**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. Over two decades ago, Parliament responded to the unfair and discriminatory treatment of sexual assault complainants by enacting the s.276 regime, which restricted questioning of victims about their sexual history.[1] The enactment of s.276 brought an increase in the use of a complainant's therapeutic records in trials[2]. So, Parliament responded and enacted a regime specific to sexual offences to deal with the accused's ability to obtain private records in the hands of third parties.[3] The purpose was to prune a discriminatory practice that involved invasive (and often inappropriate) credibility probing and had the effect of discouraging complainants from coming forward[4].

2. Two decades later, sexual assault remains a serious problem in Canada[5], reporting remains low[6], and discriminatory and harmful practices continue within the criminal justice system[7]. So, by enacting Bill C-51, Parliament has again set out to make the criminal justice system fairer and more compassionate towards complainants.[8] One of the changes which Bill C-51 brought was a scheme to govern the admissibility of private records of the complainant in the hands of the accused. This scheme represents another Parliamentary step toward ensuring that an accused cannot advance groundless myths and fantasized stereotypes, and toward the protection of a complainant's privacy interest in those records.[9]

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[1] Bill C-49, *An Act to amend the Criminal Code (sexual assault)*, 34th Parl., 3rd Sess., 1992.
[2] *R. v. Darrach*, 2000 SCC 46 at ¶26.
[3] Bill C-46, *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, 35th Parl., 2nd Sess, 1997.
[4] *R. v. Quesnelle*, 2014 SCC 46 at ¶14.
[5] Minister of Justice and Attorney General of Canada Jody Wilson-Raybould, *House of Commons Debates*, 42-1, Vol. 148, No. 366, at 1035; *R. v. Barton*, 2019 SCC 33 at ¶1.
[6] *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. [*Gender-based violence*] [TAB 11].
[7] *R. v. A.L.*, 2020 BCCA 18 at ¶230; Elaine Craig, "The Inhospitable Court" (2016) 66:2 U Toronto LJ 197 at 228 [TAB 10].
[8] Minister of Justice and Attorney General of Canada Jody Wilson-Raybould, *House of Commons Debates*, 42-1, Vol. 148, No. 366, at 1035.
[9] Senate, *Statutory Review on the Provisions and Operation of the Act to amend the Criminal Code (production of records in sexual offence proceedings): Report of the Standing Senate Committee on Legal and Constitutional Affairs* (December 2012) (Chair: The Honourable Robert W. Runciman) [Bill C-46 Senate Report] at 18-19; Minister of Justice and Attorney General of Canada Jody Wilson-Raybould, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 42-1, No. 47 (20 June 2018) at 73-74.

3. In its factum on the appeal (to be distinguished from this cross-appeal), the Attorney General of Ontario (AG Ontario) addressed the narrow issue of the constitutionality of the seven-day notice provision in s.278.93(4) of the *Criminal Code*. In that factum, AG Ontario indicated at ¶5 that it intended to address the broader issue of the participatory rights of the complainant in this factum. However, subsequent to the filing of AG Ontario's factum on the appeal, leave to appeal was granted in the companion case of *A.S. v. Her Majesty the Queen et al* (39516), in which AG Ontario is a full party and in which the participatory rights of the complainant are squarely at issue. Thus, AG Ontario will address the participatory rights of a complainant in its factum in the *A.S.* matter.

4. Instead, in this factum, AG Ontario makes three arguments in response to arguments raised by the cross-appellant J.J. and by the Intervenor the Criminal Lawyers' Association (CLA) Ontario:

a. an electronic communication can be a "record" within the meaning of s.278.1 of the *Criminal Code*;

b. an accused 'adduces' a record within the meaning of s.278.92(1) when he refers to the content of the record in court, even if he does not confront the complainant with the record or enter it into evidence; and,

c. the 'significant probative value' requirement in s.278.92(2)(b) does not violate the accused's right to full answer and defence.

## PART II: STATEMENT OF POSITION

5. AG Ontario adopts the arguments of the Respondent on the cross-appeal the Attorney General of British Columbia (AG BC) that the statutory scheme contained in ss. 278.92 to 278.94 does not infringe ss. 7, 11(c) or 11(d) of the *Canadian Charter of Rights and Freedoms.* AG Ontario further adopts the arguments of AG BC that any infringement can be saved by s.1 of the *Charter*.

6. In this factum, AG Ontario makes the three points noted above in support of the position of AG BC.

## PART III: BRIEF OF ORAL ARGUMENT

### A. An Electronic Communication Can Be a "Record" Within the Meaning of Section 278.1 of the *Criminal Code*

#### *i. A Complainant Can Have a Reasonable Expectation of Privacy in Electronic Communications*

7. Section 278.1 of the *Criminal Code* defines "record" as "any form of record that contains personal information for which there is a reasonable expectation of privacy…"[10]. The section includes an enumerated, but not exhaustive[11], list of documents that constitute records. This Court has previously held in *R. v. Quesnelle* that records do not have to arise out of trust-like, confidential, or therapeutic relationships in order to fall within the definition of "record"[12].

