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 ON CROSS-APPEAL**
(Respondent)

AND

**J.J.**

**RESPONDENT/**
**APPELLANT ON CROSS-APPEAL**
(Applicant/Defendant)

AND

**ATTORNEY GENERAL OF CANADA,**
**ATTORNEY GENERAL OF ONTARIO,**
**ATTORNEY GENERAL OF NOVA SCOTIA,**
**ATTORNEY GENERAL OF MANITOBA,**
**ATTORNEY GENERAL OF SASKATCHEWAN and**
**ATTORNEY GENERAL OF ALBERTA**

**INTERVENERS**

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# FACTUM OF THE INTERVENER, ATTORNEY GENERAL OF NOVA SCOTIA
**(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)**

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## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. Overview

1. Every individual is entitled to the equal protection and benefit of the law, and to be treated with dignity, humanity, and respect.[1] In sexual violence trials, our criminal justice system has struggled to ensure that the rights of all individuals are, in fact, protected.

2. Historically, the rights of the complainant in a sexual violence trial were often overlooked. With time, courts and Parliament have recognized that the rights of both the accused and the complainant must be balanced to ensure a fair trial. The right to a fair trial is one to which everyone is entitled – every accused, every complainant, every person in our just and fair society. The integrity of the criminal justice system depends on it.

3. In this appeal, this Court must assess the constitutionality of ss. 278.92-278.94 of the *Criminal Code*. The Intervener, Attorney General of Nova Scotia ("AGNS"), submits that these provisions do not infringe an accused's rights under ss. 7, 11(c), or 11(d) of the *Charter*. These provisions appropriately balance a sexual violence complainant's right to equality, dignity, and privacy with the *Charter*-protected rights of the accused, take into consideration legitimate policy objectives specific to sexual violence, and ultimately promote the fair trial rights of all criminal justice system participants.

4. The AGNS will make three main points: (1) the records screening regime in ss. 278.92-278.94 appropriately balances the competing rights at stake in a sexual violence trial; (2) the rights of sexual violence complainants from vulnerable populations would be disproportionately and unfairly impacted without this records screening regime; and (3) advance notice of an admissibility hearing promotes trial fairness.

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[1] *R. v. Barton*, 2019 SCC 33 at para. 210.

## B. Statement of Facts

5. The AGNS takes no position on the facts in this appeal.

## PART II – STATEMENT OF QUESTIONS IN ISSUE

6. The AGNS intervenes, as of right, to address the following constitutional question stated by the appellant (respondent on cross-appeal):

   a) 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?

7. The AGNS also intervenes, as of right, to address the following constitutional question stated by the respondent (appellant on cross-appeal):

   a) Does the "records screening regime" in ss. 278.92 to 278.94 of the *Criminal Code* violate ss. 7, 11(c), or 11(d) of the *Charter of Rights and Freedoms* in a manner that cannot be justified under s. 1 of the *Charter*?

8. In light of the filing schedule established by this Court at the time of submission of this factum, and out of an abundance of caution, the AGNS addresses both constitutional questions in this single factum.

9. The AGNS submits that ss. 278.92-278.94 are constitutional and do not violate an accused's ss. 7, 11(c), or 11(d) rights.

## PART III – STATEMENT OF ARGUMENT

### A. Sections 278.92-278.94 Appropriately Balance Competing Rights

#### *i. Historical Lens for Evaluating Sections 278.92-278.94*

10. The purpose of a criminal trial is to get at the truth in order to convict the guilty and acquit the innocent.[2] This truth-seeking function is undermined when myths and stereotypes are relied upon instead of fact and reason.[3] Evidence that is based on myths and stereotypes is irrelevant or prejudicial or both.

11. Crime of sexual violence are unlike any others – they are under-reported, under-investigated, and under-prosecuted;[4] they are overwhelmingly perpetrated by men on women;[5] and trials have long been governed by myths and stereotypes.[6] Historically, complainants of sexual violence were subjected to prolonged examination of their private lives, which shifted the focus away from the accused and effectively put the complainant on trial.[7]

12. These practices placed the complainant of sexual violence at a disadvantage not faced by witnesses or complainants of other types of crimes,[8] disregarded the equality, privacy, and security rights of complainants, and "undermine[d] the ability of the criminal justice system to effectively and fairly try sexual allegations".[9] For these reasons, "sexual assault trials

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[2] *R. v. Goldfinch*, 2019 SCC 38 at para. 1.
[3] *R. v. A.G.*, 2000 SCC 17 at para. 2, L'Heureux-Dubé J., concurring.
[4] *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 669, L'Heureux-Dubé J., dissenting; *Goldfinch* at para. 37.
[5] *Seaboyer* at 648, L'Heureux-Dubé J., dissenting; *R. v. Osolin*, [1993] 4 S.C.R. 595 at 669; *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 120. The AGNS acknowledges that crimes of sexual violence are committed on complainants of any gender, by accused of any gender. For clarity and succinctness, the AGNS will refer to complainants by the she/her/hers gender pronouns and accuseds by the he/him/his gender pronouns.
[6] *Seaboyer* at 650, L'Heureux-Dubé J., dissenting; *Barton* at para 1.
[7] *Goldfinch* at para. 33; *R. v. R.V.*, 2019 SCC 41 at para. 33.
[8] *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 119.
[9] *R. v. L.S.*, 2017 ONCA 685 at para. 79.

raise unique challenges in protecting the integrity of the trial and balancing the societal interests of both the accused and the complainant".[10]

13. For decades now, Parliament has legislated changes to enhance the truth-seeking function of the court in trials of sexual violence. Parliament has introduced changes to the substantive law, evidentiary rules, and procedures for trials of sexual violence.[11] These changes all acknowledge and work to remedy the historical inequity faced by complainants of sexual violence. Further, these changes attempt to break the barriers to reporting, protect the privacy of complainants, and ensure a fair trial based on facts and reason, not myths and stereotypes.[12]

14. Despite significant changes in sexual violence legislation and recurring direction from this Court, a complainant of sexual violence today continues to face disadvantages not experienced by witnesses or complainants of other types of criminal offences. Myths and stereotypes still pervade our justice system and complainants still struggle to have their rights respected, both of which prevent courts from fairly trying allegations of sexual violence.[13]

15. It is within this context that ss. 278.92-278.94 must be examined.

*ii. Competing Rights in Trials of Sexual Violence*

16. In enacting ss. 278.92-278.94, Parliament appropriately balanced the competing rights at stake in a prosecution of sexual violence. These provisions balance: (1) the accused's

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[10] *R.V.* at para. 1.

