SCC File No. 39133

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

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

AND:

J.J.

RESPONDENT
(Applicant/Defendant)

AND:

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ATTORNEY GENERAL OF ONTARIO,
ATTORNEY GENERAL OF NOVA SCOTIA,
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PART I – STATEMENT OF FACTS

A. Overview

1. In 2018, Parliament enacted Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, S.C. 2018, c. 29, s. 25. The amendments represent the next step in a long-standing and essential dialogue between Parliament and the courts about procedural and evidentiary rules that balance the privacy and equality rights of sexual assault complainants with the accused's right to make full answer and defence. The Bill was carefully crafted to fill a statutory procedural gap with respect to the admissibility and use of records in the possession of the accused in which the complainant has a reasonable expectation of privacy. It is a principled extension of the common law and related codified procedural and evidentiary schemes that have already survived constitutional scrutiny.

2. Bill C-51 made three primary changes. First, like other sexual activity evidence under s. 276 of the *Criminal Code*, R.S.C. 1985, c. C-46, s. 278.92(1) makes "records" in the possession of the accused presumptively inadmissible in sexual offence trials if they contain personal information in which the complainant has a reasonable expectation of privacy. Second, in accordance with the Senate Standing Committee on Legal and Constitutional Affair's 2012 recommendations, Bill C-51 added a two-step procedure at ss. 278.92(2) to 278.94 which allows the accused to apply to have the records admitted. Pursuant to s. 278.93(4), the provision at issue on this appeal, the application must be made "at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice". Third, Bill C-51 repealed ss. 276.1 to 276.5, the prior procedure by which an accused could apply to have evidence of other sexual activity evidence admitted at trial. Now, this application is made under ss. 278.92 to 278.95. This effectively creates a single admissibility procedure for s. 276 material and s. 278.1 records in the possession of the accused.

3. The purpose of the amendments with respect to records in the possession of the accused was to:

- ensure that a complainant's rights to privacy, dignity, security of the person, and equality under ss. 7, 15 and 28 of the *Charter* are fully considered, appreciated, and respected in circumstances where the admissibility of private records of the complainants are involved;
- improve victim and community confidence in the criminal justice system, thereby increasing the likelihood that victims of offences of sexual violence will report these crimes and participate in criminal prosecutions;
- protect the integrity of the trial process by ensuring that evidence that is rooted in myths and stereotypes or otherwise misleading is not admitted into evidence such as to distort the truth-seeking function; and

- at the same time, provide for admissibility and use of records where necessary and appropriate for an accused to make full answer and defence.

  See, for example, *House of Commons Debates*, 42nd Parl., 1st Sess., Vol. No. 148, No. 249 (11 December 2017) at 16218-16219; *R. v. C.C.*, 2019 ONSC 6449, para. 83.

4. The records amendments codified, in part, the common law procedure outlined in *R. v. Osolin,* [1993] 4 S.C.R. 595 and *R. v. Shearing,* 2002 SCC 58, which has always required the trial judge to act as a gatekeeper to determine the admissibility and use of records in the possession of the accused in sexual assault proceedings. The new procedure is also substantially similar to the procedures used for ss. 276 and 278.1 to 278.91 applications, the constitutionality of which were upheld in *R. v. Mills,* [1999] 3 S.C.R. 668 and *R. v. Darrach,* 2000 SCC 46.

5. The appellant appeals from an interlocutory constitutional ruling that "read down" the seven-day notice provision in s. 278.93(4). Duncan J. held that reading the section to require seven days' notice would necessitate the accused disclosing evidence and strategy before the Crown has made out a case to meet and would compel the accused to disclose detailed particulars of evidence that may affect cross-examination. She concluded that the timing "substantially alters the traditional paradigm of confronting a witness with contradictory evidence". Duncan J. held that the s. 7 *Charter* violation could not be saved under s. 1, and "read down" s. 278.93(4) to remove the reference to seven days and to provide that applications be made "at the conclusion of the complainant's examination in chief, or as otherwise directed by the judge, provincial court judge or justice in the interests of justice".

6. The appellant says that Duncan J. correctly dismissed the broader ss. 7, 11(c) and 11(d) *Charter* challenges to the scheme but erred in concluding that the seven-day notice period in s. 278.93(4) was constitutionally flawed. The impugned provision does not violate the right to make full answer and defence because: (1) it achieves a proportionate balance consistent with the principles of fundamental justice; (2) it does not result in improper "reverse" or "compelled" disclosure; (3) it neither mandates pre-trial applications nor seven-day notice; and (4) it promotes efficient trial management.

7. Duncan J. failed to recognize that the notice provision achieves a reasonable constitutional compromise because it expressly gives the trial judge the discretion to determine the timing of the application using the well-established "interests of justice" test. The incorporation of this test ensures the court has the necessary discretion to consider all the relevant factors, including the accused's right to a fair trial. Advance notice promotes efficient trial management and meaningful participation by the complainant, and helps

ensure compliance with *R. v. Jordan*, 2016 SCC 27. The constitutional remedy significantly altered the notice provision and thus the operation of the new scheme.

8. Section 278.93(4) respects the competing constitutional interests at play in a sexual assault trial: the accused's right to make full answer and defence; the truth-seeking function; and the privacy, security and equality interests of a complainant. An accused does not have a constitutional right to ambush the complainant nor a completely unfettered right to cross-examine. It is, moreover, a basic rule of evidence that the party seeking to introduce evidence must satisfy the court that it is relevant and admissible. The right to make full answer and defence does not include the right to adduce irrelevant or prejudicial evidence that would distort the truth-seeking function of the trial. As a result, s. 278.93(4) does not violate the right to make full answer and defence.

9. Parliament is entitled to broaden the scope of procedural and evidentiary rules to address and expand legally protected interests. As McLachlin and Iacobucci JJ. observed more than 20 years ago in *Mills*, Parliament may build upon the common law and develop a different statutory scheme (para. 55). Moreover, while important change has occurred through amendments to sexual assault legislation, "the treatment of sexual assault complainants remains an ongoing problem. If constitutional democracy is meant to ensure that due regard is given to the voices of those vulnerable to being overlooked by the majority, then this court has an obligation to consider respectfully Parliament's attempt to respond to those voices" (para. 58).

B. Proceedings at trial and ruling on constitutional application

10. The respondent was charged with sexual assault contrary to s. 271 of the *Code*.

11. In his Amended *Constitutional Question Act* notice (*Appeal Record*, Volume 1 ("*AR1*"), 54), the respondent asserted that ss. 278.92(1), 278.92(2)(b) and 278.94(2) violated ss. 7, 11(c) and 11(d) of the *Charter*. However, in written and oral submissions, he challenged the entire scheme and asserted that ss. 278.92 to 278.94 violated his rights to silence and to make full answer and defence, and the principle against self-incrimination contrary to ss. 7, 11(c) and 11(d) of the *Charter*. The application proceeded on the understanding that the respondent was challenging the constitutionality of the ss. 278.92 to 278.94 scheme but only as those sections relate to admissibility of records in the possession of the accused. He submitted that the impugned provisions force the defence to disclose "all" of its potential evidence in advance of the trial and adversely impact the accused's ability to contemporaneously cross-examine the complainant.

12. The respondent advised the Crown and the court that he was in possession of records that fell within the definition of s. 278.1 but declined to identify the nature of the records in advance of the constitutional application. However, as McLachlin and Iacobucci JJ. held in *Mills*, the absence of a substantive application is not a bar to a constitutional challenge (paras. 19, 35-42).

13. The constitutional challenge was heard October 7 and December 9 -10, 2019: *AR2,* 21,129; *AR3*, 1.

14. In *R. v. J.J.*, 2020 BCSC 29 (the "*Breach Ruling*"), Duncan J. found a narrow s. 7 breach related to the seven-day notice provision in s. 278.93(4) of the *Code*, but dismissed all other aspects of the challenge: *AR1,* 3 and *AR3,* 62. She held that reading the provision to require seven-days notice "would mean that the defence must disclose evidence and related strategy before the Crown has made out a case to meet. It compels the defence to disclose detailed particulars of evidence that may affect the ability of the defence to cross-examine a witness on the foundational elements of credibility and reliability" (para. 71). A "strict reading of the timing provision…substantially alters the traditional paradigm of confronting a witness with contradictory evidence to defend oneself by replacing it with a relevance hearing in advance of a witness's testimony" (para. 82). She concluded that s. 278.93(4) violates the right to a fair trial contrary to s. 7 because it "compels disclosure of defence evidence and unduly truncates the right to make full answer and defence by providing the complainant and the Crown with an advance preview of defence evidence and tactics before examination-in-chief is completed and a case to meet has been established" (para. 90).

15. Counsel filed written submissions on s. 1 and remedy: *AR1*, 150-174. On February 18, 2020, in a brief oral ruling, Duncan J. held that the s. 7 breach was not saved under s. 1, but did not address remedy: *AR3,* 75. In written reasons released on March 11, 2020, she held that the s. 7 violation could not be saved under s. 1: *R. v. J.J.,* 2020 BCSC 349 ("*Section 1 and Remedy Ruling*"), *AR1,* 32. However, because s. 278.93(4) applies to both ss. 276 and 278.92 applications, Duncan J. "read down" the provision to: (1) remove the seven day notice in s. 278.93(4) only as it applies to s. 278.92 applications; and (2) provide that s. 278.92 applications should be made "at the conclusion of the complainant's examination in chief, or as otherwise required by the judge, provincial court judge or justice in the interests of justice". As she explained:

> [22] This formulation does not preclude trial judges, in the exercise of their trial management powers, from inquiring of defence counsel at a pre-trial conference or at the commencement of a trial whether such an application might be made. Such an inquiry would have the benefit of putting the Crown and the complainant on notice that counsel might be required to assist the complainant and reduce mid-trial delay if such an application proceeds without requiring the defence to disclose any particulars.

16. On February 18, 2020, the respondent discharged his counsel. As a result, the jury trial scheduled for the week of February 24, 2020 was adjourned.

17. The respondent subsequently retained new counsel and his jury trial started on October 5, 2020. The jury returned a not guilty verdict on October 9, 2020. The Crown has not appealed from the acquittal.

18. With the respondent's agreement, the materials relating to the s. 278.92 application at trial have been included in the Appeal Record to provide a concrete example of how the amendments operate in practice.

19. The issue was canvassed at a pre-trial conference on October 1: *AR3,* 98[40] to 101[29]. After the jury was selected on October 3, respondent's counsel filed an application for directions seeking a threshold determination about whether the proposed documents were "records": *AR1,* 175; *AR*3,106[9-40]; see also *AR1*, 98[40] to 101[30], 112[30-42]. Contrary to the position taken by then-counsel at the constitutional application, respondent's counsel took the position that the documents were not "records". She also asserted that complainant's counsel did not have standing to make submissions on the threshold determination. Complainant's counsel was not provided formal notice of the application for directions, but was advised by defence counsel: *AR3*, 111[38] to 112[42].

20. The complainant testified in chief on the morning of October 5: *AR3*, 114. The application for directions was heard in the afternoon: *AR4*, 17. Duncan J. held that complainant's counsel did not have standing on the issue of whether the documents were "records": *R. v. J.J.,* 2020 BCSC 1649, *AR4,* 1; *AR4,* 26[27-37]. After complainant's counsel was excused, respondent's counsel then filed the s. 278.92 application and the Affidavit of J.J.: *AR4*, 8[46] to 9[38]; *AR1,* 40; *AR3,* 211. That was when the Crown learned that the documents in question were two photographs depicting the complainant's naked body: *AR4*, 8[46] to 9[38]. Following submissions (*AR4*, 26[39] to 39[12]), Duncan J. concluded that the photographs were "records": *AR4*, 39[18-37].

21. The substantive s. 278.92 application proceeded on October 6: *AR4,* 44. Crown counsel acknowledged that the photographs were relevant as they potentially contradicted the complainant's testimony at the preliminary inquiry about the sequence of events following the alleged offence: *AR4,* 78[2] to 79[8]. However, he expressed concerns about the risk of twin myths reasoning and the scope of cross-examination. Complainant's counsel opposed the application: *AR1,* 205; *AR4,* 60[36] to 77[29]. Duncan J. held that the photos were admissible but should be vetted further to respect the complainant's privacy: *R. v. J.J.*, 2020 BCSC 1650 (*In Camera* Oral Ruling): *AR4, 4; AR4*, 83[40[to 86[5].

PART II – STATEMENT OF QUESTIONS IN ISSUE

22. The appellant has stated the following constitutional question:

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

PART III – STATEMENT OF ARGUMENT

A. Overview of argument

23. Before turning to the substantive constitutional issues, the appellant will review the evolution of the rules of evidence applicable to sexual offences and the related jurisprudence and then summarize the jurisprudence that has considered the Bill C-51 amendments. While lengthy, this review provides the necessary context for this Court's constitutional analysis. The appellant will then: (1) outline how Duncan J. erred in concluding that the seven-day notice in s. 278.93(4) violated s. 7 of the *Charter*; and (2) address s. 1 and remedy.

