Court File No.: 39133

IN THE SUPREME COURT OF CANADA
(On Appeal from the Supreme Court for British Columbia)

B E T W E E N :

HER MAJESTY THE QUEEN

Appellant
(Respondent)

- and -

J.J.

Respondent
(Applicant/Defendant)

- and -

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PART I: OVERVIEW OF ARGUMENT

1. As this Court recognized in *R. v. Barton*, myths, stereotypes and sexual violence against women are tragically common.[1] Most women who experience sexual assault never report it. And for those who do, the criminal trial can take a terrible toll. Some complainants describe the trial as nearly as traumatic as the sexual assault itself.[2]

2. In *R. v. Levogiannis*, this Court made clear that the goal of the court process is truth seeking, and that the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth.[3] Yet the truth-seeking function of the court is impaired when the trial process itself causes such harm to the complainant that she cannot articulate her truth, or when her truth is overwhelmed by myths and stereotypes that insidiously infect the trial process.

3. The narrow issue on this appeal (to be distinguished from the broader cross-appeal) is whether the seven-day notice requirement in s.278.93(4) of the *Criminal Code* violates an accused's right to a fair trial. The Intervenor the Attorney General of Ontario adopts the Appellant's argument that the notice requirement causes no unfairness.

4. In this factum, the Attorney General of Ontario submits that rather than detracting from trial fairness, the notice requirement *enhances* it. An assessment of the fairness of the trial process must be made "from the point of view of fairness in the eyes of the community and the complainant", and "not just the accused".[4] The notice requirement in s. 278.93(4) enhances fairness in three ways:

a. It reduces the harm a complainant suffers by the criminal trial process and ensures she can speak her truth;

b. It ensures the parties and the court will have sufficient time to reflect on the proposed use of the record to ensure that it is admissible and does not invoke myths and stereotypes; and,

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[1] *R. v. Barton*, 2019 SCC 33 at ¶1.
[2] Elaine Craig, "The Inhospitable Court" (2016) 66:2 U Toronto LJ 197 at 228 [TAB 14].
[3] *R. v. Levogiannis*, [1993] 4 S.C.R. 475 at 483.
[4] *R. v. Mills*, [1999] 3 S.C.R. 668 at ¶72, citing *R. v. E.(A.W.)*, [1993] 3 S.C.R. 155 at ¶86.

c. It ensures a complainant does not have to choose between (1) asserting her privacy interest in a record and suffering the resulting delay of a mid-trial application; or (2) foregoing her legislated rights in order to bring the difficult trial process to an end.

5. The Attorney General of Ontario intends to intervene as of right on the cross-appeal and will address the broader issue of participatory rights in its factum on the cross-appeal.

PART II: STATEMENT OF POSITION

6. The Intervenor the Attorney General of Ontario submits that for the reasons set out in the Appellant's factum, and for those articulated reasons herein, s. 278.93(4) of the *Criminal Code* does not infringe s. 7 of the *Canadian Charter of Rights and Freedoms*.

7. The Attorney General of Ontario adopts the Appellant's arguments that any infringement can be saved by s. 1 of the *Charter*. The Attorney General of Ontario adopts, in the alternative, the Appellant's submissions on remedy.

PART III: BRIEF OF ORAL ARGUMENT

A. Background and Social Context

i. Sexual Offences Cause Particular Harms

8. A sexual assault is very different from other assaults. It is more than a simple act of violence. It represents an intrusion on the most private aspects of a person's body, and on her dignity. It is also an offence which is heavily stigmatized; victims are often blamed by others, and often blame themselves, for their victimhood.[5] Sexual assaults can cause long-term damage to complainants, including PTSD, eating disorders, substance abuse, depression, and anxiety.[6] The inter-generational effects of sexual assault are well-known. At its core, sexual assault constitutes a denial of any concept of equality for women.[7]

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[5] Lori Haskell & Melanie Randall: *The Impact of Trauma on Adult Sexual Victims* (2019) – Report published by Justice Canada at 8-10 [TAB 23].
[6] Heather Littleton et al. "Sexual Assault Victims' Acknowledgement Status and Revictimization Risk" (2009) 33 Psychology of Women Q at 34 [TAB 17]; Lorna Breen & Melissa Boyce, "Why did she talk to him again? The Effects of the Justice Motive, Relationship Type and Degree of Post Assault Contact on Perceptions of Sexual Assault, 2018 Journal of Interpersonal Violence 1 at 2 [TAB 24].
[7] *R. v. Osolin,* [1993] 4 S.C.R. 595 at ¶165.

ii. Sexual Assault Trials Cause Harm to Complainants

9. It is estimated that while 30 percent of women aged 15 or older report having been sexually assaulted, only five percent of victims report a sexual assault to the authorities.[8] Multiple studies establish that stigma, and a perception that they will be blamed, re-victimized, not believed, or treated disrespectfully are key contributors to victims' under-reporting of sexual assault to police. Victims' reluctance to report is often reinforced by the negative experiences described by other victims who spoke with police or participated in the criminal justice system.[9]

10. Where a sexual assault complainant has reported the offence, the trial process often causes her harm. Indeed, psychiatry Professor Judith Herman wrote that "[i]f one set out by design to devise a system for provoking intrusive post-traumatic symptoms, one could not do better than a court of law" [10]. Similarly, law Professor Elaine Craig notes that some complainants describe the criminal trial as nearly as traumatic as the sexual assault itself. [11] In her recent book, "Putting Trials on Trial: The Failure of the Legal Profession", Craig uses verbatim criminal trial transcripts from the last decade to illustrate the realities that face sexual assault complainants in trial courts across Canada. She analyses the practices of defence lawyers (and Crown attorneys and trial judges), and identifies how the legal profession unnecessarily and sometimes unlawfully contributes to the harms experienced by complainants in the sexual assault trial process.[12]

11. Numerous reasons have been identified for the harm a trial causes a complainant, including:

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[8] *Gender-based violence and unwanted sexual behaviour in Canada, 2018*: Initial findings from the Survey of Safety in Public and Private Spaces by Adam Cotter and Laura Savage. Release date: December 5, 2019 at 15, 20 [TAB 16].

