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The Balancing of Interests and The Tilting of Scales

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On October 5th and 6th, 2021, the Supreme Court will hear arguments in *R. v. J.J.* challenging the constitutionality of the new "reverse disclosure" legislation created by Bill C-51 in 2018.

The entire records screening regime is the subject of the appeal and cross-appeal, primarily focusing on the treatment of non-sexual records in the possession of the accused.

The legislation has largely been seen as a response to the trial of Jian Ghomeshi, in which each complainant was confronted with emails and other correspondences that dramatically undermined their credibility.

The Attorneys General often argue that the legislation is a response to the Supreme Court's decision in *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33 which dealt with privacy interests in a complainant's diary which had lawfully fallen into the possession of the accused.

The debate about what comprises a "record" with an expectation of privacy looms large at the heart of the legislation. The Courts have come to different conclusions on privacy interests, particularly where the evidence is electronic communications between the complainant and accused.

Complainants have always been free to provide police with text messages or other electronic communications to support their allegations without need for a warrant. In *R. v. Marakah*, 2017 SCC 59 (CanLII), [2017] 2 SCR 608, Justice Moldaver wrote in dissent that a finding of privacy interests in text messages could interfere with the reporting of sexual assaults.

If electronic communications in sexual assault cases are found to carry an expectation of privacy, it would have an impact on both the defence and prosecution of all charges enumerated in these sections of the Criminal Code.

Counsel for J.J. argues that the new sections 278.92 to 278.94 "represent Parliament's legislative choice to protect complainants' interest, not their constitutionally protected rights." They submit that in this attempt to balance the interests of a complainant against the constitutionally protected fair trial rights of an accused, the new legislation is ineffective, harmful, and ultimately unsalvageable.

An important consideration is that the presumptive inadmissibility of non-sexual evidence under s. 278.92 is not based on the nature of the evidence. Unlike sexual history evidence there is nothing inherently prejudicial about the type of non-sexual evidence in the accused's possession and it is only inadmissible because of who possesses the evidence.

One of the issues which is not as commonly addressed is an access to justice concern. With the new regime an accused must pay for extended evidentiary hearings and the time delays that go along with it. Meanwhile, complainants are provided with free legal counsel regardless of their ability to pay for their own representation. No complainant is denied "legal aid."

Many of the problems with the new legislation arise from the lack of precision or guidance regarding how the new rules are to be applied. There have been diverse rulings about whether or not a complainant should be given access to the full application record, whether or not they have standing at stage one to determine if a hearing should even be granted and, of course, which unlisted types of evidence attract a reasonable expectation of privacy.

Where an accused brings a motion for directions to find out if the evidence in their possession constitutes a "record" which requires an application, complainants have sometimes been granted standing to determine the status of the evidence and whether or not the complainant should be permitted to see the evidence or it should be sealed until a ruling is made.

This type of uncertainty and unequal outcomes in pre-trial applications lends to the argument that the legislation cannot survive proper scrutiny.

The most obvious concern with the changes for both evidence of a sexual and non-sexual nature is the complainant's standing and ability to know which evidence the defence plans to cross-examine her on.

Legitimate arguments have been made by the Crown that there are other situations which have the same effect. In the case of a re-trial, the defence will already have the earlier testimony to address any changes in the complainant's evidence. In a third party records application the complainant already has constitutional standing at the hearing but the application record is limited to arguing potential relevance only of the records the defence seeks to acquire.

The new regime requires that the defence lay out much more detail of their anticipated theory and trial strategy. The presumptive inadmissibility of all evidence in the accused's possession practically assumes that there is no legitimate defence to a sexual assault allegation.

Pre-trial applications cannot substitute for a trial and with the elimination of most preliminary inquiries it is unrealistic to expect the defence to know which evidence they will need to call at trial before capturing the complainant's accusation under oath in a proper court of law.

While counsel for J.J. and intervenors for criminal defence lawyers have largely based their written submissions on foundational principles of our legal system, the facta for the Attorneys General and groups who advocate for complainants focus more on emotional arguments and public faith in the legal system.

The Attorney General of Ontario argues in her factum that complainants are harmed by the trial itself, without explaining how to prevent a complainant from having to be involved in a trial.

One of the claimed traumas is described as being that "the rituals of the courtroom, such as its physical layout and the robing of those educated in the law, make clear that the complainant plays a subordinate role that often mirrors the gender, race and socio-economic status-based societal hierarchies in which the problem of sexual violence is rooted."

While it is a noble goal to address the problems specific to sexual assault trials, this particular point is repugnant and fails to recognize the importance of the process bringing home to any witness, including complainants, the solemnity of the trial. In addition, it is offensive to the presumption of innocence which must remain intact. Complainants are not the only people traumatized by the trial process, especially where the accusation is false. An accused and complainant both have their privacy violated by having to speak about their sexual lives in a public courtroom, never mind the harm done to an individual falsely charged with such an offence. These arguments presuppose the allegation is true and are harmful to trial fairness.

Hence these are unsolvable problems. Accused people must have trials and those trials will be difficult for all involved. While it would be nice if everyone could retain their dignity and privacy in a sexual assault trial, the legal system is not capable of tilting the scales so far that innocent people are at risk of wrongful convictions due to a presumption that any evidence in their defence is inadmissible.

The Supreme Court has overwhelmingly ruled in favour of the Crown in the majority of sexual assault appeals over the last year. They have deferred to the decisions of trial judges who were in the position to view all the evidence. Now is their chance to make sure all the relevant evidence is permitted into the trial.