[11] For example, amending sexual assault provisions to permit a husband to be charged with sexually assaulting his wife; eliminating the need for corroboration for certain offences; enacting ss. 276 and 278.2. See *Seaboyer* at 675-78, L'Heureux-Dubé J., dissenting.

[12] *Barton* at para. 58.

[13] *Goldfinch* at paras. 2, 45; *Barton* at para. 1. See e.g. *A.G.* at para. 4, L'Heureux-Dubé J., concurring (commenting on how court of appeal characterized the assault as "horseplay"); *R. v. Friesen*, 2020 SCC 9 at para. 144 (commenting on how sexual violence should not be characterized in terms such as "fondling").

*Charter*-protected rights, (2) the complainant's right to equality, dignity, and security of the person, (3) the right of everyone to the fair adjudication of allegations of sexual violence, and (4) the sound policy rationales of encouraging the reporting of sexual offences and the obtaining of treatment by complainants of sexual violence.

17. The *Charter* is concerned with both the rights of the individual as well as preserving the integrity of the judicial system. No individual *Charter* right can be considered in the abstract. Rather, a contextual interpretation is required.[14]

18. Sections 278.92-278.94 engage the accused's s. 7, 11(c), and 11(d) *Charter* rights. Sections 7 and 11(d) protect the right to a fair trial and, in turn, the right to full answer and defence.[15] Sections 7 and 11(c) protect the accused's right to non-compellability, both during a criminal investigation (right to silence) and a criminal trial (principle against self-incrimination).

19. However, s. 7 is also delimited by the principles of fundamental justice, which reflect a balancing of societal and individual interests beyond those of the accused.[16] In particular, trial fairness must be assessed from the perspectives of the accused, the complainant and the community.[17] The effect of taking into account these multiple points of view is that the accused is not entitled to the most favourable procedures imaginable, nor to have procedures crafted that take only his interests into account.[18] Further, the right to make full answer and defence is not automatically breached when relevant evidence is excluded by certain procedures.[19] Instead, a fair trial is one that considers the rights of, and does justice to, all the parties.[20]

20. The rights to a fair trial and to full answer and defence also encompass the right to call and

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[14] *O'Connor* at paras. 61, 107; *Mills* at para. 61.
[15] *Mills* at para. 69; *Goldfinch* at para. 29.
[16] *O'Connor* at para. 65; *Mills* at para. 73; *R. v. Darrach*, 2000 SCC 46 at para. 24.
[17] *Barton* at para. 202; *O'Connor* at para. 107; *Mills* at para. 72.
[18] *O'Connor* at para. 107; *Darrach* at para. 24.
[19] *Goldfinch* at para. 30.
[20] *Darrach* at para. 70.

challenge evidence.[21] The ability to challenge evidence rests on the opportunity to meaningfully cross-examine witnesses.[22]

21. The right to cross-examine is not absolute. Cross-examination is limited by the common law rules requiring that questions be relevant, and their prejudicial effect be weighed against their probative value.[23] Legislation may impose even further limits.[24]

22. In trials of sexual violence, limits on the content and method of cross-examination is required. Cross-examination of sexual violence complainants has often relied upon myths and stereotypes "about how abuse victims are expected by people who have never suffered abuse to react to the trauma".[25] Therefore, cross-examination techniques that "put the complainant on trial rather than the accused are abusive and distort rather than enhance the search for truth"[26] and must be eliminated. Additionally, the need to protect the complainant's dignity, privacy and equality interests should be taken into account when determining reasonable limitations of cross-examination.[27]

23. Sections 278.92-278.94 impose limits on cross-examination. In determining whether those limits are constitutionally sound, regard must be had to the complainant's *Charter* rights. Sections 7, 15, and 28 are concerned with the interests of the complainant.[28] A fair trial requires respect for the complainant's personal dignity, and her rights to privacy, equality, and security of the person.[29]

24. Complainants of sexual violence have a right to privacy in records in which they have "reasonable expectations of privacy". These are records that do not form part of the Crown's "case to meet" and the right to privacy in those records may only be infringed in

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[21] *Seaboyer* at 608.
[22] *R.V.* at para. 39; *Osolin* at 663.
[23] *R.V.* at para. 40; *Osolin* at 665.
[24] *R.V.* at para. 40.
[25] *R. v. Shearing*, 2002 SCC 58 at para. 121.
[26] *Shearing* at para. 76.
[27] *Osolin* at 669.
[28] *Seaboyer* at 603-604.
[29] *O'Connor* at para. 154.

accordance with the principles of fundamental justice.[30] Cross-examination on information in which a complainant of sexual violence has a reasonable expectation of privacy may raise equality, privacy, and dignity concerns.[31] One way in which the justice system can protect a complainant's rights is to limit cross-examination on records as defined in s. 278.1.

