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)

AND:

J.J.

RESPONDENT
(Appellant on Cross-Appeal)

AND:

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ALBERTA, WEST COAST LEGAL EDUCATION AND ACTION FUND AND WOMEN AGAINST VIOLENCE AGAINST WOMEN RAPE CRISIS CENTRE, BARBRA SCHLIFER COMMEMORATIVE CLINIC, CRIMINAL TRIAL LAWYERS' ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), CANADIAN COUNSEL OF CRIMINAL DEFENCE LAWYERS, AND INDEPENDENT CRIMINAL DEFENSE ADVOCACY SOCIETY

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PART I – Overview and Statement of Facts

A. Overview

1. Bill C-51 enacted an evidentiary screening mechanism in ss. 278.92 to 278.94 of the *Criminal Code* to screen records in the possession of the accused that contain personal information in which the complainant has a reasonable expectation of privacy. The amendments were carefully crafted to fill a statutory procedural gap. They are a principled extension of the common law and related codified procedural and evidentiary schemes that have already survived constitutional scrutiny. They do not violate ss. 7, 11(c) or 11(d) of the *Charter* as the procedure is not unfair to the accused, is consistent with the principles of fundamental justice, and properly reconciles the divergent interests at play.

2. J.J. asserts that the common law already provided strong protection, that the "letter of law" wasn't the problem but rather the "spirit of the law" wasn't fully appreciated by justice system actors, and that Parliament "invented an imaginary problem": *J.J.'s Respondent's Factum/Appellant's Factum on the Cross-Appeal* ("*J.J.'s Factum*"), paras. 2, 3, 6, 20, 141-143, 162. Effectively, J.J. says that Parliament should have left well enough alone despite the 2012 Senate Standing Committee Report recommending amendments to address the legislative gap and continued judicial acknowledgement of the problems that stubbornly persist in sexual assault prosecutions: *R. v. Barton*, 2019 SCC 33, para. 1; *R. v. Goldfinch*, 2019 SCC 38, para. 37; *R. v. R.V.*, 2019 SCC 41, para. 33.

3. While *R. v. Osolin*, [1993] 4 S.C.R. 595 and *R. v. Shearing,* 2002 SCC 58 created a common law process for assessing the admissibility and use of records in the possession of the accused, the fact that Parliament codified and amplified that screening process does not make it unconstitutional. Parliament is entitled to make changes to the common law, just as it did following this Court's decision in *R. v. O'Connor,* [1995] 4 S.C.R. 411 to recognize complainants' legitimate privacy rights: *R. v. Mills*, [1999] 3 S.C.R. 668, paras. 58-60. Just as in *Mills,* Parliament decided in the present case that legislation was necessary to address the issue more comprehensively and ensure uniform treatment of "records". Unfortunately, McLachlin and Iacobucci JJ.'s observation in *Mills* remains equally applicable today: "[i]mportant change has occurred through legislation aimed at both recognizing the rights and interests of complainants in criminal proceedings, and debunking the stereotypes that have been so damaging to women and children, but the treatment of sexual assault complainants remains an ongoing problem" (para. 58, emphasis added).

4. There is "a range of permissible regimes that can meet constitutional standards" and Parliament is not confined "to the specific rule adopted by the Court pursuant to its competence in the common law": *Mills*,

para. 59. The Respondent on the Cross-Appeal ("the Crown") submits that Parliament has adopted a constitutionally compliant evidentiary screening mechanism for assessing the admissibility and use of records in the possession of the accused. The new scheme does not exclude relevant defence evidence that is capable of raising a reasonable doubt, which is the appropriate constitutional litmus test: *R. v. Seaboyer; R. v. Gayme*, [1991] 2 S.C.R. 577, para. 62. Neither does it violate the accused's rights to a fair trial, to make full answer and defence, to silence, or the principle against self-incrimination.

5. This factum addresses four discrete issues that arise from *J.J.'s Factum*: (1) the appropriate analytical framework for constitutional analysis; (2) the constitutionality of the evidentiary threshold in s. 278.94(2)(b); (3) whether granting the complainant participatory rights violates the right to a fair trial or prosecutorial independence; and (4) the broader s. 1 justification with respect to ss. 278.92 to 278.94 as a whole. The Crown addressed the constitutionality of s. 278.94(3) (the seven-day notice provision) in its factum ("*Crown Appellant's Factum*") and, in the course of that analysis, has already canvassed many of the issues raised on the cross-appeal. As a result, the two factums should be read together.

B. Statement of Facts

6. The facts were outlined in the *Crown Appellant's Factum*, at paras. 10 to 21. The Crown generally agrees with the additional information outlined in *J.J.'s Factum* at paragraphs 8 to 12, but not with the characterization of counsel's submissions at paragraph 10.

PART II – Respondent's Position on Questions in Issue on Cross-Appeal

7. The Crown submits that the "records screening regime" in ss. 278.92 to 278.94 of the *Code* does not violate the right to a fair trial, the right to make full answer and defence, the right to silence, or the principle against self-incrimination contrary to ss. 7, 11(c) and 11(d) of the *Charter*.

PART III – Statement of Argument

A. Update on jurisprudence on constitutionality of Bill C-51 amendments

8. The jurisprudence on the constitutionality of the impugned scheme was summarized in the *Crown Appellant's Factum* at paragraphs 71 to 80. Since that time there have been five additional Ontario decisions which have declined to follow the reasoning in *R. v. Reddick*, 2020 ONSC 7156, leave to appeal granted, *A.S. v. Her Majesty the Queen* (S.C.C. No. 39516): see *R. v. Barakat*, 2021 ONCJ 44; *R. v. El-Zoheiry* (23 February 2021), Ottawa 17-19670 (Ont. C.J.); *R. v. B.G.*, 2021 ONSC 2299; *R. v. S.R.*, [2021] O.J. No. 1623 (Ont. S.C.J.); and *R. v. Green*, 2021 ONSC 2826. These decisions are referenced in the discussion below.

B. The *Mills/Darrach* approach is an extension of the *Dagenais* reconciliation approach

(i) The *Mills/Darrach* test applies to the judicial review of legislation

9. J.J. asserts that this Court has established two discrete analytical approaches: the *Dagenais/Mentuck* approach, as applied in *R. v. N.S.*, 2012 SCC 72, and the *Mills/Darrach* approach: *J.J.'s Factum*, paras. 21-32. The Crown disagrees with J.J.'s characterization of the role and function of these respective analytical frameworks. The *Mills/Darrach* framework is best understood as an extension of the *Dagenais* reconciliation approach applied in the context of a *Charter* challenge to legislation. Iacobucci J., writing extra-judicially, certainly saw *Mills* as an extension of *Dagenais*: F. Iacobucci, "'Reconciling Rights' The Supreme Court of Canada's Approach to Competing Charter Rights" (2003), 20 S.C.L.R. (2d) 137, at 150.[1] The articulation of the test in *N.S.* can be explained by the difference in context. The *Dagenais/Mentuck* test governs case-by-case exercises of discretion where potentially conflicting *Charter* rights are engaged. It is applied to resolve "rights conflicts that arise at common law" in a fact-specific context (*N.S.*, para. 7). In contrast, the *Mills/Darrach* approach applies *Dagenais* principles in the review of legislated compromises. To be sure, there is a conceptual overlap, but the frameworks perform very different analytical functions.

