SCC File No. 39516

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE SUPERIOR COURT OF JUSTICE FOR THE PROVINCE OF ONTARIO)

BETWEEN:

A.S

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

AND:

SHANE REDDICK

RESPONDENT

AND:

ATTORNEY GENERAL OF QUEBEC

INTERVENERS

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PART I: STATEMENT OF FACTS

A. Overview

1. A discussion is to take place about whether messy details of a person's sex life should be aired in the cold sterility of a courtroom. Should the very person whose sex life risks humiliating public display be able to participate? Or should she be silenced while others decide on exposure of one of her most intimate spheres of being? The answers are obvious.
2. Two Supreme Court cases decided 20 years ago conclusively answer these questions. In *R v Darrach*[1] this Court upheld the regime controlling admissibility of a complainant's other sexual activity. A year prior, in *R v Mills*,[2] this Court had similarly upheld the regime governing production of a complainant's private records – a procedure in which complainants participate fully. Both cases rejected constitutional challenges grounded in s. 7 fair trial arguments akin to those advanced in opposition to the legislative amendments found in Bill C-51[3]. This Court concluded that the substantive and procedural contours in both regimes struck an appropriate constitutional balance between the accused's right to a fair trial and the complainant's equally important *Charter* protected privacy and equality rights.
3. For decades, sexual assault complainants had no right to participate in proceedings to determine how the details of their private sexual lives would be used in a public courtroom. Parliament fixed this problem by amending the Criminal Code in late 2018 with the enactment of Bill C-51 which allows complainants to participate in determining the admissibility of their own private records and sexual activity. In doing so, Parliament simply combined the best of *Mills* and *Darrach*. These participatory provisions are narrow legislative adjustments that further the s. 276 mandate: "protect[ing] the integrity of the judicial process while at the same time respecting the rights of the people involved".[4]
4. The participatory rights are essential to provide complainants with the full benefit and protection legally afforded to them on issues that strike at the very heart of their constitutionally protected rights to privacy, security, and dignity. Doing so protects the integrity of the judicial process by enhancing the accuracy of admissibility rulings. It provides trial judges with a complete picture of the competing interests at play, allowing them to accurately weigh the potential prejudice to the complainant's

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[1] *R v Darrach,* 2000 SCC 46, [2000] 2 SCR 443 [*Darrach*].
[2] *R v Mills,* [1999] 3 SCR 668 [*Mills*]
[3] *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act,* S.C. 2018, c. 29, s. 25.
[4] *Darrach*, *supra n. 1*, at paragraph 3

dignity and privacy and the complainant's right to personal security – factors that they *must* consider in all sections that engage the complainant's privacy rights.[5]

5. By implementing these amendments, Parliament has reacted with a clear and valid purpose to a pressing societal concern which directly concerns a particularly vulnerable sector of society.
6. As Justice Moldaver recently noted in this Court's decision in *R v Barton*[6]:

> [1] We live in a time where myths, stereotypes, and sexual violence against women – particularly Indigenous women and sex workers – are tragically common. Our society has yet to come to grips with how deep-rooted these issues truly are and just how devastating their consequences can be. Without a doubt, eliminating myths, stereotypes, and sexual violence against women is one of the more pressing challenges we face as a society. While serious efforts are being made by a range of actors to address and remedy these failings both within the criminal justice system and throughout Canadian society more broadly, this case attests to the fact that more needs to be done. Put simply, we can – and *must* – do better. [Emphasis in original].

7. The ruling of Justice Akhtar is demonstrably inconsistent with principled trends in this Court's jurisprudence. It is regressive at a time when Parliament, this Court, and Canadian society have pointedly called for progress. As discussed at paragraphs 24 to 70 of the factum filed by the Attorney General of British Columbia in the companion case *J.J.*, the sections are in keeping with the developments in the law in recent decades.
8. To date, the ruling of in *Reddick* remains the only decision in Ontario which has concluded that these provisions are unconstitutional. In contrast there are numerous decisions which have refused to follow *Reddick* and/or held that the decision was "plainly" or "clearly" wrong.[7]
9. A.S. adopts the submissions of the Attorney General of British Columbia in their entirety on the constitutionality of the legislative scheme in issue. The remainder of this factum will provide the unique perspective of the complainant.

B. Proceedings Below

10. On November 23, 2020, in *R v Reddick*[8], Justice Suhail Akhtar of the Ontario Superior Court of Justice struck down ss. 278.92, 278.94(2), and 278.94(3) of the *Criminal Code*, finding that they infringed

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[5] *Criminal Code* ss. 276, 278.5(2), 278.92(3)
[6] *R v Barton*, 2019 SCC 33, [2019] SCJ No 33 at para 1 [*Barton*].
[7] *R v Green*, 2021 ONSC 2826 at paragraph 9 [*Green*]; *R v B.G.*, 2021 ONSC 2299 [*B.G.*]; *R v A.M.*, 2021 ONSC 8061 at paragraph 59 and 62 [*A.M.*]; *R v Navaratnam*, 2021 ONCJ 272 at paragraph 11 [*Navaratnam*]; *R v Barakat*, 2021 ONCJ 44 at paragraph 28 [*Barakat*]; *R v Rana* (26 March 2021) Brampton CR-20-086-00 (Ont. Sup. Ct.).
[8] *R v Reddick*, 2020 ONSC 7156 [*Reddick*]; Applicant's Appeal Record at Tab 1.

sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*, and that they are not saved under section 1 of the *Charter*.

11. The essential facts of the case were outlined by the court at paragraphs 3 through 8 as follows:

> [3] The applicant met the complainant, S, who lives in the United States of America, online.
>
> [4] On 15 March 2018, S visited the applicant in Toronto and spent the night with him at an Airbnb before moving to an apartment in the city.
>
> [5] On 17 March 2018, the applicant took S to a party on Lakeshore Boulevard where she was introduced to two of his friends, X and Y. S saw one of those friends give the applicant money which he then gave to her. When she went to the bathroom, X and Y followed her inside. X raped S and Y forced her to perform fellatio on him. S alleges that the applicant took back the money he had previously given to her. S passed out. When she awoke she was in bed with another of the applicant's friends, and another woman. The applicant was no longer at the party.
>
> [6] When S next met the applicant he physically assaulted her, accusing her of having had sex with other men. S contacted friends in the United States who, in turn, reported the incident to the Toronto Police. The applicant was arrested and charged.
>
> [7] At trial, the applicant intends to cross-examine S on the contents of two video recordings captured at the party. Both are of a sexual nature: one shows S dancing topless with another woman, the other shows S engaging in sex with other men and women.
>
> [8] In order to adduce these recordings, the applicant must comply with s. 276(2) of the Criminal Code and its related procedural provisions contained in ss. 278.92 through 278.94.

12. There has been no opportunity for the Court to consider the authenticity of the videos or the relevance of those videos to the trial, nor has the Court had the opportunity to consider the factors that engage the balancing of competing rights in determining whether the videos are admissible.
13. The court found that the provisions were overbroad to the extent that they captured records of a non-sexual nature, that disclosure of the records to the complainant provided the complainant with an opportunity to tailor her evidence resulting in unfairness to the accused, and that the constitutional role of the Crown was compromised by the participation of the complainant.
14. By striking down s. 278.92, Justice Akhtar held that an accused person need not bring an application in order to rely on records relating to the complainant, whose privacy and dignity is directly engaged in the sex tapes sought to be admitted, which were already in his possession. (However, evidence that

falls under s. 276 would still be presumptively inadmissible and require a successful application to be adduced.)