[9] *Ibid,* at 20 [TAB 16]; Patricia A. Frazier and Beth Haney, "Sexual Assault Cases in the Legal System: Police, Prosecutor and Victim Perspectives" (1996) 20:6 L and Human Behaviour 607 at 611 [TAB 26]; Legislative Assembly of Ontario, Select Committee on Sexual Violence and Harassment, *Final Report* (2015) at 28.

[10] Judith Herman M.D., *Trauma and Recovery* (New York: Basic Books, 1992) at 52-53 of PDF [TAB 20].

[11] Elaine Craig, "The Inhospitable Court" (2016) 66:2 U Toronto LJ 197 at 228 [TAB 14].

[12] Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal, QUE & Kingston, ON: McGill-Queen's University Press, 2018), at 3-99 [TAB 15].

a. The trial process can reawaken the original traumatic event in the complainant's mind, force her to re-experience it, and thus produces a re-traumatization[13];

b. Some defence practices involve 'whacking' the complainant, which utilizes tools of prolonged cross-examinations on humiliating details[14]. While such cross-examinations should be, and often are, curtailed by the presiding Judge, Professor Craig argues that the legal profession still celebrates defence counsel who employ 'whacking' tactics[15];

c. The rituals of the courtroom, such as its physical layout and the robing of those educated in the law, make clear that the complainant plays a subordinate role that often mirrors the gender, race and socio-economic status-based societal hierarchies in which the problem of sexual violence is rooted.[16] For some complainants, their subordinate role reifies their feelings of self-blame, shame, and powerlessness[17]. For Indigenous women, who are disproportionately the victims of sexual violence, the ritualized representation of imperialism and colonial power present in criminal trials can compound these negative effects[18];

d. The use of myths and stereotypes in a criminal trial (discussed in greater detail below) has the "violent impact" of requiring women to provide irrelevant, gender-based information or to refute sexist-stereotype-infused cross-examinations;[19] and,

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[13] Thomas G. Gutheil et al., "Preventing "critogenic" harms: minimizing emotional injury from civil litigation" (2000) 28 J of Psychiatry & L 5 at 13 [TAB 31]; see also Bree Cook, Fiona David and Anna Grant, *Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia*, (1999) Australian Institute of Criminology Research and Public Policy Series No. 19 at 57 [TAB 13]; Jeffery Epstein, Benjamin Saunders & Dean Kilpatrick, "Predicting PTSD in Women with a History of Childhood Rape" (1997) 10:4 J Traumatic Stress 573 at 580-581 [TAB 19]; Judith Herman, "The Mental Health of Crime Victims: Impact of Legal Intervention: (2003) 16 J Traumatic Stress 159 at 159-162 [TAB 21].

[14] David Tanovich, ""Whack" No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases" (2013) 45:3 Ottawa L Rev. 495 at 495, 498-499, 502-504, 507 [TAB 30].

[15] Elaine Craig, "The Inhospitable Court" (2016) 66:2 U Toronto LJ 197 at 228 [TAB 14].

[16] *Ibid,* at 214 [TAB 14].

[17] *Ibid,* at 221-224 [TAB 14]; David Tanovich, ""Whack" No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases" (2013) 45:3 Ottawa L Rev. 495 at 495, 498-499, 502-504, 507 [TAB 30].

[18] Elaine Craig, "The Inhospitable Court" (2016) 66:2 U Toronto LJ 197 at 219 [TAB 14]; Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal, QUE & Kingston, ON: McGill-Queen's University Press, 2018) at 186-190 [TAB 15].

[19] Elaine Craig, "The Inhospitable Court" (2016) 66:2 U Toronto LJ 197 at 227 [TAB 14].

e. A complainant encounters a marked disparity between her own timetables of recovery and the timetable of the justice system. Her efforts to re-establish her sense of safety will most likely be undermined by the ongoing intrusions of legal proceedings.[20]

In light of these considerations, it is no surprise that complainants sometimes do not want to continue the trial process once it has begun. Nonetheless, complainants can be compelled to continue by the issuance of a warrant.[21]

iii. Myths and Stereotypes Remain Pervasive in Criminal Trials

12. Myths and stereotypes about complainants which permeate the trial process are not limited to the twin myths under s.276 of the *Criminal Code*. While there is no exhaustive list, courts have recognized a variety of myths which carry a potential to distort the truth-seeking function of the trial, including:

a. There is a right or expected way for a victim of sexual assault to behave before, during, or after the sexual assault[22];

b. A 'real' victim would immediately report a sexual assault[23];

c. A 'real' victim would take steps to avoid the person who assaulted her and would not continue to associate with him willingly or enthusiastically[24];

d. A 'real' victim would be distraught and visibly upset following the assault[25];

e. Women who complain of sexual assault are often lying to protect their reputations, to cover up for regret about consensual acts, or as revenge for a spurned advance[26];

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[20] Judith Herman M.D., *Trauma and Recovery* (New York: Basic Books, 1992) at 177 of PDF [TAB 20].
[21] This occurred in *R. v. Khaery,* 2014 ABQB 676, discussed in Elaine Craig, "The Inhospitable Court" (2016) 66:2 U Toronto LJ 197 at 229 [TAB 14].
[22] *R. v. Lacombe,* 2019 ONCA 938 at ¶¶36-39, ¶¶43-45; *R. v. Kiss*, 2018 ONCA 184 at ¶101; *R. v. A.B.A.* 2019 ONCA 124 at ¶¶4-12
[23] *R. v. D.D.*, 2000 SCC 43 at¶65; *R. v. Seaboyer,* [1991] 2 S.C.R. 577 at ¶139 *per* L'Heureux-Dubé J. dissenting in part; *R. v. Lacombe*, 2019 ONCA 938 at ¶¶40-42.
[24] *R. v. A.J.R.D.,* 2017 ABCA 237 at ¶¶39-48, aff'd 2018 SCC 6 at ¶2; *R. v. A.B.A.*, 2019 ONCA 124 at ¶11; *R. v. C.A.M.,* 2017 MBCA 70 at ¶¶30-31, ¶¶45-53; *R. v. E.C.S.P.,* 2003 MBQB 93 at ¶¶34-36.
[25] *R. v. Seaboyer,* [1991] 2 S.C.R. 577 at ¶141 *per* L'Heureux-Dubé J. dissenting in part; *R. v. Nyznik*, 2017 ONSC 4392 at ¶193.
[26] *R. v. Seaboyer,* [1991] 2 S.C.R. 577 at ¶141 *per* L'Heureux-Dubé J. dissenting in part.