B. Background: The evolution of the law applicable to sexual offences

24. Over time, there has been a gradual but consistent evolution in the rules of evidence applicable to sexual offences. Bill C-51 is the next step in that evolution. The appellant will trace the statutory and jurisprudential evolution of two closely related regimes: admissibility of other sexual history (s. 276) and production of third-party records (ss. 278.1 to 278.91). This evolution demonstrates that Bill C-51 is filling a legislative gap and provides the necessary context in which to properly assess the constitutionality of the impugned provision.

1. The pervasive influence of the twin myths & rape myths

25. Historically, there were no restrictions on the ability of the defence to adduce evidence concerning the complainant's other sexual activities, or the inferences which could be drawn from that evidence. Consequently, such evidence was routinely used to suggest that because the complainant, who was almost always female, had consented to sexual activity in the past, they were: (1) more likely to have consented; and (2) less worthy of belief. These suggestions, now recognized as the "twin myths", severely distort the truth-seeking function of the trial process with their misleading reasoning: *R. v. Barton,* 2019 SCC 33, para 55; *R. v. Goldfinch,* 2019 SCC 38, para. 33; *R. v. R.V.,* 2019 SCC 41, para 33.

26. The twin myths are not the only falsehoods about sexual violence to permeate courtrooms. "Rape myths" and stereotypes also infect sexual assault trials. Prevalent “rape myths” and stereotypes include: victims cannot be raped against their will; only "bad girls" are raped; victims who have been assaulted deserve it; victims are unreliable witnesses; victims lie about sexual assault; victims of abuse react to trauma in predictable ways; accessing therapeutic help renders a complainant less credible; real victims engage in avoidance behaviour; real victims report or complain right away (myth of “recent complaint”); and the timeliness of the disclosure affects the credibility of the complainant. See, for example, *Darrach,* para. 33; *Goldfinch,* para. 45; *R. v. Crosby*, [1995] 2. S.C.R. 912, para. 16; *R. v. A.R.D.*, 2017 ABCA 237, paras. 50-51, aff’d *R. v. A.R.J.D.*, 2018 SCC 6, at para. 2; *R. v. C.M.G.*, 2016 ABQB 368, paras. 56-65; L. Dufraimont, “Myth, Inference and Evidence in Sexual Assault Trial” (2019), 44:2 Queen’s L.J. 316, at 330-333.

27. Persistent use of twin and rape myths resulted in complainants being subjected to humiliating and prolonged examinations on intimate topics irrelevant to the alleged offence: see, for example, *Osolin,* at 670-671 (para. 168); *Shearing,* para. 121; *Mills,* para. 119; K. Kelly, "You must be crazy if you think you were raped: Reflections on the Use of Complainant's Personal and Therapy Records in Sexual Assault Trials" (1997), 9 C.J.W.L. 178 at pp. 187-194 (cited in *Mills,* para. 113 and *Darrach*, para. 26).

28. The damage caused by these tactics remains today. Sexual assault is still among the most highly gendered and underreported of crimes: *Goldfinch*, para. 37. Further, the twin and rape myths continue to be advanced in sexual assault trials and persist in influencing laypeople, lawyers and judges alike.

2. Parliament takes action and this Court responds: *Seaboyer*, *Darrach* and *Mills*

29. In order to combat the twin myths, Parliament enacted s. 276 in 1982. That section imposed a blanket exclusion of all evidence of sexual activity other than the sexual activity that forms the subject-matter of the offence, subject to three exceptions.

30. Almost a decade later, in *R. v. Seaboyer; R. v. Gayme*, [1991] 2 S.C.R. 577, this Court struck down s. 276 because it excluded evidence of other sexual activity absolutely, without any means of evaluating whether the integrity of the trial process would be better served by receiving the evidence rather than excluding it (at 625, para. 75). McLachlin J. (as she then was), writing for the majority, drafted common law rules for the reception and use of other sexual activity evidence (at 634-636, para. 101).

31. In 1992, Parliament responded by codifying the rules set out in *Seaboyer* in a new version of s. 276 (S.C. 1992, c. 38).[1] This version imposed a two-stage procedure for determining the admissibility of other sexual activity evidence. At the first stage, the accused had to apply in writing for a hearing to determine the admissibility of the proposed evidence. The application had to set out detailed particulars of the evidence the accused sought to adduce and the relevance of that evidence to an issue at trial. A copy of the application had to be provided to the prosecutor and the clerk "at least seven days previously, or such shorter interval" as the judge "may allow where the interests of justice so require" (s. 276.1(4), emphasis added).

32. If the judge determined that certain procedural requirements were met and the evidence sought to be adduced was capable of being admitted at trial, the second stage of the procedure was triggered and an *in camera* hearing held with respect to admissibility. In rendering the admissibility ruling after the hearing, the judge was required to issue written reasons addressing the factors listed in s. 276(3).

33. On May 12, 1997, Parliament enacted Bill C-46 (S.C. 1997, c. 30) which created the legislative framework set out in ss. 278.1 - 278.91 of the *Code*, the procedure governing the production of third-party "records" in the possession of either the Crown or third-parties.

34. Like s. 276, ss. 278.1 to 278.91 sets out a two-stage procedure: at the first stage, the accused must file a written application and serve it on the prosecutor, the record holder, and the complainant or witness. When first enacted, there was also a seven-day notice provision in s. 278.3(5). The judge then holds an *in camera* hearing to determine whether the record should be produced to the judge for review. Pursuant to s. 278.4(2), the person in possession of the record, the complainant or any other person to whom the record relates may appear and make submissions.[2] The judge must consider the factors listed in s. 278.5(2).

35. If the judge orders production, the second stage of the procedure is triggered: the record is supplied to the judge, who examines the record in the absence of the parties, holds another *in camera* hearing if necessary, and determines whether the record should be produced to the accused. If the judge decides to

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[1] As noted above, the s. 276 scheme was also amended by Bill C-51. The previous ss. 276.1 to 276.5 have been repealed and replaced with the new procedural regime in ss. 278.93 to 278.97, which is the same procedure that governs s. 278.92 applications.

[2] In 2015, s. 278.4(2.1) was added, setting out the complainant's right to be represented by counsel.

hold another hearing, the complainant or witness has standing to make submissions at the hearing and the judge must again take the factors listed in s. 278.5(2) into account.

36. Both the new codified s. 276 and ss. 278.1 to 278.91 regimes were the subject of constitutional challenges.

37. In *Mills,* this Court upheld ss. 278.1 to 278.91. McLachlin and Iacobucci JJ., writing for the majority, concluded that Parliament had struck an appropriate balance between the privacy rights of complainants and the right of the accused to make full answer and defence. Sections 278.1 to 278.91 do not violate ss. 7 or 11(d) of the *Charter* because they give judges wide discretion to consider a variety of factors and to make whatever order is necessary in the interests of justice at both stages of the production application. McLachlin and Iacobucci JJ. concluded that "...Parliament has created a scheme that permits judges not only to preserve the complainant's privacy and equality rights to the maximum extent possible, but also to ensure that the accused has access to the documents required to make full answer and defence" (para. 144). They also held that the privacy and equality concerns involved in protecting the records justified interpreting the right to make full answer and defence in a way that did not include a right to call all relevant evidence: *Darrach,* para. 28.

38. The following year, in *Darrach,* this Court upheld Parliament's s. 276 scheme. The appellant asserted that s. 276 violated ss. 7, 11(c) and 11(d) of the *Charter.* He argued, among other things, that s. 276's requirement that he file an affidavit to establish the admissibility of the other sexual activity evidence violated his right not to reveal his defence (para. 44). Gonthier J., writing for the Court, dismissed this argument, pointing to the distinction between a legal compulsion to testify and a tactical decision to testify (para. 50). He also confirmed that "[t]he twin myths are simply not relevant at trial. They are not probative of consent or credibility and can severely distort the trial process" (para. 33). The right to a fair trial protected by s. 11(d) of the *Charter* is "one that does justice to all parties" - the complainant as well as the accused (para. 70).

39. Although the issue of advance notice was not expressly referenced in this Court's decision, in the court below (*R. v. Darrach* (1998), 122 C.C.C. (3d) 225, [1998] O.J. No. 397 (Ont. C.A.)) Morden A.C.J.O. affirmed the trial judge's conclusion that advance notice did not violate the right to silence. He observed that "… requiring a party, as a first step in the procedure to obtain a ruling on the admissibility of proposed evidence, to furnish an outline of that evidence to the court is in accord with established trial procedures and a requirement that advance notice be given of the evidence is similarly an accepted procedure. See *R. v. Kutynec* (1992), 70 C.C.C. (3d) 289 particularly at pp. 301-302" (para. 62, see also paras. 58-64, 74).

40. Two significant conclusions flow from *Darrach* and *Mills.* First, this Court recognized the need to protect the privacy and equality of complainants while also balancing the accused's right to a fair trial and to make full answer and defence. Second, this Court confirmed Parliament's right to enact evidentiary rules for sexual assault prosecutions that extend beyond the common law: *Mills*, at paras. 55, 58, 60. These themes are equally applicable to the present appeal given the parallels between Bill C-51 and the ss. 276 and 278.1 to 278.91 procedures.

3. A gap in the legislation: *Osolin* and *Shearing*

41. Sections 276 and 278.1 to 278.91 addressed many of the evidentiary issues likely to arise in sexual assault trials. However, there was a gap in the legislation: there was no prescribed procedure to determine the admissibility and use of a record relating to the complainant, already in the possession of the accused, which did not contain other sexual activity evidence but did contain personal information that engaged the privacy rights of the complainant.

42. This gap was first addressed in *Osolin*. In that case, the mental health records of the 17-year-old complainant were already in the possession of the accused, as they had been admitted at trial to permit an assessment of the complainant's competence to testify under oath. Defence counsel sought leave to cross-examine the complainant on those records. The trial judge refused to permit cross-examination.

43. Cory J., writing for the majority, held that reasonable limitations may be placed on the cross-examination of a complainant in sexual assault trials (at 665, para. 166). This is because "the right to cross-examine has never been unlimited", and particularly in cases of sexual assault, some restriction is necessary to prevent the use of cross-examination for improper purposes, such as advancing damaging and unfounded rape myths (at 665-666, paras. 161-162). However, cross-examination in respect of consent and credibility should be permitted where the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice that may flow from it (at 671, para. 169). Cory J. held that because sexual assault is a gendered offence, the equality rights of women under ss. 15 and 28 of the *Charter* should be considered in determining the reasonable limits of cross-examination (at 669, para. 166). He also accepted that the complainant's privacy rights must be balanced against the right to a fair trial (at 673, para. 175).

44. In terms of procedure, Cory J. held that where contentious issues arise in respect of the scope of a complainant's cross-examination, a *voir dire* should be held. The accused must show either by counsel's submissions, affidavit or *viva voce* evidence that the proposed cross-examination is appropriate. If cross-examination is permitted, the jury must be instructed as to the proper use of the evidence. These procedural

protections are critical to ensuring that a sexual assault trial does "not become an occasion for putting the complainant's lifestyle and reputation on trial" (at 672, para. 170).

45. This Court addressed a similar issue almost a decade later in *Shearing*. Mr. Shearing was charged with historical sexual offences arising from his leadership of a religious cult. One of the complainants kept a diary which came into the possession of defence counsel. The diary contained personal information but no other sexual activity evidence. Defence counsel sought to use the diary to contradict the complainant with entries inconsistent with her evidence-in-chief and by establishing the absence of any entries relating to the alleged abuse. After being confronted with the diary during cross-examination, the complainant retained her own counsel and argued that the diary should be returned to her. The trial judge did not order the diary returned. He permitted questions on actual entries but disallowed questions on the absence of entries. The accused appealed his conviction to this Court on the basis that his right to make full answer and defence had been violated (paras. 11, 17-18, 22, 26).

46. Binnie J., writing for the majority, once again referenced the abusive and distorting cross-examination techniques sometimes employed in sexual assault cases, and noted that limitations on cross-examination have been imposed as a result (paras. 76, 119, 121). One such limitation is "the privacy interest of the complainant, which is not to be needlessly sacrificed" (para. 76). He held that the complainant had not waived or abandoned her privacy interest in the diary, and that a loss of physical possession or ownership will not necessarily defeat a privacy interest in personal information contained in the document (paras. 87, 92).