8. This Court's decision in *R. v. Marakah*[13] establishes that an individual can have a reasonable expectation of privacy in electronic communications. In that case, this Court recognized two fundamental characteristics of electronic communications: (1) that "it is difficult to think of a type of conversation or communication that is capable of promising more privacy" than electronic messaging[14]; and, (2) that electronic conversations "are capable of revealing a great deal of personal information"[15]. While the purported *threat* to the privacy interest in *Marakah* came from the state, that does not change the fundamentally private nature of electronic communications as recognized in that case. Indeed, defence counsel who appeared before Parliamentary Committees considering Bill C-51 opined that the decision in *Marakah* would mean that electronic communications would fall within the

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[10] Section 278.1 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46.
[11] *R. v. H.A.R.*, 2019 ONSC 7415 at ¶25 [TAB 5]; *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.
[12] *R. v. Quesnelle*, 2014 SCC 46 at ¶27; *R. v. McKnight*, 2019 ABQB 755 at ¶¶10-11. Although *R. v. Quesnelle* 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.
[13] *R. v. Marakah*, 2017 SCC 59.
[14] *R. v. Marakah*, 2017 SCC 59 at ¶35, ¶18; *R. v. Ahmad*, 2020 SCC 11 at ¶36.
[15] *R. v. Marakah*, 2017 SCC 59 at ¶37.

definition of "record" within the meaning of s.278.1[16]. Similarly, one legal commentator has argued that the reach of *Marakah* may well extend to other contexts which do not involve state intrusion[17]. More basically, this Court has held that s.8 contemplates an individual's expectations of privacy from the state as well as privacy against other individuals.[18]

9. A complainant does not lose a reasonable expectation of privacy in an electronic communication merely because she has sent it to the recipient. As this Court in *Marakah* made clear, the risk that a recipient could disclose an electronic conversation does not negate a reasonable expectation of privacy in it.[19] And, as this Court noted in *Mills* (1999): "[p]rivacy interests in modern society include the reasonable expectation that private information will remain confidential to the person to whom and restricted to the purposes for which it was divulged."[20] As Côté J. held in *R. v. Jones*, "Canadians are not required to become digital recluses in order to maintain some semblance of privacy in their lives".[21] Indeed, digital communications between a witness and a third party have long been recognized as attracting a reasonable expectation of privacy, and that expectation of privacy is not lost simply because the recipient could breach the complainant's privacy and disseminate the digital record further, including to the accused.[22]

10. A complainant's reasonable expectation of privacy in her electronic communications is also not diminished merely by making an allegation of sexual assault, and courts that have concluded to the

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[16] Breese Davies (now Justice of the Superior Court of Justice) speaking as an individual, Canada, Parliament, *House of Commons Standing Committee on Justice and Human Rights*, 42-1, No. 71 (23 October 2017) at 1555; Michael Spratt speaking as an individual, Canada, Parliament, *House of Commons Standing Committee on Justice and Human Rights*, 42-1, No. 71 (23 October 2017) at 1645; Michael Spratt speaking as an individual, Canada, Parliament, *Standing Senate Committee on Legal and Constitutional Affairs*, 42-1, No. 48 (19 September, 2018).

[17] Gerald Chan, "Text Messaging: The Most Private (And Recorded) Form of Communication" (2018) 36 Adv. J. No. 4 at ¶21, ¶¶25-26 [TAB 12].

[18] *R. v. Jarvis*, 2019 SCC 10 at ¶58.

[19] *R. v. Marakah*, 2017 SCC 59 at ¶¶40-41; *R. v. Jones*, 2017 SCC 60 at ¶39; *R. v. Jarvis*, 2019 SCC 10 at ¶61.

[20] *R. v. Mills*, [1999] 3 S.C.R. 668 at ¶108; *R. v. Quesnelle*, 2014 SCC 46 at ¶37.

[21] *R. v. Jones*, 2017 SCC 60 at ¶45; Gerald Chan, "Text Messaging: The Most Private (And Recorded) Form of Communication" (2018) 36 Adv. J. No. 4 at ¶27 [TAB 12].

[22] Factum of the Intervener, Barbra Schlifer Commemorative Clinic at ¶16. See also: ¶26 of the AG Ontario's factum on the appeal (to be distinguished from the cross-appeal); *R. v. Tanasijevic*, 2020 ONSC 762 at ¶2, ¶¶9-10 [TAB 8]; *R. v. McKnight*, 2019 ABQB 755 at ¶¶37-38.

contrary should not be followed.[23] As noted by Gomery J. in *R. v. T.A.,* a complainant should not be expected to contemplate a potential assault and its legal consequences at the time a communication is made; such reasoning "lowers a woman's privacy rights because of a theory that she should have anticipated being a victim of sexual assault"[24]. Indeed, given the prevalence of sexual assault in our society[25], about one-third of Canadian women would be forced to self-censor their private communications if the mere reporting of a sexual assault diminished their expectation of privacy in those communications. Moreover, 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.[26] As the court held in *T.A.,* by making an allegation of sexual assault, a complainant necessarily sacrifices some expectation of privacy -- she must, at a minimum, disclose sexual activity with another person. However, the goal of the legislative protection is to ensure that the complainant's dignity and privacy rights are not compromised more than is strictly necessary, while safeguarding the presumption of innocence and the accused's right against self-incrimination.[27]

11. A categorical exclusion of electronic communications from the definition of record would result in an inconsistency which is illustrated by the following example. A complainant discusses self-harm over text messages with an accused[28]. She also discusses that same self-harm with a psychiatrist or counsellor, who might in turn record that information. In either case, the privacy interest in the subject of self-harm is the same and remains high. Yet by the categorical exclusion of electronic

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[23] Some courts have concluded that a complainant's expectation of privacy in an electronic communication with the accused is reduced by virtue of having made an allegation of sexual assault against him: *R. v. W.M.,* 2019 ONSC 6535 at ¶50; *R. v. A.M.*, 2020 ONSC 1846 at ¶106; *R. v. X.C.*, 2020 ONSC 410 at ¶62 [TAB 9]; *R. v. Mai*, 2019 ONSC 6691 at ¶25; *R. v. Marrello*, [2020] O.J. No. 3617 (Crt. Jus.) at ¶170 [TAB 6].