25. A complainant's privacy interest does not disappear once an accused person has obtained the private information.[32] In cross-examining a complainant on, or introducing into evidence, records in a trial of sexual violence, an accused seeks to use private information in a way that was not intended when it was created. Regardless of whether the accused possesses the records by accident or misadventure (like the diary in *Shearing*), through his position (e.g. a child-complainant's medical records), or because the complainant intended for the accused to have the record (e.g. text messages, photographs sent to the accused, etc.), those records were created for limited purposes and the complainant's privacy interest survives disclosure to the accused.[33] Before cross-examination is permitted on those records, consideration must be given to the complainant's reasonable expectation that her private information will remain "restricted to the purposes for which it was divulged".[34]

26. The rights of the accused and the complainant must, therefore, be balanced. Balancing rights means avoiding a hierarchical approach;[35] these rights must co-exist and one can not be used to negate or "trump" another.[36] Although ss. 278.92-278.94 engage the rights of the accused and the complainant, these rights are not in conflict. Rather, these provisions place the accused's and complainant's rights on equal footing and aim to enhance trial fairness through the eradication of discriminatory beliefs and practices.

27. The screening regime in ss. 278.92-278.94 is required to ensure that a trial of sexual violence does not "become an occasion for putting the complainant's lifestyle and

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[30] *O'Connor* at para. 130.
[31] *R.V.* at para. 8; *Shearing*, at para. 185, L'Heureux-Dubé J., dissenting.
[32] *Shearing* at para. 92.
[33] *Shearing* at paras. 91; see also para. 162, L'Heureux-Dubé J., dissenting.
[34] *Mills* at para. 108. See also *Shearing* at para. 110.
[35] *O'Connor* at para. 129; *Mills* at para. 17.
[36] *Mills* at paras. 17, 61; *O'Connor* at paras. 130, 154.

reputation on trial".[37] This regime is intended to limit what complainants of sexual violence are "forced to reveal at trial as the price of [their] access to the criminal justice system".[38] Without a screening mechanism, the complainant's ongoing right to privacy in the record will be overlooked. In addition, complainants may not seek help in order to avoid the creation of a record,[39] or they may not report sexual violence for "fear of a wide-ranging and in-depth inquiry of every detail of their private lives".[40]

28. This records screening regime is, thus, another step forward in removing systemic disadvantages faced by complainants of sexual violence which are not faced by complainants of other crimes. The screening mechanism allows for consideration of the complainant's rights to ensure that she is not "doubly victimized, initially by the sexual assault and later by the price she must pay to claim redress".[41] Removing those disadvantages promotes true trial fairness.

29. The purpose of sexual violence-specific legislation is to put complainants on equal footing with other complainants and with the accused. Such legislation works to eliminate myths and stereotypes, affirm the *Charter*-protected rights of sexual violence complainants, and promote sounds policy objectives (such as encouraging complainants to report sexual violence and to obtain counselling or other services). Sections 278.92-278.94 recognize the inherent unfairness of permitting an accused – who, by virtue of accident, treachery, or his position in relation to the complainant, possesses records relating to the complainant – to use those records without some judicial screening.[42] The records screening regime is the procedural mechanism to ensure the rights- and policy-balancing takes place for all records, regardless of who holds them.

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[37] *Osolin* at 672.
[38] *R. v. Quesnelle*, 2014 SCC 46 at para. 14.
[39] *Osolin* at 622, L'Heureux-Dubé J., dissenting.
[40] *Shearing* at paras. 170, 185, L'Heureux-Dubé J., dissenting.
[41] *Mills* at para. 91.
[42] See e.g. *R. v. B.G.*, 2015 ONSC 3284 at para. 22.

*iii. Records Screening Regime Accords with Criminal Law Principles*

30. There have always been limitations on the admission of evidence in a criminal trial. Evidence must be relevant to be admissible.[43] Even if relevant, evidence may be excluded if its prejudicial effect outweighs its probative value. Relevant evidence may be excluded for policy reasons.[44] In prosecutions of sexual violence, however, areas of cross-examination and defence-led evidence were often not screened for these limitations. This failure to screen resulted in the admission of evidence that served only myths, was misleading, or otherwise distorted the truth-seeking function of the court, all of which should have been excluded.[45]

31. Sections 278.92-278.94 create a screening mechanism to carefully examine evidence that may be irrelevant, have a prejudicial effect that outweighs its probative value, or should otherwise be excluded on policy grounds. As with the screening mechanisms in now-repealed s. 276.1 and current s. 278.2, ss. 278.92-278.94 exist as a reflection of the "fact that sexual assault prosecutions require heightened attention to the general principle that no party should be allowed to distort the process by producing irrelevant evidence".[46]

32. In reference to the use of personal and therapeutic records, this Court in *Darrach* noted that "[t]he use of these records in evidence is analogous in many ways to the use of evidence of prior sexual activity, and the protections in the Criminal Code surrounding the use of records at trial are motivated by similar policy considerations".[47] These provisions are a codification of long-standing common law principles and also take into account the competing *Charter* rights and policy considerations at stake in trials of sexual violence.

33. A codified records screening regime does not infringe the accused's rights. Instead, these provisions simply require the accused to explain why this private information is relevant and how its probative value exceeds its prejudicial effect. This records screening regime

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[43] *Goldfinch* at para. 5.
[44] *Seaboyer* at 620.
[45] *Goldfinch* at para. 4; *Darrach* at para. 21; *Seaboyer* at 692, L'Heureux-Dubé J., dissenting.
[46] *Goldfinch* at para. 55.
[47] *Darrach* at para. 26.

ensures that evidence which implicates the privacy rights of the complainant is not inappropriately admitted under the guise of "relevance" or when its prejudicial effect is not sufficiently proportionate to its probative value.

34. Further, the regime ensures that the privacy rights of the complainant are not unnecessarily infringed and, in turn, encourages complainants to report sexual offences and obtain counselling or other services in which records may be created. The overall effect of the provisions is to promote fairer trials.

35. Codification of these principles is necessary because irrelevant and prejudicial evidence continues to infect trials of sexual violence. This Court recently recognized that we can – and must – do better to protect complainants of sexual violence from unnecessary infringements on their privacy, erroneous cross-examination, and stereotypical reasoning.[48]

36. It has been suggested that there are already sufficient protections for complainants of sexual violence.[49] While many steps have been taken to protect complainants, these steps are not always followed. Accused persons continue to try to introduce evidence that is irrelevant or overly prejudicial and trial judges continue to allow complainants' rights to be wrongly negated in favour of the accused's rights.[50] Further, these steps are not a panacea: there was a legislative gap regarding use of records in the possession of the accused and sections 278.92-278.94 fill that gap.