10. There is nothing in either *Mills* or *R. v. Darrach*, 2000 SCC 46 to suggest that the *Dagenais* approach had been modified or overtaken. In fact, in *Mills,* McLachlin and Iacobucci JJ. expressly referenced *Dagenais* throughout their decision (paras. 17, 21, 61). Their analysis, which must be viewed in context, respects the traditional rights infringement versus s. 1 justification framework. It is important to keep in mind that the Court in *Mills* was considering a procedural scheme. Because the rights to a fair trial and to make full answer and defence are not absolute and are context dependent, the Court first had to determine the contours of those rights before it could determine whether there had been an actual infringement of s. 7. The relevant context included the complainant's privacy and equality rights in sexual assault prosecutions. As McLachlin and Iacobucci JJ. explained, the "rights of full answer and defence, and privacy, must be defined in light of each other, and both must be defined in light of the equality provisions of s. 15" (para. 21). They went on to emphasize that "the first question to ask is how to define full answer and defence, privacy and equality in this context, and not how they may be justifiably limited" (para. 68, emphasis in original). The "ability to make full

[1] In fact, some authors suggest that this Court's decision in *N.S.* is a departure from *Dagenais* and "represents a subtle shift in the case law from reconciling rights to balancing rights": R.K. Agarwal and C. Di Carlo, "The Re-emergence of a Clash of Rights: A Critical Analysis of the Supreme Court of Canada's Decision in *R. v. S.(N.)"* (2013), 63 S.C.L.R. (2d) 143, at 143-144, 158-162.

answer and defence… must … be understood in light of other principles of fundamental justice which may embrace interests and perspectives beyond those of the accused" (para. 73).

11. Subsequently in *Darrach,* Gonthier J. referenced *Mills* and noted that the Court defined the three *Charter* "rights relationally: 'the scope of the right to make full answer and defence must be determined in light of privacy and equality rights of complainants and witnesses'…. The privacy and equality concerns involved in protecting the records justified interpreting the right to make full answer and defence in a way that did not include a right to all relevant evidence" (para. 28).

12. This approach also respects the role of s. 1. As McLachlin and Iacobucci JJ. explained in *Mills*:

- "unlike s. 1 balancing, where societal interests are sometimes allowed to override *Charter* rights, under s. 7 rights must be defined so that they do not conflict with each other" (para. 21); and
- "[i]t is important to distinguish between balancing the principles of fundamental justice under s. 7 and balancing interests under s. 1 of the *Charter*….The most important difference is that the issue under s. 7 is the delineation of the boundaries of the rights in question whereas under s. 1 the question is whether the violation of these boundaries may be justified" (paras. 65-66, emphasis added).

13. The *Mills*/*Darrach* analytical framework remains valid to this day. As Paciocco J.A., writing for the majority, recently observed in *R. v. Sullivan*, 2020 ONCA 333, appeal pending (S.C.C. No. 39270), the "internal balancing of competing *Charter*-protected interests" as occurred in *Mills* is required when assessing "the constitutionality of a legislated compromise between protected interests" such as "the privacy and equality rights of sexual offence complainants, on the one hand, and the right[s] of the accused" on the other (para. 58); see also *R. v. A.C.*, 2019 ONSC 4270, paras. 18-25; *R. v. A.L.*, 2020 BCCA 18, para. 225.

14. While the strict two-part *Dagenais*/*Mentuck* test was initially developed to apply to discretionary publication bans, it now governs all discretionary restrictions on openness. It incorporates the s. 1 *Oakes* analysis and, as a result, combines infringement/s. 1 justification into one test. To the best of the Crown's knowledge, *N.S.* marked the first time this Court applied the strict test outside the freedom of the press/open court principle context. However, even in *N.S.* it was applied to a case-specific discretionary decision where it was necessary to resolve individual "rights conflicts that arise at common law" (*N.S.*, para. 7). The *N.S.* formulation, with its focus on traditional s. 1 considerations like necessity and reasonable alternative measures, is an awkward fit for assessing the constitutionality of legislation. Applying it in this context would mark a radical departure from this Court's traditional approach to the judicial review of legislation.

15. Bill C-51 is a principled extension of the amendments considered in *Mills* and *Darrach*. It is a legislated compromise which reconciles protected interests: the privacy, security and equality rights of the

complainant and the accused's right to a fair trial and to make full answer and defence. As a result, it is precisely the type of scheme that should be analysed using the framework endorsed in *Mills* and *Darrach.* As Iacobucci J. wrote in his article, "the exercise of rights reconciliation is a flexible one, such that a given framework for reconciling *Charter* rights may be modified to take into consideration other factors if necessary" (at 156, 160-161). Regardless of which approach this Court employs, the result would be the same.

(ii) The new scheme engages the complainant's rights

16. J.J. further submits that there are no competing constitutional rights, and, at best, the impugned scheme engages only the complainant's "interests" not their "rights": *J.J.'s Factum*, paras. 27, 153. However, this Court has consistently used the language of *Charter* guarantees to characterize the complainant's interest in the potential use of personal information in sexual offence proceedings.[2] This Court has repeatedly held that the privacy, security, and equality rights of complainants are engaged, whether it be in cross-examination on records in the possession of the accused (*Osolin, Shearing)*, applications for production of third party records (*O'Connor, Mills*), or applications to adduce s. 276 other sexual activity evidence (*Darrach, Barton, Goldfinch, R.V.)*. In particular, the complainant's right to privacy flows from their reasonable expectation of privacy in the content of the record, not the type of record or who possesses it.

17. Justice Cory's statement in *Osolin*, made in the context of a case involving records in the possession of the accused, could not have been more clear: "[t]he provisions of ss. 15 and 28 of the *Charter* guaranteeing equality to men and women, although not determinative, should be taken into account in determining the reasonable limitations that should be placed upon the cross-examination of a complainant" (at 669, para. 166). The complainant's privacy rights must be balanced against the right to a fair trial (at 673, para. 175).