15. By striking down s. 278.94(2) and (3) Justice Akhtar held that the complainant was not entitled to appear, make submissions, or be represented by counsel at the hearing of an application to adduce evidence covered by s. 276, which included video evidence of her own sexual activity.

PART II: STATEMENT OF QUESTIONS IN ISSUE

16. The appellant has stated the following constitutional question:

> Did the application judge err in concluding that ss. 278.92, 278.94(2) and 278.94(3) of the *Criminal Code*, R.S.C. 1985, c. C-46 infringe ss. 7 and 11(d) of the *Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c.11 and/or in concluding that they did not constitute a reasonable limit and were not saved pursuant to s. 1 of the *Charter*?

PART III: STATEMENT OF ARGUMENT

A. The Constitutional Analysis

General Approach

17. There is no hierarchy of *Charter* rights. The rights of the accused to make full answer and defence and the rights of the complainant to privacy, equality and security of the person stand on equal footing.[9] As such, any apparent conflict among *Charter* rights must be resolved in a manner that fully respects the importance of all rights engaged.

18. The regime governing the admissibility of a complainant's other sexual activity clearly engages two competing rights: the accused's right to full answer and defence, and the complainant's rights to privacy and equality.[10]

19. Together, *Mills* and *Darrach* assessed the constitutionality of ss. 276 and 278.1-278.9 of the *Criminal Code*. This case concerns the combined operation of incremental amendments to the ss. 276 and 278.1-278.9 regimes analyzed in *Mills* and *Darrach*. So those cases offer both definitive guidance and authoritative resolution of the present issues.

20. The proper approach under s.7 to evaluating legislation that engages competing *Charter* interests is contextual and requires identifying and defining *Charter* interests in play, recognizing that the principles of fundamental justice "reflect a spectrum of interests, from the rights of the accused to

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[9] *Mills*, *supra n. 2*, at para 61.
[10] *Darrach*, *supra n. 1*, at para 30.

broader societal concerns".[11] Each of these rights cannot be considered in isolation.[12] The accused's rights are not the only ones protected and he is not entitled to "the most favourable procedures that could possibly be imagined"[13].

21. This Court must then engage in a balancing exercise between the competing rights in order to determine the constitutionality of the impugned provisions. As set out below, a consideration of the principles established in *Mills* and *Darrach* demonstrate that the legislative scheme does no violence to the constitutional rights of the accused and, at the same time, provides meaningful protections to complainants in sexual assault cases. In this way the amendments in Bill C-51 respect the rights of all involved and are constitutionally sound.

Sections in Issue

Section 278.92, 278.94(2) and 278.94(3)

22. Parliament crafted a balanced regime to protect the privacy and dignity of complainants when the defence seeks to adduce evidence of other sexual activity or when a record in which she has a privacy interest is in the possession of the defence. As discussed at paragraphs 45 to 48 in the factum of the Attorney General of British Columbia in *R. v. J.J.*, the historical roots of the legislation lie in the decision of this Court in *Shearing*[14]. An extensive review of the ss. 278.1 – 278.9 regime by a 2012 Senate Standing Committee called upon Parliament to address the unresolved problem of how to protect the complainant's privacy and dignity when the defence is in possession of evidence that engages her privacy rights.

Section 278.92(2)(a)

23. Section 278.92(2)(a) pertains to evidence that contains or refers to sexual activity and states that the s. 276 procedures apply. In *Reddick* the proposed evidence is alleged to be two video tapes of the complainant engaged in sexual activity, and in order to establish admissibility the proposed evidence will have to pass the s. 276 filter, whether or not the complainant is ultimately granted standing.

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[11] *R v Seaboyer*, [1991] 2 SCR 577 at p. 603 [*Seaboyer*].
[12] *Mills, supra n. 2*, at para 72; *Barton, supra n.6,* at para 83.
[13] *Darrach, supra n. 1,* at para 24; *Mills, supra n. 2,* at para 72.
[14] *R v Shearing*, 2002 SCC 58, [2002] 3 SCR 33 [*Shearing*].

Section 278.92(2)(b)

24. Section 278.92(2)(b) refers to all other evidence in the possession of the defence, that is, evidence that does not involve sexual activity or communications of a sexual nature. The majority of the litigation to date has involved social media and particularly text messages between the complainant and the accused. The question of whether or not the complainant has a reasonable expectation of privacy in those communications was not specifically addressed in Bill C-51 and the definition of "record" in s. 278.1 does not list private communications. Early cases found that there may be a reasonable expectation of privacy in private communications and soon led to the development of "motions for directions", discussed below at paragraphs 38 to 68.

The definition of "record" is not overbroad

25. The records at issue in this case are videotapes of sexual activity of the complainant other than that which is the subject of the charge. As such, regardless of whether they meet the definition of "record" in s. 278.1 or not, they are presumptively inadmissible under s. 276 of the *Criminal Code*.[15] So on the facts of this case, the breadth of the definition of "record" does not arise for consideration.

26. In any event, subsequent lower court decisions[16] have found, contrary to the decision in *Reddick*, that the records definition is not overly broad. That later lower court analysis is aligned with the decision of this Court in *Quesnelle* in which this Court held,

> The definition of "record" is broad and non-exhaustive. Section 278.1 provides an illustrative list of some of the types of records that usually give rise to a reasonable expectation of privacy. However, documents that do not fall into the listed categories will still be covered by the *Mills* regime if they contain information that gives rise to a reasonable expectation of privacy.[17]

27. In the foregoing quote this Court is making the crucial observation that the definition of record was deliberately crafted to be coextensive with the *Charter* privacy rights of complainants that the regime was meant to protect. Which takes us to the purpose of the legislation. But before assessing the purpose of the legislation, it is appropriate to point out that the records in issue in *Reddick* are two sex tapes. That A.S. has a reasonable expectation of privacy in such tapes is indisputable.

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[15] *Reddick*, *supra n.8*; *A.M.*, *supra n.7*, at para 63

[16] *A.M., supra n.7,* at para 69 to 71; *Rana, supra n.7,* at para 27.

[17] *R v Quesnelle,* 2014 SCC 46, [2014] 2 SCR 390 at para 22 [*Quesnelle*].

The Purpose of the Legislation

28. Justice Akhtar addressed the purpose of the legislation at paragraph 49, stating:

> These types of records have no connection with the purposes of the legislation which is designed to **curtail irrelevant cross-examination and evidence promoting myths and stereotypes associated with sexual assault complainants**…**[Emphasis Added.]**

29. Justice Akhtar wrongly understated the purpose of the legislation. The purpose of the legislation is to protect the dignity and privacy of complainants and to filter out irrelevant myth or stereotype-based evidence. Section 276 bars the admission of any evidence that engages the twin myths. But it also instructs judges to exclude evidence of other sexual activity unless it has significant probative value that substantially outweighs the danger of prejudice to the proper administration of justice. Section 278.92(2)(b) adopts the same test. The prejudice/probative aspect of s. 276 is the strongest possible assertion of a complainant's right to privacy in her sexual activity: sexual privacy yields only where probative value is not just marginally but substantially paramount.