47. Binnie J. stressed the distinction between production and use/admissibility. He held that the trial judge should have applied the *Osolin* test in order to determine the permissible scope of cross-examination (i.e. assessed whether the proposed cross-examination would create prejudice to the complainant that substantially outweighed its potential probative value to the accused and whether cross-examination on the absence of entries relied on rape myths or the equivalent) (para. 109). Binnie J. acknowledged that the proposed cross-examination was an attempt to rely on a subtle rape myth - that women and children who are sexually abused do not suffer in silence, but must and do disclose that abuse, if only to their private diaries (para. 120). He stated that *"Seaboyer, Osolin* and *Mills* all make the point that these cases should be decided without resort to folk tales about how abuse victims are expected by people who have never suffered abuse to react to trauma...[t]his is the law and the trial judge was right to apply it" (para. 121). Ultimately, the majority held that the accused should have been permitted to cross-examine on both actual entries and omissions to test the accuracy and completeness of the complainant's recollection (para. 150).

48. Post-*Shearing*, and pre-Bill C-51, trial judges continued to act in a gate-keeper role with respect to the admissibility and use of records lawfully in the accused's possession. In some cases, judges admitted the documents and permitted cross-examination, and in other cases, they did not. [3]

4. The 2012 Senate Committee charted a path to address the legislative gap

49. Although colloquially referred to as the "Ghomeshi amendments", the Bill C-51 amendments actually flowed from the December 2012 Senate Standing Committee on Legal and Constitutional Affairs report on the statutory review of Bill C-46 (third party records) entitled, "Statutory Review on the Provisions and Operation of the *Act to amend the Criminal Code (production of records in sexual offence proceedings)*" (the "*Report*"). Citing *Shearing*, the *Report* identified the above-described gap in the legislation and stated: "...we see no logical reason to deny to individuals who have been sexually victimized by persons with access to their personal records the same legal protection of their privacy, security and equality rights afforded to other victims of sexual offences" (p.19).

50. An example of this disparity would be where a complainant accuses their psychologist of sexual abuse. The psychologist possesses detailed records of the complainant's counselling sessions and is able to cross-examine on them with no judicial pre-screening. However, if the accused is a neighbour, the neighbour must bring a third-party records application and satisfy a judge that the counselling records are relevant to an issue at trial and that production is in the interests of justice. The complainant's privacy interest and the potential for prejudice are identical in both scenarios, but only in the first would the complainant be entitled to any procedural safeguards. One can easily think of similar scenarios where the accused (a teacher, employer, or parent) has access to the complainant's personal records by virtue of a close relationship. As McLachlin and Iacobucci JJ. observed in *Mills*, "[w]hen the boundary between privacy and full answer and defence is not properly delineated, the equality of individuals whose lives are heavily documented is also affected, as these individuals have more records that will be subject to wrongful scrutiny" (para. 92).

51. To close this gap in the legislation, the *Report* recommended:

> That the Government of Canada consider amending the *Criminal Code* to set out a procedure governing the admissibility and use during trial of a complainant's private records, as defined in section 278.1 of the *Criminal Code*, which are not wrongfully in the hands of the accused. This procedure

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[3] See, for example, *R. v. C.(T.)*, (2004), 189 C.C.C. (3d) 473 (Ont. C.A.); *R. v. R.S.B.*, [2005] O.J. No. 2845 (Ont. C.A.), leave to appeal refused, [2005] S.C.C.A. No. 514; *R. v. Bernier*, 2009 NBQB 251; *R. v. N.S.*, 2017 ONCJ 128, application for extraordinary remedies dismissed, *R. v. S.C.*, [2017] O.J. No. 4958 (Ont. S.C.J.); *S.C. v. N.S.*, 2017 ONSC 5566, reversing 2017 ONSC 353; *R. v. S.C.*, [2017] O.J. No. 4958; *R. v. H.F.*, 2017 ONSC 1897; *Turbide c. R.*, 2017 QCCA 519.

> should define the purposes for which such records may not be admitted or used and set out the relevant factors for trial or case-management judges to consider in making their determinations, bearing in mind the rights of the accused under the *Canadian Charter of Rights and Freedoms*.
>
> That complainants have the opportunity to make submissions at an *in camera* hearing and that appropriate procedural protections, along the lines of those contained in sections 278.1-278.91 of the *Criminal Code* be made applicable to such hearings.
>
> *Report*, p. 20

52. Specifically, the *Report* recommended that the following steps should be taken:

i. An *in camera* hearing be held to determine the issue;

ii. Judges consider listed factors similar to those applicable to third-party records applications when weighing prejudicial effect and probative value; and

iii. The complainant be given the opportunity to make submissions during the hearing and be granted procedural protections similar to those applicable to third-party records applications.

Report, pp. 19-20.

5. Erasing the gap: Bill C-51 enacts ss. 278.92 - 278.94

53. On December 13, 2018, Bill C-51 came into force. This legislation contains the seven-day notice provision that is at issue on this appeal.

54. According to the Department of Justice *Charter Statement,* clauses 22 to 25 of Bill C-51 "would complement the existing regime by establishing a similar process [to what is currently contained in ss. 278.2 to 278.9 of the *Code*] to determine whether such records can be admitted by the accused as evidence in the trial": Department of Justice, "*Charter* Statement – Bill C-51: *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*", Tabled in the House of Commons, June 6, 2017. See also Department of Justice Backgrounder, "Cleaning up the *Criminal Code*, Clarifying and Strengthening Sexual Assault Law, and Respecting the *Charter*".

55. The Parliamentary Secretary to the Minister of Justice and Attorney General confirmed that Bill C-51 was intended to "fill a gap" and implement the recommendations of the 2012 *Report*. The amendments were intended to "maintain the fair trial rights of the accused, and at the same time, they recognize the privacy rights of victims. Indeed, the amendments' objectives are largely the same as those that underpin the rape

shield provisions, which were found to be charter compliant by the Supreme Court": *House of Commons Debates*, 42nd Parl., 1st Sess., No. 195 (15 June 2017), at 12806 (1640).[4]

56. Similarly, in submissions to the Senate Standing Committee on Legal and Constitutional Affairs, the Honourable Jody Wilson-Raybould, then-Minister of Justice and Attorney General of Canada, confirmed the amendments were intended to fill a gap and strike a balance:

> In addition, Bill C-51 proposes to implement a recommendation made by this committee in its December 2012 statutory review of the Criminal Code provisions relating to records production in sexual offence proceedings. It was one of the committee's recommendations that a procedure be set out to govern the admissibility and the use of a complainant's private records that are in the hands of the accused.
>
> It is precisely what Bill C-51 will do, by requiring a court to consider a series of factors before deciding whether the private record of the complainant that is in the hands of the accused can be used in a trial relating to a sexual offence. These factors are similar to those that a court must consider when applying the rape shield provisions, and they include both the right of the accused to make a full answer and defence and the complainant's dignity and right of privacy.
>
> …
> Together, Bill C-51's proposed sexual assault amendments reflect the critical need to respect all interests in a criminal trial: the rights of the accused; the truth-seeking function of courts; and the privacy, security and equality interests of the victim.
>
> ...
> In drafting this Bill we sought to ensure that we always consider in the back of our minds the balance required, as I said in my comments, in terms of the rights of the accused to full answer and defence, and of ensuring that we respect and provide dignity to victims of sexual assault.
>
> Senate, *Standing Committee on Legal and Constitutional Affairs,* 42nd Parl., 1st Sess., Issue No. 47 (20 June 2018), at p. 1; see also pp. 8-11.

57. The new s. 278.92(1) prohibits admission of any "record relating to a complainant that is in the possession or control of the accused – and which the accused intends to adduce" in proceedings in relation to one of the enumerated sexual offences unless the accused makes an application pursuant to ss. 278.93 and 278.94. The proposed evidence is inadmissible, unless:

(1) it is admissible pursuant to s. 276 of the *Code*, if s. 276 applies (s. 278.92(2)(a)); or

(2) in any other case, the evidence is "relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice" (s. 278.92(2)(b)).

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[4] See also *House of Commons Standing Committee on Justice and Human Rights,* 42nd Parl., 1st Sess., No. 70 (18 October 2017), at 1535, 1615; *House of Commons Debates,* 42nd Parl., 1st Sess., No. 249 (11 December 2017), at 1205; *Debates of the Senate,* 42nd Parl., 1st Sess., Vol. 150, No. 182 (15 February 2018), at 1540; *Debates of the Senate*, 42nd Parl., 1st Sess., Vol. 150, No. 233 (3 October 2018), at 6417-6419.

58. In addition, s. 278.92(3) enumerates the following list of statutory factors that the judge shall consider in determining admissibility:

(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.

59. Bill C-51 also codified an application procedure. Under s. 278.93(1), the accused must make an application for hearing under s. 278.94 to determine whether "evidence is admissible under subsection 276(2) or 278.92(2)". The new s. 278.93(2) sets out the form and content of the application. The application "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".

60. Pursuant to s. 278.93(4), the application must be filed and "given" to the Crown and the clerk of the court "at least seven days…or any shorter interval that the judge…may allow in the interests of justice" prior to what is effectively a threshold screening hearing. If the judge is satisfied that the application has been properly served and "that the evidence sought to be adduced is capable of being admissible under s. 276(2)", the judge shall grant the application and hold a hearing to determine whether the evidence is admissible under ss. 276(2) or 278.92(2). Similar application and notice provisions were previously contained in s. 276.1.

61. The hearing itself is held *in camera* (s. 278.94(1)). The complainant is not compellable at the hearing but may appear, with or without counsel, and make submissions (s. 278.94(2)). The judge must inform the complainant of their right to be represented by counsel (s. 278.94(3)).

62. Section 278.94(4) requires the trial judge to give reasons at the conclusion of the hearing and outlines three specific areas that must be addressed. If the evidence is admitted, the judge must "instruct the jury as to the uses that the jury may and may not make of that evidence" (s. 278.96).

63. These amendments were carefully crafted to address the illogical gap (i.e. no statutory protections for sexual assault complainants whose personal information is in the possession of the accused as opposed to third parties) identified by the Senate Committee in 2012.

6. Additional legislative steps to protect the privacy and dignity of complainants

64. In addition to the legislative amendments noted above, Parliament also amended the *Code* throughout the 1980s, 1990s, and 2000s to permit testimonial aids, publication bans, restrictions on the right of the accused to personally cross-examine complainants, and to expand victim participation by way of victim impact statements. In both *R. v. Levogiannis,* [1993] 4 S.C.R. 475 and *R. v. J.S.Z.*, 2010 SCC 1, this Court held that the use of testimonial aids did not violate the right to a fair trial.

65. Further, in 2015 the *Canadian Victims Bill of Rights*, S.C. 2015, c. 13 (*"CVBR"*) was enacted, which codified the rights of complainants to have their security and privacy considered by the appropriate authorities in the criminal justice system (ss. 2, 9, 11). The *CVBR* also provides that every Act of Parliament must be construed and applied in a manner that is compatible with the rights prescribed by the *CVBR* to the extent possible (s. 14). The *CVBR* also enacted s. 278.4(2.1) (complainant's right to be represented by counsel at third-party records applications).

7. *Barton*, *Goldfinch*, and *R.V.* affirm the same principles that animate Bill C-51

66. This Court's recent jurisprudence on the admissibility and use of other sexual activity evidence strongly endorses and affirms the very same principles that animate Bill C-51 and the other legislation described above.

67. In *Barton,* Moldaver J., writing for the majority, noted that eliminating myths, stereotypes and sexual violence against women is one of the most pressing challenges our society currently faces and said that "more needs to be done" (para. 1). The "fundamental" purpose of the s. 276 scheme includes "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" (para. 74). He also noted that, in that case, non-compliance with s. 276 "came at the expense" of the victim's dignity and privacy, the truth-seeking process, and trial fairness, which "must be assessed" from both the vantage point of the accused and of society more broadly (para. 83; see also para. 210).

68. Similarly, in *Goldfinch,* Karakatsanis J., writing for the Court, noted that the concerns that led to the introduction of s. 276 are still with us today: "[t]he harm caused by sexual assault, and society's biased

reactions to that harm, are not relics of a bygone Victorian era" (para. 37). She confirmed that "the investigation and prosecution of sexual assault continues to be plagued by myths" and that "over 80 percent of reported sexual assaults occurred between people who knew one another in some way. In other words, most complainants will have some kind of relationship with the accused" (para. 2). These observations apply equally to the new scheme, which will often be engaged because the complainant's pre-existing relationship with the accused enables the accused to obtain possession of a "record".

69. Finally, in *R.V.,* Karakatsanis J. held that the requirements of s. 276 apply with equal force regardless of whether the accused seeks to introduce evidence to establish a defence or to challenge inferences advanced by the Crown. She also held that s. 276 does not permit broad exploratory questioning (para. 47). Even where targeted cross-examination of the complainant is permitted, judges must strike a delicate balance between: (a) giving counsel sufficient latitude to conduct effective cross-examination; and (b) minimizing any negative impacts on the complainant and the trial process (para. 73; see also para. 70). Proposed questions should be canvassed in advance (with specific wording approved in some cases) and may be re-assessed based on the answers given (para. 73).