f. Women fantasize about rapes and make up stories that rape occurred[27]; and,

g. The existence of mental health issues or the fact of seeing a therapist or counsellor makes a complainant less credible or reliable.[28]

13. Canadian courts have repeatedly recognized that reliance on stereotypes to found credibility assessments is impermissible and gives rise to legal error.[29] Nonetheless, myths and stereotypes are insidious, and can unconsciously influence a trier of fact's assessment of a complainant's credibility or reliability. This Court made clear in *R. v. Find* that myths and stereotypes about sexual assault complainants:

> are particularly invidious because they comprise part of the fabric of social 'common sense' in which we are daily immersed. Their pervasiveness, and the subtlety of their operation, create the risk that victims of abuse will be blamed or unjustly discredited in the minds of both judges and jurors.[30]

As L'Heureux-Dubé J. commented in *R. v. Seaboyer*, myths and stereotypes "operate at a level of consciousness that makes it difficult to root them out and confront them directly".[31]

iv. Complainants are Vulnerable to a Finding that They are Not Credible or Reliable For Reasons Other than a Lack of Truthfulness

14. There are three aspects to the experience of a sexual assault complainant that can make it difficult to give evidence about the assault that appears credible and reliable, even if the complainant is telling the truth.

15. First, complainants are not immune to myths and stereotypes any more than other members of society. Indeed, unlike justice system professionals, most women will have had no training in identifying when a myth or stereotype is afoot. A complainant might have acted in accordance with

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[27] *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at ¶141 *per* L'Heureux-Dubé J. dissenting in part.
[28] *R. v. Mills*, [1999] 3 S.C.R. 668 at ¶119; *R. v. Osolin*, [1993] 4 S.C.R. 595 at ¶¶55.
[29] *R. v. A.J.R.D.*, 2018 SCC 6 at ¶2; *R. v. A.B.A.*, 2019 ONCA 124 at ¶¶8-12; *R. v. Lacombe*, 2019 ONCA 938 at ¶52.
[30] *R. v. Find*, 2001 SCC 32 at ¶103.
[31] *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at ¶144 *per* L'Heureux-Dubé J. dissenting in part. Indeed, in *R. v. A.B.A.*, 2019 ONCA 124 at ¶8, the Ontario Court of Appeal held that the trial Judge had negatively assessed the complainant's credibility based on a lack of correspondence between the complainant's behaviour and the behaviour one would "expect" of a person who had been sexually assaulted, notwithstanding that the trial Judge had instructed herself she must not rely on myths and stereotypes.

a myth she internalized yet be unable on cross-examination to identify that myth as the explanation for her behaviour. For example, some women initially conceptualize a sexual assault as a miscommunication, seduction, or instance of bad sex, or are unsure how to label the experience; those women are significantly more likely to continue their relationship with the assailant after the assault.[32] Similarly, prior victimization, motivation to maintain the relationship, financial dependence, complex emotional ties or how a woman is socialized to view herself within the relationship can impact her resistance and response to sexual coercion, including post-offence contact.[33] But when a complainant cannot explain her own behaviour, her credibility or reliability becomes suspect.[34]

16. Second, research shows that in the face of a serious threat, the brain releases stress hormones that dramatically impair the functioning of the prefrontal cortex and reduce an individual's ability to reason, plan, and think.[35] Stress can have an impact on the encoding and consolidation of memories as well as retrieval and integration of memories, in particular those of emotional material.[36] Acute stress can impair brain function, and one who has a sense of control over a situation (even if this is an illusion) is less impaired by stress exposure compared to one who feels out of control.[37] Speaking about the experience in a courtroom under extreme stress will

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[32] Heather Littleton et al. "Sexual Assault Victims' Acknowledgement Status and Revictimization Risk" (2009) 33 Psychology of Women Q a, 33-34, 40 [TAB 17].

[33] Paula S. Nurius & Jeanette Norris, "A Cognitive Ecological Model of Women's Response to Male Sexual Coercion in Dating" (1996) 8:1 J Psychology & Human Sexuality 117 at 123-124 [TAB 27]; Lorna Breen & Melissa Boyce, "Why did she talk to him again? The Effects of the Justice Motive, Relationship Type and Degree of Post Assault Contact on Perceptions of Sexual Assault" (2018) J Interpersonal Violence 1 at 5-6 [TAB 24].

[34] *Ibid,* Breen & Boyce at 4, 13 [TAB 24]. The authors argue that while individuals can reject sexual assault myths when applied generally, they are prone to biases in specific situations when a victim violates their schemas for how a victim is supposed to behave.

[35] Karen Bellehumeur, "A Former Crown's Vision for Empowering Survivors of Sexual Violence" (2020) 37 Windsor YB Access Just at 5 [TAB 22], citing Melanie Randall & Lori Haskell "Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping" (2013) 36: 2 Dal LJ 501 at 518; Lori Haskell & Melanie Randall: *The Impact of Trauma on Adult Sexual Victims* (2019) Report by Justice Canada at 19-20 [TAB 23].

[36] Lars Schwabe, (2016). "Memory Under Stress: From Single Systems to Network Changes" (2016) 45:4 European J Neuroscience 478 at 479, 485 [TAB 29].