30. Sexual assault complainants have historically had to contend with myths regarding their behaviour after an assault, questions about whether they reported the assault too early or too late, archaic ideas regarding the ability of women to safeguard their own chastity, and pervasive myths about the use of sexual assault allegations for "ulterior motives".[18] It is hardly surprising, given the long and stubbornly persistent history of court mistreatment of female sexuality, that even currently, sexual assault remains one of the most underreported crimes.[19]

31. While it may be true that many of the records that an accused may be in possession of would not contribute to "twin myth" reasoning absent reference to other sexual activity, there remains broad scope for the accused to violate a complainant's reasonable expectations and rights to privacy, and to attack the complainant along stereotypical and myth-laden lines through the use of other information contained in her personal records. These sorts of intrusions into complainants' private lives are not only destructive for the individual complainants affected; if permitted they amount to systemic gender-based mistreatment, given that sexual assault is overwhelmingly a gendered crime.

32. Respectfully, the court in *Reddick* seems to have failed to recognize the broader purpose of the legislation. Parliament sought to address the issue that arose in *R v Shearing*, where this Court ruled that the salutary protections of the third-party records regime were unavailable, regardless of how

[18] *R v G.(A.)*, 2000 SCC 17, [2000] 1 SCR 439 at para 3 [*A.G.*]; *R v Osolin*, [1993] 4 SCR 595 at para 50 [*Osolin*]; *Seaboyer*, *supra n.11,* at para 141.
[19] *R v Goldfinch* 2019 SCC 38, [2019] SCJ No 38, at para 37 [*Goldfinch*].

private the records may have been, because the accused already had possession of them. To fix the problematic gap identified in *Shearing,* the new provisions had to cover records in the possession of the accused that do not include any evidence of other sexual activity. If they did not there would remain an irrational distinction between records in the hands of the accused and records in the hands of a third party.[20] In the absence of the legislative scheme, use of potentially highly private records would turn not on a sensitive and just balancing of competing *Charter* rights, but rather, pursuant to *Shearing,* on random events that may have caused the records to fall into the hands of the accused. When competing *Charter* rights of equal value are at stake, it is essential that the law do far better than simply surrender to the caprice of random circumstances from the messy world outside the courtroom.

33. For far too long, sexual assault trials have provided an opportunity to mistreat and malign sexual assault victims, often placing vulnerable people in the position of being revictimized and stigmatized on the basis of pernicious myths and repeated violations of their privacy. This problem has been recognized by this Court for decades. In 1999 in *Mills,* this Court held:

> [58] The history of the treatment of sexual assault complainants by our society and our legal system is an unfortunate one. Important 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. If constitutional democracy is meant to ensure that due regard is given to the voices of those vulnerable to being overlooked by the majority, then this court has an obligation to consider respectfully Parliament's attempt to respond to such voices.

34. Respect for the complainant's privacy and dignity, extending well beyond merely prohibiting the use of twin-myth reasoning, is a clear driving force behind the Bill C-51 amendments:

> …it acknowledges the privacy interests of a complainant. While privacy interests do not trump all else, the regime seeks to acknowledge that victims of sexual assault and other related crime, even when participating in a trial, have a right to have their privacy considered and respected to the greatest extent possible.[21]

35. Finally, Parliament was responding to concerns repeatedly raised and reaffirmed by this court regarding the importance of encouraging the reporting of sexual assaults. By providing complainants

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[20] *Green*, *supra n.7,* at para 60.

[21] Marco Mendicino, former Parliamentary Secretary to the Minister of Justice and Attorney General of Canada, Lib., House – Concurrence at Report Stage, December 11, 2017; also see 53 Hon Senate – Standing Committee on Legal and Constitutional Affairs. Jody Wilson-Raybould, former Minister of Justice and Attorney General of Canada, Lib., June 20, 2018.

with a participatory role in determining the use to which their private and sexual information can be put, Parliament sought to provide an appropriate degree procedural empowerment and a measure of reconciliation with sexual assault victims who have so often been mistreated by the criminal justice system. As stated by Chief Justice Lamer in *R v L.(D.O.)*:[22]

> [30] The innate power imbalance between the numerous young women and girls who are victims of sexual abuse at the hands of almost exclusively male perpetrators cannot be underestimated when "truth" is being sought before a male-defined criminal justice system. […] We cannot disregard the propensity of victims of sexual abuse to fail to report the abuse in order to conceal their plight from institutions within the criminal justice system which hold stereotypical and biased views about the victimization of women. […] We live in a society which continues to blame even the most innocent of victims.

36. In confining the purpose of the legislation to "curtail[ing] irrelevant cross-examination and evidence promoting myths and stereotypes associated with sexual assault complainants" the court below took an artificially narrow view that compromised the constitutional analysis irredeemably.
37. Returning now to the broad definition of "record" found at s. 278.1 and considering it in light of the purposes of the legislation, it is clear that the broad definition deployed is not only desirable but necessary to achieving Parliament's goals of plugging the hole left by *Shearing*, protecting the privacy and dignity of complainants in the face of historical injustice, and encouraging confidence in the criminal justice system and the reporting of sexual assaults. The definition captures exactly what it must to achieve these laudable goals and is therefore not overly broad.

Motion for Directions

38. A practice has developed, particularly in Ontario, of bringing a "motion for directions" before the court in relation to materials in the possession of the defence that may fall within the definition of a "record".[23] The motion for directions is a request that the court make an advance ruling as to whether the records in question engage the victim's reasonable expectation of privacy and are thus a "record" as defined in section 278.1 of the *Criminal Code*.
39. The most common procedure on a motion for directions is that the accused provides sealed materials to the court and a summary of the materials included to the Crown.[24] The Crown is then called upon to make submissions without having seen the records. The complainant is entirely excluded.

[22] *R v L.(D.O.)*, [1993] 4 SCR 419 at para 30.
[23] *R v A.M.*, 2020 ONSC 1846 [*A.M. Motion for Directions*]; *R v XC*, 2020 ONSC 410; *R v RMR*, 2019 BCSC 1093; *R v McKnight*, 2019 ABQB 755.
[24] *R v W.M.*, 2019 ONSC 6535 [*W.M.*]; *R v M.S.*, 2019 ONCJ 670 [*M.S.*]; *R v Mai*, 2019 ONSC 6691 [*Mai*].

40. The motion for directions is unwarranted for six reasons.
    - It is an invention that sits entirely outside the legislative scheme;
    - It excludes the complainant from a hearing devoted solely to determining the scope of her own personal rights;
    - It is an attempt to back-door trial by ambush tactics specifically prohibited by this Court in *Darrach*;
    - It perpetuates offensive gender-based stereotypes that complainants (mostly women) will lie to tailor their evidence to the disclosure;
    - It is contrary to closely analogous direction from this Court in *R. v. McNeil 2009 SCC 3*; and,
    - It is nothing more than seeking legal advice from a Court on whether a s. 278.92 application is necessary.

    These problems with the motion for directions will be addressed in turn.

Contrary to the Legislative Scheme

41. The *Criminal Code* does not contemplate motions for directions. The legislative scheme clearly defines two stages in determining admissibility of records in the hands of the defence. The motion for directions is not one of them. So, a motion for directions grafts onto the legislation a third layer of litigation neither contemplated nor sanctioned by Parliament. By routinely allowing motions for directions before s. 278.92 applications, courts are stepping into prohibited legislative territory by creating a *de facto* expansion of the legislative scheme in the absence of statutory wording, departing from Parliament's expressed intent, and adding to the complexity and costs of litigation. And in situations where the materials are determined not to be records the legislative scheme is avoided altogether. Such a legislative-style invention is far outside the constitutionally permissible judicial role.