18. Two years later in *O'Connor*, L'Heureux-Dubé J. expressly recognized the complainant's rights as *Charter* rights: the right to privacy and the right to equality without discrimination (paras. 110-128). She identified s. 7 as the source of the right to privacy, noting that privacy is integrally related to dignity and autonomy. When "a private document or record is revealed and the reasonable expectation of privacy therein is displaced, the invasion is not with respect to the particular document or record in question. Rather, it is an invasion of the dignity and self-worth of the individual, who enjoys the right to privacy as an essential aspect of his or her liberty in a free and democratic society" (para. 119). Other judgments employed similar language:

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[2] A number of International Standards provide protection for complainants: see the 2019 *Gillen Review: Report into the law and procedures in serious sexual offences in Northern Ireland,* pp. 161-162.

see para. 17 (Lamer C.J.C. and Sopinka J., dissenting but not on this point); para. 189 (Cory and Iacobucci J.J. concurring); and paras. 192-193 (McLachlin J. (as she then was) concurring). See also *M.(A.) v. Ryan*, [1997] 1 S.C.R. 157, para. 36.

19. In *Mills*, McLachlin and Iacobucci JJ. noted that the appeal involved "three principles, which find their support in specific provisions of the *Charter*. These are full answer and defence, privacy and equality": *Mills,* para. 61; see also *Darrach*, para. 28. The majority recognized that privacy is not an "all-or-nothing" concept; that it includes "the reasonable expectation that private information will remain confidential to the persons to whom and restricted to the purposes for which it was divulged", and that disclosure of a document for one purpose does not amount to a waiver of privacy for all purposes (para. 108; see also *R. v. Jarvis*, 2019 SCC 10, para. 61 and *R. v. Trinchi*, 2019 ONCA 356, paras. 17-19).

20. In *Shearing,* which also addressed records in the possession of the accused, Binnie J. referenced the abusive and distorting cross-examination techniques sometimes employed in sexual assault cases and noted that limitations on cross-examination have been imposed as a result (paras. 76, 119, 121). One such limitation is "the privacy interest of the complainant, which is not to be needlessly sacrificed" (para. 76).

21. The above approach has not changed in the intervening two decades. More recently, this Court has confirmed that s. 276 protects a complainant's dignity, equality and privacy rights: *Barton,* paras. 58, 68, 74, 83; *Goldfinch*, para. 39; see also *A.L.*, para. 223.

22. Parliament has also expressly codified these guarantees in the non-exhaustive list of statutory factors in s. 278.92. Section 278.92(3)(g) requires a judge to consider the potential prejudice to the complainant's personal dignity and right of privacy, while s. 278.92(3)(h) requires consideration of the right of the complainant and every individual to personal security and to the full protection and benefit of the law.

23. Adopting J.J.'s assertion that the complainant has no "rights" to balance in this context would mark a significant regression from this Court's recognition of complainant's rights, something which Parliament continues to protect, and would essentially amount to resiling from almost 30 years of jurisprudence.

24. Ultimately, J.J. appears to take no issue with the application of the scheme to enumerated records in s. 278.1 (records "that were never meant for the accused's eyes or personal use") and appears to anchor his constitutional challenge on the potential extension of the scheme to records like texts, emails or social media communications. He seems to say that the complainant's rights are engaged in s. 276 applications, third-party records applications and cases involving "problematic *Shearing* evidence" (i.e. enumerated

s. 278.1 records), but not in applications involving non-enumerated, "non-problematic" *Shearing* records. However, "records" cannot be separated into these watertight compartments. There is no basis for distinguishing between different categories of "records" because the complainant has a reasonable expectation of privacy in the content of the record. As a result, all "records" raise similar concerns about improper use, including myth-based reasoning.

C. The *Darrach* "significant probative value" threshold test is not restricted to s. 276 evidence

25. J.J. submits that the impugned scheme "sets a stricter test for admitting defence evidence than is warranted or constitutionally permissible": *J.J.'s Factum,* paras. 4(ii), 33(ii). His submissions appear to hinge on two interrelated points: (1) that Bill C-51 expanded the scope of defence evidence that is "presumptively inadmissible" by adding records in the possession of the accused, which are "categorically different" from s. 276 evidence; and (2) that the definition of "record" in s. 278.1 is too broad and captures records (emails, texts and other social media communication) that were never intended to be caught by the scheme. However, when the scheme is properly characterized and interpreted, J.J.'s constitutional complaints evaporate.

26. The Crown submits that the correct questions to ask are: (1) can Parliament create a new evidentiary screening mechanism?; and (2) if so, does that evidentiary screening mechanism create rules that exclude relevant defence evidence that is capable of raising a reasonable doubt? In this case, the answer to the first question is "yes" and the answer to the second is "no".

27. The Crown submits that: (1) no evidence is presumptively admissible; (2) Parliament's adoption of a new evidentiary screening mechanism for the admissibility and use of records in the possession of the accused does not automatically exclude relevant evidence capable of raising a reasonable doubt; (3) the *Darrach* "significant probative value" threshold is not limited to s. 276 evidence; and (4) in any event, s. 278.92 records raise analogous concerns.

(i) No evidence is presumptively admissible

28. J.J. asserts that prior to Bill C-51 records in the possession of the accused were "presumptively admissible" and the accused was "free" to adduce them at trial: *J.J.'s Factum,* para. 33(ii). However, there is no category of evidence that is "presumptively admissible". Moreover, the fact that evidence is potentially relevant does not automatically make it admissible

29. It is a fundamental principle of evidence that the party seeking to adduce evidence must establish that it is relevant, material and admissible. Evidence is relevant if it tends to prove what it is offered to prove. It is material if what is offered tends to prove something with which the case is concerned. Relevant and

material evidence is admissible if its reception does not offend an exclusionary rule of evidence and its probative value exceeds its prejudicial effect. Admissibility "is a legal concept governed by rules that are primarily exclusionary, but subject to inclusionary exceptions": *R. v. J.H.*, 2020 ONCA 165, paras. 52, 56.

30. It is trite law that relevance, materiality and probative value must be determined contextually, looking at the purpose for which the evidence is tendered. Evidence that is relevant, material and probative to one issue may not be in relation to another.

31. The test for exclusion of otherwise admissible defence evidence is whether the prejudicial effect of that evidence substantially outweighs its probative value: *Seaboyer*, at 611 (para. 43). Evidence must be tendered for a legitimate purpose and logically support a defence or line of cross-examination. In weighing prejudicial effect and probative value in sexual assault trials, the trial judge must consider not only the accused's right to full answer and defence, but also the complainant's privacy, security and equality rights: *Osolin*, para. 166; *Shearing*, paras. 76, 107-109.