[37] Amy Arnsten, "Stress signalling pathways that impair prefrontal cortex structure and function" (2009) 10:6 Nat Rev Neuroscience 410 at 410-411 [TAB 12].

reasonably increase a complainant's difficulty with recall. It can therefore be difficult for complainants to recall what occurred, as well as to explain why they reacted as they did[38]; both these difficulties can make for fruitful cross-examination.

17. Third, given the subject matter of a sexual assault trial, a complainant may deliver her testimony in an emotional fashion. However, complainants who cannot deliver their evidence in a manner that is rational, responsive, sober, and consistent risk being disbelieved.[39]

B. The Legislative Scheme in Sections 278.92 to 278.94

i. The Basic Requirements of Sections 278.92 to 278.94 of the Criminal Code

18. In prosecutions for certain enumerated offences, no "record" relating to a complainant in the possession of an accused shall be admitted into evidence except in accordance with ss.278.92 to 278.94 of the *Criminal Code*. This two-stage process requires the court to be satisfied at the first stage that the procedural requirements have been met – the application is made in writing, setting out detailed particulars of the evidence and its relevance to an issue at trial, served on the Crown and the clerk "at least seven days previously, or any shorter interval that the judge… may allow in the interests of justice", and the evidence must be "capable of being admissible" under s.278.92 or s.276(2). If the court is satisfied that these criteria are met, then it shall grant the application and hold a hearing under s.278.94 to determine whether the evidence in question is admissible under s.276(2) or 278.92(2).

19. Section 278.94(3) of the Criminal Code gives the complainant the right to be represented by counsel at the hearing stage. There is no legislative requirement that the complainant receive a copy of the application record. However, courts have held that the complainant must receive a copy of the application record so that she can instruct her counsel[40] and make meaningful submissions at the hearing from the perspective of the person directly affected by the order

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[38] A sexual assault victim's inability to explain why she reacted as she did can lead to feelings of confusion and guilt: Karen Bellehumeur, "A Former Crown's Vision for Empowering Survivors of Sexual Violence" (2020) 37 Windsor Y B Access Just at 5 [TAB 22], citing Lori Haskell & Melanie Randall: *The Impact of Trauma on Adult Sexual Victims* (2019) – Report published by Justice Canada at 11-15 [TAB 23].

[39] Elaine Craig, "The Inhospitable Court" (2016) 66:2 U Toronto LJ 197 at 211-212, 215-218 [TAB 14]; [39] Lori Haskell & Melanie Randall: *The Impact of Trauma on Adult Sexual Victims* (2019) – Report published by Justice Canada at 34 [TAB 23].

[40] *R. v. A.C.*, 2019 ONSC 4270 at ¶¶32-44.

requested.[41] Moreover, as the court pointed out in *R. v. Boyle*, it would be "extremely unreasonable" to read the legislation to permit the complainant to participate in the hearing at which the accused will present his proposed evidence and make submissions about its relevance and admissibility, but not to permit the complainant access to the application record.[42]

20. Nonetheless, there is sufficient flexibility for judicial discretion on a case-by-case basis. For example, if the accused is concerned that the application record contains too much detail about the defence theory or references other witness statements that might affect a complainant's testimony, the court can order that the application record be redacted after the first stage and before being provided to the complainant for use on the second stage.[43]

ii. The Definition of Record Within the Meaning of Section 278.1

21. The private records screening regime applies only to records of the complainant as defined by s.278.1. That section defines "record" as "any form of record that contains personal information for which there is a reasonable expectation of privacy". It includes an enumerated list of records, but this list is not exclusive.[44] Records do not have to arise out of trust-like, confidential, or therapeutic relationships in order to fall within the definition.[45] Nor is a record limited to paper records; digital records are also captured.[46]

22. Not every record in the accused's possession will be subject to the record screening regime. As this Court held in *R. v. Mills*, "[o]nly documents that truly raise a legally recognized privacy interest are caught and protected".[47]

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[41] *R. v. Boyle*, 2019 ONCJ 11 at ¶¶10-43; *R. v. F.A.*, 2019 ONCJ 391 at ¶64; *R. v. Simon*, 2019 ABPC 186 at ¶¶30-58.
[42] *R. v. Boyle*, 2019 ONCJ 11 at ¶33.
[43] *R. v. T.C.*, 2019 ONSC 1467 at ¶9 [TAB 8].
[44] *R. v. H.A.R.*, 2019 ONSC 7415 at ¶25 [TAB 4]; *R. v. R.M.R.*, 2019 BCSC 1093 at ¶37; *R. v. Navia*, 2020 ABPC 20 at ¶78; *R. v. M.S.*, 2019 ONCJ 670 at ¶¶33-36.
[45] *R. v. Quesnelle*, 2014 SCC 46 at ¶27; *R. v. McKnight*, 2019 ABQB 755 at ¶¶10-11. Although *R. v. Quesnelle* and certain other cases referred to herein dealt with the definition of "record" in the context of third-party records applications before the enactment of Bill C-51, the definition is the same except that Parliament removed the words "without limiting the generality of the foregoing" under the new regime as redundant: *R. v. M.S.*, 2019 ONCJ 670 at ¶34.
[46] *R. v. Taseen*, 2017 ONSC 7176 at ¶2 [TAB 9], ¶34; *R. v. Z.N.*, 2018 ONCJ 501 at ¶¶1-6.
[47] *R. v. Mills,* [1999] 3 S.C.R. 668 at ¶99.

