SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. S.*, 2025 NSSC 218

Date: 20250625
Docket: CRH-532488
Registry: Halifax

Between:

His Majesty the King

v.

W. M. S.

DECISION ON DEFENCE s. 278.92 APPLICATION

Restriction on Publication: ss. 278.4(1) and 486.4 CC

Judge:	The Honourable Justice Joshua Arnold
Heard:	April 25, 2025, in Halifax, Nova Scotia
Final Written Submissions:	June 3, 2025
Initial Written Decision:	June 25, 2025
Anonymized Written Decision:	March 16, 2026
Counsel:	Scott Morrison, for the Provincial Crown Eugene Tan, for W. S. Shawn D'Arcy, for M.F.

Publication Bans:

Hearing *in camera*

278.4 (1) The judge shall hold a hearing in camera to determine whether to order the person who has possession or control of the record to produce it to the court for review by the judge.

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 162.1, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

NOTE:

The parties were provided with this decision on June 25, 2025. The trial was scheduled to commence on March 16, 2026. On March 13, 2026, the Crown advised the Court that the complainant did not want to proceed with the matter, and the Crown opted not to call any evidence. As a result, the charges were dismissed for want of prosecution. In accordance with s. 278.95(1), I then conducted an inquiry with Crown and defence regarding the publication of this decision. Both parties agree that, considering the dearth of relevant decisions, there is precedential value in consenting to publication, if both parties' names are anonymized to avoid the identification of the complainant. Having taken into account the complainant's right of privacy, as well as the interests of justice, I order that my determination and reasons (this decision) may be published, broadcast or transmitted, as per s. 278.95 of the Criminal Code.

Facts

[1] W. M. S. stands charged with offences of violence, including sexual violence, between January 1, 2020, to January 1, 2023, and a breach of an Undertaking between November 29, 2022, and January 9, 2024, all in relation to the same complainant, M.F. Mr. S. and M.F. were in a domestic relationship during the time of the alleged offences. Mr. S. has applied pursuant to s. 278.92 of the *Criminal Code* to use text messages, photographs, video recordings, and audio recordings that are in his possession. He does not seek the production of any records; all of the proposed electronic evidence is in his possession and has been provided to the court on this application. The focus of his application is solely on which of the proposed evidence are records and which of these materials he is permitted to use at trial.

[2] The Stage One and Stage Two hearings took place, *in camera*, on April 22 and 25, 2025, respectively. I gave counsel a bottom-line decision in relation to Stage One on April 22. Complainant's counsel then participated at Stage Two. Mr. S. initially presented a considerable amount of proposed evidence for the court to consider, which was significantly refined by the end of the Stage Two hearing. The court has not considered materials that were initially proposed but did not make the "refined list."

Issues

1. Which of the proposed evidence are "records" pursuant to s. 278.1 of the *Criminal Code*?

2. Which of the "records" are admissible past Stage Two (and why)?

Law

Records

[3] In *R. v. J.J.,* 2022 SCC 28, the majority determined that the definition of "record" has two distinct groups: enumerated and non-enumerated (para. 38). Enumerated records include those listed at s. 278.1 of the *Code.*

> **278.1** For the purposes of sections 278.2 to 278.92, ***record*** means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

[4] The Crown takes the position that all items of proposed evidence are "non-enumerated records" pursuant to s. 278.1 of the *Criminal Code,* and the defence now agrees that all the proposed evidence meets the definition of non-enumerated records. Regarding non-enumerated records, the majority in *J.J.* wrote:

> [42] Ultimately, we conclude that a non-enumerated record will only be captured by s. 278.1, in the context of the record screening regime, if the record contains information of an intimate or highly personal nature that is integral to the complainant's overall physical, psychological or emotional well-being. Such information will have implications for the complainant's dignity. As we will explain, this threshold is informed by interpreting the text and scheme of the record screening regime. We then provide a framework for assessing whether a piece of evidence qualifies as a non-enumerated record that must be vetted under the record screening regime.
>
> […]
>
> [45] Complainants have privacy interests in highly sensitive information about themselves, the disclosure of which can impact on their dignity. As this Court has observed in the past, the "dissemination of highly sensitive personal information" can result "not just in discomfort or embarrassment, but in an affront to the affected person's dignity" (*Sherman Estates v. Donovan,* 2021 SCC 25…at para. 7). **To**

> **reach the level of an impact on dignity, an intrusion on informational privacy must "transcen[d] personal inconvenience by reason of the highly sensitive nature of the information that might be revealed"** (*Sherman Estate,* at para. 75; see also para. 73).
>
> [...]
>
> [53] In our view, s. 278.1 presupposes that a certain level of privacy must be engaged; namely, this provision concerns only records that could cause "potential prejudice to the complainant's personal dignity". These factors suggest that the scheme is not intended to catch more mundane information, even if such information is communicated privately. **Moreover, given the accused's right to make full answer and defence, mere discomfort associated with lesser intrusions of privacy will generally be tolerated. In this context, a complainant's privacy in open court "will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self"** (*Sherman Estate,* at para. 74).
>
> [Emphasis added].