Shutting out the Complainant When Deciding her Own Privacy Rights

42. Even more concerning, the general practice has been that motions for directions are heard without the input of the complainant or her counsel.[25] This clearly undermines the clear intention of Parliament in Bill C-51: to grant the complainant standing in matters concerning her privacy, dignity, and equality rights to ensure that the judge as the gatekeeper of this evidence engages in the appropriate balancing exercise. As noted in the Attorney General of British Columbia factum in *J.J.,* this approach circumvents the complainant, the very person the legislative regime is intended to protect.

[25] *R v Moyes*, 2020 BCPC 274 at para 36.

43. Notably, this practice is in sharp contrast to the third-party records regime in which the records are sealed, and the judge does not review them until satisfied that the application passes stage one of the test for likely relevance, *at which the complainant has full standing*. Common-law third-party records applications, commonly referred to as *O'Connor* applications, follow the same procedure. Importantly, *O'Connor* applications may involve records that do not attract a reasonable expectation of privacy, for example in the context of drinking and driving cases.[26] And yet, the minimum legal requirements must be met before judicial resources are squandered in a review of the records.

44. By excluding the complainant from a proceeding that determines her rights, the motion for directions also violates the *audi alteram partem* principle, which this court recognized and described in the context of the third party records regime in *A.(L.L.) v B.(A.)*:[27]

> [27] The one question that remains is whether both a complainant, a third party to the proceedings (whether or not an appellant, but here one of the appellants), and the Crown, a party to the proceedings, have standing in third party appeals. There is no doubt in my mind that they do. **The *audi alteram partem* principle, which is a rule of natural justice and one of the tenets of our legal system, requires that courts provide an opportunity to be heard to those who will be affected by the decisions.** The rules of natural justice or of procedural fairness are most often discussed in the context of judicial review of the decisions of administrative bodies, but they were originally developed in the criminal law context…
>
> [28] Here, **both the complainant and the Crown possess a direct and necessary interest in making representations.** Both would be directly affected by a decision regarding the production of the complainant's private records. The decision is susceptible of affecting the course of the criminal trial. **Both therefore, must be afforded an opportunity to be heard. [Emphasis Added.]**

45. As stated by Justice Bell in the Ontario Superior Court in *R v E.A.*:[28]

> [29] In my view, **to deny the complainant a voice on the motion for directions**, when the court will determine whether there is a reasonable expectation of privacy in the communications, **would be inconsistent with the very purpose of the legislation**. That purpose is to respect all interests in a criminal trial, including the rights of the accused and the privacy, security, and equality interests of the complainant. **It may be contrary to notions of respect and fairness to deny the complainant standing to make submissions on the "reasonable expectation of privacy" issue when it is the complainant's expectation of privacy that the court will be determining**. At the same time, granting the complainant standing at this preliminary stage would not prejudice the accused's right to make a full answer and defence: if the communications are determined to be records, then the two-stage

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[26] *R v Jackson,* 2015 ONCA 832, [2015] OJ No 6274.

[27] A. (L.L.) v B.(A.), [1995] 4 SCR 536 at para 27 [*A.(L.L.) v B.(A.)*].

[28] *R v E.A.,* 2020 ONSC 6657 at para 29 [*E.A.*]

> admission process applies and the complainant has standing only at the second stage. **[Emphasis Added.]**

46. Some courts have held that the defence in a motion for directions is required to provide some evidence about (i) the nature and type of material, (ii) the manner in which the material was created, (iii) the nature of the relationship between the accused and the complainant, (iv) the parties to the materials, (v) where and how they were obtained, (vi) when they were created.[29] However admirable this sort of effort to restore some sense of balance to motions for directions, it is re-arranging deck chairs on the Titanic. It is irredeemably problematic for one side alone to be permitted to define with finality the nature of the clash between competing and equal *Charter* rights. The only fair way to adjudicate upon competing *Charter* claims is to allow both the parties with the competing *Charter* interests to be fully, equally, and fairly heard. Preventing the complainant from accessing the materials and from participating in the hearing robs the court of the perspective and evidence of the complainant which may be critical to determining whether a reasonable expectation of privacy exists.
47. And on the question of whether the complainant has a reasonable expectation of privacy, which is what a motion for directions purports to address, the person best situated to illuminate the court is the complainant herself. The complainant may well not assert a privacy interest over the subject records and if she does not, no further litigation is necessary. In cases in which she does assert a privacy interest, the final determination of admissibility must be made under s. 278.94. So from both the procedural perspective, (*audi alterem partem*) and a best evidence perspective, complainant participation in proceedings that determine the scope of her rights is essential.

Sneaking Trial by Ambush in the Back Door

48. A common justification for the practice of bringing a motion for directions is the defence assertion that the disclosure of records, affidavits, applications, and/or information to the complainant will "taint" their evidence and blunt the effectiveness of cross-examination, as the complainant faced with such evidence will simply tailor their evidence to conform to it and that absent a clear legislative requirement, the defence is entitled to "hold his cards close to his chest".[30] The concern that the accused's defence would be compromised if he had to reveal elements of it was rejected in *Darrach* and should accordingly be rejected here.

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[29] *Mai, supra n.24*, at paras 9 to 12; *W.M*, supra *n.24,* at para 41; *M.S., supra n.24,* at para 70.
[30] See for example: *W.M*, supra *n.24,* at para 22; *A.M. Motion for Directions, supra n.23*, at paras 63 and 68; *M.S., supra n.24,* at para 12.

Section 278.94(2)(3) Complainant's participation

49. The *Reddick* decision overtly endorsed trial by ambush, an approach rejected in *Darrach*:

> [49] These types of records have no connection with the purposes of the legislation which is designed to curtail irrelevant cross-examination and evidence promoting myths and stereotypes associated with sexual assault complainants. **There is no reason why an accused in possession of these documents should not be able to surprise a witness with them in sexual assault cases when they are able to do so in any other type of offence. However, the legislation prohibits them from doing so.**
> …
> [56] However, the difference is that ss. 278.92(1) and 278.94(2) and (3) mandate that disclosure be made to the complainant. **The risks to the fairness of the trial are obvious.**
> …
> [61] I agree that upon receipt of the accused's affidavit, the Crown would be obligated to consult with the complainant on its contents, and negligent if it did not do so. However, there is a clear difference between, on the one hand, consultation of proposed sexual activity evidence and, on the other, disclosure of the accused's defence. **When consulting, the Crown could not provide the entire affidavit and defence to the complainant. To do so would potentially taint the complainant as a witness and diminish their credibility when they testified. [Emphasis Added.]**

50. The problem with such reasoning is that this Court in *Darrach* was clear, concise and conclusive: "The right to make full answer and defence does not include the right to defend by ambush."[31]

51. Meaningful cross-examination is essential in a criminal trial and the right to effectively cross-examine engages s. 7 of the *Charter*.[32] However, s.7 of the *Charter* requires only that a trial be fair and not that the accused have "the most favourable procedures that could possibly be imagined". [33] The fact that the complainant will learn in advance what evidence the accused intends to rely on is neither novel nor problematic. Courts have rejected similar arguments in both the third-party records and other sexual activity regimes.[34]

52. In *Mills* this court upheld the constitutionality of the s. 278.3 third-party records regime. In that regime, the complainant is entitled to participate in the process and be represented by counsel as well as to receive the application record and review their records in advance of the application for their production being heard: *R v A.C.*[35] The complainant therefore knows in detail what records the accused intends to use in cross-examination; and from the application record where the accused explains why

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[31] *Darrach, supra n.1,* at para 55.
[32] *Osolin*, *supra n.18,* at p. 663; *R v Lyttle*, 2004 SCC 5, [2004] 1 SCR 193 at paragraph 43.
[33] *Mills, supra n.2,* at paragraph 42 and 72.
[34] See: *Mills, supra n.2; Darrach, supra n.1*.
[35] *R v A.C.*, 2019 ONSC 4270, [2019] OJ No 3721 at para 41 [*A.C.*].

the records are necessary for full answer and defence, the complainant also knows in advance precisely how they will be used. For almost three decades now complainants have had this kind of comprehensive advance knowledge. And the regime has worked commendably well, fairly to both sides, producing sound verdicts.