[24] *R. v. T.A.*, 2020 ONSC 2613 at ¶¶26-31; *R. v. G.E.*, 2020 ONCJ 451 at ¶¶22-23[TAB 4].

[25] *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. [*Gender-based violence*] [TAB 11].

[26] *R. v. T.A.*, 2020 ONSC 2613 at ¶¶26-31; *R. v. G.E.*, 2020 ONCJ 451 at ¶¶22-23 [TAB 4].

[27] *R. v. T.A.*, 2020 ONSC 2613 at ¶¶26-31; *R. v. G.E.*, 2020 ONCJ 451 at ¶¶22-23 [TAB 4].

[28] *R. v. E.W.,* [2019] O.J. No. 6880 (Crt. Jus.) at ¶¶58-60 [TAB 2].

communications from the statutory scheme, her privacy interests in her communications on the topic receives no protection.

12. Importantly, however, AG Ontario does not argue that *all* electronic communications fall within the definition of "record" in s.278.1. A communication is only a "record" where it "contains personal information for which there is a reasonable expectation of privacy"[29]. As set out at ¶23 of AG Ontario's factum on the appeal (to be distinguished from this cross-appeal), courts have generally taken a contextual approach in determining whether an electronic communication meets the definition of "record", and have considered factors such as:

a. The content of the record;
b. The individuals who were privy to the information in the record;
c. The risk that the receiver would reveal the information to others;
d. The nature of the relationship between the parties; and,
e. The nature of the social media application used for the communication.

This contextual approach resembles the contextual approach this Court took in *Jarvis* in determining whether female students maintained a reasonable expectation of privacy in their cleavage where their male teacher surreptitiously recorded them with a pen camera contrary to section 162(1).[30] It also resembles the contextual approach this Court took *Marakah* in determining whether an accused had a reasonable expectation of privacy in his electronic communications[31]. Indeed, privacy is not an all-or-nothing concept.[32]

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[29] Section 278.1 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46.
[30] *R. v. Jarvis*, 2019 SCC 10 at ¶5, 28-31, 60.
[31] *R. v. Marakah*, 2017 SCC 59 at ¶¶22-45. The Intervenor CLA Ontario argues at ¶15 of its factum that *Marakah* prevents consideration of the content of a record to determine the privacy interest in it and that, as such, the *Marakah* analysis must be "content neutral". This is a misreading of *Marakah*, in which the Court was simply making clear that the contents of a record could not be used to justify an unreasonable privacy violation by the state: *R. v. Marakah*, 2017 SCC 59 at ¶48.
[32] *R. v. Jarvis,* 2019 SCC 10 at ¶41.

13. In cases where communications were determined to be records, the complainant divulged private information such as feelings, mental health history, and details about the parties' relationship.[33] By contrast, many of the cases interpreting s. 278.1 ultimately decided that the communications were not records because they did not contain private personal information.[34] Regardless of the outcome, no court has bypassed the contextual reasonable expectation of privacy analysis in favour of categorical exclusion.[35]

### *ii. Parliament Intended for Electronic Communications to Be Covered by the Legislative Screening Regime*

14. This Court has held that a legislature is presumed to have a mastery of existing law, and that when a legislature uses a common law term or concept in legislation, that term or concept is presumed to retain its common law meaning.[36] In light of this Court's decision in *R. v. Marakah*[37], which was released before Bill C-51 was passed[38], Parliament can be taken to have intended that electronic communications could fall within the definition of "record", as *Marakah* clearly establishes that they can give rise to a reasonable expectation of privacy. Indeed, lawyers appearing on behalf of the Criminal Lawyers' Association before the Parliamentary Committees urged Parliament specifically to

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[33] *R. v. R.M.R.*, 2019 BCSC 1093 at ¶6, ¶18, ¶¶38-39; *R. v. T.A.*, 2020 ONSC 2613 at ¶10, ¶¶39-42; *R. v. M.S.*, 2019 ONCJ 670 at ¶69, ¶72.

[34] Eg. *R. v. Navia*, 2020 ABPC 20 at ¶¶2-6; *R. v. Mai*, 2019 ONSC 6691 at ¶10, ¶¶30-31; *R. v. W.M.*, 2019 ONSC 6535 at ¶43, ¶56; *R. v. A.M.*, 2020 ONSC 1846 at ¶¶104-123; *R. v. White*, 2020 ONSC 1808 at ¶1, ¶4, ¶¶14-20.

[35] AG Ontario concurs with, and supports, the request made at ¶¶25-27 of the factum of the Intervenor the Barbra Schlifer Commemorative Clinic that this Court provide guidance on the interpretation of the legislative scheme for the assistance of the lower courts. This includes clarification on the question of whether electronic communications can fall within the definition of "record" and, if so, what kinds of communications would or would not attract the application of the scheme.

[36] *R. v. Jarvis*, 2019 SCC 10 at ¶56.

[37] *R. v. Marakah*, 2017 SCC 59.