70. To use the words of Karakatsanis J. in *Goldfinch,* at para. 38, it is against this historical backdrop that the notice provision impugned in this appeal must be interpreted and applied. However, before turning to the alleged errors in Duncan J.'s decision, the appellant will first review the jurisprudence that has developed on the Bill C-51 amendments.

C. Conflicting jurisprudence on the constitutionality of the Bill C-51 amendments

71. There are conflicting constitutional decisions in several Canadian jurisdictions regarding the constitutionality of the Bill C-51 amendments.

72. In Alberta, Sanderman J. concluded that s. 278.92 violated ss. 7 and 11(d) of the *Charter*, and that the violations could not be saved under s. 1. He declared s. 278.92 to be of no force or effect: *R. v. J.S.,* [2019] A.J. No. 1639 (A.B.Q.B.) (breach ruling); [2020] A.J. No. 515 (A.B.Q.B.) (s. 1 ruling). The Alberta Crown Prosecution Service has not appealed the constitutional ruling.

73. In Saskatchewan, several courts have concluded that the amendments violate the *Charter*: *R. v. A.M.,* 2019 SKPC 46; *R. v. Anderson*, 2019 SKQB 304 (breach ruling), 2020 SKQB 11 (s. 1 ruling), appeal pending; *R. v. S.S.* (23 April 2020), SK QB CRM 194 of 2018 (S.K.Q.B.) (unreported), appeal pending; and *R. v. Moya*, 2020 SKQB 260, appeal pending.

74. In the breach ruling in *Anderson*, Rothery J. held that ss. 278.92(1), 278.92(2)(b) and 278.94(3) violated the right to a fair trial and the right to make full answer and defence. She noted that even though the amendments are of no force or effect, the issue "can be addressed in the same manner as outlined in *Shearing*. That is, the trial judge holds a *voir dire*, with the complainant and counsel present, to determine the admissibility of that record" (para. 24). Rothery J. concluded that the ss. 7 and 11(d) violations could not be saved under s. 1 but did not expressly address the question of constitutional remedy. She noted that the "[t]his legislation tramples on the truth-seeking objective of cross-examination" (para. 10). Prior to the conclusion of the trial, the Attorney General of Saskatchewan filed a Notice of Appeal to the Court of Appeal for Saskatchewan. Mr. Anderson was subsequently acquitted. The Crown has not appealed from acquittal. No date is currently set for the appeal from the interlocutory constitutional ruling.

75. In *S.S.*, Kovach J. followed *Anderson* based on principles of comity. He also declared ss. 278.3(5), 278.4(2), 278.4(2.1), 278.4(3), 278.94(2) and 278.94(3) (which allow a complainant to receive notice or to make submissions on third party records applications) to be of no force or effect. The Crown has filed an appeal of the interlocutory constitutional ruling. A judicial stay of proceedings was entered prior to trial as a as a result of a s. 11(b) delay application.

76. In *Moya*, Robertson J. followed *Anderson* based on principles of comity. However, he concluded that he was bound by *Mills* and declined to follow *S.S.* to the extent that it declared the provisions which allow a complainant in a third party records application to receive notice or to make submissions to be of no force or effect (para. 44). In Appendix 2, Robertson J. set out a common law procedure based on *Shearing* that should be followed to determine the admissibility of records in the possession of the accused.

77. In Ontario, there have been three decisions dismissing constitutional challenges to the scheme: *R. v. F.A.*, 2019 ONCJ 391; *R. v. A.C.*, 2019 ONSC 4270 and *R. v. C.C.*, 2019 ONSC 6449. In a fourth case, *R. v. R.S.*, 2019 ONCJ 645, Breen J. concluded that a statutory provision which "compels disclosure of material to a complainant, *in advance of cross-examination*" violates the right to a fair trial and the principle against self-incrimination (paras. 66, 68, 78 (emphasis in original)). However, he held that the standing of the complainant on the admissibility *voir dire* does not offend the fair trial rights of the accused (para. 81). Ultimately, Breen J. determined that the provisions can be interpreted to maintain their constitutionality as long as the admissibility *voir dire* is held during the cross-examination of the complainant (paras. 85-89).

78. More recently, in *R. v. Reddick*, 2020 ONSC 7156, application for leave to appeal pending,[5] Akhtar J. held that ss. 278.92, 278.94(2) and 278.94(3) violate ss. 7 and 11(d), and the violations are not saved under s. 1. He held that the remaining provisions continue to apply with the *Darrach* framework governing s. 276 applications (para. 133). Post-*Reddick,* a number of judges have concluded that the s. 52 declaration in *Reddick* is not binding and an accused must file a Notice of Constitutional Question challenging the constitutionality of the s. 278.94 procedure to have the declaration in *Reddick* applied: *R. v. Bickford*, 2020 ONSC 7510; *R. v. Tevkin*, 2020 ONCJ 576; *R. v. A.M.*, 2020 ONSC 7674. In a recent ruling, Christie J. held that the principles of *stare decisis* did not apply and that even if *stare decisis* were to apply, the *Reddick* decision is plainly wrong in critical areas: *R. v. A.M.* 2020 ONSC 8061.

79. In Nova Scotia, there has been one constitutional challenge, which was dismissed: *R. v. Whitehouse*, 2020 NSSC 87.

80. Finally, in *R. v. D.L.B.*, 2020 YKTC 8, Ruddy T.C.J. held that ss. 278.92 to 278.94 infringed the accused's right to silence and right to make full answer and defence contrary to ss. 7 and 11(d) (paras. 45-80) but concluded that: the amendments were not arbitrary or overbroad (paras. 27-44); the complainant's standing to make submissions did not violate the accused's right to a fair trial (paras. 81-83); and, the scheme did not violate the accused's s. 11(b) rights (paras. 21-26). Ruddy T.C.J. held that the violations could not be saved under s. 1 (paras. 84-87).

D. Jurisprudence on the operation of the Bill C-51 scheme

81. This Court's constitutional analysis must also be informed by an understanding of the non-constitutional issues that have arisen with respect to the scheme and how it is currently operating in practice. The primary issues are: (1) what constitutes a "record"; (2) procedure; (3) the complainant's standing; and (4) the meaning of "adduce".

82. A body of jurisprudence on what constitutes a "record" has developed. The primary area of dispute is with respect to whether emails, text messages and communications that occur on social media platforms (either between the complainant and the accused or between the complainant and third parties) are "records" within the meaning of s. 278.1. That is, does the complainant have a reasonable expectation of privacy in those documents? See, for example, *R. v. R.M.R*, 2019 BCSC 1093; *R. v. McKnight*, 2019 ABQB 755; *R. v.*

[5] The complainant has filed an application for leave to appeal to this Court pursuant to s. 40 of the *Supreme Court Act* (*A.S. v. Her Majesty the Queen, et al.*, S.C.C. No. 39516).

Mai, 2019 ONSC 6691; *R. v. M.S.* 2019 ONCJ 670; *R. v. A.M.,* 2020 ONSC 1846; *R. v. X.C.,* 2020 ONSC 410; *R. v. T.A.*, 2020 ONSC 2613; *R. v. Navia*, 2020 ABPC 20; *R. v. H.J.M.* (15 September 2020), Surrey Registry No. 233586-1 (B.C.P.C.).

83. Different procedures have developed for determining what is a "record". Counsel have made applications for directions, sometimes in advance of a formal s. 278.92 application being filed, in which they request that the trial judge engage in pre-screening to determine if documents are in fact "records". This process has taken a variety of forms: *Navia,* at paras. 64-65; *R. v. A.M.,* 2020 ONSC 1846*; R. v. Ekhtiari*, 2019 ONCJ 774; *R. v. H.M.* (28 August 2020), Surrey Registry No. 233586-1 (B.C.P.C.). In some cases, the defence has requested a "reverse-*Garofoli*" procedure whereby the records are provided to the Court for review, but not to Crown counsel or the complainant: *R. v. W.M.*, 2019 ONSC 6535, paras. 11-27; *Mai*, paras. 9-16; *X.C.*, para. 22; *A.M.*, paras. 10, 44-70.

84. As these pre-screening applications are often taking place outside the formal two-stage process prescribed in the *Code*, issues have also arisen with respect to whether the complainant or her counsel has "standing" to make submissions about whether the documents are "records": see, for example, *R.M.R*, at paras.19-22; *R. v. Roland*, 2020 BCPC 130; *Navia*, paras. 32-48; *R. v. A.M.,* 2020 ONSC 1846, paras. 9-10, 27-30, 37, 39; *R. v. Boyle,* 2019 ONCJ 11, para. 10; *Mai*, para. 6; *R. v. Marrello*, [2020] O.J. No. 3617; *R. v. G.E.*, 2020 ONCJ 449; *R. v. H.M.*; *R. v. E.A.*, 2020 ONSC 6657. A number of judges, including the trial judge in this case (*AR4,* 1), have concluded that the complainant does not have standing on the issue of whether they have a "reasonable expectation of privacy" in the record, which effectively circumvents the amendments and negates any meaningful participation by the complainant.

85. In some cases, separate hearings are scheduled on each issue (with deliberation time scheduled between each hearing): see, for example, *R. v. G.E.*, 2020 ONCJ 448 and 2020 ONCJ 453, para. 8. The practical result is that if defence counsel are not required to file an application until the conclusion of the complainant's direct examination (or, in some provinces, in the midst of cross-examination), the complainant's evidence may be adjourned for a significant period of time in order to allow the complainant to retain counsel and for the parties to litigate these issues. Further, if the complainant is already under cross-examination, complainant's counsel will not be able to speak to the complainant to obtain instructions unless the trial judge grants leave to do so. This may defeat any meaningful participation by the complainant.

86. Finally, conflicting jurisprudence has emerged on the meaning of "adduce" (i.e. when the new scheme is engaged). Some courts have concluded it is engaged only when defence counsel seeks to tender

the actual document: *X.C*, paras. 30, 58-62. Other courts have concluded that the section is engaged any time defence counsel seeks to cross-examine on the information contained in the record: *R. v. Boyle*, 2019 ONCJ 226, paras. 27-28; *M.S.,* paras. 22, 70-71. This latter approach is consistent with *Shearing* where Binnie J. confirmed that the issue was the status of the information contained in the record (or lack thereof) and its admissibility or use in cross-examination (paras. 89, 92, 103, 109).

E. Duncan J. correctly held that the broader scheme did not violate ss. 7, 11(c) and 11(d)

87. The appellant submits that Duncan J. correctly held that the broader scheme does not violate the right to a fair trial in ss. 7 and 11(d) or the principle against self-incrimination in s. 11(c). The analysis underpinning these findings provides important context for demonstrating the error with respect to the seven-day notice period.

1. The procedure is not new

88. The content of the amendments is not new.

89. First, the inclusion of "significant" probative value and the phrase "prejudice to the proper administration of justice" represents a change to the *Seaboyer* test. However, it is not an unknown standard. The same test is codified in s. 276(2)(c) of the *Code* and the constitutionality of that provision was upheld in *Darrach* (paras. 38 to 43). In *Darrach,* Gonthier J. held that the requirement of "significant" probative value serves to exclude evidence of trifling relevance that "even though not used to support the two forbidden inferences, would still endanger the 'proper administration of justice'" (paras. 39, 41). He also explained that "[t]he adverb 'substantially' serves to protect the accused by raising the standard for the judge to exclude evidence once the accused has shown it to have significant probative value. In a sense, both sides of the equation are heightened in this test, which serves to direct judges to the serious ramifications of the use of the evidence of other sexual activity for all parties in these cases" (para. 40). See also *R. v. M.T.,* 2012 ONCA 511, para. 43.

90. Second, this list of statutory factors largely parallels those set out in ss. 276(3) and 278.5(2): *Mills*, paras. 127 to 134 and 138. Further, inclusion of the phrase "proper administration of justice" and the list of statutory factors simply codifies factors that were already considered in the balancing required under *Seaboyer*: see, for example, *S.C. v. N.S.*, 2017 ONSC 5566, para. 38.

91. As with ss. 278.1 to 278.91, Parliament has created a scheme which gives judges wide discretion to assess a multitude of factors, including the right to make full answer and defence (s. 278.92(3)(a)). As McLachlin and Iacobucci JJ. explained in *Mills,* at para. 144:

> By giving judges wide discretion to consider a variety of factors and requiring them to make whatever order is necessary in the interest of justice at both stages of an application for production, Parliament has created a scheme that permits judges not only to preserve the complainant's privacy and equality rights to the maximum extent possible, but also to ensure that the accused has access to the documents required to make full answer and defence.