[5] Section 278.92 the *Criminal Code* describes the admissibility requirements for non-enumerated records in the possession of the accused:

> **Requirements for admissibility**
>
> **(2)** The evidence is inadmissible unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 278.93 and 278.94,
>
> > **(a)** if the admissibility of the evidence is subject to section 276, that the evidence meets the conditions set out in subsection 276(2) while taking into account the factors set out in subsection (3); or
> >
> > **(b)** in any other case, that the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
>
> **Factors that judge shall 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)** the interest in encouraging the reporting of sexual assault offences;
> >
> > **(c)** society's interest in encouraging the obtaining of treatment by complainants of sexual offences;

> **(d)** whether there is a reasonable prospect that the evidence will assist in arriving at a just determination of the case;
>
> **(e)** the need to remove from the fact-finding process any discriminatory belief or bias;
>
> **(f)** the risk that the evidence may unduly arouse sentiments or prejudice, sympathy or hostility in the jury;
>
> **(g)** the potential prejudice to the complainant's personal dignity and right of privacy;
>
> **(h)** the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
>
> **(i)** any other factor that the judge, provincial court judge or justice considers relevant.

[6] At Stage One, the court must review the application to determine whether the evidence sought to be adduced is *capable* of being admitted having regard to the threshold tests set out in s. 278.92(2)(a) and (b) (*J.J.*, at *para*. 23). If the judge finds the proposed evidence is a "record" and is capable of being admissible, the application proceeds to a Stage Two hearing pursuant to s. 278.93(4) (*J.J.*, at para. 29).

Stage One Analysis

Which of the proposed evidence advances to Stage Two?

[7] As noted above, on April 22, 2025, the court gave a bottom-line oral decision on Stage One allowing the entire refined list of proposed evidence as agreed upon by counsel to advance to Stage Two. The test for whether proposed evidence should advance to Stage Two is generally whether it is *capable* of being admitted. This is not a high bar (*R. v. M.R.G.C*., 2023 PESC 47, at para. 7). Only "clearly unmeritorious applications" should be denied a second stage hearing. Residual concerns about whether the evidence is capable of being admitted should be resolved in favour of holding the Stage Two hearing. At Stage One, the court conducts a facial consideration of the matter and makes a tentative decision, "with any doubts that exist as to the admissibility of the evidence left to be determined during the second stage…" (*R. v. W.G.,* 2025 ABKB 58, at para. 20). Considering the detailed analysis at Stage Two, I will simply state in relation to Stage One that I considered all of the requisite criteria as imposed by the *Criminal Code* and *J.J.* and determined that the revised list of proposed evidence is *capable* of being admitted at trial as it goes variously to whether M.F. was using the threat of

criminal prosecution to control Mr. S. and prevent him from ending their relationship, whether M.F. may have self-harmed and blamed him for her injuries, and whether M.F. was physically aggressive towards him.

Stage Two

[8] At Stage Two, the court decides whether the proposed evidence meets the test for admissibility as set out in s. 278.92(2)(b): the evidence is admissible if it is "relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice." This determination is made in accordance with the s. 278.92(3) factors (*J.J.* at para. 32). Complainants have participatory rights at Stage Two.

Positions of Parties at Stage Two

Defence

[9] Mr. S.'s position is that the entire refined list of proposed evidence is relevant to his anticipated defences at trial and should be admitted. He alleges that M.F. tried to control his behaviour through the threat of initiating baseless criminal complaints against him. He also wishes to show that she initiated physical aggression with him and engaged in self-harm.

[10] Mr. S. says he seeks admission of the proposed evidence for two main reasons: (1) to test M.F.'s reliability and (2) to show how she became aggressive with him. He submits that he would not use any of the proposed evidence with respect to the issue of consent in relation to the sexual assault charges, and that he is only interested in using it in relation to the assault charges.

[11] On reliability, Mr. S. points to M.F.'s threats to make a criminal complaint if he breaks up with her.

[12] On aggression, he says some of the proposed evidence shows M.F. overreacting to things she was not happy with and then becoming aggressive with him, and that M.F.'s injuries were either caused through self-harm or by him defending himself.

[13] With respect to surreptitious recordings, Mr. S. highlights that in much of the proposed evidence that was audio or video-recorded, he was the intended recipient of the communications. In other words, the content of those

communications was directed at him, and he simply surreptitiously recorded it for accuracy and verification. He argues that the fact that these conversations were surreptitiously recorded is one of many factors for the court to consider in its balancing between the accused's right to a fair trial and M.F.'s privacy rights.

[14] There were other events surreptitiously recorded by him, but all involve M.F. being in his presence exclusively, and none involve M.F. being surreptitiously recorded while communicating with a third person. That is, all recordings involve the single-party consent of Mr. S.