[38] This Court's decision in *Marakah* was released on December 8, 2017: *R. v. Marakah*, 2017 SCC 59. Bill C-51 received Royal Assent on December 13, 2018: *An Act to Amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, S.C. 2018, c.29.

exclude electronic communications from the definition of "record"[39], but Parliament declined to do so. Two Senators in fact specifically mentioned the *Ghomeshi* case in connection with the legislative scheme, in which case communications the accused and complainants exchanged were put to the complainants by the defence at trial.[40]

### *iii. The Legislative Screening Regime is Not Rendered Unconstitutional by the Broadening of its Application*

15. There can be no doubt that the inclusion of electronic communications within the definition of "record" will broaden the application of the statutory screening scheme as it applies to records in the hands of the accused. However, it will not mean that the statutory scheme will apply to all electronic communications because, as outlined above, only records containing personal information which attract a reasonable expectation of privacy will fall within the definition of "record". Moreover, as this Court established in *Mills* (1999), the mere broad applicability of the statutory scheme does not make out a constitutional violation: it is the procedures established by the scheme, and not the spectrum of records subject to these procedures, that will determine the fairness or constitutionality of the legislation.[41]

## B. An Accused 'Adduces' a Record When He Refers to its Contents in Court

16. Section 278.92(1) of the *Criminal Code* provides that "no record relating to a complainant that is in the possession or control of the accused — and which the accused intends to adduce — shall be admitted in evidence…" except in accordance with the section. The CLA argues that to 'adduce' does not include putting the contents of the record to a complainant but is limited to putting the record itself to the witness. AG Ontario urges this Court to reject that interpretation for three reasons: (1) Parliament intended for the contents of the record to be protected by the statutory screening regime,

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[39] Megan Savard speaking on behalf of the Criminal Lawyers' Association, Canada, Parliament, *House of Commons Standing Committee on Justice and Human Rights,* 42-1, No. 71 (23 October 2017) at 1730; Genevieve McInnes speaking on behalf of the Criminal Lawyers' Association, Canada, Parliament, *Standing Senate Committee on Legal and Constitutional Affairs*, 42-1, No. 48 (19 September, 2018); Anne Marie McElroy speaking on behalf of the Criminal Lawyers' Association, Canada, Parliament, *Standing Senate Committee on Legal and Constitutional Affairs*, 42-1, No. 48 (19 September, 2018).

[40] Senator Mobina Jaffer, Canada, Parliament, *Standing Senate Committee on Legal and Constitutional Affairs,* 42-1, No. 48 (September 19, 2018); Senator Murray Sinclair, Canada, Parliament, *Senate Orders of the Day*, 42-1, Vol. 150, No. 233 at 1450 (3 October, 2018).

[41] *R. v. Mills,* [1999] 3 S.C.R. 668 at ¶100.

and not just the physical record itself; (2) this Court's jurisprudence supports the interpretation that requires an accused to bring an application when putting the content of the record to the complainant, and not just the record itself; and, (3) no absurdity results when an accused is required to bring an application before using the content of a record at trial.

### *i. Parliament Intended for the Contents of a Record to Be Protected by the Statutory Screening Regime*

17. Statutory interpretation requires that the words of an Act must be interpreted in their entire context, harmoniously with the scheme and object of the Act, and the intention of Parliament.[42] It is also a well-established principle of statutory interpretation that Parliament does not intend to produce absurd consequences.[43] A review of the legislative history of, and context to, Bill C-51 reveals that Parliament intended that s.278.92 would apply when defence counsel seek to use the content of a record to cross-examine the complainant, and not just when they wish to put to her the physical record itself.

18. In December of 2012, the Standing Senate Committee on Legal and Constitutional Affairs released its report on Bill C-46, *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*.[44] In the report, the Committee considered this Court's decision in *R. v. Shearing*[45], and noted that the *Criminal Code* scheme governing records production is distinct from the rules that govern the admissibility of evidence or the permissible lines of cross-examination during

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[42] *Rizzo & Rizzo Shoes Ltd. (re),* [1998] 1 S.C.R. 27 at ¶21; *R. v. Stipo,* 2019 ONCA 3 at ¶175.
[43] *Rizzo & Rizzo Shoes Ltd. (re),* [1998] 1 S.C.R. 27 at ¶27; *R. v. Stipo,* 2019 ONCA 3 at ¶177.
[44] Senate, *Statutory Review on the Provisions and Operation of the Act to amend the Criminal Code (production of records in sexual offence proceedings): Report of the Standing Senate Committee on Legal and Constitutional Affairs* (December 2012) (Chair: The Honourable Robert W. Runciman) [Bill C-46 Senate Report].
[45] *R. v. Shearing*, 2002 SCC 58.

criminal trials.[46] Recognizing that individuals may retain important privacy interests in information that is in the possession of an accused person, the Committee wrote[47]:

> Therefore, we believe that in a trial on a sexual offence charge, in which an accused is in lawful possession of a complainant's private records **and wishes to use these records for the purposes of cross-examination or seeks to introduce them into evidence**, judges should take into account, when weighing prejudicial effect against probative value, factors similar to those governing their determinations on third party records applications under section 278.5(2) of the *Code* and the admissibility of evidence of a complainant's prior sexual activity under section 276(3) of the *Code*. [emphasis added]

As a result, the Committee made the following recommendation:

> That the Government of Canada consider amending the *Criminal Code* to set out a procedure governing the **admissibility and use** during trial of a complainant's private records, as defined in section 278.1 of the *Criminal Code*, which are not wrongfully in the hands of the accused. **This procedure should define the purposes for which such records may not be admitted or used** and set out the relevant factors for trial or case-management judges to consider in making their determinations, bearing in mind the rights of the accused under the *Canadian Charter of Rights and Freedoms*... [emphasis added][48]

19. In June of 2018, then Justice Minister Wilson-Raybould identified this recommendation as the genesis of what would become s.278.92 through the introduction of Bill C-51[49]. She explained that Bill C-51 would require a court to[50]:

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[46] Senate, Statutory Review on the Provisions and Operation of the Act to amend the Criminal Code (production of records in sexual offence proceedings): Report of the Standing Senate Committee on Legal and Constitutional Affairs (December 2012) (Chair: The Honourable Robert W. Runciman) [Bill C-46 Senate Report] at 18.