53. In *Darrach* at paragraph 55 this Court held:

> [55] Section 276 does not require the accused to make premature or inappropriate disclosure to the Crown. For the reasons given above, the accused is not forced to embark upon the process under s. 276 at all. As the trial judge found in the case at bar, if the defence is going to raise the complainant's prior sexual activity, it **cannot be done in such a way as to surprise the complainant**. **The right to make full answer and defence does not include the right to defend by ambush.** The Crown as well as the Court must get the detailed affidavit one week before the *voir dire*, according to s. 276.1(4)(*b*), **in part to allow the Crown to consult with the complainant.** The Crown can oppose the admission of evidence of sexual activity if it does not meet the criteria in s. 276. Neither the accused's s. 11(*c*) right not to be compelled to testify against himself nor his s. 11(*d*) right to be presumed innocent are violated by the affidavit requirement. This is borne out by the way in which the admissibility procedure operates. **[Emphasis Added].**

54. In doing so, this Court rejected the argument that advanced disclosure to the Crown violated the principle against self-incrimination and found that there was nothing constitutionally problematic about requiring an accused to bring forth and justify why evidence that he proffered was admissible. More to the point, this Court held that there is no right to "defend by ambush" and explained that advance notice to the Crown is *designed to allow the Crown to consult with the complainant*. Put plainly, this Court has already specifically endorsed the constitutionality of advanced disclosure of defence proffered evidence to the complainant.[36]

55. The finding in *Darrach* is sound legal principle. Ambush utilizes the element of surprise to disorient and discombobulate an opponent. Disorienting and discombobulating witnesses *compromises* the search for truth by preventing those witnesses from delivering their perspective in the most considered and comprehensive way. Ambush therefore compromises the search for truth by denying the fact finder access to relevant information. Furthermore, deliberately disorienting or discombobulating a witness is an abuse of power by lawyers which diminishes the repute of the justice system in the eyes of fair-minded observers. And when we factor in the reality that sex assault complainants are among the most vulnerable witnesses in the courts, who frequently understand

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[36] *Ibid* at para 42; *B.G., supra n.7,* at para 57 to 59.

criminal trials as re-traumatizing, tactics of disorientation and discombobulation are not only antithetical to the search for truth; they are demeaning and dehumanizing as well.

Perpetuating Offensive Gender-based stereotypes

56. Sexual assault is an undeniably gendered crime[37]. And as stated by this Court in *Goldfinch,* "the harm caused by sexual assault, and society's biased reactions to that harm, are not relics of a bygone Victorian era".[38] We are still far from eradicating deep-seated and misogynistic stereotypes regarding the spitefulness and perniciousness of women.[39] This Court has repeatedly rejected the notion that complainants in sexual assault cases are less worthy of belief or have a higher tendency to fabricate allegations for ulterior motives.[40] And as stated in *Goldfinch,* that effort must still be ongoing.

57. The argument for trial by ambush in sex assaults is that if complainants, who are overwhelmingly female, get advance disclosure, they will lie: tailor their evidence to the disclosure. The very same arguments were made in the past by Crowns objecting to *Stinchcombe* disclosure to (mostly male) accused persons. Courts repeatedly rejected those arguments.[41] But we now have the very same argument being raised zombie-like from the graveyard of bad law, with the claim for its current validity resting on the fact that it is applied to mostly female complainants, rather than mostly male accused persons. It takes little illumination to expose the misogyny lurking in the shadows of this argument.

58. Much like an accused person who is constitutionally entitled to know the case against him and is entitled to enforce that right, a complainant is entitled to ensure that her constitutional rights are respected. In order to do so she must know the content and manner in which evidence is proposed to be used against them without any presumption that the exercise of these rights compromises the administration of justice. This analogy is particularly poignant in the context of sexual assault trials that have historically, and all too often been used to subject the complainant to abusive and inappropriate questioning and attempt to put her on trial.[42]

59. In both the third-party records regime and the other sexual activity regime complainants were *already* receiving advance notice of the evidence the accused intended to adduce and how he intended to use it. The jurisprudential sky has not fallen. They continue to do so, and as before, the accused continues to have a powerful remedy if the complainant does tailor her evidence to meet the disclosure.

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[37] *Goldfinch*, *supra n.19*, at para 37.
[38] *Ibid*
[39] *Seaboyer*, *supra n.11,* at para 141.
[40] *G.(A.),* *supra n.18,* at para 3; *Osolin*, *supra n. 18,* at para 50.
[41] *R v Smuk* (1971), 3 CCC (2d) 457, [1971] BCJ No 633 (BCCA) at paras 12 to 15; *R v Sabir,* 2018 ONCA 912; *R v White*, [1999] OJ No 258 (QL) (ONCA).
[42] *Goldfinch*, *supra n.19,* at para 33.

60. Unlike an accused person who is often providing evidence for the first time at trial, complainants give statements to police at the outset of criminal proceedings which are disclosed to the defence pursuant to *Stinchcombe*. These statements are often given under oath or affirmation in order that the Crown may rely on them as "KGB"[43] statements in the event that there is a recantation by the complainant prior to or at the time of trial.

61. Any significant departure from a complainant's police statement which are traceable to a defence application can be the subject of vigorous cross-examination. And any fabrication exposed will not be lost on a trier of fact. So not only are bald assertions that complainants will fabricate if they get application records little more than rank misogyny, the fabrication problem if there is one at all, can be readily exposed at trial.

Motions for Directions are Contrary to *R v McNeil*

62. Motions for directions are preliminary determinations of the scope of any reasonable expectation of privacy, undertaken before a s. 278.92 application which determines, among other things, the scope of any reasonable expectation of privacy. In short, a motion for directions is a waste of limited court resources determining something that will inevitably be addressed again under s. 278.92.

63. In the closely analogous common-law third-party records regime, or *O'Connor* regime, this Court addressed the desirability of preliminary proceedings to determine the scope of a reasonable expectation of privacy in records, before an *O'Connor* records application. In *McNeill,* the Court of Appeal had held that an *O'Connor* application was required only once it had been determined that there was a reasonable expectation of privacy in the records in issue. In other words, the Court of Appeal had contemplated a preliminary determination of a reasonable expectation of privacy, much like the current motion for directions preceding a s. 278.92 application.[44] This Court rejected that approach, as follows at paragraph 11:

> the procedure set out in *O'Connor* provides a general mechanism at common law for ordering production of *any* record beyond the possession or control of the prosecuting Crown. Whether or not the targeted record is subject to a reasonable expectation of privacy is one of the questions that must be determined at the hearing of an *O'Connor* application. For that pragmatic reason alone, the operation of the common law production regime cannot be premised on the existence of a reasonable expectation of privacy.

[43] *R v B.(K.G.),* [1993] 1 SCR 740.
[44] *R v McNeil,* 2009 SCC 3, [2009] 1 SCR 66 at para 8.