[15] Mr. S. says that the court must consider the totality of the circumstances when applying the robust framework for assessing M.F.'s reasonable expectation of privacy. He says that since he was the intended recipient of M.F.'s communications, or was with M.F. when the recordings were made, her reasonable expectation of privacy was lower than had he recorded her conversation with someone else or intercepted a message from M.F. intended for someone else. He says that the proposed evidence is probative and should be admitted, allowing him to explore the issues he has raised and does not engage the "twin myths".

Crown

[16] The Crown opposes the admission of the entirety of Mr. S.'s refined list of proposed evidence. It opposes admission of any of the recordings that were surreptitiously recorded. The Crown's position is that the secret nature of the recordings is an affront to M.F.'s dignity and privacy, and any probative value is not substantially outweighed by its prejudicial effect. The Crown provided caselaw to support its position that surreptitiously recorded evidence can attract a high reasonable expectation of privacy.

[17] With respect to the content of the recordings, it takes issue with two main things: (1) the accused cannot introduce his own statement through these recordings, and (2) the recordings are not clear, so even if they are intended to use for impeachment, they have low probative value. It says that many of M.F.'s responses to the accused's questions are not clear, and that they would not be useful for that reason.

[18] The Crown notes that the defence seeks the admission of some of the proposed evidence to show that M.F. abused alcohol, became aggressive, and engaged in self-harm. It highlights paragraph 55 of *J.J.,* which notes that discussions about mental health diagnoses, suicidal ideation, and substance abuse

all consist of "information of an intimate and highly personal nature that is integral to M.F.'s overall physical, psychological or emotional well-being." The Crown also says that Mr. S.'s allegation that M.F. generally had "emotional problems" is not specific enough to support admission of the proposed evidence. Finally, it argues, this was a toxic relationship and that discussions between Mr. S. and M.F. during its breakdown are deeply personal, attracting a high expectation of privacy, and thus should not be admitted.

Complainant

[19] M.F. also opposes the admission of the entirety of the refined list. Her position is that the surreptitious recordings are a particularly egregious violation of her right to dignity and privacy. She says their intended purpose was repeated attempts by Mr. S. to get her to agree with his suggestions. She says he was motivated by his concern about current and potential criminal charges against him, in relation to her. She says he surreptitiously recorded her constantly, for the sole purpose of trying to get her to say something inculpatory, and that her answers to his suggestions were ambiguous at best. She argues there is nothing in the proposed evidence to support Mr. S.'s suggestion that she fabricated the allegations. She highlights that she remained consistent under pressure while the accused was asking her cross-examination style questions, while also not knowing she was being recorded.

[20] M.F. says the proposed evidence is highly prejudicial and lacking in probative value. She notes that Mr. S. was constantly recording her and violating her privacy, but he did not get the "money shot" he was looking for: namely, an explicit admission that she was making false allegations.

[21] M.F. says that there is no evidence of self-harm contained in the proposed evidence. In one of the proposed videos, Mr. S. simply asked her about a bruise she had and suggested she caused it herself, which she denied and said he caused it.

The potential s. 276 issues

[22] Following the Stage Two hearing, the court requested further submissions from the parties with respect to two electronic files, asking their position on whether s. 276 was engaged for either of them. Below I have briefly outlined the parties' submissions and the court's finding on each.

IMG_0865.MP4

[23] This surreptitious video shows M.F.'s phone screen as she views an online platform discussing sadistic women. Mr. S. submits that while the term "sadistic" may have sexual connotations, he wishes to rely on the non-sexual definition, being "delighting in cruelty." He says s. 276 is not engaged.

[24] The Crown says s. 276 is triggered by M.F. privately reading about behaviours that can lead to sexual gratification. The Crown further argues that the video negatively impacts M.F.'s dignity and privacy. M.F. adopts the Crown's submissions.

[25] The court's view is that s. 276 is not engaged. While sadism can be featured in a sexual context, there is nothing inherently sexual about the complainant viewing a short text-blurb depicted in the video, which reads: "are any women in this group that enjoy sadism? No guilt, no fear, no empathy you just like to hurt men with no regard for how they feel or what they want". Without more, this does not amount to sexual activity that is engaged by s. 276.

[26] The video of M.F.'s internet viewing, over her shoulder, without her knowledge or consent, is a violation of her dignity and privacy. It does have some limited probative value as it could reveal behaviour on the part of M.F. that supports some of the defence theory, but its prejudicial effect, occasioned by the fact that it is a surreptitious recording of M.F. viewing a webpage that contains highly personal information, when she appears to believe no one would see what she was viewing, substantially outweighs any limited probative value. It is inadmissible.

New Recording

[27] This is a surreptitious audio recording of an argument between Mr. S. and M.F. Mr. S. questions M.F. on why she threatens to charge him. Mid-way through the discussion, there is mention of him choking her during sex, and her cheating on him.

[28] Mr. S. says s. 276 is not engaged because sexual activity is not the focus of the discussion, and the recording does not engage interests protected by s. 276.

[29] The Crown says s. 276 is engaged, and M.F. adopts the Crown's submissions.