[47] Senate, *Statutory Review on the Provisions and Operation of the Act to amend the Criminal Code (production of records in sexual offence proceedings): Report of the Standing Senate Committee on Legal and Constitutional Affairs* (December 2012) (Chair: The Honourable Robert W. Runciman) [Bill C-46 Senate Report] at 19.

[48] Senate, *Statutory Review on the Provisions and Operation of the Act to amend the Criminal Code (production of records in sexual offence proceedings): Report of the Standing Senate Committee on Legal and Constitutional Affairs* (December 2012) (Chair: The Honourable Robert W. Runciman) [Bill C-46 Senate Report] at 20.

[49] Minister of Justice and Attorney General of Canada Jody Wilson-Raybould, *Standing Senate Committee on Legal and Constitutional Affairs*, 42-1, No. 47 (20 June 2018) at 73.

[50] Minister of Justice and Attorney General of Canada Jody Wilson-Raybould, *Standing Senate Committee on Legal and Constitutional Affairs*, 42-1, No. 47 (20 June 2018) at 74.

> …consider a series of factors before deciding whether the private record of the complainant that is in the hands of the accused can be **used** in a trial relating to a sexual offence. [emphasis added]

Similarly, during third reading of Bill C-51 before the Senate in October of 2018, Senator Sinclair, the sponsor of the Bill in the Senate, made clear that the provisions pertained to a record's use[51]:

> This measure requires that an accused person, who is in possession of records that they wish to **use** to cross-examine a complainant at trial, must give notice that they intend to **use** those records and what those records are, and then a judge must rule on their ability to **use** those records to cross-examine the complainant. The complainant then has the right to appear, with or without counsel, to argue about the **potential usage** of those records. [emphasis added]

20. Parliament's intention that the statutory scheme cover all uses of a "record" within the meaning of s.278.1 is further demonstrated by the Summary included at the start of the Bill, which states that the goal of the legislation is, in part, to provide "a procedure for determining the **admissibility and use** of the complainant's records when they are in the possession of the accused". [emphasis added][52]

21. An interpretation of "adduce" that would permit an accused to cross-examine on the content of a record without an application would also thwart Parliament's stated goal for the legislation, which is to safeguard the privacy, security and equality interests of victims, while upholding an accused's right to a fair trial.[53] This intention is made manifest by the factors a court is directed to consider on an application as outlined in s.278.92(3), including:

- society's interest in encouraging the reporting of sexual offences;
- society's interest in encouraging the obtaining of treatment by complainants of sexual offences;
- the potential prejudice to the complainant's personal dignity and right of privacy; and

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[51] Senator Murray Sinclair, Canada, Parliament, *Senate Orders of the Day*, 42-1, Vol. 150, No. 233 at 1450 (3 October, 2018).

[52] Legislative Summary, Bill C-51: *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, October 1, 2018, Revised December 18, 2018 at 1.

[53] Minister of Justice and Attorney General of Canada Jody Wilson-Raybould, *Standing Senate Committee on Legal and Constitutional Affairs*, 42-1, No. 47 (20 June 2018) at 74.

- the right of the complainant and of every individual to personal security and to the full protection and benefit of the law.[54]

If "adduce" only meant the introduction of the physical record, the statutory provision would not safeguard the complainant's privacy interest at all; once a question about the content is asked and answered, the complainant's privacy would be breached, and the information would become publicly known[55]. Moreover, many of the factors the court is directed to consider on such an application would be moot. As Doody J. held in *R. v. Boyle*, the result of an interpretation which would not require the accused to bring an application before putting the content of a record to a complainant "would be 'absurd'".[56]

### *ii. This Court's Jurisprudence Supports the Interpretation that Requires an Accused to Bring an Application When Putting the Content of the Record to the Complainant*

22. The argument advanced by the CLA that a record is not "adduced" until a copy of it is introduced into evidence stands contrary to this Court's jurisprudence in two ways. First, this Court has made clear that a privacy interest is not defined in terms of "physical acts, physical space, or modalities of transmission", but rather reference must be made to the nature of the privacy interests potentially compromised[57]. Thus, in *Marakah,* this Court characterized the subject of the search not as the phone on which the relevant text messages were contained, but rather as the messages themselves. This Court also focused on the privacy interest engaged, rather than the medium, in *R. v. Shearing.* In that case, this Court described the issue as being not who owned the complainant's physical diary, but the status of the information contained therein.[58] The argument the CLA advances is antithetical to this line of jurisprudence in its attempt to reduce a complainant's privacy interest to the physical record itself.

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[54] Section 278.92(3)(b), (c), (g), and (h) of the *Criminal Code of Canada* R.S.C. 1985, c. C-46.