32. It is clear from *Darrach* that it is open to Parliament to enact a different evidentiary screening mechanism for defence evidence as long as it does not have the potential to exclude otherwise relevant defence evidence. The key question is whether "evidence is excluded absolutely, without any means of evaluating whether in the circumstances of the case the integrity of the trial process would be better served by receiving it than by excluding it": *Seaboyer*, at 620 (para. 62).

(ii) The *Darrach* "significant probative value" test is not limited to s. 276 evidence

33. While the inclusion of "significant" probative value and the phrase "prejudice to the proper administration of justice" in s. 278.92(2)(b) represents a change to the *Seaboyer* test governing the admissibility of defence evidence, it is not an unknown standard. The same test is codified in s. 276(2)(d) of the *Code* and the constitutionality of that provision was upheld in *Darrach* (paras. 38 to 43).

34. J.J. submits that the constitutionality of the higher evidentiary threshold in s. 278.92(2)(b) is tied to the nature of s. 276 evidence and therefore its use cannot be supported in other contexts: *J.J.'s Factum,* paras. 79-93. However, a close reading of *Darrach* does not support that interpretation.

35. In *Darrach,* the accused asserted that the threshold criteria in then-s. 276(2)(c) [now s. 276(2)(d)] (i.e. that evidence be of "significant" probative value) violated his right to make full answer and defence contrary to ss. 7 and 11(d). Gonthier J., writing for the Court, rejected that submission. He noted that "[t]he word 'significant' was added by Parliament but it does not render the provision unconstitutional by raising the

threshold for the admissibility of evidence to the point that it is unfair to the accused" (para. 38). Before even turning to the nature of s. 276 evidence, Gonthier J. concluded that the provision was constitutional based on the rule of equal authenticity and the rule against unconstitutional interpretation:

> 39 It may be noted that the word "significant" is not found in the French text; the law speaks simply of "*valeur probante*". The rule of equal authenticity and the rule against unconstitutional interpretation require that the two versions be reconciled where possible. The interpretation of "significant" by the Ontario Court of Appeal satisfies this requirement: Morden A.C.J.O. found that "the evidence is not to be so trifling as to be incapable, in the context of all the evidence, of raising a reasonable doubt" (p. 16). At the same time, Morden A.C.J.O. agrees with *R. v. Santocono* (1996), 91 O.A.C. 26 (C.A.), at p. 29, where s. 276(2)(*c*) was interpreted to mean that "it was not necessary for the appellant to demonstrate 'strong and compelling' reasons for admission of the evidence". This standard is not a departure from the conventional rules of evidence. I agree with the Court of Appeal that the word "significant", on a textual level, is reasonably capable of being read in accordance with ss. 7 and 11(d) and the fair trial they protect.

36. It was only after reaching the above conclusion that Gonthier J. then observed that "[t]he context of the word 'significant' in the provision in which it occurs substantiates this interpretation" (para. 40, emphasis added). However, his constitutional analysis was not founded solely on the s. 276 context.

37. Justice Gonthier's analysis applies equally to s. 278.92(2)(b) as the text, in both French and English, matches the text of s. 276(2)(c) [now s. 276(2)(d)] which was upheld in *Darrach*.

38. Moreover, there is nothing in *Darrach* which forecloses the use of the "significant probative value" threshold in other contexts. For example, in *R. v. Grant,* 2015 SCC 9, this Court acknowledged that in some cases a higher threshold may be required "to protect the integrity of the trial process" (para. 47). In that case, this Court held that the *Seaboyer* test (and not a higher standard) applied to the admission of unknown third party suspect evidence, in part because there were other measures in place "to protect the privacy interests of individuals implicated in unrelated criminal matters or the confidentiality of ongoing investigations" and specifically referenced the third party records scheme in ss. 278.1 to 278.91 (para. 52). However, as the 2012 Senate Standing Committee Report outlined, there are no similar legislative protections to safeguard the privacy interests of complainants in sexual assault prosecutions when records are in the possession of the accused. The elevated risk of prejudice that arises when an accused seeks to adduce records in which the complainant has a reasonable expectation of privacy requires "the accused to satisfy a higher admissibility threshold or require the judge to engage in an enhanced evaluation of the evidence": *Grant*, para. 53.

39. There is no evidence before this Court that the use of the higher admissibility threshold in the impugned scheme has resulted in the exclusion of otherwise relevant defence evidence. In fact, the non-

exhaustive list of statutory factors in s. 278.92(3) operates to ensure precisely the contrary. It requires a judge to consider "the interests of justice, including the right of the accused to make a full answer and defence" (s. 278.92(3)(a)) and "any other factor that the judge, provincial court judge or justice considers relevant" (s. 278.92(3)(i)). Moreover, as J.J. acknowledges "in the vast majority of cases applying the s. 278.92 regime to private records in the hands of the accused, the evidence was admitted …": *J.J.'s Factum*, para. 88.

(iii) Unscreened use of s. 278.92 "records" raises analogous concerns to s. 276 evidence

40. J.J. submits that s. 278.92 records in the nature of emails and texts are categorically different from s. 276 evidence and have nothing to do with myths and stereotypes: *J.J.'s Factum*, para. 80; see also paras. 81-93. However, J.J. incorrectly assumes that the only purpose of the impugned scheme is to address myth-based reasoning. Rather, its purpose is to ensure that a judge takes into account a complainant's privacy, security and equality rights when weighing the potential prejudicial effect of cross-examination, which in turn encourages the reporting of sexual offences: *Green*, paras. 9, 25-27, 34, 37-38. When viewed in that context, the unscreened use of "records" raises analogous concerns to s. 276 evidence.

41. As noted in the *Crown Appellant's Factum* at paragraphs 93-96, the non-exhaustive definition of "record" is not new or overly broad in scope. It passed constitutional muster in *Mills* because "[o]nly documents that truly raise a legally recognized privacy interest are caught and protected" (para. 99). It does not capture all documents in the possession of the accused but only those that contain personal information in which the complainant has a reasonable expectation of privacy: *S.R.*, para. 27; *R. v. A.M.*, 2020 ONSC 8061, paras. 69-71. It is "the procedures established by the Bill and not the spectrum of records subject to these procedures that will determine the fairness or constitutionality of the legislation": *Mills*, para. 100.

42. Trial judges ultimately determine whether a complainant has a reasonable expectation of privacy in texts, emails and other electronic communications by interpreting and applying the s. 278.1 definition on a case-by-case basis. This reflects the reality that those types of records may contain highly sensitive communications and intimate details about a complainant's lifestyle and relationships: see, *R. v. Marakah*, 2017 SCC 59, paras. 34-37; see also G. Chan, "Text Message Privacy: Who Else is Reading This?" (2019), 88 S.C.L.R. (2d) 69, at 71, 74, 84. The *Attorney General of Ontario's Intervener Factum* lists examples of non-sexual communications between the complainant and accused in which the complainant may have a reasonable expectation of privacy (para. 26). In other cases, trial judges have concluded that materials in the accused's possession were not "records": see *Attorney General of Ontario Intervener's Factum*, para. 25.