[30] Despite the defence position, the parties all jointly propose that the offending section of the recording can be edited out of the recording.

[31] The aspect of the recording that discusses Mr. S. choking M.F. during sex, and her cheating on him, clearly engages s. 276. I agree with the parties that this part of the conversation (from 01:44 – 02:07 of the recording) must be excluded and can be excised from the recording. The remainder of the recording, before and after that conversation, is admissible.

Stage Two Analysis

Which items of the proposed evidence are "records"?

[32] The parties agree that the items on the refined list of proposed evidence are all non-enumerated records pursuant to s. 278.1 of the *Code*. *J.J.* sets out a detailed framework at paras. 43-64 to assess whether records are non-enumerated under s. 278.1 of the *Code.* Below is a summary of these factors as detailed by Marion J., in *R. v. W.G.,* 2025 ABKB 58:

> [39] In *JJ*, the Supreme Court of Canada set out a detailed framework for assessing whether records are non-enumerated records under section 278.1 of the *Criminal Code*: *JJ* at paras 43-64. That framework requires the Court to consider, non-exhaustively:
>
> > (a) whether the records include personal information of the complainant. This invokes the concept of informational privacy, which is based on the notion of individual dignity and integrity, and which protects the ability to control the dissemination of intimate and personal details about oneself that go to one's "biographical core": *JJ* at paras 44-45;
> >
> > (b) whether the complainant has a reasonable expectation of privacy, including as informed by (but not necessarily the same as) some of the principles from jurisprudence under the common law and under section 8 of the *Charter*: *JJ* at para 47; *Quesnelle* at para 27. Two principles inform reasonable expectation of privacy in this context: (1) the complainant must have a subjective expectation of privacy that is objectively reasonable in the circumstances; and (2) a reasonable expectation of privacy only engages legally recognized privacy interests: *JJ* at para 47, citing *R v Edwards*, 1996 CanLII 255 at para 45; *R v Jarvis*, 2019 SCC 10 at paras 35-43; *R v Mills*, 1999 CanLII 637 (SCC) at para 99. A reasonable expectation of privacy will be assessed in the totality of the circumstances: *RU* at para 26;
> >
> > (c) the factors set out in section 278.92(3) of the *Criminal Code*, which "shed light on the interests implicated by the record screening regime" and

> reinforce that Parliament intended to "safeguard highly personal information related to complainant dignity": *JJ* at para 51;
>
> (d) the content of the records (including whether the information in the non-enumerated record is similar to what would be contained in an enumerated record): *JJ* at paras 55-56; *RU* at para 27; and
>
> (e) the context in which the record came into existence. Courts may consider why the complainant shared the private information in question, the relationship between the complainant and the person with whom the information was shared, and where the record was shared and how it was created or obtained: *JJ* at paras 57-60.

[33] As noted above, in *J.J.,* the majority set out how to identify non-enumerated records that would fall within the purview of the s. 278.1 regime. In providing guidance, the majority stated that one of the factors to consider is whether the record was created or obtained surreptitiously by the accused:

> [60] Third, courts may consider where the record was shared and how it was created or obtained. Records produced in the private domain (e.g., one-on-one communications between the complainant and accused) may attract an enhanced reasonable expectation of privacy; records created or obtained in the public domain, where they could be accessed by multiple people or the general public (e.g., social media or news media), are less likely to attract a reasonable expectation of privacy. That said, the fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest through additional dissemination that would increase access to the information (*Sherman Estate*, at para. 81). In other words, there are different degrees of publicity, and in some cases a complainant may have a reasonable interest in preventing information from being disseminated in court proceedings, even if it was not perfectly private before. Similarly, the fact that a record was created or obtained surreptitiously by the accused, without the complainant's knowledge, would also be relevant as part of the contextual analysis. Such a record would be more likely to attract a reasonable expectation of privacy. [Emphasis added]

[34] In the present case I am satisfied that each item of proposed evidence is indeed a non-enumerated record, except for IMG_0821.PNG (as will be explained below). M.F. had a reasonable expectation of privacy when communicating with Mr. S. orally in private, in-person conversations, which was violated by Mr. S. surreptitiously recording many of their conversations for his own use. There are also records where M.F. is alone in a room and Mr. S. barges in, recording her and asking her questions. With respect to the content of the records, many include personal information about M.F. and involve emotional conversations which were

intended to be kept private. The nature of the content and context of the proposed evidence is not "mundane" such that the pre-screening records regime would not apply. I agree with counsel that all the proposed evidence (except IMG_0821.PNG) can be treated as non-enumerated records pursuant to s. 278.1.

What records are admissible?