64. The reasoning from this Court in *McNeill* applies with unmitigated vigour to s. 278.92 applications. This can be demonstrated by simply substituting "278.92" for "*O'Connor*" in the quote above: Whether or not the targeted record is subject to a reasonable expectation of privacy is one of the questions that must be determined at the hearing of a s. 278.92 application. For that pragmatic reason alone, the operation of the s. 278.92 regime cannot be premised on the existence of a reasonable expectation of privacy. Therefore, preliminary motions for directions in the absence of a complainant aimed at determining in advance the existence of a reasonable expectation of privacy are ill-conceived and should not occur, on the authority of *McNeil*.

<u>Seeking Legal Advice From the Court</u>

65. The key question sought to be answered in a motion for directions is this: "Do I need to bring a s. 278.92 application?". That is a matter of legal advice about how to properly conduct a criminal trial. It is not a question for the courts. Counsel uncertain of the answer should consult colleagues with more experience. They should not seek free legal advice from a Court in the guise of a motion for directions. Courts are already far too busy doing their own work deciding cases to be saddled in addition with handling requests from lawyers about how to conduct cases.

The appropriate procedure

66. For the reasons set out immediately above, the Appellant asks this Court to affirm that the question of whether the complainant has a reasonable expectation of privacy should be determined at the hearing held under s. 278.94 and not in a preliminary motion in which she plays no part.
67. Determining the scope and importance of any reasonable expectation of privacy is highly contextual. This contextual analysis should be undertaken at the second stage under s. 278.94 with full participation and input of the complainant to whom the materials relate. This approach places the court in the best possible position to assess not only the contents of the record in issue, but the medium in which the content exists, the relationship between those privy to the materials, the circumstances in which the accused came to be in possession of the materials, the creation of the materials and the complainant's subjective perspective on the materials. All of these important facets of a contextual analysis may be the subject of agreement between the accused and complainant, which may shorten things. Or they may be disputed, which may lengthen things. But such agreement or disagreement both highlight the importance of hearing fully from both affected parties.
68. As outlined above, given that the accused has no right to ambush the complainant, the admissibility hearing under s. 278.94 will not infringe fair trial rights or impede the search for truth. Rather, it will place the court in the best possible position to analyse the competing perspectives with a full record

and a full understanding of the contextual landscape. Judicial decisions in this realm of competing *Charter* rights will then be made as they should be, on a sliding scale, where the extent of the probative value and privacy interests in play are fully understood both on their own, and in relation to each other. The final decision on the s. 278.94 hearing can then be made in the most informed and fairest way for everyone, but also harmoniously with Parliament's intention to allow complainants to have their voice heard in a meaningful way on issues impacting their own personal, private, and sexual lives.

B. Section 278.92(2)(3) Role of complainant's counsel

69. Complainant's counsel are called upon to serve the interests of justice as officers of the court in challenging circumstances by providing legal services to some of the most vulnerable and trauma afflicted members of our society. Their clients often include trafficked women, children, people with mental illness, sex workers, and other peoples on the fringes of society.[45]
70. Since *Mills* there has emerged a small but crucial subdivision of criminal lawyers who focus on representing complainants. These lawyers have developed an expertise in this evolving area of the law. In litigation regarding sexual assault complainants, counsel have been effectively representing the interests of complainants for decades in third party records cases. Complainant's counsel is bound by all of the same professional and ethical obligations that bind defence and Crown lawyers and are required to discharge their role with utmost candour toward the court. Complainant's counsel has the unique opportunity to assist the court in the orderly litigation of cases where complex and competing *Charter* rights come into play. The expansion of complainant participatory rights and therefore the role of complainant's counsel is crucially important to achieving the goals of Bill C-51.
71. Sexual assault complainants, a historically maligned group, gain the comfort of having an advocate who will ensure that their interests are zealously protected within time-honoured ethical limits. As noted below, this role has not, should not, and can not be fulfilled by Crown counsel who must balance the interests of the complainant against other competing rights, including the rights of the accused.
72. Society benefits from the involvement of complainant's counsel in that it can be assured that the interests of those allegedly victimized by sexual violence are being carefully considered in the criminal courts. As noted above, the criminal courts have far too often been a place of revictimization and trauma for sexual assault complainants.
73. The court benefits from experienced counsel who assist in navigating an area of the law which is procedurally complex, conceptually difficult, and plagued by pervasive, insidious myths and reasoning.

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[45] See for example: *R v John*, 2019 ONSC 3602, [2019] OJ No 3201.

In *Seaboyer* Justice L'Heureux-Dube discussed the myths and stereotypes that plague sexual assault complainants and observed "This baggage belongs to us all." Granting the complainant meaningful rights of participation in applications engaging s. 278.94 helps us finally set the bags down.

Scope of Participation

74. The participatory rights of the complainant must be interpreted liberally and purposively to effectively operationalize and realize in concrete terms the complainant's *Charter* rights, as well as to assist the court in making accurate admissibility decisions. Access to the application record and full participation in evidentiary hearings are essential to meaningful participation by complainants. These basic procedural norms are routine in the third-party records context. Experience has shown that such full participation contributes to just resolutions in ways that are fundamentally fair. The situation can justifiably be no different in proceedings under the Bill C-51 amendments.

Access to the Application Record

75. In *R v Boyle*,[46] Justice Doody considered the meaning of the words "appear and make submissions" in s. 278.94(2). In considering the principles of statutory interpretation and the history of the legislative provisions, he held that the right must be meaningful and required access to the application record:

> [42] The section in issue gives complainants a right to appear and make submissions. **That right, to be meaningful, requires that they are able to see, hear, and read the basis of the application.** The right is the complainant's. It is not a right which can be diminished or attenuated by any state actor, including the Crown. Prior to the enactment of the new section, the contents of the application could be shared with the complainant should Crown counsel choose to exercise their discretion to do so. The new section is different. What was previously a possibility is now a right.
>
> [43] **In my view, the complainant is entitled to see the application record of the defendant sufficiently in advance of the hearing to allow her to prepare and make meaningful submissions.** I need not rule now on the manner in which that is to be accomplished. In this case the complainant already has counsel. He can obtain the record from either Crown counsel or defence counsel. **[Emphasis Added.]**

76. An application under s. 278.92 is essentially asking the court for permission to air the details of some of the most intimate aspects of the complainant's life in open court. As noted by Justice Maxwell in *R v Marrello*,[47] a refusal to provide the application record to the complainant would leave her and her counsel in a position where they are expected to make submissions without the appropriate context:

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[46] *R v Boyle,* 2019 ONCJ 11 [*Boyle Access Decision*]; See also: *R v Barakat,* [2019] OJ No 705 at para 7.
[47] *R v Marrello,* [2020] OJ No 3617.