43. In *Darrach,* this Court noted that the use of personal and therapeutic records in sexual assault trials "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" (para. 26). More recently, Caponecchia J. observed that there is no compelling reason why "defence disclosure of private records being adduced in evidence should be treated any differently than disclosure of someone's private sexual activity. Both pertain to sensitive information over which a complainant has a privacy interest. Both potentially lend themselves to impermissible inferences based on myths and stereotypes.": *R. v. F.A.*, 2019 ONCJ 391, para. 67.

44. J.J. asserts that there is "no evidence of the relationship between private 'records' and myths and stereotypes": *J.J.'s Factum,* para. 168. However, his submission fails to recognize the myriad ways in which a complainant's privacy interests can be engaged. Moreover, evidence is not required. The jurisprudence has widely recognized that myth-based reasoning distorts the truth-seeking function. It can arise in a wide variety of contexts, including where there is cross-examination on records in which the complainant has a reasonable expectation of privacy: see, for example, *Shearing*, paras. 79-80,119-120. The unscreened use of "records" may lead to myth-based reasoning beyond the twin myths, nor is myth-based reasoning limited to s. 276 evidence: see, for example, *Attorney General of Nova Scotia's Intervener Factum*, para. 42; *Attorney General of Saskatchewan Intervener Factum*, paras. 55-60, 65; *Attorney General of Ontario Factum*, paras. 12-13, 37; M. Shaffer, "The Impact of the *Charter* on the Law of Sexual Assault: Plus Ça Change, Plus C'est La Même Chose" (2012), 57 S.C.L.R. (2d) 337 at 348, 353.

45. J.J. seeks to artificially distinguish between what he designates as "problematic" and "non-problematic" *Shearing* evidence. However, that is the raison d'être of the impugned scheme: to determine which "records" are problematic in sexual assault prosecutions. The legal context must inform the admissibility analysis: *A.L.*, paras. 221-236. As L'Heureux-Dubé J. wrote in *O'Connor*, "[a]lthough the defence must be free to demonstrate, without resort to stereotypical lines of reasoning, that such information is actually relevant to a live issue at trial, 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 whatsoever" (para. 124, emphasis in the original; see also *R. v. C.M.G.*, 2016 ABQB 368, paras. 62-90 and L. Dufraimont, "Myth, Inference and Evidence in Sexual Assault Trials" (2019), 44:2 Queen's LJ 316, at 345-353). The new evidentiary screening mechanism is entirely consistent with this Court's repeated guidance that the trial judge should act as a gatekeeper and identify the precise purpose for which evidence is being adduced. That is, what evidence is being elicited or admitted? How is it relevant to the issues at trial? What is the legitimate

purpose of the cross-examination? What inference is the trier of fact being invited to draw? Is the purported relevance grounded in explicit or implicit myth-based reasoning? Should the scope of cross-examination be narrowed to minimize infringement of the complainant's legitimate interests?

46. It is widely recognized that evidence proffered for "impeachment" can be used for an improper purpose or lead to myth-based reasoning. Some myths and stereotypes are obvious but others are grounded in hidden assumptions based on subconscious but flawed reasoning. Often, these "[b]eliefs will inform notions of relevance. However, as they often function unconsciously, their effect can be unacknowledged and identifying them may be a difficult and elusive process": *Osolin*, at 626-627 (para. 53, *per* L'Heureux-Dubé J., dissenting). The "risk of misuse persists…because some of the myths and stereotypes upon which illegitimate reasoning rests have long masqueraded as 'truths' based on common sense": *A.L.*, para. 230. Sometimes, just asking the question "is enough to distort the truth-seeking goal … because the prejudice derives from the innuendo imbedded in the question": *Shearing*, para. 173 (*per* L'Heureux-Dubé J., dissenting in part). Credibility assessments based on stereotypes amount to an error of law: *R. v. A.J.R.D.*, 2018 SCC 6, para. 2; *R. v. A.B.A.*, 2019 ONCA 124, paras. 8-12. That is why "evidence which normally lies outside the purview of the trial process but is deemed relevant to the credibility of sexual assault complainants must be carefully, and perhaps sceptically, scrutinized": *Osolin,* at 627 (para. 54, *per* L'Heureux-Dubé J., dissenting).

47. Moreover, the use of unscreened records must be situated in the broader context: the risk of secondary trauma when a complainant participates in the criminal trial process: *Attorney General of Ontario's Intervener Factum*, paras. 9-11; Senate Standing Committee Report, p. 9. As D.E. Harris J. observed in *B.G.*, "[c]onfining the legislation to the purpose of dispelling myths and stereotypes distorts the constitutional analysis" (para. 29); see also *Green*, paras. 9, 25-27, 34, 37-38. He rejected the suggestion that an accused should be able to proceed without disclosing anything in advance just as in any other proceeding, noting that sexual assault is fundamentally different than other offences. In support, he cited this Court's decision in *M.(A.) v. Ryan*: "[t]he intimate nature of sexual assault heightens the privacy concerns of the victim and may increase, if automatic disclosure is the rule, the difficulty of obtaining redress for the wrong. The victim of a sexual assault is thus placed in a disadvantaged position as compared with the victim of a different wrong…." (para. 30).

48. The "key to rights reconciliation … lies in a fundamental appreciation for *context*. *Charter* rights are not defined in abstraction, but rather in the particular factual matrix in which they arise": F. Iacobucci, at 140 (emphasis in original). As Dr. Elaine Craig stresses in "Private Records, Sexual Activity Evidence, and the

Charter of Rights and Freedoms" (2021), 58:4 Alta. L. Rev. [forthcoming], "[t]he nature of the protected privacy interest under 278.92 must be assessed in relation to its context: an allegation of sexual violence….The impact of an intrusion into the privacy of a sexual assault complainant will often be qualitatively worse than a similar breach with respect to the alleged victim of a fraud or theft, for example" (at 32). An analysis of "the nature of the privacy interest at stake requires recognition of the interconnectedness between the privacy interest protected under section 278.92 and the dignity and equality rights that the regime seeks to preserve": Craig, at 33. As Dr. Craig observes at p. 32:

> Moreover, the privacy protection offered by rules such as section 278.92 must be understood in light of both a legal history in which women who alleged rape were laid bare, put on trial, and often explicitly discriminated against, and the ongoing (often necessary) practice of scrutinizing to a highly granular degree every detail of a sexual assault complainant's allegation. This too makes the nature of the privacy interest different in this context. Some intrusions into the privacy of a sexual assault complainant are a necessary part of the criminal justice process. In some circumstances ensuring a full and rigorous ability to challenge the Crown's case, such as a case in which identity is at issue, will require that defence counsel be permitted to bring an application after the complainant's testimony has begun. The aim of section 278.92 is to eliminate or reduce the unnecessary intrusions, and the needless ambushes, such as those driven by a legal legacy which discriminated against women or an ongoing social reality in which attitudes continue to be informed by problematic and empirically unfounded social assumptions about sex and women (particularly marginalized women).