[35] The test at Stage Two for admissibility is found at s. 278.92(2)(b):

> **Admissibility – accused in possession of records relating to complainant**
>
> **Requirements for admissibility**
>
> **(2)** The evidence is inadmissible unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 278.93 and 278.94,
>
> (a) if the admissibility of the evidence is subject to section 276, that the evidence meets the conditions set out in subsection 276(2) while taking into account the factors set out in subsection (3); or
>
> (b) in any other case, that the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[36] This determination is made in accordance with the factors listed in s. 278.92(3) (*J.J.* at para. 32):

> **Factors that judge shall 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)** society's interest in encouraging the obtaining of treatment by complainants of sexual offences;
>
> **(d)** whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
>
> **(e)** the need to remove from the fact-finding process any discriminatory belief or bias;

> **(f)** the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
>
> **(g)** the potential prejudice to the complainant's personal dignity and right of privacy;
>
> **(h)** the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
>
> **(i)** any other factor that the judge, provincial court judge or justice considers relevant.

Surreptitious Recordings Generally

[37] The Crown's primary position is that none of the surreptitiously recorded exchanges are admissible. As noted above, in *J.J.*, the majority stated that surreptitious recordings should be assessed contextually, and such a record would be more likely to attract a reasonable expectation of privacy, in determining whether the recording is a non-enumerated record.

[38] The Crown provided supplementary caselaw to support its position that the surreptitious recordings should not only be considered non-enumerated records but also should be not admitted. In *R. v. F.A.,* 2020 ONCJ 178, the accused sought admission of two recorded phone conversations between the complainant and the complainant's son. The accused was physically present with the complainant's son, who was on speaker phone with his mother. They discussed intimate details of the complainant's life, including her faith, history with other men, and relationship with the defendant. The court found that both recordings were "records" under s. 278.1. The factors that weighed in favour of this finding were: a) the recordings were surreptitiously made by the accused while he was not a party to the conversation; b) the complainant was misled to believe that she was having a private conversation with her son only; and c) the complainant discussed personal, intimate, sensitive information about lifestyle choices (paras. 22-24). These recorded phone calls were nonetheless ruled admissible (paras. 5-6). This decision was focused on defining which of all the proposed evidence met the definition of "record," rather than explaining why the court subsequently ruled the records admissible.

[39] *F.A.* proposes that even when there is a high reasonable expectation of privacy engaged, admission of the evidence is still possible depending on the circumstances. In the present case, Mr. S. was a party to all the recorded conversations, unlike in *F.A.*

[40] In *R. v. W.F.,* 2023 ONSC 6068, the accused sought admission of a recorded phone call between the complainant and accused, which was in the accused's possession. The context suggested the conversation was surreptitiously recorded. The accused sought an order that the conversation was not a "record", and therefore that its admissibility did not need to be pre-determined at a s. 278.92(2) hearing. The court found that the conversation was a record. Its admissibility was not determined in this decision, but the court ruled that a s. 278.93 hearing was required. The court agreed with the Crown that:

> [14] In the recorded phone conversation, the Complainant exposes her ill feelings to her father about his difficult dispute with her mother; and it is made clear in the recording that the family law issues were impacting on her emotional well-being. In my view, the "dissemination of highly sensitive personal information" of this nature can result "not just in discomfort or embarrassment, but in an affront to the [Complainant's] dignity": [*J.J.]* at para. 45, quoting *Sherman Estates v. Donovan,* 2021 SCC 25 at para. 7.
>
> [15] …The complainant's feelings towards her parents' conflictual family law proceedings go to the core of what a young teenager…would consider highly sensitive and personal. It is entirely understandable that for the Complainant her parental relationships are a personal matter that is integral to her emotional well-being. The production of recorded conversation in court would have an impact that goes well beyond inconvenience to touch on her sense of dignity.

[41] In *R. v. B.W.,* 2024 ONSC 4940, the final case relied on by the Crown, the court addressed the reasonable expectation of privacy of spouses in conversations surrounding marital breakdown. The accused sought an order that e-mails between himself and the complainant were not records under s. 278.1, and that he be permitted to use the contents of the e-mails to cross-examine the complainant. The court commented on the reasonable expectation privacy of the complainant with respect to the content of the e-mails:

> [34] …some of the emails address the state of the marriage and the problems within it. They do not simply reference general emotional states, such as "I was happy today when…". They reference very personal thoughts and feelings about themselves and one another in the context of a private and intimate relationship. Several emotionally-charged exchanges take place, and personal thoughts revealed. From the circumstances, it can be inferred that the intention was to keep those emails out of the public eye. Some that are authored by the complainant are self-deprecating, though not in a humorous way. While not limited to the complainant, the complainant records her private and personal thoughts about her marriage, herself and the Applicant. Even reading them felt like a gross intrusion on the complainant's privacy, akin to reading her personal journal or diary.

> [35] While certainly not a general rule, it is my view that communications between spouses whose marriage is at peril or disintegrating and who are revealing personal thoughts and feelings about that life transition have a very high expectation of privacy in those exchanges. It can usually be inferred, in such circumstances, that the objectively reasonable expectation would be that the communications remain private. The emails that I have identified as records are of an intimate and highly personal nature containing information that is integral to the complainant's psychological or emotional well-being.

[42] The application in *B.W.* was dismissed for its non-compliance with the *Criminal Code.* In my opinion, even though the nature of the conversations described in *B.W.* might elicit a high expectation of privacy, there is no general rule that they must be excluded.