23. Disputes as to whether a record falls within the definition in s.278.1 generally revolve around records which are not enumerated in the definition. In particular, the litigation since the enactment of Bill C-51 has, for the most part, focused on communications between the complainant and an accused. Courts have generally taken a contextual approach in determining whether communications in the accused's possession fall under the definition of "record".[48] Factors which the courts have considered in determining whether a communication falls within the meaning of "record" include[49]:

a. the content of the record, including:
   i. whether the information in the record could be considered core biographical information;
   ii. if the record does not contain sexual history, whether it nonetheless contains something akin to sexual history;
   iii. whether the record contains information which has historically and improperly been used to discredit sexual assault complainants;

b. which parties were, or were expected to be, privy to the information at the time of the communication;

c. the risk that the receiver would reveal the communication to others;

d. the nature of the relationship between the parties at the time of the communication and the time of the application[50];

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[48] *R. v. A.C.,* 2020 ONSC 159 at ¶22 [TAB 1], citing *R. v. Quesnelle,* 2014 SCC 46 at ¶27, ¶29, and ¶37; *R. v. A.M.,* 2020 ONSC 1846 at ¶109; *R. v. R.M.R.*, 2019 BCSC 1093 at ¶37; *R. v. Navia*, 2020 ABPC 20 at ¶90.

[49] *R. v. A.M.,* 2020 ONSC 1846 at ¶102; *R. v. B.H.,* 2020 ONSC 4533 at ¶¶15-21 [TAB 2]; *R. v. Mai*, 2019 ONSC 6691 at ¶¶21-26; *R. v. Navia,* 2020 ABPC 20 at ¶¶90-100; *R. v. M.S.*, 2019 ONCJ 670 at ¶50, ¶61.

[50] The fact that the complainant and accused were strangers to one another has been found to undermine the argument that the complainant had a reasonable expectation of privacy in the communication: *R. v. Mai*, 2019 ONSC 6691 at ¶¶30-31. By contrast, in the context of a personal or intimate relationship, there is a reasonable inference that a complainant who communicated highly personal information to the accused expected it to be kept in confidence: *R. v. T.A.*, 2020 ONSC 2613 at ¶31.

e. with respect to social media communications, the nature of the social media application and whether the communication would be destroyed once sent (such as Snapchat);

f. whether there was an express desire that the communication remain private or such a desire could be inferred;

g. the purpose for which the information was provided to the accused; and,

h. the manner in which the information came into the accused's possession, including whether it was surreptitiously gained.

In addition, where the record is a video or photo, courts have considered the context in which it was taken.

24. Some courts have found that a complainant's expectation of privacy in a communication with an accused is reduced once she has gone to the police to make a criminal complaint.[51] However, other courts have rejected that position. In *R. v. T.A.*, the court held that a complainant should not be expected to contemplate a potential assault and its legal consequences at the time a communication is made, and that such reasoning "lowers a woman's privacy rights because of a theory that she should have anticipated being a victim of sexual assault". The *T.A.* court also noted that the competing interests between an accused and complainant are the reason Parliament enacted s.278.92, and there is a circularity in allowing the criminal process to limit the complainant's reasonable expectation of privacy.[52]

25. A review of the jurisprudence reveals that in many cases, courts have concluded that materials in the accused's possession were *not* a record within the meaning of s.278.1. Those cases include:

a. Innocuous communications between the complainant and accused about things like daily activities or plans to meet;[53]

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[51] *R. v. X.C.*, 2020 ONSC 410 at ¶62 [TAB 10]; *R. v. A.M.*, 2020 ONSC 1846 at ¶106; *R. v. W.M.*, 2019 ONSC 6535 at ¶50; *R. v. Mai*, 2019 ONSC 6691 at ¶25; *R. v. Marrello*, [2020] O.J. No. 3617 (Crt. Jus.) at ¶170 [TAB 6].
[52] *R. v. T.A.*, 2020 ONSC 2613 at ¶¶26-31; *R. v. G.E.*, 2020 ONCJ 451 at ¶¶22-23 [TAB 3].
[53] *R. v. Navia*, 2020 ABPC 20 at ¶¶2-6; ¶¶80-101; *R. v. T.A.*, 2020 ONSC 2613 at ¶38; *R. v. R.M.*, 2019 ONSC 7290 at ¶16, ¶¶26-31; *R. v. G.E.*, 2020 ONCJ 451 at ¶¶47-48 [TAB 3]; *R. v. A.M.*, 2020 ONSC 1846 at ¶¶104-123; *R. v. White*, 2020 ONSC 1808 at ¶1, ¶4, ¶¶14-20; *R. v. W.M.*, 2019 ONSC 6535 at ¶43, ¶56.

b. Discussions about the complainant's drug use, on the basis that at the time the conversation occurred the accused was a stranger;[54]

c. A voicemail from the complainant to the accused after the accused was charged, in which she expressed animus toward him[55];

d. A four-second cell phone video the accused took of the complainant as she left his house following the alleged sexual assault[56];

e. WeChat messages that the complainant would not likely have cared if the accused shared with others[57];

f. An audio recording of an argument between the complainant and accused about marital assets[58];

g. A "selfie" of the complainant and accused taken at a bar on the night of the alleged sexual assault.[59] [60]

26. By contrast, cases in which courts have held that certain materials in an accused's possession *were* records within the meaning of s.278.1 were limited to those in which the record truly engaged a legally recognized privacy interest, and include:

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[54] *R. v. Mai*, 2019 ONSC 6691 at ¶10, ¶¶30-31.
[55] *R. v. B.H.*, 2020 ONSC 4533 at ¶¶7-8; ¶¶22-27 [TAB 2].
[56] *R. v. Ali*, 2020 ONCJ 8 at ¶4, ¶¶14-30.
[57] *R. v. X.C.*, 2020 ONSC 410 at ¶21, ¶¶64-70 [TAB 10].
[58] *R. v. S.L.*, 2019 NSSC 408 at ¶¶1-17: although the Judgment is somewhat unclear, it appears the argument occurred out of the courtroom, but during the complainant's cross-examination at the criminal trial.
[59] *R. v. Ali*, 2020 ONCJ 8 at ¶3, ¶¶10-13.
[60] In the case at bar, the trial Judge referred to a hypothetical example in which an accused and complainant took a 'selfie' at a party, at the conclusion of which party the accused was arrested. The trial Judge held that such a 'selfie' would be a record within the meaning of s.278.1: *R. v. J.J.*, 2020 BCSC 29 at ¶¶76-80. Respectfully, it is difficult to see how there would be a reasonable expectation of privacy in the photo, nor what personal information it would contain. The court in *R. v. Ali* held that a 'selfie' was not a record within the meaning of s.278.1 in almost identical circumstances: *R. v. Ali*, 2020 ONCJ 8 at ¶3, ¶¶10-13.