[55] As the Court noted in *R. v. S.L.*, 2020 ONSC 497 at ¶21, a cross-examination on the content of a record means that information is exposed to those in attendance at court, including: the complainant's friends and family, the accused and his supporters, and complete strangers. The media may also extend the content of the record to the public at large, albeit without information that would identify the complainant.

[56] *R. v. Boyle*, 2019 ONCJ 226 at ¶¶26-28, ¶31, ¶38.

[57] *R. v. Marakah*, 2017 SCC 59 at ¶¶15-17.

[58] *R. v. Shearing*, 2002 SCC 58 at ¶¶87-93.

23. *R. v. Shearing* stands against the interpretation of "adduce" as advanced by the CLA in another way. In that case, the defence wanted to cross-examine the complainant on the content of her diary, but there was no suggestion that the defence wanted to enter the diary itself into evidence. Nonetheless, this Court characterized the issue of the extent to which the defence could refer to the diary as a question of *admissibility*[59] [60]. Indeed, just as in *Shearing*, a record within the meaning of s.278.1 would normally be referred to in cross-examination to refresh a complainant's memory or undermine her credibility, but it would be rare for the record itself to be admitted into evidence. Thus, to adopt the narrow definition of "adduce" proposed by the CLA would render the statutory scheme to have only the rarest of applications.[61]

### *iii. No Absurdity Results When an Accused is Required to Bring an Application Before Using the Content of a Record at Trial*

24. Requiring an accused to bring an application before putting the content of a record to a complainant does not create an absurdity, as the CLA suggests. The mere fact that an accused is required to bring an application before referring to the contents of a message does not necessarily mean that he will not be permitted to refer to the content of the message; the application might be allowed. Moreover, where the application is not allowed, it cannot be said to be nonsensical, as the Court held it to be in *R. v. X.C.*[62], to expect an accused to structure his defence without reference to information of which he has independent knowledge. The distinction as to whether he obtained the "record" in question by a production order, or whether it came into his possession by some other means, does not affect the complainant's privacy interest in the record. Nor is it unreasonable to expect an accused person to structure his defence without evidence of which he is aware but which is rendered inadmissible by a statutory or common law rule; to the contrary, that is a common occurrence in a criminal trial.

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[59] *R. v. Shearing*, 2002 SCC 58 at ¶¶94-106.
[60] Similarly, the British Columbia Court of Appeal dismissed defence counsel's argument that simply *asking* a youth witness whether he had been convicted of a youth crime (where counsel was in possession of the youth record) was not *using* the record contrary to the *Youth Criminal Justice Act*: *R. v. Hammerstrom*, 2018 BCCA 269 at¶¶ 42-43
[61] *R. v. Boyle*, 2019 ONCJ 226 at ¶39.
[62] *R. v. X.C.*, 2020 ONSC 410 at ¶60 [TAB 9].

## C. The 'Significant Probative Value' Requirement in s.278.92(2)(b) Does Not Violate the Accused's Right to Full Answer and Defence

25. Section 278.92(2)(b) of the *Criminal Code* provides that private records which do not fall under s.276 of the *Criminal Code* (the 'other sexual conduct' provision) are admissible only if "the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice". JJ argues this admissibility standard impairs the accused's ability to make full answer and defence. AG Ontario disagrees. This Court's prior jurisprudence supports the constitutionality of the "significant probative value" admissibility standard. Moreover, its application does not place an unfair burden on the defence.

### *i. This Court's Jurisprudence Supports the Constitutionality of the "Significant Probative Value" Admissibility Standard*

26. The mere fact that relevant evidence might be excluded under the screening regime does not establish a *Charter* violation.[63] Nor does the fact that the screening regime applies broadly to numerous kinds of private records[64], nor that it applies in all sexual offence prosecutions.[65] Nor is a *Charter* violation established by the fact that the scheme developed by Parliament differs from a regime envisaged by this Court in the absence of a statutory scheme.[66] An accused is not entitled to the "most favourable procedures that could possibly be imagined"[67]. Neither does full answer and defence include the right to evidence that would distort the search for truth.[68]

27. In *R. v. Darrach,* this Court upheld the constitutionality of the same admissibility standard for defence evidence in the context of s.276 of the *Criminal Code.* In particular, the Court considered the constitutionality of what was then s.276(2)(c) of the *Criminal Code* (now s.276(2)(d)). That section creates criteria for the admissibility of evidence of other sexual conduct, one of which is that the evidence has "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice". This Court held that the word "significant" does not

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[63] *R. v. Mills*, [1999] 3 S.C.R. 668 at ¶74; *R. v. Goldfinch*, 2019 SCC 38 at ¶30.
[64] *R. v. Mills*, [1999] 3 S.C.R. 668 at ¶¶97-100.
[65] *R. v. Mills*, [1999] 3 S.C.R. 668.
[66] *R. v. Mills*, [1999] 3 S.C.R. 668 at ¶¶55-60.
[67] *R. v. Mills*, [1999] 3 S.C.R. 668 at ¶72; *R. v. Darrach*, 2000 SCC 46 at ¶24; *R. v. Goldfinch*, 2019 SCC 38 at ¶30 *per* Karakatsanis J.
[68] *R. v. Mills*, [1999] 3 S.C.R. 668 at ¶72, ¶90; *R. v. Darrach*, 2000 SCC 46 at ¶24; *R. v. Goldfinch*, 2019 SCC 38 at ¶30 *per* Karakatsanis J.

render the provision unconstitutional by raising the threshold for the admissibility of evidence to the point that it is unfair to the accused.[69] The Court in *Darrach* gave three reasons upholding the constitutionality of the admissibility standard in s.276(2)(d). Each of those three reasons is equally applicable to s.278.92(2)(b).