[43] Neither Mr. S., nor M.F., provided any caselaw on the issue of the surreptitious recordings.

[44] In the instant case, it is not contentious that the recordings are non-enumerated records thereby falling under the s. 278.1 regime, or that they attract a high expectation of privacy. While the court in *J.J.* held that surreptitious recordings are more likely to attract a reasonable expectation of privacy and therefore are likely to be considered non-enumerated records, it did not direct that the surreptitious nature of the records outweighs the other factors that the court *shall* consider listed at 278.92(3) of the *Code*. Therefore, contrary to the real gist of the Crown's position, the surreptitious nature of the recordings does not, on its own, overwhelm all other s. 278.93(3) considerations, and render the records inadmissible.

Section 278.92(3) Analysis

(a) the interests of justice, including the right of the accused to make a full answer and defence;

[45] Mr. S. is charged with very serious offences. If convicted he is exposed to incarceration and lifelong stigmatization. The right to make full answer and defence is integral to his ability to have a fair hearing. The materials are capable of showing that M.F. is an unreliable witness, that she was using the threat of criminal prosecution to control Mr. S. and prevent him from ending their relationship, that she may have self-harmed and blamed him for her injuries, and that she was physically aggressive towards him.

[46] This weighs in favour of admission of these materials generally.

(b) society's interest in encouraging the reporting of sexual assault offences;

[47] The admission of recordings that show nothing other than a complainant getting upset and emotional, or talking exclusively about intimate matters, would have a chilling effect on the reporting of sexual offences. There is no question following *J.J.* that the admission of surreptitious recordings that disclose highly personal information or intimate discussions would have a significantly negative impact on the reporting of sexual assault cases.

[48] Surreptitious recordings which might reveal that a complainant may have been using the threat of a criminal complaint to control an accused and prevent him from ending the relationship, that the complainant may have self-harmed and falsely blamed him for her injuries, and that the complainant was physically aggressive towards the accused, are such rare likelihoods that the admission of such surreptitiously gathered records would have a reduced chilling effect.

[49] This weighs slightly against the admission of these materials.

(c) society's interest in encouraging the obtaining of treatment by complainants of sexual offences;

[50] This application involves recordings in the possession of Mr. S., and does not involve third-party therapeutic records. Therefore, this factor is not relevant to this application.

(d) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

[51] If the records are capable of confirming that M.F. may have been using the threat of a criminal prosecution to control Mr. S. and prevent him from ending the relationship, that she may have self-harmed and falsely blamed him for her injuries, and that she was physically aggressive towards him, then there is a reasonable prospect that the evidence will assist in arriving at a just determination in this case.

[52] This weighs in favour of the admission of these materials.

(e) the need to remove from the fact-finding process any discriminatory belief or bias;

[53] The materials are not being tendered for any purpose related to a discriminatory belief or bias.

[54] This weighs in favour of the admission of the materials.

(f) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

[55] This matter is being heard by a judge sitting alone, not a judge a jury. There is no issue of the evidence arousing sentiments of prejudice, sympathy or hostility in the trier of fact.

[56] This weighs in favour of admission.

(g) the potential prejudice to the complainant's personal dignity and right of privacy;

[57] The admission of recordings that show M.F. in an unhappy emotional state are prejudicial to her personal dignity and surreptitious recordings impact on her right to privacy. The surreptitious recordings made when she was in public with the accused, or in his company discussing non-intimate issues, including whether she was going to proceed with a criminal complaint, would have a much lesser impact on her personal dignity and her right to privacy.

[58] This weighs against admission certain, but not all, of the materials.

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

[59] The recordings are in the possession of Mr. S., and some were made when M.F. and Mr. S. were together, or in public, and are not of an intimate nature, nor do they involve intimate topics. Some of the recordings do depict M.F. when she was very emotionally upset.

[60] This weighs against the admission of some, but not all, of the records.

(i) any other factor that the judge, provincial court judge or justice considers relevant.

[61] In the present case, when the balancing exercise is complete, these factors weigh in favour of admitting some of the refined list of proposed evidence, which is both relevant to the accused's defence, and does not engage in discriminatory beliefs/biases, or twin myth reasoning. Ultimately, contrary to the Crown's submissions, the fact that videos and audio recordings were surreptitiously obtained is one factor in a constellation of many factors that the court must consider in its ruling on admissibility, but it does not outweigh the other s. 278.92(3) factors.

[62] I am also of the view that some of the records would prejudice M.F.'s personal dignity and right of privacy (s. 278.92(3)(g)) and would not assist in arriving at a just determination in the case (s. 278.92(3)(d)) and therefore should not be admitted.

[63] Below are tables detailing the title of each proposed record (as provided by Mr. S.), a brief description of the contents of the record, and the reasons for the court's ruling on their admissibility. The creation date of each record is included in brackets following the name of the record. Each date fits within the dates prescribed by the indictment.