a. Non-sexual communications between the complainant and accused including discussions:

   i. About the parties' breakdown of their marriage and terms of separation;[61]

   ii. which were friendly or flirtatious and related to personal information such as thoughts, feelings, details of daily activities, preferences, friendships, and social interactions[62];

   iii. in which the complainant described her abusive relationship with her father, her mental health history, and her attendance at an 'AA' meeting[63];

   iv. between the complainant and a friend (not the accused) in which they discussed the complainant's relationship with her family and the alleged sexual assault[64];

   v. in which the complainant, who had previously been in a romantic relationship with the accused, expressed her warm feelings for the accused and their previous relationship[65];

b. A video the accused surreptitiously took of the complainant at a doctor's appointment[66] and a letter from the complainant's doctor containing information about her medical history, sexual activity, and pregnancy[67];

c. Audio recordings of conversations between the complainant and her son which the complainant was not aware were being made, in which they discussed her faith, her history with men other than the accused, and her relationship with the accused[68]; and

d. A photocopy of the inside of the complainant's passport, which revealed her travels.[69]

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[61] *R. v. A.C.*, 2020 ONSC 159 at ¶¶10-30 [TAB 1]; *R. v. G.E.* 2020 ONCJ 451 at ¶¶35-44 [TAB 3].
[62] *R. v. R.M.R.*, 2019 BCSC 1093 at ¶6, ¶18, ¶¶38-39.
[63] *R. v. M.S.,* 2019 ONCJ 670 at ¶69, ¶72.
[64] *R. v. Tanasijevic*, 2020 ONSC 762 (QL) at ¶2, ¶¶9-10. Similarly, the text messages at issue in *R. v. McKnight*, 2019 ABQB 755 at ¶¶37-38 were exchanged between the complainant and a third party, who gave them to the accused. The court described the messages as "intensely private".
[65] *R. v. T.A.*, 2020 ONSC 2613 at ¶10, ¶¶39-42.
[66] *R. v. F.A.*, 2020 ONCJ 178 at ¶4, ¶¶27-31.
[67] *R. v. F.A.,* 2020 ONCJ 178 at ¶¶26-31.
[68] *R. v. F.A.,* 2020 ONCJ 178 at ¶4, ¶¶22-24; *R. v. H.A.R.*, 2019 ONSC 7145 at ¶8, ¶17, ¶51 [TAB 4].
[69] *R. v. F.A.*, 2020 ONCJ 178 at ¶40.

C. The Seven Day Notice Requirement in Section 278.93(4) Promotes Trial Fairness and Enhances the Truth-Seeking Function of the Court

27. Fundamental justice embraces more than the rights of the accused. An assessment of the fairness of the trial process must be made "from the point of view of fairness in the eyes of the community and the complainant", and "not just the accused".[70] Full answer and defence does not entitle the accused to admit at trial all evidence that tends to prove his innocence irrespective of the ordinary rules governing the admissibility of evidence, nor to distort the truth-seeking function of the trial process.[71]

28. The Attorney General of Ontario adopts the Appellant's arguments at ¶¶101-135 of its factum that the seven-day notice period in s.278.93(4) does not violate an accused's right to a fair trial, and submits that the question of fairness must also be considered from the broader perspective of fairness to the complainant. The seven-day notice period *enhances* fairness to the complainant for the three reasons set out below. When a complainant is afforded fairness, she is better able to provide her account, and is not disbelieved because of unfair myths and stereotypes which permeate the process. This, in turn, promotes the truth-seeking function of the court.

i. The Notice Requirement in Section 278.93(4) Reduces the Harm a Complainant Suffers by the Criminal Trial Process and Ensures She Can Speak Her Truth

29. Certain unavoidable aspects of a criminal trial make it likely that testifying will be difficult for many victims of sexual violence.[72] The accused's right to cross-examine and to make full answer and defence must be robustly facilitated to ensure the presumption of innocence is protected and to avoid conviction of the innocent. But, as Professor Craig argues, we should not allow interpretations of due process and the presumption of innocence to obscure how inhospitable the criminal trial process is for women who have been sexually assaulted. We must take whatever

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[70] *R. v. Mills*, [1999] 3 S.C.R. 668 at ¶72, citing *R. v. E.(A.W.)*, [1993] 3 S.C.R. 155 at ¶86.
[71] *R. v. Mills*, [1999] 3 S.C.R. 668 at ¶74.
[72] Elaine Craig, "The Inhospitable Court" (2016) 66:2 U Toronto LJ 197 at 200, 232 [TAB 14].

steps are reasonably possible to make the legal process more humane.[73] This Court issued a clarion call in *R. v. Barton* that in prosecutions of sexual assault, "we can - - and *must* - - do better".[74]

30. Law Professor Melanie Randall and clinical psychologist Dr. Lori Haskell argue for a trauma-informed approach to processing criminal matters involving sexual violence. A trauma informed approach requires justice officials to recognize and understand the complexities of trauma's impact and responses to it. Delivering services in a way that avoids inadvertent re-traumatization and harm to individuals accessing justice is paramount.[75]

31. Professor Craig maintains that complainants are often "woefully unprepared" for the criminal trial process, and that better preparation of the complainant would render the process more humane.[76] As noted above, rituals of the courtroom make clear that the complainant plays a subordinate role, which can reify complainants' feelings of self-blame, shame, and powerlessness.[77] Professor Craig explains that unfamiliarity with rituals renders individuals more vulnerable to being impressed by the ritual at a basic level of identity. By contrast, preparation of a complainant would help to ensure the performance of the rituals is less constitutive of a complainant's sense of self or 'identity as complainant'.[78]