In addition, s. 278.92(3)(i) provides that a judge can assess any other factor relevant in determining whether evidence in a private record is admissible.

92. Third, notice to the complainant and their involvement in an application is neither new nor novel.[6] In *Darrach,* the trial judge confirmed that the Crown had the right to see the particulars of the s. 276 application and review them with the complainant "to properly prepare a response" to the *voir dire* (para. 9). Gonthier J. noted that the "Crown as well as the Court must get the detailed affidavit one week before the *voir* dire…in part to allow the Crown to consult with the complainant" (para. 55). In *Shearing*, the complainant was represented by counsel at the admissibility stage. Further, under the third-party records scheme, the accused must file an application in writing (s. 278.3(4)) and the complainant may appear and make submissions (s. 278.4(2)). A number of courts have also concluded that participatory rights for complainants in s. 278.92 applications do not violate ss. 7 or 11(d): see, *D.L.B.*, paras. 81-83; *R. v. A.M.* 2020 ONSC 8061, paras. 84-88; *F.A.*, paras. 63-72; *A.C.*, paras. 32-43; *C.C.*, paras. 70-75.

2. The definition of "record" is not new

93. A "record" is defined in s. 278.1:

> 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.
>
> [Emphasis added.]

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[6] The respondent has identified the scope of the complainant's participation in the admissibility hearing as a ground of appeal on the cross-appeal. As a result, the appellant will comprehensively address this issue in the Crown respondent's factum on the cross-appeal.

94. This is the same definition of "record" that is currently applied to the third-party records scheme, and, with minor changes, substantially the same definition that was upheld in *Mills* (paras. 78, 97-101). As the majority explained in *Mills*, it is "the procedures established by the Bill and not the spectrum of records subject to these procedures that will determine the fairness or constitutionality of the legislation" (para. 100).

95. The amendments do not apply to "any" record. They apply only to records in which the complainant has a "reasonable expectation of privacy". This is a well-known normative standard that is informed by the s. 8 *Charter* jurisprudence: *R. v. Jarvis,* 2019 SCC 10, paras. 55-64; *R. v. Quesnelle*, 2014 SCC 46, paras. 27-29. As the majority noted in *Mills*, "[o]nly documents that truly raise a legally recognized privacy interest are caught and protected….The Bill is therefore carefully tailored to reflect the problem Parliament was addressing….By limiting its coverage to records in which there is a reasonable expectation of privacy, the Bill is consistent with the definition of s. 8 privacy rights…." (para. 99). The burgeoning body of jurisprudence on what constitutes a "record" confirms that trial judges are well-positioned to apply this standard.

96. While texts, emails and other electronic communication may be caught by this definition in some circumstances post-*Marakah* (*R. v. Marakah,* 2017 SCC 59), the reality is that these records may "contain highly sensitive communications about a Complainant's lifestyle and relationships": *McKnight*, para. 35. They also can be, and often are, used to advance myths, stereotypes, and other impermissible reasoning and/or their use may offend the collateral fact rule. Even "'relatively benign' relationship evidence must be scrutinized and handled with care": *Goldfinch,* para. 46.

3. The scheme does not violate the right to silence or principle against self-incrimination

97. Section 11(c) is "a procedural protection that underlies the principle against self-incrimination, which is also a principle of fundamental justice under s. 7": *Darrach,* para. 23. The right to silence in s. 7 "comprises the right to silence before trial and the privilege against self-incrimination at trial; it is inaccurate to speak of an absolute right to silence at the trial stage of the criminal process": *Darrach,* para. 54.

98. There is nothing presumptively unconstitutional about requiring an accused to bring an application to adduce evidence in advance of trial or the complainant's direct examination.

99. In *Darrach,* the applicant asserted that having to submit an affidavit to support his s. 276 application violated his right to silence because it "... compels him to reveal his defence and to disclose evidence he hopes to call at trial" (para. 54). Gonthier J., writing for the Court, rejected this argument. He noted that "the particular *voir dire* required by s. 276 does not offend the principle against self-incrimination because the

requirement that the accused establish a legitimate use for evidence of sexual activity does not compel him to testify" (para. 47). The accused "is not forced to embark upon the process under s. 276 at all" as there is an important distinction between a legal obligation to testify and a tactical decision to testify (para. 55). Where there is no legal obligation to testify, mere tactical pressure does not offend the principle against self-incrimination (paras. 50-52). In that case, neither the accused's ss. 11(c) or 11(d) rights were violated by the affidavit requirement (paras. 55-56).

100. Similarly, in *Mills,* this Court upheld the constitutionality of the third-party records scheme, which requires the accused to serve a written application on the complainant detailing why the record is likely relevant. In many cases, establishing such relevance requires the accused to disclose, to some extent, an aspect of their trial strategy or theory of the case.

F. Section 278.93(4) does not violate right to a fair trial or to make full answer and defence

101. Duncan J. held that reading s. 278.93(4) to require seven days' notice "would mean that the defence must disclose evidence and related strategy before the Crown has made out a case to meet" and "compels the defence to disclose detailed particulars of evidence that may affect the ability of the defence to cross-examine a witness on the foundational elements of credibility and reliability" (*Breach Ruling,* para. 71). She concluded that the timing "substantially alters the traditional paradigm of confronting a witness with contradictory evidence" (*Breach Ruling*, para. 82).

102. The appellant submits that the impugned provision does not violate s. 7 because: (1) it achieves a proportionate balance consistent with the principles of fundamental justice; (2) it does not result in improper "reverse" or "compelled" disclosure; (3) on its plain wording, it neither mandates pre-trial applications nor seven-day notice; and (4) the seven-day notice promotes efficient trial management.

1. The provision achieves a proportionate balance consistent with the principles of fundamental justice

103. The new scheme, and s. 278.93(4) in particular, achieves a just and proportionate balance between the right to make full answer and defence and the complainant's right to security of the person, privacy and equality. This is entirely consistent with the principles of fundamental justice.

(a) Full answer and defence does not entitle an accused to the most favourable rules or procedure

104. This Court has repeatedly held that *Charter* rights must be defined contextually as the principles of fundamental justice reflect a spectrum of interests: *Mills,* para. 76. An accused is entitled to a trial that is "fundamentally fair", not the fairest of all possible trials: *R. v. Harrer*, [1995] 3 S.C.R. 562*,* paras. 14, 45; *Goldfinch,* para. 30. The fairness of the trial process must be seen "from the point of view of fairness in the eyes of the community and the complainant" and not just from the accused's point of view: *Mills*, para 72; see also paras. 17-18, 61, 69-76. A fair trial is one in which the right to silence and full answer and defence are consistent with the principles of equality, privacy, and fairness: *Mills*, paras. 72-74; *Darrach*, paras. 24, 31, 70.

105. The "right to make full answer and defence does not imply an entitlement to those rules and procedures most likely to result in a finding of innocence. Rather, the right entitles the accused to rules and procedures which are fair in the manner in which they enable the accused to defend against and answer the Crown's case": *R. v. Rose*, [1998] 3 S.C.R. 262, para. 99. The "ability to make full answer and defence … must … be understood in light of other principles of fundamental justice which may embrace interests and perspectives beyond those of the accused": *Mills*, para. 73.

106. Further, while the "case to meet" principle is a component of the right to make full answer and defence, it is also part of the broader protection against self-incrimination. As a result, it is not absolute and "may mean different things at different times and in different contexts": *R. v. S.(R.J.)*, [1995] 1 S.C.R. 451, para. 107; see also para. 97; *R. v. Underwood*, [1998] 1 S.C.R. 77, paras. 5-6; *Darrach,* paras. 28-29; *R. v. S.A.B.*, 2003 SCC 60, para. 57; *Mills*, para. 29.

(b) The right to cross-examine a witness is vital, but is not without limitation

107. While "…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" (*R. v. Lyttle*, 2004 SCC 5, at para. 2), the right to cross-examine is not absolute or unlimited. It is governed by the rules of evidence and procedure. Further, "[c]ounsel are bound by the rules of relevancy and barred from resorting to harassment, misrepresentation, repetitiousness or, more generally, from putting questions whose prejudicial effect outweighs their probative value": *Lyttle*, para. 44.[7]

[7] For a discussion of some of the ethical issues that may arise on cross-examination, see D.M. Tanovich, "'Whack' No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases" (2013),

108. Moreover, this Court has long recognized that limitations on cross-examination are appropriate in sexual assault prosecutions to protect the complainant's security of the person, equality and privacy rights. It does not advance the truth-seeking purpose to engage in "the gratuitous humiliation and denigration of a complainant": *R. v. S.B.*, 2016 NLCA 20, at paras. 43-44 (*per* Rowe J.A. (as he then was) writing for the Court on this point), overturned on other grounds, 2017 SCC 16. Moreover, this Court has held:

- "the goal of the court process is truth seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth": *Levogiannis*, at 483;
- an accused is "not permitted to 'whack the complainant' through the use of stereotypes regarding victims of sexual assault": *Mills*, para. 90.
- "the right to make full answer and defence does not include the right to defend by ambush": *Darrach*, para. 55 (emphasis added);
- the right to make full answer and defence does not include the right to adduce irrelevant evidence or misleading evidence that would support illegitimate inferences: *Darrach,* para. 37; *Goldfinch,* para. 30;
- the accused is not "entitled to procedures that would distort the truth-seeking function of a trial by permitting irrelevant and prejudicial material at trial": *Darrach,* para. 24 (emphasis added); see also *Mills*, para. 90; *Goldfinch*, para. 30;
- "it is only right that reasonable limitations" be placed upon cross-examination as a complainant "should not be unduly harassed and pilloried to the extent of becoming a victim of an insensitive justice system": *Osolin*, at 669 (para. 166);
- the "fact that the accused's ability to make full answer and defence requires that the complainant be cross-examined is not the end of the analysis. The scope of the permissible questioning must also be balanced with the danger to the other interests protected by s. 276(3), including the dignity and privacy interests of the complainant": *R.V.*, paras. 40-41; and
- even where the right to a fair trial requires cross-examination, "it does not entitle an accused to pursue the *most* expansive cross-examination": *R.V.,* para, 67 (emphasis in original).

109. This principled approach is not attenuated because the impugned scheme involves records in which the complainant holds a reasonable expectation of privacy, as opposed to other sexual activity evidence or evidence tendered to support an affirmative defence.

(c) The impugned scheme extends legitimate protections to sexual assault complainants

110. The fact that this scheme is limited to sexual offences is significant. As Cory J. noted in *Osolin*, "[i]t cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all other

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45 Ottawa L. Rev. 495 and D. Layton and M. Proulx, *Ethics and Criminal Law, 2nd Edition* (Toronto: Irwin Law, Inc., 2015), at 46-64. Layton and Proulx comment on the Tanovich approach at 61-64.

forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault based upon human dignity and constitutes a denial of any concept of equality for women" (at 669, para. 165). Sections 15 and 28 of the *Charter*, "although not determinative should be taken into account in determining the reasonable limitations that should be placed upon the cross-examination of a complainant": *Osolin*, at 669 (para. 166).

111. Even prior to the amendments, an accused did not have *carte blanche* to use third party records. Regardless of whether an accused had records in their possession or obtained them following a successful ss. 278.1 to 278.91 application, those records have always been subject to common law admissibility and use requirements *per Seaboyer, Osolin* and *Shearing*. Trial judges have long-acted as gatekeepers to assess whether the probative value of defence evidence is substantially outweighed by the danger of unfair prejudice that may flow from it: *Osolin*, at 671. In some cases, records were admitted and/or cross-examination permitted and in others, the application was dismissed.[8] A fact-specific analysis is required in every case.

112. Because the amendments only operate to exclude information that is either irrelevant or which is relevant but is substantially more prejudicial to the administration of justice than it is probative, they do not infringe the accused's right to make full answer and defence: *Darrach*, paras. 37 and 43; *Mills*, paras. 7-76. As in *Darrach*, the legislation enhances the fairness of the hearing by excluding misleading evidence in sexual assault trials. The accused's right to adduce relevant evidence that meets certain criteria is preserved (para. 21). The "principles of fundamental justice include … protecting the integrity of the trial by excluding evidence that is misleading, protecting the rights of the accused, as well as encouraging the reporting of sexual violence and protecting the security and privacy of witnesses": *Darrach*, para. 25 (emphasis added). Further, "[n]o single principle is absolute and capable of trumping the others; all must be defined in light of competing claims": *Mills*, para. 61.

113. As pointed out in *Mills,* the greater procedural burden placed on the accused "reflects the fact that unlike the Crown, the accused bears no responsibility to protect the rights of others", such as the complainant's right to privacy, equality and security of the person. Consequently, "[t]o protect such rights, when they are threatened by the acts of the accused, greater procedural protections are required": *Mills,* para. 113.