> [82] Second, in granting complainants the right to appear at the s. 278.94 hearing with counsel, Parliament granted complainants the right to effective assistance of counsel. **Effective assistance of counsel necessarily requires access to the evidence and arguments, including the ability to share information with the client to obtain instructions.** It is not the role of the Crown or the defence to determine that a complainant can adequately present her views concerning her privacy and dignity rights on partial information. **Nor can it be expected that complainant's counsel can present helpful and complete submissions based on a general summary of the communications in question.** There may be important context that only the complainant can explain and provide to the court, through counsel. The specific content of the records may be the catalyst the complainant requires to identify and articulate what privacy and dignity concerns arise.
>
> [83] In my view, giving the complainant only partial or summarized information about the records diminishes the complainant's ability to make meaningful submissions and risks the complainant being relegated to making submissions which are generalized and of limited use to the court. Other courts have come to a similar conclusion: *Boyle,* at para. 32; *R.S.#2*, at para. 22.
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> [84] **Similarly, restricting access to the application record and facta asks complainant's counsel to make submissions about the complainant's privacy and equality interests in the abstract, without knowing the legal arguments being advanced, or the purported relevance of records.** This again creates the risk that the complainant or her counsel will be forced to resort to generalized submissions, or present arguments which are not responsive or misconstrue how the records will be used, if admitted. **[Emphasis Added.]**

77. The complainant's access to the defence application arises only after the trial judge has determined the threshold issue: that the proposed evidence is *capable of being admissible*. At the second stage under s. 278.94, the complainant requires the application materials in order to "appear and make submissions" and to retain and instruct counsel to do so in the matter. As noted above, this Court, in *Darrach*, clearly contemplated that the complainant would be consulted regarding the details of the application and that this approach did not infringe the accused's rights.
78. Parliament must have understood that providing the complainant the right to appear and make submissions would ultimately and necessarily include the complainant becoming privy to the information presented and arguments advanced in the hearing; after all, she is entitled to be present during the hearing itself.[48]
79. Complainant's counsel cannot competently operate in a vacuum. In order to fulfill their professional and ethical obligations to their clients, they require the application record in order to review it, properly advise their clients, and seek instructions. It is crucially important that complainant's counsel

[48] *Ibid,* at para 80.

be armed with sufficient information to be able to discharge their duties and make useful and meaningful submissions to the court.

80. Full access to the application materials as an essential prerequisite to meaningful representation can be illustrated by turning the tables. Let us suppose defence counsel argued a *Charter* motion or a trial without reviewing the disclosure or reading the Crown's written argument in advance. That is obvious professional incompetence. Complainants' counsel advocate for *Charter* rights that are equally important to the rights of the accused. Denying complainants' counsel full access to all materials would be sanctioning performance by counsel that on the other side of the table would be uncontroversial incompetence. Parliament surely did not legislate such a pernicious double standard.

Right to Cross Examine

81. In *R v Boyle,*[49] Justice Doody considered the scope of complainant participation in an application under the s. 278.92 regime and stated:

> [6] I start with the proposition that the right to appear and make submissions must be meaningful. Parliament has decided that the complainant's perspective is important to the issue in this application and the court should take that perspective into account. **Her perspective may require evidence to flush out her submissions. Submissions made without evidence are often of limited use. And Parliament wanted to ensure her rights to privacy were protected, and that may require that certain things be brought out by cross-examination.**
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> …
>
> [15] Defence counsel submitted that it was fundamentally unfair to allow complainant's counsel to cross-examine on the basis of information he has and the Crown does not because such information need not be disclosed. That submission did give me pause, but **I have concluded that this is consistent with Parliament's intention of allowing complainants to be heard. That intention must rest on a determination that complainants have different information and different perspectives from the Crown on the issues at play in a s. 276 hearing.** And when the defendant makes the decision to testify, he exposes himself to cross-examination.
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> …
>
> [17] Parliament has decided that complainants have the right to appear and make submissions. **In my view, making that right meaningful means that the complainants have a right to cross-examine on issues relevant to the application. [Emphasis Added.]**

82. This approach was adopted by Justice Sutherland in *R v A.C.*, where he stated:

[49] *R v Boyle*, 2019 ONCJ 253 at para 6 [*Boyle Cross-Examination*].

> [68] I agree with Doody J. that the meaning of "attend and make submissions" and to "participate" must have meaning. The involvement of the complainant at the *voir dire* hearing must be a useful one. **I agree this includes the ability to cross-examine and lead evidence at the hearing.** This lends itself to the complainant having the ability to make meaningful submissions to the court.
>
> [69] However, the ability to "attend and make submissions" is a limited one. It is for the sole and limited purpose of determining the admissibility of proposed evidence at the trial proper and based on the statutory framework and goals. It is not to attend and make submissions at the trial proper. It is not to have standing at the trial. **It is strictly limited to the issue of the admissibility of the proposed evidence at the trial and the opportunity to convey the perspective of the complainant to assist the court in its decision-making** as to whether the proposed evidence should be admitted, such that it does not perpetuate the twin myths and offend the factors described in s. 276 of the *Criminal Code*. **[Emphasis Added.]**

83. Complainant's counsel will not have access to the entire Crown brief, she will only have the application record. As such, some valuable areas of cross-examination may not be known to complainant's counsel. Likewise, the Crown will not have knowledge of the intimate details of the relationship and history between the defendant and the complainant. Both the Crown and complainant's counsel may have meaningful information that informs their respective cross-examinations.
84. In the present case, while finding that s. 278.94(2) was unconstitutional, the court in *Reddick* appears to have implicitly accepted that the interpretation in *Boyle* and *A.C.* were correct at para 105:

> [105] Finally, the complainant would be present if an accused testified, be able to hear their entire voir-dire testimony, **and have the right to cross-examine them with the aim of excluding evidence that might be used to undermine the complainant's account.** The fact that the complainant might choose not to exercise this right, as suggested in *A.C.*, does not make the provisions any less unconstitutional. **[Emphasis Added.]**

85. As stated in *Boyle*, in order to be meaningful the right to appear and make submissions must include the right to present and adduce evidence. That evidence may include some that contradicts the evidence of the accused, and as such complainants' counsel may be ethically bound to present contradictory assertions to the accused in cross-examination.
86. In enacting Bill C-51, Parliament was concerned with the privacy, dignity, and equality rights of complainants in their broadest possible sense and was seeking to provide an active and meaningful right to participate in determining the scope of those rights in particular cases. To respect Parliament's intent, the participatory rights of complainants must be interpreted in a broad and purposive fashion. Cross-examination is as an essential tool in the lawyer's tool kit. In advancing the *Charter* protected

91. The question of the timing of an application is the very issue before this Court in the companion appeal of *R v J.J.*. The appellant, A.S. adopts the arguments of the Attorney General of British Columbia in its factum in *J.J.* at paragraphs 121 to 135 and adds the following comments.
92. While considering whether mid-trial applications should be brought routinely with the inevitability of a bifurcated trial, in *M.S.* Justice Chapman warned that "such an interpretation would defeat the spirit and intent of the legislation and lead to significant trial management mischief." [50]
93. And of course it has to be asked, why a mid-trial application? To re-introduce trial by ambush. Defence counsel want to pin down a complainant in chief, before pouncing with records not disclosed in a pre-trial application. The result? All of the undesirable affects of ambush discussed above: disorientation, discombobulation, compromise of the search for truth, and demeaning and dehumanizing a highly vulnerable class of witness. So the problems with routine mid-trial applications are both procedural and substantive. And in both categories the problems run deep.
94. As noted above, routine pre-trial disclosure of application materials and records does not infringe on the accused's constitutional rights nor result in unfairness to the accused. This has been done pre-trial in third party records applications for decades. Much like in the third party records regime, it is in everyone's best interest for these questions to be answered well in advance of trial. In this way the parties are well aware of the parameters of the trial and can be prepared to engage in meaningful and efficient litigation.[51] Indeed, in those cases where the material in the defence application substantially undermines the complainant's allegations, pre-trial litigation of the issues can serve to eliminate unnecessary trials altogether. Busy, underfunded courts need comprehensive pre-trial litigation to minimise stress on limited trial-time resources. They do not need unnecessary mid-trial applications creating bifurcated trials that exacerbate stress on those limited resources. Increased emphasis on pre-trial planning and narrowing of issues has been the salutary trend in case management since at least the post-*Askov* era in the early 1990s. Courts are far too overburdened to cater to the shallow drama of trying to create a Perry Mason ambush moment. Neither the *Charter* nor Bill C-51 supports a return to the bad old days of introducing uncertainty and disruption into trial management, especially when accompanied by mistreating a class of witnesses whose history of discriminatory mistreatment in the justice system has been as painful as it has been protracted.
95. On the rare occasions where issues do arise unexpectedly mid-trial, 278.94(4) allows the judge to shorten notice periods as necessary "in the interests of justice". The provision is therefore permits

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[50] *M.S., supra n.24*, at para 81.
[51] *Mills*, *supra n.2,* at para 145; *B.G., supra n.7,* at para 62.

shorter notice mid-trial when needed. However, the erroneous belief that a pre-trial motion violates the accused's right to a fair trial or against self-incrimination is not sufficient reason.