49. As a result "of structural discrimination, Indigenous women, racialized women, women living with disabilities and women living in poverty are more likely to have been scrutinized through state apparatus. The more records, the greater the jeopardy to privacy interests, and the higher the barriers to reporting": Craig, at 33; see also *Attorney General of Nova Scotia's Intervener Factum*, paras. 52-59. The reconciliation analysis must include a recognition that "the gendered nature of sexual violence will often produce a context in which an accused has access to and power over many aspects of a complainant's private or intimate life. It also requires recognition of the increased scrutiny and corresponding documentation to which women marginalized on the basis of race, Indigeneity, disability and poverty are subjected": Craig at 33.

50. When viewed in that context, the impugned scheme precisely addresses Parliament's objectives and substantiates the use of the "significant probative value" threshold upheld in *Darrach*.

D. Complainant's participatory rights do not infringe the right to a fair trial or prosecutorial independence

(i) Participation of complainant does not violate the right to a fair trial

51. As in *Darrach,* JJ.'s submissions have "generally, appeared to proceed on the assumption that procedures which depart from those normally followed when the defence seeks to tender evidence at trial

over the objection of the Crown are unconstitutional": *R. v. Darrach* (1998), 122 C.C.C. (3d) 225 (Ont. C.A.) ("*Darrach (ONCA)*"), para. 74. However, as Morden J.A. observed, "neither the common law nor the *Charter* require that any specific procedure be followed in determining the admissibility of evidence. The procedure followed may vary and may be adapted to protect any competing interests that may come into conflict when evidence is proffered at trial": *Darrach (ONCA)*, para. 74. There is "no constitutional guarantee to the most favourable procedure imaginable": *R. v. Rodgers,* 2006 SCC 15, para. 51. Rather, "[t]he constitutional norm … is procedural fairness … it is well settled that what is fair depends entirely on the context" (para. 47).

52. Granting the complainant standing is consistent with the well-established rule of natural justice *audi alteram partem*, which requires that "courts provide an opportunity to be heard to those who will be affected by the decisions": *L.L.A. v. A.B.,* [1995] 4 S.C.R. 536, para. 27; see also *Attorney General of Saskatchewan's Intervener Factum*, paras. 43-46.

53. J.J. asserts that the impugned scheme "introduces a stranger into the litigation": *J.J.'s Factum,* para. 129. However, a complainant has always had the right to consult counsel about the issues arising from her role as a witness in a criminal prosecution, "the only difference is that now it is a codified right": *A.M.*, para. 88; *Barakat*, para. 43. Prior to the impugned scheme, "the complainant could, as she can now, have sought legal advice about the evidence sought to be adduced after she was consulted by Crown counsel about that proposed evidence": *Barakat*, para. 46. For example, in *Shearing*, the complainant sought, and was granted, an adjournment to obtain counsel when she was asked questions about her diary in cross-examination. Her counsel subsequently made submissions on the *voir dire*. In *Mills,* the complainant was granted full standing to intervene on the constitutional challenge and sought s. 40 leave to appeal the constitutional ruling.

54. While the complainant's communications with her counsel are protected by solicitor-client privilege, any communication between the complainant and her lawyer "were not automatically discloseable [sic], either before or after the amendments in issue. The defendant did not have a constitutional right under *Stinchcombe* and s. 7 to learn what she told her lawyer about the proposed evidence. Nor did Crown counsel. The amendments did not change the law about this": *Barakat*, para. 46; *A.M.*, para. 88; *R. v. Marrello*, [2020] O.J. No. 3617 (Ont. C.J.), para. 91; *S.R.*, para. 37. Counsel for the complainant may lack "the quasi-judicial function of the Crown but, like the Crown, is bound by the rules of professional ethics": *B.G.*, para. 59. Further, as in any case, solicitor-client privilege can be set aside where an accused meets the "innocence at stake" test: *Barakat,* para. 46 and *R. v. McClure*, [2001] 1 S.C.R. 445 (where an accused who was charged with sexual assault filed a civil action seeking damages and sought production of the complainant's lawyer's file).

55. Regardless of whether the complainant retains counsel, Crown counsel "would be permitted if not professionally obligated to review all material aspects of the application with the complainant" as part of ethical witness preparation (*B.G.,* para. 57) and is constitutionally obligated to disclose anything that arises. Moreover, contrary to J.J.'s assertion (*J.J.'s Factum*, para. 74), s. 648 of the *Code* does not preclude counsel from cross-examining the complainant about her prior knowledge of the application and application materials.

56. Courts have recognized that Crown counsel and complainant's counsel (or the record holder's counsel) play different roles. The Crown is not the complainant's lawyer and does not take instructions from them. It is not the Crown's role to "represent the privacy and equality interests of complainants and other third parties": *R. v. J.G.C.*, [2003] O.J. No. 2274 (Ont. S.C.J.), para. 9. See also *R. v. T.A.H.*, 2019 BCSC 1614, para. 67; *R. v. MacKay*, 2020 BCCA 258 (In Chambers), para. 41; *A.M.*, para. 86; *Marrello*, paras. 38-39, 82; *S.R.*, para. 37. Complainant's counsel "is best able to articulate and make submissions regarding the complainant's privacy interests": *S.R.*, para. 31. The additional perspective offered by complainant's counsel assists the court and facilitates the truth-seeking function: *R. v. M.S.*, 2019 ONCJ 670, paras. 104-105; *J.G.C.,* para. 9; *T.A.H.*, para. 67; *Marrello*, paras. 41, 43; *S.R.,* paras. 31, 41; *B.G.*, para. 39, 44; *El-Zoheiry*, para. 133.