[8] See the list of cases at footnote 3.

2. Section 278.93(4) does not result in improper "reverse" or "compelled" disclosure

114. Duncan J. erred in concluding that the notice provision forces the accused to disclose his defence to the Crown and the complainant.

115. An accused who seeks to have a "record" admitted is not required to disclose a wide array of possible defences or his defence strategy. The accused need only provide "detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial" (s. 278.93(2)). Moreover, there are a number of situations in criminal law where an accused is required to provide advance particulars about their defence.

116. As noted above, the new scheme is virtually identical to the procedures governing applications in respect of other sexual activity evidence (s. 276) and third-party records applications (ss. 278.1 to 278.91). In *Darrach,* this Court held there was no *Charter* violation even though the scheme "requires the defence to enter an affidavit with 'detailed particulars' of the evidence it seeks to adduce" (para. 53). The Court assumed that the Crown would consult with the complainant after being provided with an affidavit containing detailed particulars (para. 55; see also para. 9). Similarly, in *Mills,* this Court upheld the third-party records regime, which requires an accused who is seeking access to the complainant's private records (usually for the purpose of cross-examination at trial), to serve a written application on the complainant detailing why the record is "likely relevant". In many cases, establishing such relevance requires the accused to disclose, to some extent, an aspect of his trial strategy or theory of the case. However, this Court held that the scheme was constitutional.

117. Further, there are other situations in which an accused may be required to provide disclosure of some aspect of their defence if they wish to raise a reasonable doubt:

- pursuant to s. 657.3(3) of the *Code,* an accused seeking to tender expert evidence must give notice of the expert's name, field of expertise and qualifications 30 days prior to the commencement of the trial, and must disclose an expert report or summary no later than the close of the Crown's case. See, for example, *R. v. Simon*, 2017 ABQB 586;
- the *Canada Evidence Act* contains several advance notice requirements: ss. 28, 30(7);
- an accused who advances alibi evidence is subject to an adverse inference if he fails to give advance disclosure of the substance of the alibi. This is a recognized qualification on the right to silence and does not offend s. 7 of the *Charter: R. v. Hill,* [1995] O.J. No. 2360 (Ont. C.A.), para. 26; see also *R. v. Wright,* 2009 ONCA 623, paras. 18-20;
- the *Garofoli* threshold test (leave requirement) requires the defence to show a reasonable likelihood that cross-examination of the affiant will elicit testimony of probative value to the issue under consideration by the reviewing judge: *R. v. Pires; R. v. Lising*, 2005 SCC 66. Moreover, courts have

dismissed applications for an order prohibiting Crown counsel from discussing the contents of an application with the witness, recognizing that any responsible Crown counsel engages in witness preparation, which must be conducted in a responsible and ethical manner: see, for example, *R. v. Poloni*, 2006 BCPC 166; *R. v. Sipes*, 2008 BCSC 1926. Crown counsel cannot use the information obtained in an unethical way;

- an accused who wishes to lead evidence of previous acts of violence by the deceased (a "*Scopelliti*" defence) must establish its probative value: *Darrach* (ONCA), para. 60;
- the defence may have an obligation to reveal evidence on a *Corbett* application to have all or part of the accused's criminal record excluded: *Darrach* (ONCA), para. 60; *Darrach* (SCC), para. 65;
- the defence must seek a ruling in advance of cross-examining Crown witnesses about third party suspects: *R. v. Pickton*, 2007 BCSC 799; *R. v. Singh*, 2014 ONSC 6512, para. 15; and
- an accused must serve a notice of constitutional question which details the particulars of a *Charter* claim. The Crown may request, or the court may hold on its own motion, a *Vukelich* or *Cody* threshold hearing in which the accused is required to demonstrate that there is a sufficient foundation for the *Charter* application: *R. v. Cody*, 2017 SCC 31, para. 38 This may be done on the submissions of counsel, but if those are found to be insufficient, additional evidence, including affidavits, may be required: *R. v. Vukelich* (1996), 78 B.C.A.C. 113 (B.C.C.A.), at para. 20, leave to appeal refused, [1996] S.C.C.A. No. 461.

118. Some judges have suggested that the amendments violate the principle that witnesses should be excluded: *A.M.* (SKPC), paras. 12, 16; *J.S.*, paras. 24-25; *R.S.*, para. 70. However, the impugned provision operates as a legislated exception to any exclusion order that has been made. Further, as occurred at trial in this case, the complainant can be cross-examined about their access to materials or participation in the application: *AR3,* 193[12-28]. Where there is a basis to do so, the accused may seek to discredit the complainant by suggesting they tailored their evidence to fit what they have learned. The accused can also argue that this knowledge undermines the complainant's credibility or reliability. Further, in almost all cases the complainant will have already provided one or more statements to the police and may have also testified at a preliminary hearing. This means that if they do "modify" their evidence in response to defence materials, they can be readily cross-examined on that fact. Where this occurs, the complainant's knowledge of the defence strategy may impact the weight given to their evidence. However, the mere fact of acquired knowledge does not give rise to a presumptive breach of the accused's right to make full answer and defence.

119. In any event, the witness exclusion principle is not absolute. Even in circumstances where a witness violates an exclusion order, they are not necessarily disqualified, although (a) in certain circumstances, the trial judge may exclude their evidence; and (b) the weight, if any, to be given to their evidence is for the jury, or the trial judge, to decide. As such, there is no automatic exclusionary rule and the trier of fact decides what weight, if any, ought to be given to the evidence: *R. v. Dobberthien*, [1975] 2 S.C.R. 560; see also *R. v. Donszelmann*, 2015 ABCA 284.

120. There are also other situations, in addition to s. 276 other sexual history and ss. 278.1 to 278.91 third-party records applications, in which a complainant may become aware of potential lines of cross-examination and/or the defence theory/strategy in advance: (1) at a preliminary inquiry; (2) where a mistrial has resulted; and/or (3) where there is a re-trial following an appeal. In those circumstances, the complainant may have detailed knowledge of the cross-examination that may arise at trial or at a new trial. They may have even read the transcripts or judgment from the first trial (in the case of an appeal) and could be aware of the first trial judge's view of their evidence. Notwithstanding, they will not be prohibited from testifying.

3. On its plain wording, the impugned provision mandates neither seven-days notice nor a pre-trial application

121. Duncan J. erred in concluding that the timing aspect (s. 278.93(4)) was constitutionally flawed. It is well-established that "the interpretation of [an impugned law] is a necessary pre-condition to the determination of constitutionality": *R. v. Sharpe*, 2001 SCC 2, para. 32. In determining the scope of a law (and hence a potential infringement), a reviewing court should not simply "accept the allegations of the parties as to what the law prohibits" (*Sharpe,* para. 32) but must independently consider the law's meaning based upon its text, context and purpose. The appellant says that Duncan J. failed to recognize that the notice provision achieved a reasonable constitutional compromise because it expressly gives the trial judge the discretion to determine the timing of the application: "at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice" (emphasis added). Duncan J. also failed to appreciate that s. 278.93(4) does not specify that the application must be made pre-trial. The notice provision is flexible and involves the balancing of several factors under the "interests of justice" test.

122. The "interests of justice" test is a well-known standard that is used widely throughout the *Code* and provides for the broadest possible consideration of factors. While the term is not defined in the *Code*, it is used in a variety of provisions, including: the admissibility of a complainant's sexual history (s. 276(3)(a)); the admissibility of third party records in the possession of the accused (s. 278.92(3)(a); continuing a hearing if the accused absconds (s. 475, s. 544(1)); remand of accused in requested official language (s. 530(4)); application for severance (s. 591(1)); application to take a view (s. 652(1)); whether rulings from a mistrial bind at a new trial (s. 653.1); application to adduce fresh evidence on appeal (s. 683); and application for appointment of counsel on appeal (s. 684).

123. "Interests of justice" is "a broad and flexible concept": *R. v. Smith*, 2004 SCC 14, para. 41. The "compendious expression 'the interests of justice' is not statutorily confined.... The 'interests of justice' are amenable to neither precise nor exhaustive definition. Indeed, it would seem antithetical to the breadth of the

phrase and wholly inimical to the interests there described to essay its definition": *R. v. Blakeman*, 1988 CarswellOnt 848 (Ont. S.C.J.), para. 108. The phrase "takes its meaning from the context in which it is used and signals the existence of a judicial discretion to be exercised on a case-by-case basis". It encompasses "broad based societal concerns and the more specific interests of a particular accused": *R. v. Bernardo* (1997), 121 C.C.C. (3d) 123 (Ont. C.A.), para. 16. The term incorporates "the accused's right to be tried on the evidence admissible…, as well as society's interest in seeing that justice is done in a reasonably efficient and cost-effective manner": *R. v. Last,* 2009 SCC 45, para. 16; see also paras. 17-18.

124. The inclusion of the "interests of justice" test in s. 278.93(4) allows for the widest possible balancing of factors with respect to the timing of notice, including the accused's right to make full answer and defence.

4. <u>The requirement for seven-days notice promotes efficient trial management</u>

125. While s. 278.93(4), properly interpreted, does not mandate a pre-trial application, the requirement for seven-days notice in fact promotes efficient trial management. Parliament's choice of a presumptive seven-day notice period must be given meaningful effect. It should be the default, not the exception. The provision is entirely consistent with the continued emphasis post-*Jordan* on the flexible exercise of the trial management power and on all actors in the criminal justice system acting proactively and taking steps to minimize delay.

126. While the appellant acknowledges that a pre-trial application may not be in the interests of justice in all circumstances, a s. 278.92 application should be made pre-trial wherever possible. What occurred at trial in this case was not the norm because complainant's counsel had already been retained for the pre-trial s. 276 applications which occurred in January 2020 and made herself available for the jury trial even though no formal application had yet been filed. If there is no advance notice, an adjournment will likely be required to allow the complainant to retain counsel. In judge-alone trials, this may lead to difficulties securing continuation dates, which are often only available months later. In jury trials, this may necessitate sending the jury away for days or weeks.

127. Pre-trial applications are not unique. The notice provision in s. 278.93(4) is the same notice provision as the former s. 276.1(4)(b). Prior to Bill C-51, s. 276 applications were generally heard as pre-trial applications. This resulted in an efficient use of court time, ensured that there were not unnecessary delays or adjournments of the trial, and all parties knew in advance precisely what other sexual history evidence could be lead at trial: D. Brown and J. Witkin note in *Prosecuting and Defending Sexual Offence Cases, A Practitioner's Handbook*, 2nd Ed. (Toronto: Emond Montgomery Publications Limited, 2020) at 365. This is

also consistent with the general approach to hearing applications with respect to the admissibility of evidence prior to trial. Moreover, any admissibility ruling can be revisited if there is a material change: *R.V.*, para. 72.

128. In the constitutional rulings on the Bill C-51 scheme, a number of courts have noted that the notice provision in s. 278.93(4) and pre-trial applications lead to efficient trial management: *F.A.*, para. 62; *Whitehouse*, para. 54. If the new scheme is "to have any real meaning or provide any protection for the integrity of the fact finding process they must continue to be interpreted as they always have been, namely requiring an application be brought to admit sexual history evidence prior to trial…": *M.S.*, para. 90.

129. Significant trial management issues will arise because "in many if not most cases … the defence in a sexual assault trial will wish to rely upon sexual history evidence or private records of the complainant. Such applications are routinely brought in the busy trial courts … and a day well in advance of trial is usually set [aside] for their adjudication": *M.S.*, para. 94. If the defence can bring their application after the complainant's direct examination, 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.
>
> *M.S.*, para. 97.

130. Duncan J.'s constitutional remedy may lead to mid-trial adjournments after the complainant has testified in chief (see, for example, *R. v. Boyle*, 2019 ONCJ 232, para. 15) and associated s. 11(b) delay, which will have a significant impact on sexual assault complainants. The process that unfolded at trial in this case, where defence counsel only disclosed the nature of the record during the s. 278.92 application in the midst of the jury trial, did not allow for meaningful preparation by the Crown at the threshold application; see also *R. v. Lennox*, 2019 ONSC 3844, paras. 5-13. Further, if the application is not brought until the complainant is under cross-examination, complainant's counsel will not be able to speak to them to obtain instructions without leave, which defeats any meaningful participation by the complainant.

131. Moreover, mid-trial applications may affect a complainant's decision to participate in the records application. As Brown and Witkin note at 343:

> [a]ny interpretation of the provisions that encourages mid-trial applications will likely have a very real adverse impact on a complainant's decision as to whether he or she wants to dispute the admission of evidence, thereby making the complainant choose between his or her equality rights and

> continuation of the trial. Participation of the complainant at the hearing stage and disclosure of the applications materials for that purpose enhances rather than detracts form the truth-seeking process.