Admissible Records:

Name	**Description**	**Reason for admissibility**
IMG_1069.MP4 (2021-09-19)	Video of Mr. S. recording M.F. asking questions like "why do you threaten to charge me when you get upset?", she says "I don't want to". M.F. says that Mr. S. "ruined her life" and "she is alone every single day". Mr. S. presses her to answer his questions and her answers are unclear.	Probative value which is not substantially outweighed by prejudice; while M.F.'s privacy rights are infringed, the discussion about M.F.'s threats to have Mr. S. charged are relevant to his right to make a full answer and defence; no discriminatory belief/bias engaged.

IMG_1390.MP4 (2021-11-24)	Video of M.F.'s face where she points out what she says is a bruise, Mr. S. confronts M.F. insisting he did not cause her bruise. He alleges she smashes her head off of stuff, and she disagrees.	Probative value which is not substantially outweighed by prejudice; relevant to the accused's right to make a full answer and defence to the assault charges with the defence that M.F.'s injuries were self-inflicted; M.F. does not acknowledge that she self-harmed when he suggested same; no discriminatory belief/bias engaged.
Cut Steakhouse 3 (2021-09-19)	Audio recording; Mr. S. tries to get M.F. to admit she is threatening him; M.F. says she will not charge him or threaten him and she's sorry for scaring him; Mr. S. suggests to her that she threatens to charge him for attention when she is mad and she says "I threaten you because you do more to me than I've ever done to you".	Probative value not substantially outweighed by prejudice; discussions between M.F. and Mr. S. about her threatening to charge him are relevant to the accused's right to make a full answer and defence; no discriminatory belief/bias engaged.
Cut Steakhouse 4 (2021-09-19)	Audio recording; M.F. says "I'm not going to fucking charge you M.".	Same reasons as "Cut Steakhouse 3".
Cut Steakhouse (2021-09-19)	Audio recording; Mr. S. presses M.F. to agree with his suggestion that she threatens to charge him when she is mad,	Probative value outweighs prejudicial effect; no discriminatory belief/bias engaged; discussion of her alleged threats to charge him is necessary to his right to

	M.F. says she is not going to charge him, says he ruined her life and she lost her friends; at 02:20 he says "why do you threaten to charge me" and she says "because you treat me like shit and never apologize for anything…do you want to hear the recording of you today?"; she shows him a recording she made of him and he gets mad and says "you are going to ruin my life" and says he deleted the video. She then says he tried to kill her and she screamed and he denies this.	make a full answer and defence.
New Recording 2 (2022-05-21)	Audio recording; Mr. S. confronts M.F. alleging she pulled his hair and punched him. M.F. agrees that she was upset because she thought he was cheating on her. M.F. does not admit to Mr. S.'s allegations, she says "don't try to manipulate me because you think I'm	Probative value which is not substantially outweighed by prejudice; M.F. admitting she punched him multiple times that day is relevant; Mr. S. alleges that M.F.'s injuries were a result of defensive wounds from her trying to assault him; no discriminatory belief/bias engaged.

	drunk enough to believe something but I am not"; accused says "did you or did you not punch me in the face"; she says "I probably did yeah…I did multiple times today actually, this morning…you choked me…and beat me".	
New Recording (2021-09-19)	Audio recording; Mr. S. questions M.F. on whether she would charge him if they broke up and asking her why she threatens to charge him if they broke up; there also is discussion about Mr. S. choking M.F. during sex as well as M.F. being unfaithful; from **01:44-02:07**, Mr. S. says "you've cheated on me multiple times" and M.F. says she cheated on him six months ago; then there is discussion about him making her pass out during sex and that she likes it rough; she denies that. M.F. says that Mr. S. "treats her like shit" and does not love her.	The admission of this recording is contingent on the excision of 01:44 – 02:07 of the file. Section 276 of the *Criminal Code* is engaged during this part of the discussion and if the accused seeks to have this portion admitted, he must bring a separate s. 276 application. Conversations about past sexual activity either as between M.F. and the accused, and M.F. and another, is clearly captured by s. 276. The recording other than the above-noted portion is admissible and relevant to the accused's defence that M.F. threatens to engage the police/judicial system to control him.

Cut Steakhouse 5 (2021-09-19)	Audio recording; M.F. becomes agitated and upset with Mr. S. about breaking up with her, she says "I've waited for you to change and you've changed", and she asks him repeatedly not to break up with her. M.F. says that she wanted to leave because [she] was "stupid" and is sorry and won't do it again. Much of the audio is very difficult to hear and will have to enhanced by the defence if they want to rely on it at trial.	Mr. S. says that M.F. attempted to control him and prevent him from breaking up with her through the threat of a criminal complaint, which led to these charges. This audio recording includes Mr. S. trying to break up with M.F. and her repeatedly asking him not to. The recording has probative value. The prejudicial effect arises from the fact that this is a personal conversation during which M.F. is crying and expressing her feelings. Nonetheless, this is relevant to a material issue that defence has raised and M.F.'s motive for making the criminal complaint will be a central issue at trial. The probative value outweighs its prejudicial effect on these facts.
Salter St (2021-09-19)	Audio recording; Mr. S. repeatedly asks "are you going to charge me" M.F. says "I am not going to charge you with anything" Mr. S. asks M.F. "Are you going to charge me if I don't get you an Uber? And why do you keep threatening it?"; M.F. says she is not going to charge	Considering the defence theory, the probative value of this recording outweighs its prejudicial effect.

