior inconsistent statements to impeach a witness is a well-established means of testing the credibility and reliability of witnesses. The evidence of the complainant in this case, as in many cases, is crucial. While there are circumstances where the complainant may be aware of defence strategy prior to trial, this does not mean that it should be encouraged or that it should be the norm.

[116] In summary, on the issue of timing, once a complainant testifies in chief, it is distinctly possible that defence may have evidence that only becomes relevant and highly probative of the issue of credibility after the testimony, which is what occurred in the case of *Harris*. The probative value of credibility evidence is not being used for the purpose of the now debunked myths suggesting some connection between prior sexual activity and a lack of veracity, but it is useful in its ability to contradict specific evidence given by the complainant that might be central to her version of the relevant events.

[117] In supporting his conclusion that all such applications must be addressed exclusively in a pre-trial motion, Akhtar J. in *Reddick* suggests that a mid-trial hearing will only lead to a bifurcated process. He writes as follows:

> [71] Second, delaying the application to be heard after the complainant's examination-in-chief would create substantial practical difficulties.
>
> [72] The trial would necessarily be halted to allow the disclosure of the records. Counsel for the complainant would have to be retained, meet with the complainant, prepare a response, file materials, and argue the matter in front of the trial judge. This could conceivably delay the trial for weeks if not months. Such methods would be unworkable in a jury trial.
>
> [73] In this regard, I agree with the comments of Chapman J. in *M.S.*, at para. 97:
>
> > If the 7 days [*sic*] 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 will 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.

[118] The above concerns are not without merit and need to be weighed. There is an undeniable negative impact on the administration of military justice where mid-trial applications are submitted given the uniqueness of a court martial.

[119] Similarly, I accept Ms Way's submissions that although some mid-trial applications cannot be avoided, in general, they negatively affect a complainant's rights as they are likely faced with a difficult choice: either participate in the application at that time or adjourn the trial to permit them to retain and receive independent legal advice. In my view, Parliament has provided them the participatory rights in the impugned provisions and it is incumbent on the court to ensure that they are protected, while at the same time ensuring that an accused's rights to a fair trial are also protected.

[120] Importantly, the requirement to file a section 276 application applies equally to the prosecution as it does for the defence. With the expanded definition of "sexual activity", it is anticipated that there may also be an increased number of applications from the prosecution. With this in mind, the Court needs to be able to provide manageable expectations for counsel.

[121] Firstly, as Moldaver J. stated in *Goldfinch*, at paragraph 142:

> It is true that the Crown is not subject to the procedural requirements of ss. 276.1 and 276.2, which apply only where the *accused* seeks to adduce evidence of the complainant's other sexual activity. However, the Crown is subject to s. 276(1)'s prohibition on twin myth reasoning and must also abide by the common law principles articulated by this Court in *Seaboyer*. Indeed, in *R. v. Barton*, 2019 SCC 33, this Court stated that trial judges should determine the admissibility of Crown-led prior sexual activity evidence through a *voir dire* prior to trial, applying this Court's guidance in *Seaboyer* (*Barton*, at para. 80).
> [Emphasis in original.]

[122] As Moldaver J. wrote in *Goldfinch* at paragraph 145, it is advisable to vet all proposed sexual activity evidence before trial as it has a salutary effect of focusing all parties. Importantly, it places the judge and counsel on notice to ensure that they are mindful of the acceptable parameters during the trial:

> [145] I would add that, as the AGO points out, vetting sexual activity evidence advanced by either Crown or defence before trial will have the salutary effect of focusing all parties on the legitimate use of such evidence. This approach will also "establish the parameters of any sexual relationship evidence that the Crown seeks to adduce" and trigger defence counsel to bring a separate application under s. 276(2) if they wish to elicit evidence going beyond the scope of that proposed by the Crown (I.F., at para. 14). The failure to do so here led to the unnecessary and inappropriate admission of sexual activity evidence that went beyond the trial judge's s. 276 ruling. This evidence came in without first having been vetted, and it was never the subject of its own limiting instruction. This was a serious error.

[123] The choice of the wording here is "vetting" and not "arguing" or "deciding". It suggests that both the prosecution and the defence should be aware of the applications. Moldaver J. goes on to describe the distinct benefits to the efficiency of the entire trial process when applications for any reasonably foreseeable sexual activity evidence are "vetted" prior to the trial. This makes perfect sense. At no time does Moldaver J. weigh in on when the application should be heard or, rather, decided.

[124] For obvious pragmatic reasons, the court must hold a Stage 2 hearing for a request by the prosecution prior to the trial. This was confirmed by Moldaver J. in *Goldfinch* at paragraph 142.