32. The seven-day notice period in s.278.93(4) helps to facilitate the improvements suggested by both Haskell and Randall, and by Craig:

a. The notice period supports a trauma-informed approach. Complainants must testify about traumatic events, and they must do so in the distressing circumstances of the courtroom. As

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[73] Elaine Craig, "The Inhospitable Court" (2016) 66:2 U Toronto LJ 197 at 200, 232 [TAB 14]; Legislative Assembly of Ontario, Select Committee on Sexual Violence and Harassment, *Final Report* (2015) at 11; Karen Bellehumeur, "A Former Crown's Vision for Empowering Survivors of Sexual Violence" (2020) 37 Windsor Y B Access Just at 5 [TAB 22], citing Melanie Randall & Lori Haskell "Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping" (2013) 36: 2 Dal LJ 501 at 518 at 518 [TAB 25].
[74] *R. v. Barton*, 2019 SCC 33 at ¶1.
[75] Lori Haskell & Melanie Randall: *The Impact of Trauma on Adult Sexual Victims* (2019) – Report published by Justice Canada at 33-35 [TAB 23]; Karen Bellehumeur, "A Former Crown's Vision for Empowering Survivors of Sexual Violence" (2020) 37 Windsor Y B Access Just at 5 [TAB 22], citing Melanie Randall & Lori Haskell "Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping" (2013) 36: 2 Dal LJ 501 at 518 [TAB 25].
[76] Elaine Craig, "The Inhospitable Court" (2016) 66:2 U Toronto LJ 197 at 235 [TAB 14].
[77] *Ibid,* at 222-223 [TAB 14].
[78] *Ibid,* at 234-235 [TAB 14].

will be explained below, the legislation helps to ensure that the complainant will not face the "violent impact" of requiring her to provide irrelevant, gender-based information or to refute sexist-stereotype-infused cross-examinations. And, when the record is admitted, and the complainant is required to face cross-examination on private material in the traumatic setting of a criminal trial, she will have had a chance to prepare herself to face the particular invasion of her privacy that the use of the record represents, and to process the impact of its use in a safer setting (that is, not on the witness stand);

b. A complainant for whom the trial rituals make her feel subordinate, thereby increasing her feelings of self-blame, shame, and powerlessness, will only have those feelings compounded when her private record is used against her. The notice period helps to prepare the complainant for the performance of the rituals so that they are less constitutive of a complainant's sense of self or 'identity as complainant'. An understanding of the rituals of the court, including, but not limited to, what evidence a court may properly consider and for what purpose, will reduce feelings of self-blame, shame, and powerlessness.

33. In addition, the seven-day notice period in s.278.93(4) facilitates the truth-seeking function of the court. Notice gives the complainant an opportunity to reflect on why she acted as she did, so that she can provide an explanation, if she has one. These explanations can be difficult to identify, particularly where a complainant has acted in accordance with a myth she may have internalized herself. A prepared complainant is also less likely to be emotional than one who is ambushed and is more likely to be able to provide logical and coherent responses. There is a palpable unfairness in the diminishment of a complainant's credibility because she is caused emotional upset by the criminal trial process itself.

34. In *R. v. M.S.,* Chapman J. found that the legislative scheme both reduces harm to a complainant and facilitates the truth-seeking function of the court:

> …the participation of the complainant at the hearing stage and disclosure of the applications materials for that purpose, enhances rather than detracts from the truth-seeking process. The cross-examination in question necessarily involves private, sensitive, and/or sexual material. The potential for humiliation, in having your intimate communications and photos produced in a public courtroom, under intense stress and scrutiny. It would be unreasonable to expect a complainant, testifying about an embarrassing and personal subject matter, to respond logically, coherently and calmly when confronted with such material out of the blue. Mechanisms that serve to impede the process by causing unnecessary anxiety to the witness do not advance the truth-finding process.

> Private records, or evidence of sexual history, when put to a complainant with inadequate prior notice, logically invites a response that is generated by fear, humiliation, confusion or anxiety, and not one that is comprehensive and responsive, and conducive to getting at the truth.[79]

35. Moreover, the overstated concern that the complainant will adjust her evidence to meet the record relies on the stereotypical assumption previously rejected by this Court that sexual assault complainants have a higher tendency than people who complain of other crimes to fabricate stories based on "ulterior motives"[80]. Indeed, if a complainant *knows* that the accused has a record in his possession, she is likely inclined to be *more* truthful on the stand since contradictory evidence has been identified. Further, parties to civil proceedings are entitled to production of all relevant evidence as a matter of fairness, and there is no concern that cross-examination will somehow be impeded. Similarly, an accused has a constitutional right to disclosure and the Crown is not permitted to suggest that the accused has tailored his evidence to conform with the disclosure[81], yet there is no suggestion the truth-seeking function of the trial process has been critically impaired.

ii. The Notice Requirement in Section 278.93(4) Ensures Records Will Not Be Used to Advance Myths and Stereotypes

36. Section 278.92(2)(b) permits an accused to rely on a private record in his possession if it is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. Section 278.92(3) lists a number of factors a judge must consider in determining whether the record meets the admissibility requirements of s.278.92(2), including, among other things: (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 trier of fact; (g) the potential prejudice to the complainant's personal dignity and right of privacy; and, (h) the right of the complainant to personal security and full protection and benefit of the law.

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[79] *R. v. M.S.*, 2019 ONCJ 670 at ¶¶104-105. See also *R. v. C.C.*, 2019 ONSC 6449 at ¶80, in which the court held that it is "debatable" whether ambushing a witness with her private records "aids or impairs the truth-seeking function of a trial".

[80] *R. v. A.G.*, 2000 SCC 17 at ¶3; *R. v. Osolin*, [1993] 4 S.C.R. 595 at ¶50.

[81] *R. v. Lee*, [2005] O.J. No. 5387 (C.A.) at ¶2 [TAB 5].