132. Finally, a timely motion supports ongoing application of the Crown charge approval standard. In some cases, a record could very well affect the strength of the Crown's case and the decision to proceed.

133. Section 11(b) is "a right that inures not just to the benefit of accused persons, but to the benefit of victims and society as a whole as well": *R. v. Thanabalasingham,* 2020 SCC 18, para. 9; see also *Jordan,* paras. 1, 19, 23-24, 110. *Jordan* "will not deliver on its promise … unless *all* participants in the criminal justice system work together and take a proactive approach from day one": *R. v. K.J.M.*, 2019 SCC 55*,* para. 80 (emphasis in original). The "defence has a duty to be proactive" and must take "meaningful and sustained steps", including "conducting all applications reasonably and expeditiously": *K.J.M.,* para. 83.

134. Under the current post-*Jordan* jurisprudence, a ss. 278.92 to 278.94 application would likely not be treated as either defence delay or as a discrete exceptional circumstance in the s. 11(b) analysis, absent exceptional circumstances. Unless the application is frivolous, it will likely be categorized as a defence action "legitimately taken to respond to the charges" (*Jordan*, at para. 65) and counted as part of the overall period of delay. See, for example, *R. v. Akumu*, 2017 BCSC 896, paras. 76-84, affirmed *R. v. Boima*, 2018 BCCA 297. If defence counsel does not give notice of the application or does not advance it in a timely manner, the time associated with the application may be treated as defence delay: *Cody,* paras. 30-33; *Rice c. R*, 2016 QCCS 4659, paras. 48-50, aff'd 2018 QCCA 198, paras. 149-151.

135. Duncan J.'s ruling will undermine efficient trial management. As she acknowledged in the *Breach Ruling* at para. 87, elimination of the seven-day notice provision raises potential s. 11(b) *Charter* concerns as it will likely lead to the bifurcation of sexual assault trials and scheduling difficulties. These scheduling difficulties are compounded by the fact that the complainant may wish to retain counsel, which may take time due to funding approval issues (which vary by jurisdiction) and counsel's availability. In British Columbia, for example, the Ministry of Public Safety and Solicitor General's Victim Services and Crime Prevention Division ("VSCPD") provides funding to Legal Aid B.C. for independent legal advice and representation of complainants in specific circumstances. If the complainant consents, the Crown will contact Legal Aid to provide required intake information. The Managing Lawyer will then review the request for independent legal advice and representation. In some circumstances, intake staff may follow-up directly with the complainant or witness to obtain required intake information. It takes time to complete the intake process, obtain VSCPD's approval, and find and contract with appropriate counsel. Once retained, assigned counsel will also require time to take instructions from the complainant and prepare a response to the application. Their availability

will also be determined by their own schedule. In contrast, see *R. v. T.P.S.*, 2019 NSSC 48, where, on the Crown's application, state-funded counsel was ordered for the complainant for the s. 276 application because there was no program in Nova Scotia to provide state-funded counsel for this type of hearing.

G. Conclusion

136. Parliament has acted to remedy a legislative gap by codifying a procedure for the admission and use of records in the possession of the accused. Like the other sexual activity evidence and third party records schemes assessed in *Darrach* and *Mills,* this procedure balances the rights of the complainant and the accused by protecting the complainant's privacy, equality and security of the person while also vindicating the accused's right to make full answer and defence. The notice provision provides "sufficient protection for all relevant *Charter* rights": *Mills*, para. 22.

H. Any infringement is justified under s. 1

137. The appellant also submits that Duncan J. erred in concluding that the narrow s. 7 *Charter* breach relating to the seven-day notice provision in s. 278.93(4) could not be justified under s. 1 of the *Charter*.

138. Section 278.93(4) is a reasonable limit because it permits the application to be initiated and adjudicated at any point before, or during, trial. The provision does not require that the application be brought prior to trial and specifically affords the trial judge the discretion to truncate the notice period in exceptional circumstances. It expressly provides for judicial discretion to determine when the application will be heard based on a well-established threshold test, "the interests of justice", which allows the Court to consider a broad array of factors. This flexibility fully respects the accused's right to make full answer and defence.

1. Justification under s. 1 of the *Charter*

(a) Principles governing the s. 1 analysis

139. Section 1 of the *Charter* provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

140. The test under s. 1 is well-established. The factors set out in *R. v. Oakes,* [1986] 1 S.C.R. 103 remain the governing test to determine whether an impugned provision is reasonable and demonstrably justified in a free and democratic society. The impugned provision must have a pressing and substantial objective, and

the means chosen to achieve the objective must be rationally connected to the objective, minimally impair the *Charter* right, and result in overall proportionality.

(b) The importance of context

141. The *Oakes* test, and each component of it, must be applied flexibly. The factual and social context within which the law is applied is a legitimate factor for consideration: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, paras. 132-133. Although the law's impact on the individual claimant is a significant factor, the "broader societal context in which the law operates must inform the s. 1 justification analysis": *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, para. 69. The "proportionality inquiry is a normative and contextual one, which requires courts to examine the broader picture by 'balanc[ing] the interests of society with those of individuals and groups'": *R. v. K.R.J.*, 2016 SCC 31, para. 58. Competing "moral claims and broad societal benefits" are appropriately considered under s. 1: *Carter v. Canada (Attorney General),* 2015 SCC 5, para. 79.

(c) Onus and standard of proof

142. The Crown bears the onus of establishing that any infringement is justified under s. 1. The civil standard of proof on a balance of probabilities applies at all stages of the s. 1 analysis and does not require demonstration to a scientific standard*: RJR-MacDonald*, paras. 137, 151 and 154 (*per* McLachlin J., as she then was) and para. 184 *(per* Iacobucci J.).

143. Justification does not have to be supported by evidence. It may be demonstrated through the application of common sense, logic and inferential reasoning: *K.R.J.*, para. 60; *Sharpe,* paras. 78, 85; *RJR-MacDonald*, para. 137. As McLachlin C.J. observed in *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, "while some matters can be proved with empirical or mathematical precision, others, involving philosophical, political and social considerations, cannot...it is enough that the justification be convincing, in the sense that it is sufficient to satisfy the reasonable person looking at all the evidence and relevant considerations, that the state is justified in infringing the right at stake to the degree it has" (para. 18).

144. At this stage of the analysis, "courts must accord the legislature a measure of deference. Proportionality does not require perfection…. Section 1 only requires that the limits be 'reasonable'…. there may be a number of possible solutions to a particular social problem" and "a 'complex regulatory response' to a social ill will garner a high degree of deference'": *Carter*, para. 97.

(d) All *Charter* breaches are open to justification

145. It "is difficult, but not impossible, to justify a s. 7 violation under s. 1": *R. v. Safarzadeh-Markhali*, 2016 SCC 14, para. 57. While it was historically thought that a s. 7 violation could never be justified under s. 1, this Court has left open the possibility that a s. 7 violation could be saved under s. 1: *Canada (Attorney General) v. Bedford,* 2013 SCC 72*,* para. 129; *Carter*, para. 95. An impugned provision "may be saved under s. 1 if the state can point to public goods or competing social interests that are themselves protected by the *Charter*….Courts may accord deference to legislatures under s. 1 for breaches of s. 7 where, for example, the law represents a 'complex regulatory response' to a social problem'": *Safarzadeh-Markhali*, para. 57.

2. Application of the *Oakes* test

(a) Pressing and substantial objective

146. Duncan J. correctly held that "protecting a sexual assault complainant's right to privacy, improving confidence in the justice system and protecting the integrity of the trial process are pressing and substantial legislative objectives": *Section 1 and Remedy Ruling*, at para. 9. As noted above, the amendments:

a. ensure that a complainant's right to privacy, dignity, security of the person, and equality under ss. 7, 15 and 28 of the *Charter* are protected;

b. improve victim and community confidence in the criminal justice system, increasing the likelihood that victims will report and participate in criminal prosecutions;

c. protect the integrity of the trial process by ensuring that evidence that is misleading or rooted in myths and stereotypes is not admitted nor distorts the truth-seeking function; and

d. at the same time, provide for admissibility and use of records where necessary and appropriate for an accused to make full answer and defence.

147. Further, the seven-day notice requirement in s. 278.93(4) has a specific pressing and substantial objective – efficient trial management and related s. 11(b) *Charter* concerns.

(b) Rational connection

148. At this stage, the "question is whether the means the law adopts are a rational way for the legislature to pursue its objective": *Carter*, para. 99. The "government need only show that there is a causal connection between the infringement and the benefit sought 'on the basis of reason or logic'": *Carter,* para. 99. Not all aspects must be rationally connected; a "rational *connection*, not a complete rational *correspondence*, is all this branch of *Oakes* requires": *R. v. Appulonappa,* 2015 SCC 59, para. 80 (emphasis in original).

149. Duncan J. correctly held that "the notice period lends itself to efficient trial management and complainant participation and therefore … it is rationally connected to the goal of the legislation": *Section 1*

and Remedy Ruling, at para. 11. The seven days gives the complainant time to determine if they want to participate and/or be represented by counsel at the second stage such that the application itself can proceed in a timely manner. This in turn furthers the privacy, dignity, security of the person and equality rights of complainants and increases victim and community confidence in the criminal justice system.

(c) Minimal impairment

150. The appellant submits that Duncan J. erred in concluding that s. 278.93(4) does not minimally impair the accused's right to a fair trial or to make full answer and defence.

151. As Karakatsanis J. explained in *K.R.J.,* the question at this stage is "whether the ….amendments are minimally impairing, in the sense that 'the limit on the right is reasonably tailored to the objective'…. It is only when there are alternative, less harmful means of achieving the government's objectives 'in a real and substantial manner' that a law should fail the minimal impairment test…." (para. 70). In both its structure and application, the notice provision in s. 278.93(4) is reasonably tailored to the objective.

152. First, Parliament did not craft an entirely novel regime, but rather codified common law jurisprudence (*Osolin* and *Shearing*) using a procedural scheme that had already passed constitutional muster in *Mills* and *Darrach*. The amendments created a consistent scheme for the admissibility and use of third-party records, regardless of who was in possession of the records.

153. Second, s. 278.93(4) permits the application to be brought at any time, including after the examination-in-chief of the complainant. It provides that the application be filed "at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice" (emphasis added). Thus, the provision expressly provides for judicial discretion to abridge the notice requirements. In *R. v. Lloyd*, 2016 SCC 13, McLachlin C.J. held, albeit in a different legal context, that "[r]esidual judicial discretion for exceptional cases is a technique widely used to avoid injustice and constitutional infirmity" (para. 36).

154. Third, as noted above, the "interests of justice" test is a well-known standard in criminal law and provides for the broadest possible consideration of factors with respect to the timing of notice, including the accused's right to make full answer and defence.

155. Fourth, the seven-day notice provision is entirely consistent with the continued emphasis post-*Jordan* on all actors in the criminal justice system acting proactively and taking steps to minimize delay: *K.J.M.*, paras. 80, 83. As Duncan J. acknowledged in the *Breach Ruling* at para. 87, elimination of the seven-day

notice requirement raises potential s. 11(b) *Charter* concerns as it may lead to the bifurcation of sexual assault trials and scheduling difficulties. These scheduling difficulties are compounded by the fact that the complainant may wish to retain counsel for the application, which may take time due to funding approval issues, which vary by province, and counsel's availability. In judge-alone trials, this may lead to difficulties securing continuation dates, which are often only available months later. In jury trials, this may necessitate sending the jury away for days or weeks while the application is litigated. As noted above, other courts have expressed similar trial management concerns: *F.A.*, para. 62; *M.S.*, paras. 90-94. The section, as drafted, encourages parties and the courts to address these issues at an early stage so as to minimize bifurcation and its associated harms.

156. Judicial concern about delay in sexual assault prosecutions is supported by the statistics. In A. Maxwell, "Adult criminal court processing times, Canada, 2015/2016" (Statistics Canada, February 13, 2018), it was noted that in 2015/2016, provincial court processing times were highest for sexual offences, and that approximately one in seven sexual offences completed in provincial court exceeded the presumptive ceiling (pp. 13-14). Further, sexual offences take some of the longest times to complete in superior court (p. 22). See also M. Karam, J. Kukassen, Z. Miladinovic and M. Wallace, "Measuring efficiency in the Canadian adult criminal court system: Criminal court workload and case processing indicators" (Statistics Canada, March 5, 2020),12-13, 15, 19.