37. Sections 278.92-278.94 are a codification of the principles in *Shearing*, buttressed by a specific procedural mechanism to ensure adherence to those principles. Courts have long recognized that "[t]he issue of admissibility of evidence in a sexual assault case requires a careful balancing".[51] For this reason, Parliament has created various "substantive rules that prevent evidence of a complainant's sexual activities from being used for improper

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[48] *Barton* at para. 1.
[49] See e.g. *R. v. Reddick*, 2020 ONSC 7156 at para. 75.
[50] See e.g. the facts in *Barton*; *Goldfinch*; *Shearing*.
[51] *Osolin* at 667.

purposes, backed by procedural requirements designed to enforce these rules".[52] Sections 278.92-278.94 are one incremental step by Parliament to ensure that admissibility of records in a sexual violence case is carefully screened.

38. A similar screening regime – relating to evidence of sexual activity – was found constitutional by this Court in *Darrach*. It may be argued that *Darrach* is distinguishable on the basis that evidence of sexual history is presumptively inadmissible and always prejudicial, unlike "records".

39. Both screening regimes, however, simply highlight the common law rule that applies to all evidence, but which is often forgotten in trials of sexual violence: unless evidence is demonstrably relevant, it is inadmissible.

40. Further, both types of evidence – sexual activity and records – are prejudicial, to some degree, for the same reasons: (1) their disclosure at trial is an invasion of the complainant's privacy, and (2) they may lead to myth-based reasoning. Both screening regimes allow an evaluation of that prejudice against other competing interests.

41. The "twin myths" are but two of the most insidious and prominent myths; they are far from the only myths alive in trials of sexual violence.[53] In *Osolin*, L'Heureux-Dubé J. in dissent recognized that, where an accused obtained the complainant's medical records for one purpose and then used them for another purpose, "there is serious risk that such information will be used to draw impermissible inferences and encourage the trier of fact to rely on myths about the credibility of sexual assault victims to the prejudice of both the witness and the trial process".[54]

42. Examples of myths that may be engaged by the unscreened use of "records" include:

    a) That "the personal and psychological backgrounds and profiles of complainants of sexual assault are relevant as to whether or not the complainant consented to the sexual contact, or whether the accused honestly believed that she consented".[55]

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[52] *Barton* at para. 58.
[53] *Mills*, para. 119.
[54] *Osolin* at 621, L'Heureux-Dubé J., dissenting.
[55] *O'Connor* at para. 124.

b) That only strangers commit crimes of sexual violence,[56] or that the complainant's consent was implied by the relationship between the parties,[57] and records showing a relationship between the parties undermines the complainant's trustworthiness.

c) That complainants of sexual violence are more likely to lie than other types of complainants[58] and there is an "extraordinary need for caution with respect to the credibility of complainants"[59]. Therefore, records are relevant to examine all areas of the complainant's personal life for signs of her inherent untrustworthiness.

d) That complainants of sexual violence actively struggle against their assailants and there should be records of their injuries.[60]

e) That complainants of sexual violence are persons of unimpeachable character and records of being on welfare, use of drugs or alcohol, having children outside of wedlock, or running away from home, are indicia that the complainant was more likely to have consented or is incredible.[61]

f) That complainants of sexual violence immediately report and records should reflect timely disclosure.[62]

g) That complainants of sexual violence run away from their assailant and do not associate with the attacker any further. Therefore, records of post-offence communication between the parties belies the credibility of the complaint.[63]

h) That having a medical or psychiatric record is indicative of the potential unreliability of a witness or that unreliability can be inferred from a witness undergoing any particular course of treatment.[64]

i) "[T]hat women and children who are sexually and physically abused do not suffer in silence, but must and do confide their inner hurt even if only to their private diaries"[65] and the absence of such confessions in a record is indicative of the complainant's untrustworthiness.

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[56] *Goldfinch* at para. 2.
[57] *Barton* at para. 98.
[58] *A.G.* at para. 3, L'Heureux-Dubé J., concurring.
[59] *Osolin* at 625, L'Heureux-Dubé J., dissenting.
[60] *Seaboyer* at 651-52, 655-65, L'Heureux-Dubé J., dissenting.
[61] *Osolin* at 670; *Seaboyer* at 652-53, 661-65, L'Heureux-Dubé J., dissenting.
[62] *Seaboyer* at 653, L'Heureux-Dubé J., dissenting; *Osolin* at 625, L'Heureux-Dubé J., dissenting; *Shearing* at para. 172, L'Heureux-Dubé J., dissenting.
[63] *R. v. C.A.M.*, 2017 MBCA 70 at paras. 47-53.
[64] *O'Connor* at para. 143; *Mills* at para. 119.
[65] *Shearing* at para. 120.

43. As this Court noted in relation to the purported relevance of records disclosing personal and psychological details of a complainant, "it would mark the triumph of stereotype over logic if courts and lawyers were simply to assume such relevance to exist, without requiring any evidence to this effect whatsoever".[66] This statement applies equally to other types of records. Therefore, the potential prejudice – that records will be used to support stereotypes about sexual violence – must be weighed against its purported probative value.

44. Having a records screening regime "does not turn persons accused of sexual abuse into second-class litigants. It simply means that the defence has to work with facts rather than rely on innuendoes and wishful assumptions".[67] The records screening regime in ss. 278.92-278.94 is the means Parliament has seen fit to employ in its effort to ensure defence demonstrates relevance and probative value outweighing prejudicial effect where the complainant's privacy rights are implicated and where policy considerations specific to prosecutions of sexual violence must be considered.