37. Records within the meaning of s.278.1 often contain the kind of information on which an accused might rely to advance myths and stereotypes. Some examples illustrate this point:

a. A complainant's diary reveals that she went out for dinner with friends immediately after the alleged sexual assault. An accused might wish to argue that the complainant's actions were inconsistent with those of a 'true' sexual assault victim;

b. A complainant sent friendly text messages to the accused in which she invited him to a movie after the alleged sexual assault. An accused might wish to argue that 'true' sexual assault victims cut off contact with her assailant;

c. A series of text messages reveal that prior to the sexual assault, the complainant had a romantic interest in the accused. The accused might wish to argue that the complainant fantasized about the sexual assault and made it up.

It is important that the parties have an opportunity to make submissions on admissibility, and the court be afforded the necessary time to render a ruling which is required in every case.[82] The notice period in ss.278.93(4) aligns with those objectives.

38. While s.278.94(2) makes clear that the complainant is not compellable, she is nonetheless uniquely positioned to assist the court in applying the factors in s.278.92(3). As the court recently recognized in *R. v. Barakat,* the complainant is in the best position to assist the court with the prejudice she would suffer by the use of the record.[83] The complainant is also especially able to identify reliance on myths and stereotypes by comparing her own motivations with those attributed to her in the accused's argument.

iii. Mid-Trial Applications Cause Harm to Complainants

39. Some might argue that a complainant is given sufficient notice when an application under s.278.93(1) is brought mid-trial and after her examination-in-chief, and that pre-trial notice is not required. However, this argument fails to consider the delays which ensue from a mid-trial application and the harms which flow to the complainant from that delay.

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[82] Section 278.94(4): the court's reasons must state the factors referred to in s. 278.92(3) that affected the determination.

[83] *R. v. Mohamad Barakat*, unreported, decision of Doody J. of the Ontario Court of Justice, January 26, 2021, at ¶¶57-60 [TAB 7].

40. A mid-trial application will likely cause substantial delay. Once the accused announces that he is seeking to adduce a record, the trial is halted while numerous and complicated steps are taken. At the first stage, the accused must bring an application in writing, containing detailed particulars and an explanation of how the evidence is relevant to an issue at trial. The Crown must have an opportunity to review the application and respond in writing if necessary. Then, both parties need to appear before the judge to make submissions. Next, the judge must decide whether to hold a hearing. If the judge decides to hold a hearing, then the complainant has a right to participate and a right to counsel.[84] The process of obtaining and instructing counsel cannot reasonably take place overnight. Counsel are not 'waiting in the wings', especially in busy jurisdictions where counsel have full practices or in remote jurisdictions where finding counsel is more challenging. A proper retainer of counsel involves a review of the materials and consultation with the complainant. In addition, courts have found that the complainant may have the right to make submissions at the hearing, call evidence, and cross-examine the accused[85]; this also takes preparation. Finally, the judge must have an opportunity to render a decision as to the admissibility of the record before the complainant can commence her cross-examination.

41. Trial delay harms complainants in particular ways. Studies have shown that where court processes are delayed, the complainant's recovery is interrupted and undermined[86] and she experiences additional stress.[87] The Standing Senate Committee on Legal and Constitutional Affairs reported that the effects of delay on complainants "can result in feelings of re-victimization" as "every additional court appearance requires that they prepare to revisit the upsetting events surrounding the crime and see the accused person once again in court."[88] As noted by Justice Chapman in *R. v. M.S,* any interpretation of the provisions that encourages mid-trial applications will have a very real adverse impact on a complainant's right to privacy and equality, as it will put

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[84] Section 278.94(2) and (3).
[85] *R. v. A.C.;* 2019 ONSC 4270 ¶68; *R. v.* Boyle, 2019 ONCJ 253 ¶¶15-17; *R. v. F.A.,* 2019 ONCJ 391 ¶64.
[86] Andrew Paterson, "The Future of Committal Hearings: the Victim/Witness Point of View" in Julie Vernon (ed), *The Future of Committals: Proceedings of a conference held 1-2 May 1990* (Canberra: Australian Institute of Criminology, 1991) at 136 [TAB 11].
[87] Ivana Bacik, Catherine Maunsell, Susan Gogan, *The Legal Process and Victims of Rape,* (Dublin: The Dublin Rape Crisis Centre, 1998) at 41 [TAB 18].
[88] Report of the Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada* (August 2016), online: *Parliament of Canada* at 4 and 5 [TAB 28].

her in the position of having to choose between availing herself of her legislative right to participate in the hearing, and therefore bifurcating the trial, or giving up on those rights in order to avoid further delay.[89]

42. Moreover, as The Report of the Chief Justice's Advisory Committee on Criminal Trials in the Ontario Superior Court of Justice (May, 2006) found, when trials last longer than scheduled, there is an "extremely negative" impact on the criminal justice system and all participants: cases cannot proceed; jury trials are impractical to adjourn; and, judge-alone trials are bifurcated, which results in additional challenges including for a trial judge who must make credibility findings. An additional downstream effect is that s.11(b) applications for unreasonable delay increase, which, even if unsuccessful, lengthen the trial.[90]

PART IV: SUBMISSIONS ON COSTS

43. The Attorney General of Ontario makes no submissions as to costs.

PART V: ORDER REQUESTED

44. It is the position of the Intervenor, the Attorney General of Ontario, that the issues should be resolved in accordance with the foregoing submissions.

45. The Intervenor, the Attorney General of Ontario, requests permission to present oral argument at the hearing of this appeal.

Jill Witkin
Counsel for Attorney General of Ontario

Jennifer A.Y. Trehearne
Counsel for Attorney General of Ontario

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[89] *R. v. M.S.*, 2019 ONCJ 670 at ¶106.
[90] Ontario, The Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice, *New Approaches to Criminal Trials* (2006) at 88-92.

PART VII: TABLE OF AUTHORITIES

Paragraph No.

Secondary sources

Legislative Authorities