57. Canada is not the only country that has granted complainants some form of participatory rights. The 2019 *Gillen Review: Report into the law and procedures in serious sexual offences in Northern Ireland* reviews the approach in continental European systems and other common law jurisdictions (pp. 167-171); see also K. Bellehumeur, "A Former Crown's Vision for Empowering Survivors of Sexual Violence" (2020), 37 Windsor Y B Just. 1, at 8-14. The Right Honourable Sir John Gillen and Bellehumeur both cite research confirming that independent legal representation reduces secondary trauma and rates of attrition, thereby increasing confidence in the administration of justice: *Gillen Review,* 167-171, 173, 175; Bellehumeur, at 7-11. The Gillen Review noted that independent representation "means that complainants are likely to see less use of the previous sexual history myths and misconceptions that may be invoked currently by defence teams. These are damaging on many levels" (p. 175).

58. When Parliament enacted ss. 278.94(2) and (3) "it did so because it recognized that the complainant's rights and interests could be affected by the decision to be made by the judge. Allowing the complainant the right to appear and make submissions would both give a measure of procedural fairness to the complainant and assist the court by granting it access to submissions from the perspective of one of the persons directly affected by the order to be heard": *R. v. Boyle*, 2019 ONCJ 11, para. 31. Permitting

complainant's counsel to attend and make submissions gives meaningful effect to the complainant's privacy, security and equality rights. It would be "illogical and inconsistent with Parliament's intention, to interpret the complainant's participation rights in such a way that she can hear the information during the hearing, but not see or read it in advance of the hearing": *Marrello*, paras. 80-81, 83-84.

(ii) Giving the complainant standing does not violate principle of prosecutorial independence

59. J.J. submits that the complainant's involvement also offends the principle of prosecutorial independence as it introduces a second adverse party into the admissibility hearing: *J.J.'s Factum,* para. 128. However, this assertion is inconsistent with the principles that underpin prosecutorial independence.

60. The principle of fundamental justice enshrined in s. 7 of the *Charter* requires that a "prosecutor – whether it be an Attorney General, a Crown prosecutor, or some other public official exercising a prosecutorial function – has a constitutional obligation to act independently of partisan concerns and other improper motives": *R. v. Cawthorne*, 2016 SCC 32, para. 24. A prosecutor must be independent, "must not act for improper purposes, such as purely partisan motives" and must act in the public interest "for the public good": *Cawthorne*, paras. 26, 28. A prosecutor has an "undivided loyalty … to the proper administration of justice": *R. v. McNeil*, 2009 SCC 3, para. 49.

61. The term "prosecutorial discretion" is an expansive term that covers all "decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it": *Krieger v. Law Society of Alberta*, 2002 SCC 65, para. 47.

62. Section 278.94(2) gives the complainant the right to "appear and make submissions" at the admissibility stage. Nothing in the impugned scheme gives the complainant standing as a "prosecutor" or any of the core powers that fall within the exercise of prosecutorial discretion: *Krieger,* para. 46; *R. v. Anderson*, 2014 SCC 41, para. 44. The complainant does not tender evidence at trial and an accused is not called upon "to meet the case of a second adverse party": *J.J.'s Factum,* para. 128. The burden remains on the Crown to prove the essential elements of the offence beyond a reasonable doubt. The prosecutor continues to make all "decisions regarding the nature and extent of the prosecution": *Krieger*, para. 47; *B.G.*, para. 40.

63. Contrary to J.J.'s submissions, the impugned scheme does not permit the complainant "to participate in the evidentiary decision-making before trial" or inject "a private party into the decision-making about the merits of the case": *J.J.*'s *Factum,* paras. 4(i) and 4(iv). As D.E. Harris J. observed in *B.G.*, "[t]he right to make submissions is just that and no more. The *voir dire* judge must still apply the legislation and, as with all legal argument, may find the submissions of the complainant persuasive or not. Critically, the judge remains the

exclusive evidentiary gatekeeper" (para. 36). Submissions, whether by the Crown, defence, or complainant, are not binding nor do they fetter the trial judge's discretion: *B.G.*, paras. 36, 38. If J.J.'s argument

> … implies that trial judges may lack the capability to discard arguments likely to deprive the accused of the right to full answer and defence, this must be rejected. Trial judges perform this type of function day in and day out. There is nothing unique in this context which suggests that the complainants' submissions could have the tendency to pull the wool over a judge's eyes. Judges have the necessary independence to properly perform their job when it comes to private records and sexual history.
>
> *B.G.*, para. 36. See also *El-Zoheiry*, paras. 135-137.

64. J.J. assumes that the complainant will have a right to cross-examine the accused: *J.J.'s Factum,* para. 127. However, s. 278.94(2) does not provide an express right of cross-examination and there is conflicting jurisprudence on this point: see, for example, *B.G.*, paras. 45-48; *A.C.*, paras. 68-69; *Boyle*, para. 40; *F.A.*, para. 71.

65. As this case clearly illustrates, a Crown counsel, acting independently in their Minister of Justice role, may well take a different position than the complainant. There is nothing in the record of this case to support the assertion that the complainant's participation interfered with the Crown's independence or exercise of prosecutorial discretion; that J.J. was unable to advance his position or effectively cross-examine the complainant; or that the appearance of fairness was "fundamentally undermined".[3]

E. Any infringement is justified under s. 1 of the *Charter*

66. If this Court finds that any aspect of the impugned scheme violates ss. 7, 11(c) or 11(d) of the *Charter*, the Crown submits that the infringement is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

67. The s. 1 analytical framework is outlined in the *Crown Appellant's Factum* at pages 34-36 and will not be reproduced here. That factum addressed the s. 1 justification related to the seven-day notice provision in s. 278.94(3) (paras. 36-39). This factum will address the broader s. 1 justification with respect to ss. 278.92 to 278.94 and should be read together with the s. 1 analysis in the *Crown Appellant's Factum*.

(i) Pressing and substantial objective

68. J.J. acknowledges "that Parliament's objective in enacting the regime, *properly understood*, is pressing and substantial" and asserts that "Parliament's *valid* purpose in creating the records screening

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[3] See also the Craig article, where the *R. v. Ghomeshi* trial transcripts are analyzed to assess whether the impugned scheme would have had any impact on the result in that case.

regime was to protect sexual assault complainants' privacy, equality, and dignity by creating a formal screening mechanism for complainant records that were never meant for the accused's eyes or personal use": *J.J.'s Factum*, paras. 157-158 (italicized emphasis in original, underlined emphasis added).

69. However, the objectives of the infringing measure cannot be read as narrowly as J.J. suggests. Parliament intended that the impugned scheme would apply to all records in which the complainant has a reasonable expectation of privacy in personal information in order to: (1) ensure that a complainant's rights to privacy, security and equality are protected; (2) improve victim and community confidence in the criminal justice system to increase the likelihood of reporting and victim participation; and (3) protect the integrity of the trial process by ensuring that evidence that is misleading or rooted in myth-based reasoning is not admitted into evidence: *Crown Appellant's Factum*, paras. 3 and 146. There can be no question that Parliament's objectives in enacting ss. 278.92 to 278.94 are pressing and substantial.