## B. Complainants of Sexual Violence from Vulnerable Populations Disproportionately and Unfairly Impacted Without this Records Screening Regime

45. Sections 278.92-278.94 cover a wide array of scenarios in which an accused will have possession of the complainant's records. In assessing whether Parliament has struck a constitutionally-sound balance between the rights of all justice system participants, regard must be had to the practical implications of the records screening regime.

### *i. Accuseds Possess Records Through Their Relationship with Their Victim*

46. An accused will usually possess the complainant's records as a result of his relationship with the complainant; a stranger is unlikely to have the opportunity, or knowledge of the complainant, to be in a position to possess the complainant's records without resorting to ss. 278.2-278.4.

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[66] *O'Connor* at para. 124 [emphasis in original].
[67] *Shearing* at para. 122.

47. Most complainants of sexual violence will have some kind of relationship with the accused.[68] The closer the relationship, the more access an accused will have to the complainant's records. Consider:

a) A doctor (accused)/patient (complainant) relationship: by virtue of his professional relationship to the complainant, the accused will possess the complainant's medical, psychiatric, or other counselling records.

b) A father (accused)/daughter (complainant) relationship: by virtue of his parental relationship to the complainant, the accused may be permitted access to the complainant's school, social services, or medical records; by virtue of his living arrangement with the complainant, the accused may also have opportunity to obtain the complainant's diary, phone, or private correspondence.

c) A spousal relationship: by virtue of his relationship to the complainant, the accused may have the opportunity to find in the household the complainant's adoption, child welfare, or employment records.

d) A date-turned-sexual-assault scenario: in arranging the date, the accused may have text messages from the complainant, or the complainant may accidentally leave her phone behind after the offence.

48. The accused should not doubly benefit from his relationship to the complainant: first, by having the opportunity to sexually assault the complainant, and then, by having the unscreened opportunity to use her private records, which he only possesses by virtue of his relationship with the complainant.

49. Where an accused is required to apply for production of the complainant's records, through ss. 278.2-278.4, the court has the opportunity and responsibility to take into account the complainant's privacy rights and the policy grounds animating these provisions before any use of those records can be made by the accused. An accused who has familiarity with, or even authority over, his victim should not be permitted to bypass judicial considerations of the factors outlined in s. 278.92(3).

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[68] *Goldfinch* at para. 2.

50. The AGNS acknowledges that the considerations regulating production are different from those regulating admissibility.[69] This difference does not mean that an accused in possession of the complainant's records is entitled to trample the complainant's rights. To the contrary, "[d]isclosure and production are broader concepts than admissibility and, as such, evidence which is produced to the defence will not necessarily be admissible at trial".[70]

51. The admissibility threshold is higher than the production threshold. This difference is reflected in the broader array of factors to be considered in determining admissibility (s. 278.92(3)) than production (s. 278.5(2)). Therefore, records that an accused seeks to admit must be subject to more scrutiny – not less – than when an accused seeks production of records. The records screening regime provides the mechanism for that necessary judicial scrutiny.

*ii. Vulnerable Complainants Have More Records*

52. Individuals from vulnerable populations are more likely to have records. These vulnerabilities may arise due to socio-economic pressures. For example:

a) Individuals living in lower income neighbourhoods or areas considered "high crime" may encounter police or witness more crime than those living in more affluent or "low crime" neighbourhoods, leading to more entries in police databases which may contain personal information.[71]

b) Individuals receiving social assistance or involved with social services will have documents containing private information created as a result of accessing those services.

c) Children from disadvantaged backgrounds may have more involvement with school counsellors and social services, again leading to the creation of records about their private lives.

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[69] *Shearing* at para. 96.
[70] *O'Connor* at para. 164.
[71] See e.g., S. Wortley, "Halifax, Nova Scotia: Street Checks Report" (March 2019), 152-53; S. Wortley and A. Owusu-Bempah, "Street Checks, Racial Profiling and Police-Community Relations: A Review of the Research Literature" being Appendix A to "Halifax, Nova Scotia: Street Checks Report" (March 2019), 21.

53. In Nova Scotia, two notable vulnerable populations exist: (1) the African-Nova Scotian community, and (2) human trafficking complainants.

54. First, African-Nova Scotians – along with African-Canadians across the country – have long been, and continue to be, subject to marginalization. Persons from those communities are also more likely to be involved in the criminal justice system (generating entries in police databases),[72] engaged with social services (generating welfare records), and scrutinized in the educational setting (generating school records).[73]

55. Second, Nova Scotia has the highest proportion of human trafficking incidents in Canada for its population. A majority of human trafficking complainants are women and they, like most complainants of sexual violence, know their abusers. Further, these complainants "disproportionately tend to come from vulnerable or marginalized populations".[74] Given the exploitative relationship between the trafficker and the complainant, the trafficker is likely to possess – or have access to – records of the complainant, including electronic communications (e.g. emails, text messages, and social media exchanges) and intimate photographs of the complainant.

56. Vulnerable populations require specific attention and consideration when assessing ss. 278.92-278.94 because: (1) they are more likely to have records, (2) they are more likely to be subject to myths and stereotypes, and (3) they are at increased risk of being victims of sexual violence.[75]

*iii. The Effect on Complainants of Sexual Violence from Vulnerable Populations*

57. Complainants of sexual violence whose lives are heavily documented are often subject to multiple inequalities. These complainants must navigate the vulnerabilities that have led to

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[72] S. Wortley, "Halifax, Nova Scotia: Street Checks Report" (March 2019), 104, 107, 109, 112-13.
[73] I. Abdillahi and A. Shaw, "Social Determinants and Inequities in Health for Black Canadians: A Snapshot" (Public Health Agency of Canada, September 8, 2020), 2, 4, 6.
[74] A. Cotter, "Trafficking in persons in Canada, 2018" (Statistics Canada, June 23, 2020), 4, 6, 7, 8.
[75] S. Conroy and A. Cotter, "Self-reported sexual assault in Canada, 2014" (Statistics Canada, July 11, 2017), 4, 7-10.