[125] However, in responding to defence applications, a trial judge needs to be particularly thoughtful in assessing the appropriate time to hear the application. Recognizing the fact that the impugned provisions cast a broader net of records captured under the regime, defence may wish to rely upon records that are uncontroversial. In cases such as this, there is no bar to the court hearing such requests pre-trial. However, as I concluded earlier, there is also no statutory bar to a court holding the Stage 2 hearing after the direct examination of the complainant.

[126] The reality is that moving the hearing of a defence application until after the complainant has testified in chief, does risk lengthening the time period of the actual trial. For a judge sitting alone, the overall time invested will remain the same as the time that would have been invested in hearing a pre-trial application will simply shift to the trial proper. It is very possible that after hearing the prosecution's evidence, as Moldaver J.A., as he then was, concluded in *Harris*, the balancing exercise will be clearer, permitting the trial judge to render a better decision. It is also likely that after the complainant testifies, an application that defence counsel intended to pursue

may no longer be relevant and responsible counsel will reconsider their position. I also agree with Christie J. in *A.M.* at paragraph 111 that:

> If the applicant is forced to bring these applications pre-trial, defence counsel will likely err on the side of caution and bring the application even if later on they decide not to use the evidence once the complainant testifies. This would put the complainant through an unnecessary pre-trial application. However, if these applications were to be brought at the time that the issues crystalize, there may actually be less applications brought, as they may become unnecessary or improper given how the evidence unfolds.

[127] However, more importantly, where a member has elected to be tried by a General Court Martial (GCM), these issues are not so straightforward. A GCM will have a five-member military panel appointed, which is generally comprised of members who come from outside the physical location where the trial will unfold. The cost associated with their time away from work, their families as well as the cost of flights and hotel accommodations are significant. Consequently, if this type of application is not properly managed, it could lead to unnecessary adjournments during a trial, leaving the panel sitting in a hotel for weeks. In this type of situation, the costs of adjournments are not measured strictly in terms of the schedule.

[128] As a result, it is imperative that this Court clarify judicial rules of practice to account for and accommodate the required balance between complainants and accused persons in the uniqueness of military court martial process.

[129] As an example, in the CAF, it is imperative that complainants not bear the financial cost of retaining legal counsel and their requests must be processed internally within the Department of National Defence to gain the requisite legal and financial approvals. The search for independent legal advice may be further complicated by the fact that the trial may be held in a different location than where the complainant is serving or residing. As Ms Way noted in her submission, meaningful legal representation relies upon a relationship of trust that is essential to the solicitor-client relationship. The risk associated with mid-trial applications is that the complainant's right to consult and gain independent legal advice is forced and very last-minute and she cited an example of how it degrades the representation that a complainant receives. Consequently, the ability of a complainant to establish a solicitor-client relationship with her lawyer prior to the trial will enable her counsel to consult and get instructions from the complainant, thereby being able to provide more reliable legal advice.

[130] It is for this reason that I must insist that if the defence chooses to pursue such an application, they must serve their notice to the Court and the prosecution prior to the trial and it must include sufficiently detailed particulars to satisfy Stage 1. If the applicant satisfies Stage 1, it will trigger the complainant's rights to retain counsel. By serving the notice at least seven days pre-trial, this permits the prosecution to discuss with the complainant the defence's intent to introduce such evidence and ensure she is provided assistance in retaining legal counsel in advance of the trial. Once retained, the complainant's legal counsel can listen to the complainant's direct testimony so there is no requirement to go back and read transcripts, etc. However, the complainant will not receive the defence materials until after her direct examination, but it must be prior to her cross-examination on the specific topic to ensure that she is not ambushed.

[131] In response to one of the queries of defence counsel on the "consultation role of the prosecution with the complainant", in light of the role of a complainant's counsel providing independent legal advice to a complainant, this alleviates pressure on the prosecution to advocate for and protect the interests of a complainant. The prosecution will still have a role in the management of a complainant as their key witness and holds responsibility to keep the complainant informed of the process as it unfolds and ensure that she is aware of her full rights. As an example, it is imperative that the prosecution advise a complainant of the existence of a section 276 application and then facilitate the complainant in the retention of legal counsel. However, most importantly, the prosecution is not placed in an untenable position of having to consult with the complainant who is a witness in the midst of her testimony.

Summary

[132] The accused's right to make full answer and defence must be balanced with the dangers posed to the complainant's privacy and dignity and to the integrity of the trial process. As a statutory court, military judges presiding over courts martial have the authority to control its own process in order to administer justice fully and effectively. With that, judicial discretion provided for under the *Criminal Code* and required to be exercised within the section 276 process falls within the Court's authority and the Court is duty bound to exercise it to ensure that the accused's right to make full answer and defence are preserved in every case.

Conclusion

[133] For the foregoing reasons, I find that sections 278.93 and 278.94 do not contravene section 7 and paragraph 11*(d)* of the *Charter*. This conclusion is dependent upon an interpretation of section 278.93 that the statute provides sufficient discretion to a trial judge responsible for managing the process to permit such applications to be brought prior to the cross-examination of the complainant.