157. Finally, and most significantly, the potential bifurcation of sexual assault trials will impact the complainant, who may have to wait days, weeks or months, potentially while under cross-examination, for their testimony to resume. It is well-established that "[t]estifying in a sexual assault case can be traumatizing and harmful to complainants": *R.V.,* para. 33. Adjourning a trial partway through the complainant's direct or cross-examination could be enormously stressful for a complainant. Further, there is a recognized connection between the procedures used and the willingness of complainants to report offences involving sexual violence, and to continue to participate in the prosecution of those offences: *R. v. Adams*, [1994] 4 S.C.R. 707, para. 25; *A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 536, para. 60; *R.M.R.,* para. 57; *C.C.*, para. 69; *Lennox*, para. 28; A. Cotter and L. Savage, "Gender-based violence and unwanted sexual behaviour in Canada, 2018: Initial Findings from the Survey of Safety in Public and Private Spaces" (Statistics Canada, December 5, 2019), 20-21; M. McCallum and G. Ng, "A toolkit for navigating section 276 and 278 *Criminal Code* matters as complainant counsel in criminal proceedings" (Vancouver: West Coast LEAF, April 2020), 4.

158. The notice provision in s. 278.93(4), which expressly provides for the exercise of judicial discretion, is not just reasonably tailored to its objective, but perfectly so. Indeed, it is difficult to imagine a better mechanism to balance the competing interests at stake.

(d) Proportionality of effects

159. At this final stage, the court must balance the salutary and deleterious effects of the impugned provision, and "weig[h] the impact of the law on protected rights against the beneficial effect on the law in terms of the greater public good": *Carter*, para. 122.

160. Overall proportionality has been achieved. Section 278.93(4) achieves a reasonable constitutional compromise between impact on an individual offender and societal interest.

I. Remedy

161. If this Court concludes that the s. 7 violation cannot be saved under s. 1, the appellant submits that Duncan J. correctly "read down" the provision, but only as it applies to s. 278.92 applications.

162. Section 52(1) of the *Constitution Act, 1982* grants courts the jurisdiction to declare laws of no force and effect only to "the extent of the inconsistency". Duncan J. correctly interpreted the extent of the inconsistency flexibly as it failed the second (minimal impairment) and third element (overall proportionality) prongs of the test: *Schachter v. Canada*, [1992] 2 S.C.R. 679, 717-719 (para. 85); see also 702-706 (paras. 43-50); *Ontario (Attorney General) v. G.*, 2020 SCC 38, paras. 108-111. Each of the three elements of the *Schachter* test (717, para. 84) were met and "reading down" represented a lesser intrusion on Parliament's legislative role than striking down: *Schachter*, 696 (para. 26); *Ontario (Attorney General) v. G,* paras. 111-116; see also *R. v. Ferguson,* 2008 SCC 6, para. 51; *R. v. Rajaratnam*, 2019 BCCA 209, paras. 164-167, leave to appeal refused, [2019] S.C.C.A. No. 344; P. Hogg, *Constitutional Law of Canada,* 5th Ed. Supplemented (Toronto: Thomson Reuters, 2019, loose-leaf), 40-22 to 40-22.1.

163. In *Schachter*, this Court also held that if the remaining constitutional portion of the legislation "is very significant or of a long-standing nature, it strengthens the assumption that it would have been enacted without the impermissible portion" (712-715, paras. 70-76). The constitutional remedy in this case was responsive to the constitutional defect, but also preserved Parliament's intent and the operation of the section to the greatest extent possible. The remedy ensured that (1) the accused's right to make full answer and defence is respected; (2) Parliament's objective that complainants not be ambushed is respected; and (3) the trial judge retains discretion to determine the timing of the application. "Reading down" was also more appropriate

in this case where the provision applies to both s. 276 and s. 278.92 applications but the constitutional defect identified was limited only to the latter. Duncan J. exercised remedial powers flexibly to address the specific constitutional defect in order to preserve, to the extent possible, Parliamentary intent.

PART IV – SUBMISSIONS ON COSTS

164. The appellant does not seek costs and says each party should bear its own costs.

165. The respondent sought solicitor and client costs in the response to the application for leave to appeal. The decision on costs was referred to the panel hearing the appeal. However, on October 16, 2020, the respondent confirmed that he is no longer seeking solicitor and client costs against the appellant on the application for leave to appeal.

PART V – ORDER SOUGHT

166. The appellant submits that the appeal be allowed, and the finding of a *Charter* infringement and the associated remedy of "reading down" be quashed.

PART VI – SUBMISSIONS ON EFFECT OF PUBLICATION BAN AND RESTRICTION ON PUBLIC ACCESS

167. There is a s. 486.4 publication ban, imposed May 2, 2018, on any information that would identify the complainant. The following documents in the Appeal Record contain information that is subject to the s. 486.4 publication ban: Tab 24 – Aide Memoire to Applicant's Submissions; Tab 38 – Proceedings at Trial, October 1, 2020; Tab 38 – Proceedings at Trial, October 5, 2020 (Direct Examination of Complainant); Tab 41 – Proceedings at Trial, October 6, 2020 (Cross-examination of the Complainant); Tab 42 – Proceedings at Trial, October 7, 2020 (Cross-examination and Re-examination of the Complainant); Tab 43 – Affidavit of J.J.; Tab 48 – Proceedings at Trial, October 5, 2020 (*in camera,* sealed); Tab 49 – Proceedings at Trial, October 6, 2020 (*in camera*, sealed); Tab 50 - Exhibit A and B to the Affidavit of J.J.; Tab 51 – Photo of the Complainant (Exhibit 2); Tab 52 – Photo of the Complainant (Exhibit 3).

168. At the time of the constitutional application (October 2019 to March 2020), the proceedings were also governed by a s. 648 publication ban as the respondent had elected trial by judge and jury. While there was no publication ban on the name of the respondent (i.e. identifying the respondent would not identify the complainant), in a Memorandum to Counsel dated January 15, 2020, Duncan J. advised that she would refer to the respondent by initials in the *Reasons* to comply with the s. 648 publication ban so that the constitutional ruling could be circulated to other counsel prior to the conclusion of the jury trial. The jury trial concluded on

October 9, 2020. The respondent was acquitted. The *Breach Ruling* and the *Ruling on Section 1 and Remedy* have now been reported as *R. v. J.J.*, 2020 BCSC 29 and 2020 BCSC 349.

169. At trial on October 5, 2020, the respondent filed an application pursuant to s. 278.92 and, as a result, the automatic publication ban in s. 278.95(1) applied: *AR4,* 48[23-33]. Proceedings related to the application on October 5 and 6, 2020 were heard *in camera* and those transcripts are sealed pursuant to the Order of Duncan J. dated October 16, 2020.

170. The *Oral Ruling Re Standing of Complainant* (*R. v. J.J.*, 2020 BCSC 1649; *AR4,* 1) and the *Oral Ruling Re Application on ss. 278.92 to 278.94* (*R. v. J.J.*, 2020 BCSC 1650; *AR4,* 4) are both marked "*in camera*" and have been included in Appeal Record, Volume IV (Sealed). The evidence was admitted and, as a result, the exception in s. 278.95(1)(d) likely applies to the *Oral Ruling re Application on ss. 278.92 to 278.94*. The parties sought clarification from Duncan J. by way of an email request through the trial coordinator with respect to the status of the Rulings (i.e. whether they would be redacted and published and to confirm whether they were still subject to s. 278.95 publication ban). The parties were advised by email dated November 12, 2020, "These rulings are not for publication. If counsel are satisfied they can be disseminated for use in other proceedings without breaching any bans they ma y do so". Out of an abundance of caution, the appellant continues to treat these two oral rulings as *in camera* decisions.

171. The publication ban in ss. 278.95(1)(a) and (b) also applies to Tab 25 - Notice of Application; Tab 26 - Argument of Complainant; Tab 43 – Affidavit of J.J.; Tabs 48 and 49 - Transcripts of *In Camera* Hearings (October 5 and 6, 2020); and Tab 50 - Exhibit A and B to the Affidavit of J.J..

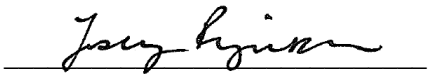
172. Finally, at the request of the respondent, the appellant has included the following documents in the Appeal Record: two redacted photographs which were attached as Exhibits A and B to the Affidavit of J.J. (filed on the s. 278.92 application at trial) and two further redacted photographs which were marked as Exhibits 2 and 3 at trial. The photographs depict the complainant naked. The photographs are subject to the s. 486.4 publication ban which covers any information that would identify the complainant.

173. The appellant has included these documents in Appeal Record IV (Sealed). Although these exhibits were not sealed at trial, in British Columbia access to these exhibits would be restricted to Crown and defence counsel. A member of the accredited media would need to submit a Form 2 request and any member of the public would have to bring an application to access these photographs: see Supreme Court of British Columbia, *Court Record Access Policy,* ss. 2.4, 4*;* Form 2: Media Request for Access to An Exhibit (Request

for An Exhibit Where No Exhibit Access Protocol Has Been Implemented); *R. v. Blackmore*, 2018 BCSC 1225; *R. v. Ferguson,* 2018 BCSC 1539. If an access request or application is filed, a hearing may be held. The parties and any third party with legally protected interests (in this case, the complainant) would have the opportunity to make submissions on the access application. There has been no access request or application in the court below and, as a result, the appellant has included the photographs in the sealed volume to respect both the Supreme Court of British Columbia's supervisory and protecting power over its records (*R. v. Moazami*, 2020 BCCA 350, at paras. 44 – 78) and the complainant's privacy interests.

174. The trial judge held that the complainant had a "reasonable expectation of privacy" in the photographs within the meaning of ss. 278.1 and ss. 278.92 to 278.94. Although they were admitted into evidence, the trial judge took a number of steps at trial to minimize the impact on the complainant's privacy. While the appellant has agreed to include the photos in the Appeal Record at the respondent's request, public access to the photos and/or dissemination of these photographs beyond the Court and counsel for the respondent would be injurious to the complainant's privacy interests. The photos are accurately described on the record and counsel for the interveners do not need to see the photographs to make submissions about the constitutionality of the legislative scheme.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



Lesley Ruzicka
Counsel for the Appellant

Dated at Victoria, British Columbia,
this 22nd day of January, 2021.

PART VII - TABLE OF AUTHORITIES AND LEGISLATION

STATUTORY PROVISIONS

An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act, S.C. 2018, c. 29, (Bill C-51) s. 25	C-51, *Loi modifiant le Code criminel et la Loi sur le ministère de la Justice et apportant des modi,cations corrélatives à une autre loi*, 2018, c.29, (Project De Loi, C-51) s.25

An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts, 2018, c. 21 (Bill C-46)	*Loi modifiant le Code criminel (infractions relatives aux moyens de transport) et apportant des modifications corrélatives à d'autres lois,* 2018 c. 21 (Projet De Loi C-46)
An Act to amend the Criminal Code (sexual assault), S.C. 1992, c. 38. (Bill C-49)	*Loi modifiant le Code criminel (agression sexuelle),* S.C. 1992, c. 38. (Projet De Loi C-49)
Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. ss. 1, 7, 11(b), 11(c), 11(d), 15, 28, 52(1)	*Charte canadienne des droits et libertés, partie 1 de la Loi constitutionnelle de 1982*, constituant l'annexe B de la loi canadienne de 1982 (UK), 1982, c 11. ss. 1, 7, 11(b), 11(c), 11(d), 15, 28, 52(1)
Canada Evidence Act, R.S.C. 1985, c. C-5, ss. 28, 30	*Loi sur la preuve au Canada,* L.R.C. (1985), ch. C-5, ss. 28, 30
Canadian Victims Bill of Rights, S.C. 2015, c. 13	*Charte canadienne des droits des victims, L.C. 2015, ch. 13, art. 2*
Criminal Code, R.S.C., 1985, c. C-46. ss. 271, 276, 278.1, 278.2, 278.3, 278.92, 278.93, 278.94, 278.95, 278.96, 278.97, 657.3	*Code Criminel,* L.R.C. (1985), ch. C-46. ss. 271, 276, 278.1, 278.2, 278.3, 278.92, 278.93, 278.94, 278.95, 278.96, 278.97, 657.3

SECONDARY SOURCES

LEGISLATIVE HISTORY (in chronological order)

APPENDIX A - NOTICE OF CONSTITUTIONAL QUESTION

SCC File No.: 39133

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

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

-and-

J.J.

RESPONDENT
(Applicant/Defendant)

NOTICE OF CONSTITUTIONAL QUESTION
(Pursuant to Rule 33(2) of the *Rules of the Supreme Court of Canada*)

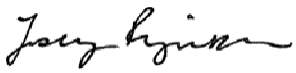
TAKE NOTICE that I, Lesley Ruzicka, counsel for the appellant, assert that the appeal raises the following constitutional question:

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

AND TAKE NOTICE that an attorney general who intends to intervene with respect to this constitutional question may do so by serving a notice of intervention in Form 33C on all other parties and filing the notice with the Registrar of the Supreme Court of Canada within four weeks after the day on which this notice is served.

Dated at Victoria, British Columbia, this 28th day of August, 2020.

SIGNED:



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