the greater number of records about their lives being created. They suffer an invasion of privacy in having those records created. And they are exposed to additional scrutiny of their lives in cross-examination based solely on the fact that their lives have been documented.[76]

58. In evaluating the constitutionality of ss. 278.92-278.94, special attention must be paid to the real impact these provisions have on the rights of sexual violence complainants from vulnerable populations. As noted by this Court in *Mills*:

> 92 When 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. K. Busby cautions that the use of records to challenge credibility at large
>
> > will subject those whose lives already have been subject to extensive documentation to extraordinarily invasive review. This would include women whose lives have been documented under conditions of multiple inequalities and institutionalization such as Aboriginal women, women with disabilities, or women who have been imprisoned or involved with child welfare agencies.
> >
> > ("Discriminatory Uses of Personal Records in Sexual Violence Cases" (1997), 9 *C.J.W.L.*148, at pp. 161-62.)
>
> 93 These concerns highlight the need for an acute sensitivity to context when determining the content of the accused's right to make full answer and defence, and its relationship to the complainant's privacy right.[77]

59. A complainant of sexual violence faces disadvantages not faced by complainants or witnesses of other crimes. A complainant of sexual violence whose life has been heavily documented faces even further disadvantages. Parliament has incrementally enacted legislative change to put complainants on equal footing with other types of complainants and the accused. In enacting ss. 278.92-278.94, Parliament sought to ensure complainants whose lives are heavily documented remain on equal footing and are not subject to inappropriate scrutiny on that basis. To allow unscreened use of their records without

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[76] See e.g. *R. v. Medwid* (2008), 80 W.C.B. (2d) 791, [2008] O.J. No. 4614 at para. 21 (ONSC).
[77] *Mills* at paras. 92-93. See also *R. v. Blake*, 2013 ONSC 481; *Medwid* at para. 21.

judicial scrutiny is to add barriers once again to reporting and testifying for vulnerable complainants.

## C. Advance Notice Enhances Trial Fairness

60. The right to a fair trial is a right enjoyed by all justice system participants. There are two general complaints about how the notice provision in s. 278.93(4) breaches an accused's fair trial rights: (1) the complainant may tailor her evidence upon notice, infringing the accused's right to cross-examination; and (2) defence disclosure before the Crown has presented a "case to meet" infringes the principle against self-incrimination. When "trial fairness" is evaluated from perspectives beyond that of the accused, s. 278.93(4) can not be said to infringe the accused's fair trial rights. Rather, notice enhances trial fairness.

### *i. The Impact on Cross-Examination*

61. Section 278.93(4) was found unconstitutional by the trial judge because of the potential that, given advance notice of the records on which she would be cross-examined, the complainant might tailor her evidence and this would negatively impact the efficaciousness of cross-examination.[78]

62. There are several difficulties with this reasoning.

63. First, this argument assumes that the complainant would change her evidence to account for the content of the record or avoid creating an inconsistency between her evidence-in-chief and the record. This is akin to presuming the "uncreditworthiness" of a sexual violence complainant and such devaluation raises s. 15 concerns.[79] Further, such an assumption perpetuates the unfounded myth that complainants of sexual violence should be regarded with suspicion and distrust.[80]

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[78] *R. v. J.J.*, 2020 BCSC 29 at paras. 72, 84.
[79] *O'Connor* at para. 123. See also, in the context of a cross-examination that did not occur, *Shearing* at para. 147.
[80] *Seaboyer* at 665, L'Heureux-Dubé J., dissenting.

64. Second, this argument ignores the reality that complainants are given "notice" of other material on which they may be cross-examined whenever they review a copy of their police statement, their preliminary inquiry transcript, photographs, or other relevant documents in preparation for trial. The reality of the criminal justice system is that a complainant may not testify for months or years after the offence. Complainants are routinely given the opportunity to review material to help refresh their memories without concern that they will tailor their evidence to accord with this material. Despite this practice, counsel have been able to effectively cross-examine complainants on inconsistencies between their evidence-in-chief and the pre-trial materials, as well as any potential tainting from other sources that may have affected those inconsistencies.

65. Third, this argument is not supported by the general rule excluding witnesses from trial. The exclusionary rule applies to prevent one witness's evidence from tainting another. In the ss. 278.92-278.94 context, the complainant is simply permitted to know which records she made, or were made using her information, that the accused intends to use for a purpose other than the purpose for which the records were created. The complainant is not being "tainted" by her own records.

66. Fourth, this argument ignores situations where an accused has first had to seek production of the records. Section 278.3 requires an accused give the same type of notice when seeking production of the records. If production is ordered, the complainant, then, will already know about the content of the records when the accused applies to admit the records under ss. 278.92-278.94. The notice requirement in s. 278.3 is constitutionally sound,[81] despite the complainant having knowledge of the record before any admissibility hearing.

67. Fifth, this argument ignores situations where the record contains "sexual activity" evidence falling within the parameters of s. 276. Now-repealed s. 276.1 required an accused to give the same type of notice before the hearing to determine admissibility of that evidence. This notice requirement had been interpreted as permitting notice to go to the complainant, to

[81] *Mills* at para 146.

allow her the opportunity to meaningfully engage with the application through the Crown.[82] This notice requirement was constitutionally sound.[83]

68. Sixth, this argument ignores other situations in which the complainant will have knowledge of the defence strategy or areas of cross-examination because she has already been subject to cross-examination once. Such situations include when a preliminary inquiry takes place, a mistrial is ordered, a re-trial is ordered after appeal, severance of co-accused results in multiple proceedings, or co-accused must tried in separate proceedings (i.e. youth and adult co-accused). The risk of a complainant tailoring her evidence in these cases does not amount to an infringement of an accused's *Charter* rights.