### a. The Word "Significant" is Reasonably Capable of Being Read in a *Charter*-Compliant Manner on a Textual Level

28. The first reason this Court gave in *Darrach* for upholding the constitutionality of the admissibility standard in s.276(2)(d) is that the word "significant" was reasonably capable of being read in a *Charter*-compliant manner on a textual level. The word "significant" does not appear in the French version of s.276, which speaks only of "valeur probante". The rule of equal authenticity and the rule against unconstitutional interpretation required that the two versions be reconciled where possible.[70] This Court held that an interpretation of the word "significant" to mean 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", and which recognized that it is not necessary for an accused "to demonstrate 'strong and compelling' reasons" for the admission of the evidence, met the requirements of statutory interpretation. The Court concluded that the standard was "not a departure from the conventional rules of evidence".[71]

29. The word "significant" also does not appear in the French version of s.278.92(2)(b), which also speaks only of "valeur probante". There is no reason to interpret the word "significant" differently in s.278.92(2)(b) than this Court did in *Darrach* in relation to s.276. This standard is not a departure from the conventional rules of evidence. In *R. v. Green*, the court concluded that the standard of admissibility required as a result of the new statutory scheme "is not markedly more onerous than the existing standard". Judges routinely weigh probative value against prejudicial effect and the complainant's privacy and equality rights, as well as broader considerations, inform the determination of whether to restrict cross-examination on personal information records.[72]

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[69] *R. v. Darrach*, 2000 SCC 46 at ¶38.
[70] *R. v. Darrach*, 2000 SCC 46 at ¶39; *R. v. Stipo*, 2019 ONCA 3 at ¶180.
[71] *R. v. Darrach*, 2000 SCC 46 at ¶39.
[72] *R. v. Green*, 2021 ONSC 2826 at ¶57

### b. The Context of the Word "Significant" Supports its Constitutionality

30. This Court also upheld the constitutionality of s.276(2)(d) in *Darrach* because the adverb "substantially" protects the accused "by raising the standard for the judge to exclude evidence once the accused has shown it to have significant probative value". As the Court explained, both sides of the equation are heightened in this test.[73]

31. Again, the same is true about the standard in s.278.92(2)(b). There is protection for the accused built right into the section. Where he can show that evidence has "significant probative value", it will not be excluded unless its value is "substantially outweighed" by the prejudice.

### c. The Admissibility Standard in Section 278.92(2)(b) Enhances Trial Fairness

32. In *Darrach*, this Court held that the standard in s.276(2)(d) actually enhances trial fairness. The Court noted that the requirement of "significant probative value" served to exclude evidence of trifling relevance that would endanger the proper administration of justice, ensuring that evidence of other sexual conduct is not used for improper purposes. At the same time, the Court noted that the s.276 scheme preserves the right to make full answer and defence by directing a judge to consider the right of an accused to make full answer and defence in determining whether to exclude evidence.[74]

33. While s.276 deals with evidence of other sexual conduct, the use of private records that fall outside the scope of s.276 can nonetheless constitute a significant invasion of the complainant's privacy[75], can interfere with her psychological integrity[76], and can give rise to myths and stereotypes[77], [78]. Parliament has recognized the parallel between the evidence implicated by s.276 and s.278.92 by imposing the same admissibility standard. In *Darrach,* this Court recognized that s.276 evidence and

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[73] *R. v. Darrach*, 2000 SCC 46 at ¶40.
[74] *R. v. Darrach*, 2000 SCC 46 at ¶¶41-43; *R. v. Goldfinch*, 2019 SCC 38 at ¶128 *per* Moldaver J., concurring.
[75] *R. v. Mills*, [1999] 3 S.C.R. 668 at ¶62, ¶72, ¶77.
[76] *R. v. Mills*, [1999] 3 S.C.R. 668 at ¶85.
[77] *R. v. Mills*, [1999] 3 S.C.R. 668 at ¶90.
[78] The effect of the use of private records on complainants, and the myths and stereotypes which can arise from the use of private records, is fully addressed at ¶¶29-37 of the AG Ontario's factum on the appeal (to be distinguished from the cross-appeal).

evidence relating to private records of a complainant operate in analogous ways in a sexual assault trial. It held:

> The Court in Mills upheld the constitutionality of the provisions in the Criminal Code that control the use of personal and therapeutic records in trials of sexual offences. The use of these records in evidence is analogous in many ways to the use of evidence of prior sexual activity, and the protections in the Criminal Code surrounding the use of records at trial are motivated by similar policy considerations.

Similarly, in *R. v. A.L.,* the British Columbia Court of Appeal upheld the trial judge's decision to place limits on the use the defence could make of a video which engaged the complainant's privacy interests but did not fall under the s.276 scheme. The court recognized that although the *Seaboyer* test for the admissibility of defence evidence generally applies, the right to cross-examine is not unlimited, and in the context of sexual assault cases in particular, limits may be necessary to protect the complainant's dignity, privacy, and equality interests.[79]

34. Parliament was entitled to recognize that the interests countervailing those of the accused in a criminal trial are high, and that the bar for admissibility is naturally raised as a consequence. Indeed, myth-based thinking continues to masquerade as truth in criminal trials[80], and we have come to better understand the harm which can be occasioned when a complainant is confronted with private records in the context of an allegation that the core of her privacy has been violated[81]. In *R. v. Barton,* this Court held that the criminal justice system must do better to eliminate myths, stereotypes, and sexual violence against women[82]. Section 278.92(2)(b) is merely a codification of that call to action.