	him, even if he breaks up with her.	
IMG_0618.MP4 (2022-11-12)	Non-surreptitious video of M.F. crying in a bathroom, from 00:00-00:08 the video shows Mr. S. speaking to her, she says that historically Mr. S. would grab her phone out of her hands when he wants to look at it, and M.F. admits that she goes into his phone when he is asleep. At 00.08 M.F. says "stop", he won't let her close the door, accused says "this is great evidence of your mental state".	The video is admissible from 00:00-00:08 but is inadmissible from 00:08 onward for the same reasons as IMG_0617.MP4.

Inadmissible Records:

Name	**Description**	**Reason for inadmissibility**
IMG_0617.MP4 (2022-11-12)	Video of M.F. crying in a bathroom.	Not surreptitious. Violation of M.F.'s privacy/dignity to film her crying, not necessary for Mr. S. to make a full answer and defence and not relevant to an anticipated issue at trial.
IMG_1415.MP4 (2021-11-24)	Video of M.F. talking about taking her meds, and her plan to commit suicide.	Violation of M.F.'s privacy/dignity rights; no probative value; irrelevant to a material issue at trial; unrelated to the issues the accused has raised of

		reliability or tendencies to be aggressive or threaten him.
Dartmouth Crossing (2022-07-09)	Audio recording; M.F. says while upset that a number of things in her life make her unhappy and then says, "I want to be gone, I can't do this anymore. I want to go home"; Mr. S. screams at her to "shut up".	No probative value; violation of M.F.'s privacy/dignity rights; M.F. is emotional; unrelated to any material issue.
Hawthorn Elementary School (2022-05-22)	Audio recording; M.F. is talking about what she wants to wear and have and Mr. S. screams at M.F. to "hang up the fucking phone".	Same reasons as Dartmouth Crossing; it is unclear what M.F. is saying; no probative value.
Waverly Rd (2022-05-02)	Audio recording; M.F. sounds upset but it is unclear what she is saying and she sounds far away from recording device, it vaguely sounds like a discussion M.F. was having with a third party about pants.	No probative value without audio enhancement as it is impossible to make out with any certainty what exactly is being said. The court is open to revisit its decision about this recording if the audio is improved.
IMG_0865.MP4 (2021-11-24)	As noted in paras. [23]-[26] above, surreptitious video recording of M.F.'s phone screen filmed over her shoulder while she appears to	As noted in paras. [23]-[26] above, M.F.'s private internet viewing is of a highly personal nature and attracts a high expectation of privacy; While M.F.'s curiosity about being a "sadistic woman" might have

	be possibly travelling in a car. This is clearly something that M.F. is viewing privately; the webpage appears to be a social media post where people are discussing in a forum titled "Sadistic Women"; M.F. is viewing a post that reads: "are any women in this group that enjoy sadism? No guilt, no fear, no empathy you just like to hurt men with no regard for how they feel or what they want"; the other posts cannot be read in their entirety.	some probative value, this is substantially outweighed by prejudice of violating her right to dignity and privacy by spying on her internet scrolling.

IMG_0821.PNG

[64] As noted above, one item of the proposed material does not properly fit into the s. 278.1 records regime and is not subject to pre-screening as part of this application. IMG_0821.PNG is a screenshot of text messages from M.F. to Mr. S. complaining about her physical appearance, hairstyle, ability to apply makeup, and her eyelashes. The court does not accept that this qualifies as a non-enumerated record, as its contents, while personal, are not of a highly sensitive nature. It is a mundane text and does not fit within the s. 278.1 regime. Its potential relevance is not obvious at this stage, but its admissibility and possible use at trial can be determined at trial.

Conclusion

[65] The following screenshot is not engaged by the records regime and is thus not subject to pre-screening as part of this application:

- IMG_0821.PNG

[66] Considering the requirements for admissibility pursuant to s. 278.92(2)(b) of the *Criminal Code* and the s. 278.92(3) factors, as noted in the above detailed tables, the following records are admissible:

- IMG_1069.MP4
- IMG_1390.MP4
- Cut Steakhouse 3
- Cut Steakhouse 4
- Cut Steakhouse
- New Recording 2
- New Recording (admissibility dependent on counsel's removal of the portions that reference prior sexual activity: 01:44 – 02:07)
- IMG_0618.MP4
- Cut Steakhouse 5
- Salter St

[67] The following records are inadmissible:

- IMG_0617.MP4
- IMG_0821.PNG
- IMG_1415.MP4
- Dartmouth Crossing
- Hawthorn Elementary School
- Waverly Rd

Arnold, J.