FOR THESE REASONS, THE COURT:

[134] **DENIES** the application.

Counsel:

Major F. Ferguson, Defence Counsel Services, Counsel for C.A. Sergeant Tait, Counsel for the Applicant

The Director of Military Prosecutions as represented by Major C. Walsh and Major L. Langlois, Counsel for the Respondent

Annex A to
R. v. Tait, 2021 CM 2009

Criminal Code of Canada R.S.C., 1985, c. C-46	**PRE BILL C-51** **<u>Past Version</u>** **Past version: in force between September 19, 2018 and October 16, 2018**	**POST BILL C-51** **<u>Current Version</u>** **Current version: in force since March 17, 2021**
Stage 1	**Application for hearing** 276.1 (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 276.2 to determine whether evidence is admissible under subsection 276(2). **Form and content of application** (2) An application referred to in subsection (1) must be made in writing and set out (a) detailed particulars of the evidence that the accused seeks to adduce, and (b) 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. **Jury and public excluded** (3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded. **Judge may decide to hold hearing** (4) Where the judge, provincial court judge or justice is satisfied (a) that the application was made in accordance with subsection (2), (b) that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or such shorter interval as the judge, provincial court judge or justice may allow where the interests of justice so require, and	**Application for hearing — sections 276 and 278.92** 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). **Form and content of application** (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. **Jury and public excluded** (3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded. **Judge may decide to hold hearing** (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

	(c) 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 276.2 to determine whether the evidence is admissible under subsection 276(2).	under section 278.94 to determine whether the evidence is admissible under subsection 276(2) or 278.92(2). • 2018, c. 29, s. 25
Stage 2	**Jury and public excluded** 276.2 (1) At a hearing to determine whether evidence is admissible under subsection 276(2), the jury and the public shall be excluded. **Complainant not compellable** (2) The complainant is not a compellable witness at the hearing. **Judge's determination and reasons** (3) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part thereof, is admissible under subsection 276(2) and shall provide reasons for that determination, and (a) where 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) that affected the determination; and (c) where 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. **Record of reasons** (4) The reasons provided under subsection (3) shall be entered in the record of the	**Hearing — jury and public excluded** 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). **Complainant not compellable** (2) The complainant is not a compellable witness at the hearing but may appear and make submissions. **Right to counsel** (3) The judge shall, as soon as feasible, inform the complainant who participates in the hearing of their right to be represented by counsel. **Judge's determination and reasons** (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. **Record of reasons** (5) The reasons provided under subsection (4) shall be entered in the record of the

	proceedings or, where the proceedings are not recorded, shall be provided in writing. 1992, c. 38, s. 2. **Publication prohibited** 276.3 (1) No person shall publish in any document, or broadcast or transmit in any way, any of the following: (a) the contents of an application made under section 276.1; (b) any evidence taken, the information given and the representations made at an application under section 276.1 or at a hearing under section 276.2; (c) the decision of a judge or justice under subsection 276.1(4), unless the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the decision may be published, broadcast or transmitted; and (d) the determination made and the reasons provided under section 276.2, unless (i) that determination is that evidence is admissible, or (ii) the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the determination and reasons may be published, broadcast or transmitted. **Offence** (2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction. • 1992, c. 38, s. 2; • 2005, c. 32, s. 13.	proceedings or, if the proceedings are not recorded, shall be provided in writing. 2018, c. 29, s. 25 **Publication prohibited** 278.95 (1) A person shall not publish in any document, or broadcast or transmit in any way, any of the following: (a) the contents of an application made under subsection 278.93; (b) any evidence taken, the information given and the representations made at an application under section 278.93 or at a hearing under section 278.94; (c) the decision of a judge or justice under subsection 278.93(4), unless the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the decision may be published, broadcast or transmitted; and (d) the determination made and the reasons provided under subsection 278.94(4), unless (i) that determination is that evidence is admissible, or (ii) the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the determination and reasons may be published, broadcast or transmitted. **Offence** (2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction. 2018, c. 29, s. 25

	276(3) Factors	
276(3) Factors	**Factors that judge must consider** (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account (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) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case; (d) the need to remove from the fact-finding process any discriminatory belief or bias; (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury; (f) the potential prejudice to the complainant's personal dignity and right of privacy; (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and (h) any other factor that the judge, provincial court judge or justice considers relevant.	**Factors that judge must consider** (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account (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) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case; (d) the need to remove from the fact-finding process any discriminatory belief or bias; (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury; (f) the potential prejudice to the complainant's personal dignity and right of privacy; (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and (h) any other factor that the judge, provincial court judge or justice considers relevant. **Interpretation** (4) For the purpose of this section, ***sexual activity*** includes any communication made for a sexual purpose or whose content is of a sexual nature.