35. Just as with the s.276 legislative scheme, s.278.92(3)(a) directs a court to consider the accused's right to make full answer and defence in determining the admissibility of a record. The legislative scheme in s.278.92 therefore strikes the same constitutional balance as does the s.276 scheme and enhances trial fairness.

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[79] *R. v. A.L.*, 2020 BCCA 18 at ¶¶219-225. The trial in this matter took place prior to Bill C-51 coming into effect, so the Court of Appeal's comments relate to the way in which the *Seaboyer* test for the admission of defence evidence should be shaped to protect the interests of the complainant.

[80] *R. v. A.L.*, 2020 BCCA 18 at ¶230.

[81] *R. v. B.G.*, 2021 ONSC 2299 at ¶¶12, 29-30 [TAB 1].

[82] *R. v. Barton*, 2019 SCC 33 at ¶1.

### *ii. The "Significant Probative Value" Admissibility Standard is Not Unfair by Virtue of Applying Only to the Defence*

36. There is no unfairness caused by the fact that the admissibility standard applies only when the defence seeks to adduce the evidence covered by the legislative screening regime. This is because the same concerns do not arise where the records are adduced by the Crown.

37. In particular, a complainant will not be caught off guard by the Crown's use of her private records during a trial. Where a Crown has possession of a private record, she cannot use it at trial until it has been disclosed to the defence. Moreover, the record cannot be disclosed to the defence unless the Crown is satisfied that the victim has expressly waived the application of the provisions of ss.278.1-278.91 or there is a court order[83]. A valid waiver is only found where the person to whom the record relates knew and understood the protections afforded by the legislation, and explicitly waived those protections with a full understanding of the consequences of that waiver. The use of the records in court potentially represents a greater detriment to a complainant's privacy and dignity than does production, involving as it does the airing of the private record in open proceedings often held in front of a complainant's friends and family, and those of the accused.[84] Thus, it is insufficient for a complainant to provide a waiver that her records be turned over to the police or Crown; she must specifically understand that the records will be used in court[85].

38. Further, given the different roles between the Crown and the defence, it is difficult to conceptualize of a circumstance in which a Crown will make use of a private record in a way which the

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[83] *R. v. Mills*, [1999] 3 S.C.R. 668 at ¶¶108-109; *R. v. Quesnelle*, 2014 SCC 46 at ¶29; *R. v. McNeil*, 2009 SCC 3 at ¶38; *R. v. W.G.G.*, [2002] O.J. No. 1542 (C.A.) at ¶¶9-15.

[84] *R. v. S.L.,* 2020 ONSC 497 at ¶21.

[85] *R. v. B.G.*, 2021 ONSC 83 at ¶¶4-14; *R. v. Plaunt*, [2006] O.J. No. 2175 (Sup. Crt.) at ¶¶13-22 [TAB 7]. The difference between disclosure or production of a complainant's records to the accused on the one hand, and their use at a trial on the other, explains why most courts have found that even where a record has been produced to an accused, he must still apply to adduce it into evidence under s.278.93: *R. v. S.L.,* 2020 ONSC 497 at ¶¶10-23; *R. v. Floyd,* 2019 ONSC 7036 at ¶7 [TAB 3]; *R. v. J.P.,* 2019 ONCJ 871 at ¶¶23-27; *R. v. M.S.,* 2019 ONCJ 670 at ¶18, ¶22, ¶28; *R. v. Boyle,* 2019 ONCJ 226 at ¶40; *contra* see *R. v. McFarlane,* 2020 ONSC 5194 at ¶¶17-27.

legislative scheme seeks to protect against. A Crown has no interest in 'whacking' the complainant in order to dissuade her from continuing with the prosecution or cause her mental anguish.

39. The experience of the complainant is also different when she is in examination-in-chief versus cross-examination. In examination-in-chief, she is asked open-ended questions by the Crown, a familiar face, about private records she knows about. In cross-examination, she is confronted unexpectedly with alleged inconsistencies arising from her own private records by the lawyer who represents, and sits at the same table as, the person she alleges violated her body.

40. It is notable as well that in *Darrach,* this Court upheld the constitutionality of the s.276 legislative scheme even though that scheme applied only to evidence "adduced by or on behalf of the accused"[86]. Indeed, this Court has established that the principles of fundamental justice and trial fairness do not guarantee defence counsel the right to precisely the same privileges and procedures as to the Crown[87]. This is not to say that no standard applies where the Crown seeks to introduce the private records of a complainant. A trial judge will retain the discretion to exclude this evidence where its probative value is outweighed by its prejudicial effect[88].

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[86] Section 276(2) of the *Criminal Code of Canada,* R.S.C. 1985, c. C-46.
[87] *R. v. Mills,* [1999] 3 S.C.R. 668 at ¶111; *R. v. Quesnelle,* 2014 SCC 46 at ¶64.
[88] *R. v. Barton*, 2019 SCC 33 at ¶80; *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at ¶41.

## PART IV: SUBMISSIONS ON COSTS

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

## PART V: ORDER REQUESTED

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

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

ALL of which is respectfully submitted,

Jill Witkin
Counsel for Attorney General of Ontario

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

Dated this 22nd day of April 2021.

## PART VII – TABLE OF AUTHORITIES

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