69. Seventh, the right to meaningful cross-examination does not entitle the accused to the most efficacious cross-examination possible. In the context of cross-examination being limited by virtue of a ruling relating to s. 276, this Court "acknowledge[d] that this cross-examination may have been less effective because counsel could not ask the final question".[84] A "less effective" cross-examination is not a constitutional infringement. Just as an accused is not entitled to the most beneficial procedures imaginable, neither is an accused entitled to the most effective cross-examination imaginable. Rather, the right to cross-examination must be balanced with other competing rights.

70. Eighth, and assuming the test in ss. 278.92-278.94 is met, the complainant can still be cross-examined on any inconsistencies between her evidence, the records, and any earlier statement. The complainant can be cross-examined about the circumstances of the creation of the records as well as how and when she became aware that the records would be used at trial. Cross-examination can still be fulsome even after the complainant has had "notice" that she may be cross-examined on her records.

71. Cross-examination has never been without limits. The argument that a complainant may tailor her evidence if she knows about the records on which she will be cross-examined is

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[82] *Darrach* at para. 55. See also, in s. 278.2 context, *O'Connor* at para. 137.
[83] *Darrach* at para. 72.
[84] *R.V.* at para. 98.

grounded in baseless suspicions about complainants of sexual violence and does not accord with the reality of criminal trial conduct.

72. What an accused characterizes as the potential for the complainant to tailor her evidence is really a desire to surprise the complainant with her own records. An inability to surprise the complainant with her records is not an infringement on the accused's ability to cross-examine the complainant. Further, the mere existence of a potential risk that the complainant will modify her evidence does not mean that the procedure permitting such risk is unconstitutional. Rather, this risk exists in many other situations and has not been found unconstitutional.

*ii. The Impact on Self-Incrimination*

73. The trial judge also found s. 278.93(4) unconstitutional because it required disclosure by defence before the Crown had established a "case to meet", contrary to the right against self-incrimination as protected by s. 7.[85]

74. The right delineated in s. 11(c) refers to the accused's lack of obligation to assist in his prosecution.[86] Requiring that the accused demonstrate the admissibility of his evidence, and permitting the complainant to know which of her private records may become part of the trial, does not amount to obliging the accused to assist in his prosecution.

75. In *Darrach*, this Court held that s. 276 – which requires an accused to establish the admissibility of sexual activity evidence prior to the Crown demonstrating its "case to meet" – does not require the accused to make premature or inappropriate disclosure. The accused has neither a legal obligation nor an evidentiary burden to seek to introduce evidence of sexual activity. The accused chooses to embark on the process under s. 276 and the mere tactical pressure to do so does not offend the principle against self-incrimination.[87] Similarly, the accused chooses to embark upon the process under ss.

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[85] *J.J.* at para. 90.
[86] *R. v. P.(M.B.)*, [1994] 1 S.C.R. 555 at 577.
[87] *Darrach* at para. 50.

278.92-278.94. There is no obligation to seek to admit the complainant's records, there is only a tactical choice.

76. The trial judge distinguished *Darrach* in observing that s. 276 materials are adduced to advance a defence,[88] whereas records may be used for impeachment or otherwise challenging the Crown's case. Therefore, the argument extends, where the materials are used to advance a defence, requiring the defence give notice in advance of the Crown calling its "case to meet" is permissible.

77. While s. 276 materials are often used to advance the "defence" of consent or honest but mistaken belief in communicated consent, they are also used to challenge the Crown's case. For example, to show that the complainant has a motive to lie,[89] where the complainant has offered inconsistent statements on the existence of a sexual relationship with the accused,[90] or to challenge Crown-led evidence of pregnancy or injury.[91] Therefore, it is immaterial whether the materials are sought to be used to challenge the Crown's case or to raise a defence: requiring notice in advance of the Crown calling its evidence is constitutionally sound.

78. Requiring advance notice of the use of the complainant's records does not amount to a breach of the right against self-incrimination. The accused is not obliged to make the application; he makes the tactical decision to make the application to use the records to challenge the Crown's case, raise a defence, or both. The accused simply must ensure the records are truly admissible. The fact that this application takes place before the Crown calls evidence at trial does not amount to a constitutional infringement.

*iii. Trial Fairness*

79. As times passes, society's understanding of the harms caused by sexual violence continues to deepen. These harms can affect trial fairness if not properly considered. First, sexual

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[88] *J.J.* at para. 62.
[89] See e.g. *Seaboyer* at 613-14.
[90] See e.g. *Goldfinch* at para. 63.
[91] *R.V.* at paras. 56-58.

violence can have a profound impact on a complainant's physical and mental health;[92] a fair trial requires that records created to address those health issues are not unnecessarily used to put the complainant on trial. Second, biased reactions to the harms caused by sexual violence and stereotypes about sexual violence still exist; a fair trial requires that any of the complainant's records are not adduced under the guise of myths masquerading as relevant evidence. Finally, testifying about the sexual violence can already be traumatizing;[93] a fair trial requires that complainants are treated with dignity and respect. To ensure these harms do not adversely impact trial fairness, the complainant must be treated with fairness.

80. Ambushing a witness is not fair. While the right to cross-examination is constitutionally-protected, it does not include the right to "defend by ambush". In the context of s. 276, the requirement for "detailed particulars" ensures "that defence evidence does not take the Crown or complainant by surprise"[94] and advance notice contemplates the opportunity to consult with the complainant about the application.[95] Similarly, advance notice of the ss. 278.92-278.94 application ensures the complainant is not unfairly taken by surprise when confronted with her private records.

81. "Surprise" does not further the truth-seeking function of the court. Instead, surprise has the potential to distort the truth-seeking function. As noted above, complainants are given the opportunity to review other material in advance of trial. This serves the truth-seeking function of the court, rather than reduce the trial process to a contest of memories. Any impact of this pre-trial review of material can be explored through cross-examination and often is, to great effect.