(ii) Rational connection

70. J.J. accepts "that there is a rational connection between the records screening regime and Parliament's interest in creating a formal screening mechanism for problematic *Shearing* evidence" but asserts that "no evidence of the relationship between private 'records' and myths and stereotypes has been presented" *J.J.'s Factum*, paras. 161, 168 (emphasis added). However, as noted above, a complainant's privacy, security, and equality rights are not limited to enumerated or so-called "problematic" *Shearing* records. Any attempt to limit the objective of the infringing measure should be rejected.

71. It has been widely recognized that there continues to be underreporting by victims of sexual offences as they fear revictimization as a result of the trial process: *Osolin,* at 628 (para. 57, *per* L'Heureux-Dubé J., dissenting); *Goldfinch*, para. 37; Bellehumeur, at 4. As L'Heureux-Dubé J., dissenting in part, recognized almost 20 years ago in *Shearing,* cross-examination on records "has potential equality implications, as victims would naturally be loath to report sexual assaults if they feared that their entire private lives would be intensely scrutinized at trial" (para. 185); see also L.C. Wilson, "Independent Legal Representation for Victims of Sexual Assault: A Model for Delivery of Legal Services" (2005), 23 Windsor Y.B. Access Just. 249 at 254.[4] This observation remains particularly apt today given the ubiquitous digital world in which we live. The concerns

[4] These concerns are not limited to Canada. The *Gillen Review* documented similar concerns in Northern Ireland: see Chapter 2, "The voice of complainants", paras. 2.64, 2.87, 2.88. Sir John Gillen also found a connection between delay and complainant participation/rates of withdrawal (paras. 2.64-2.65, 2.124-2.129).

arise not from the type of record, but from the content – information in which the complainant has a reasonable expectation of privacy. As Perkins-McVey J. observed in *El-Zoheiry*:

> [133] … a sexual assault complainant's privacy is acutely impacted by testifying at a criminal law. Historically the law has discriminated against such witnesses, who are most frequently women or children. This mistreatment has resulted in a loss of confidence in the legal system and a widespread reluctance on the part of victims to seek the protection of the law. Affording complainants standing and a right to counsel can assist the decision-making process by ensuring that courts fully appreciate the impact of evidentiary rulings on the privacy interests of witnesses. Extending natural justice to complainants enhances the confidence of complainants and the public in the administration of justice.

72. Records, whether enumerated or non-enumerated, may contain highly sensitive communications about a complainant's lifestyle and relationships that can be used to advance myth-based reasoning that extend beyond the twin myths. The new evidentiary screening mechanism mandates a more focussed assessment of relevance, materiality, probative value, and prejudicial effect, which enhances the confidence of complainants and the public in the administration of justice. This Court has recognized the impact that procedural and substantive rules have upon the reporting of sexual offences: *A.(L.L.)*, para. 60; *R. v. Adams*, [1995] 4 S.C.R. 707, paras. 24-26. As a result, the means are rationally connected to the objectives.

(iii) Minimal Impairment

73. The Crown submits that the impugned scheme is minimally impairing.

74. First, it is limited to prosecutions for sexual offences, which engage the privacy, security and equality rights of complainants. Cory J. recognized the exceptional nature of sexual offences in *Osolin*, "[i]t cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault based upon human dignity and constitutes a denial of any concept of equality for women" (at 669, para. 165).

75. Second, Parliament did not craft an entirely novel regime, but rather codified common law jurisprudence (*Osolin* and *Shearing)* using a procedural scheme that had already passed constitutional muster in *Mills* and *Darrach*. The amendments created a consistent scheme for the admissibility and use of third-party records, regardless of who was in possession of the records. The scheme fairly reconciles the divergent interests at play by: (1) using a well-known normative standard, reasonable expectation of privacy, in the definition of "record" in s. 278.1; (2) employing the threshold admissibility test ("significant probative value") which had already been upheld in *Darrach*; and (3) enumerating a non-exhaustive list of statutory factors in s. 278.92(3) similar to the factors set out in ss. 276(3) and 278.5(2). The judge shall consider and

balance all factors including "the interests of justice, including the right of the accused to make full answer and defence" (s. 278.92(3)(a)). The scheme permits a trial judge to engage in an unfettered balancing of relevant considerations and does not mandate a result or exclude relevant defence evidence.

76. Third, granting complainants the limited right to appear and make submissions, with or without counsel, is consistent with the principles of natural justice. The trial judge's discretion is not fettered by the complainant's submissions and they must continue to balance a non-exhaustive list of statutory factors.

77. Finally, s. 278.93(4) permits the application to be brought at any time, including after the examination-in-chief of the complainant (i.e. "at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice"). The "interests of justice" test is a well-known criminal law standard and provides for the broadest possible consideration of factors with respect to the timing of notice, including the accused's right to make full answer and defence.

(iv) Overall proportionality

78. The impugned scheme achieves a reasonable constitutional compromise between impact on an individual offender and the applicable societal interests including respect for the equality, privacy and security rights of a complainant and encouraging the reporting of sexual offences and complainant participation.

F. Remedy

79. J.J. submits that "the only solution to the unconstitutionality of the records screening regime is an order striking it down in its entirety": *J.J.'s Factum*, para. 171. However, his submission assumes this Court will ultimately conclude that the entire scheme violates the *Charter*. While it is difficult to address remedy in a vacuum in advance of this Court's ultimate decision, s. 52(1) of the *Constitution Act, 1982* encourages a more surgical approach. It grants courts the jurisdiction to declare laws of no force or effect only "to the extent of the inconsistency". Depending on this Court's decision, it would be entirely possible to employ a number of different remedial options to address discrete breaches while leaving most of the scheme intact.

80. In the event that this Court declares some or all of the impugned scheme to be of no force or effect, the Crown does not seek a suspension of the declaration of invalidity.

PART IV – Submissions Concerning Cost

81. The Crown does not seek costs on the cross-appeal and asks that no costs be ordered against it.

PART V – Order Sought

82. The Crown requests that its appeal be allowed and J.J.'s cross-appeal dismissed.

PART VI – Submissions on Effect of Publication Ban and Restriction on Public Access

83. The Crown's submissions on the effect of the publication bans and sealing order are set out at paragraphs 167 to 174 of the *Crown Appellant's Factum*. There have been no further changes to date.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Lesley Ruzicka
Counsel for the Appellant/Respondent on Cross-Appeal

Dated this 19th day of April, 2021
at Victoria, British Columbia

PART VII – Table of Authorities and Legislation

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