82. Pre-trial notice of the complainant's records serves a similar purpose – it allows the complainant an opportunity to refresh her memory on a document she either created or about whose contents she should be familiar. Records will never be documents entirely foreign (and therefore, surprising) to a complainant – that is why they fall under this records

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[92] *Goldfinch* at para. 37.
[93] *R.V.* at para. 33.
[94] *R.V.* at para. 48.
[95] *Darrach* at para. 55.

screening regime. But the fact that the accused is in possession of them, the fact that the accused wishes to cross-examine the complainant on them, the passage of time since the records were created, or the content itself may take the complainant by surprise and prevent the complainant from giving clear and candid evidence.[96] Therefore, the truth-seeking function is better served by giving advance notice of the potential use of the complainant's private records. Promoting the truth-seeking function of the court, in turn, furthers trial fairness.

83. Trial fairness is also enhanced when the complainant's equality, dignity, and privacy rights are respected. Advance notice respects the complainant's rights. Knowing how much of her private life will be put on trial before testifying will allow a complainant to assess whether she wishes to proceed. Testifying in a trial of sexual violence can be traumatizing – in recounting the offence itself, the complainant is describing something that is "an assault upon human dignity and constitutes a denial of any concept of equality for women".[97] If the complainant is then ambushed with cross-examination of other areas of her private life, the insult to her personal dignity is perpetuated.

84. The advance notice not only protects the rights of a complainant at trial, it also works within the records screening regime as a whole to advance the policy goal of encouraging the reporting of offences and the obtaining of treatment. Without a clear notice provision, a complainant will not know whether her life will be put on trial. Knowing that she may be surprised during cross-examination with her private records will have a chilling effect on reporting, participating in trials, obtaining counselling, confiding in teachers/counsellors/mentors, and obtaining medical treatment.[98]

85. Section 278.93(4) addresses complainants' fears of trial procedures and embarrassment, which are significant barriers to reporting.[99] Section 278.93(4) operates much like the

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[96] See *R. v. M.S.*, 2019 ONCJ 670 at para. 104; see also para. 105.
[97] *Osolin* at 669.
[98] See e.g., in the context of production of records, *Osolin*, at 628-29, L'Heureux-Dubé J., dissenting.
[99] *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122 at 131-33.

mandatory publication ban in cases of sexual violence: it gives the complainant some certainty about the trial process and how her privacy will be considered and protected.

86. Having regard to all the competing interests, advance notice of the potential use of the complainant's private records enhances, rather than detracts from, trial fairness.

*iv. Efficient Adjudication of Criminal Trials*

87. The fair and efficient adjudication of criminal trials requires that notice and the admissibility hearing be made, whenever possible, in advance of trial. Sections 278.93-278.94 do not specify when, during the trial process, the admissibility hearing is to take place. However, many mischiefs would arise if these provisions were interpreted, as the trial judge did, as requiring the hearing to take place after the complainant's examination-in-chief was complete or during cross-examination:

a) To allow the complainant the opportunity to consult with counsel, a mid-trial admissibility hearing would require an adjournment before the hearing could take place. The inevitable bifurcation of the trial would lead to trial scheduling issues. Such a default approach seems contrary to the responsibility of all justice system participants to prevent trial delays.[100]

b) A bifurcated process creates added issues with jury trials.

c) A bifurcated process also puts the complainant at a testimonial disadvantage, being cross-examined on a later date (sometimes months later) about areas covered in her examination-in-chief.

d) The complainant may feel compelled to choose between her right to consult counsel and her desire to complete her evidence once she has started.

e) The complainant will not have been in a position to make an informed decision about whether or not to participate in the trial thus far because she did not know how much of her private life would be subject to cross-examination.

f) The complainant may be prevented from starting, continuing, or making progress in any treatment which covers discussions about the offence (due to the general prohibition of not discussing the evidence whilst under cross-examination) or the experience of testifying (which has not concluded).

[100] *R. v. Cody*, 2017 SCC 31 at para. 36.

g) The Crown is prevented from consulting with the complainant about the application.

88. It has been held that a mid-trial hearing may save the complainant from the trauma of an unnecessary pre-trial application if, during examination-in-chief, it becomes evident that the records are not relevant.[101] With respect, such an approach does not save the complainant from unnecessary trauma: she is not a compellable witness at the admissibility hearing, she is not forced to participate in the hearing, and the hearing exists to take into account her privacy rights. This approach only saves the accused from having to articulate how the records are relevant until mid-trial.

89. The efficient administration of criminal trials in an already heavily-burdened system requires that admissibility hearings, whenever possible, be heard in advance of the trial. Much like efforts to improve trial fairness, timely adjudication of criminal matters protects the integrity of the justice system.

90. This records screening regime does not put complainants' rights ahead of an accused's, nor give complainants an advantage, rendering the accused's trial unfair. The actual objective and effect of the regime is to give meaning to complainants' rights alongside the accused's, to remove another disadvantage uniquely faced by complainants of sexual violence, and to ensure that trials of sexual violence are fairly adjudicated.

## PART IV – SUBMISSIONS ON COSTS

91. The Intervener, Attorney General of Nova Scotia does not seek costs and asks that no costs be awarded against it.

[101] *R. v. A.M.*, 2020 ONSC 4541 at para. 88.

## PART V – ORDER SOUGHT

92. The Intervener, Attorney General of Nova Scotia submits that the Constitutional Questions should be answered as follows:

a) 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* (U.K.), 1982 c.11 and does not constitute a reasonable limit pursuant to s. 1?

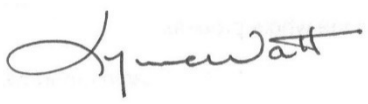
Yes, s. 278.93(4) does not infringe s. 7.

b) Does the "records screening regime" in ss. 278.92 to 278.94 of the Criminal Code violate ss. 7, 11(c), or 11(d) in a manner that cannot be justified under s. 1 of the Charter?

No, ss. 278.92-278.94 do not infringe ss. 7, 11(c), or 11(d).

93. The AGNS seeks permission to present oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of January, 2021.



*for:*

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**ERICA KORESAWA**
Counsel for the Intervener,
Attorney General of Nova Scotia

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