C. Granting the complainant participatory rights does not interfere with Crown's constitutional role

96. The court in *Reddick* was troubled that complainant participatory rights would diminish the role of the Crown. The court's concern appears to be focused on the prospect of the Crown and complainant taking different positions on an application for the admission of evidence.

97. The case of *Barton* puts those concerns to rest. There, the Crown failed to object to highly prejudicial comments about the deceased, Cindy Gladue, and in fact made things worse by referring to her as a "Native prostitute". As observed in *Barton*, irrelevant evidence was shielded from s.276 and allowed at trial. In *R v Barton*, this court affirmed that it is the trial judge who is the gatekeeper of the complainant's sexual and other private evidence. Allowing the complainant participatory rights ensures that her perspective will be placed before the court:

> [68] Mr. Barton submits that as a matter of procedural fairness, the s. 276 issue was not properly raised before the Court of Appeal. Respectfully, I disagree. While the Crown did not object to Mr. Barton's testimony about Ms. Gladue's prior sexual activity, in my view, its failure to do so was not fatal. **The ultimate responsibility for enforcing compliance with the mandatory s. 276 regime lies squarely with the trial judge, not with the Crown. After all, it is the trial judge, not the Crown, who is the gatekeeper in a criminal trial**. Moreover, I simply cannot accept that a complainant's dignity, equality, and privacy rights, which the s. 276 regime is meant to protect may be waived by mere Crown inadvertence. There is nothing in the record suggesting that the Crown made a deliberate attempt to avoid the application of the s. 276 regime, and indeed it had no reason to. It certainly gained no tactical advantage as a result of non-compliance – quite the opposite. And in any event, given the important objectives underlying s. 276, the Crown should refrain from commenting on a complainant's prior sexual history unless necessary. **[Emphasis Added.]** [52]

98. While the court in *Reddick* noted that the role of the Crown is quasi-judicial and encompasses duties to all participants in the criminal justice system including the accused, victims, other witnesses, and societal interests, the fact that these interests can and do conflict in certain circumstances was overlooked. Complainant participation can prevent the misstep that occurred in *Barton.*

99. The Crown is not and cannot become a lawyer for the complainant, advancing her interests as an advocate for her cause. So the Crown may well be functionally prohibited from adducing relevant

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[52] See also: *Goldfinch, supra n.19*, at para 75; *R v R.V., 2019 SCC 41*, at para 71.

evidence and making relevant submissions on the very complainant-related factors that the Court is required to consider under s. 278.92(3). As noted by Justice Lynch in *R v T.P.S.*:[53]

> [25] If the complainant does not have counsel, her interests will not be fully before the court. Crown counsel cannot substitute as counsel for the complainant, that is not the role of the Crown. The accused has counsel and his interests will be before the court. It would be an injustice to this complainant and to all complainants if they are unable to exercise their right to be represented by counsel to protect their privacy and personal dignity. It is fair and just that the complainant be represented by counsel to protect her privacy and equality interests and rights.

100. A Bill C-51 application is essentially a clash between two private sets of *Charter* rights. Those of the complainant and those of the accused. Oftentimes, therefore, the Crown will best discharge its quasi-judicial minister of justice role by remaining neutral, letting those with skin in the game hash it out, and abiding by the trial judge's ruling. Crown neutrality may be the best course, in many cases, but that in turn requires that both private rights holders are equally and fully represented.

101. Additionally, third party participation in criminal trials is by now well established. It already exists in the constitutionally sound third-party records regime. It arises when media outlets challenge publication bans. Or when witnesses claim privilege over materials or testimony. And provisions of the *Criminal Code* allow complainants and witnesses to apply of their own motion for testimonial aids, and publication bans.[54]

102. In cases with multiple co-accused, each accused may be cross-examined by defence counsel for other accused in addition to the Crown. Often times the co-accused have adverse interests and run adversarial "cut-throat" defences. In a very real sense an accused in this position must defend himself both from the Crown and the co-accused, and yet no constitutional violence is done. [55]

103. In every Bill C-51 application there are two persons with equally important and independent constitutional rights (the complainant and the accused) and a party with an over-arching duty to represent the public interest (the Crown). There is no way to know in advance in any given case the extent to which these different interests will overlap or conflict. And no lawyer can ever advance two positions that conflict. Accordingly, the only way to ensure each is given the respect it deserves, is to have each represented independently.

104. Far from undermining prosecutorial independence, the possibility that the Crown's position may conflict with the complainant's demonstrates the need for independent complainant representation

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[53] *R v T.P.S.*, 2019 NSSC 48 at para 25.
[54] *Criminal Code* s. 486.1, 486.2, 486.3, 486.31, 486.5
[55] *R v Zvolensky*, 2017 ONCA 273 at paras 21 to 35.

to ensure the Crown remains free to exercise its discretion in line with its role as a quasi minister of justice. The possibility of conflict also shows why the Crown cannot effectively represent her interests.

105. In any event, the trial judge is well placed to consider the arguments of the complainant within the context of the legislative scheme and apply the legislative test. Allowing the complainant to take a position and make submissions on the application merely provides the trial judge with a useful and different perspective from the party in the best position to elucidate how the decision will impact her privacy and security rights and promotes accountability and transparency.[56] Accountability and transparency are pre-eminent priorities in addressing the woeful mistrust of the criminal justice system that the dismal reporting rate of sexual violence illustrates.

106. Not only does the complainant's participation operate in a way which improves the ability of the trial judge to consider the factors they must consider, it also respects another principle of natural justice. This Court has recognized that the *audi alteram partem* principle requires that courts provide those who will be affected by decisions be heard.[57] Parliament has provided the complainant with an opportunity to be heard on matters that directly impact her privacy, dignity, and equality interests and there is no compelling reason why the complainant must do so through the filter of the Crown who is not well positioned and fundamentally prevented from zealously advocating her position.[58]

107. Finally on this point, the role of complainant's counsel can depart from the role of Crown counsel in ways that markedly assist the administration of justice. In those cases where a defence 278.92 application has merit, the Crown may be quite properly persuaded to concede. But in the absence of complainants' counsel, Crown counsel will be inhibited in communicating effectively with the complainant about why her personal *Charter* rights should give way to the interests of the accused, because this sort of conversation strays directly into the giving of personal legal advice that Crown counsel cannot do. Thus the presence of complainants' counsel in these situations frees the Crown to do its job, while simultaneously ensuring robust lawyer-client discussions between the complainant and her counsel result in a fully informed complainant giving meaningful instructions. Concessions that narrow issues are commonplace and welcome in busy courthouses. So this service to the administration of justice by complainants' counsel, freeing Crown counsel from a sticky no-win situation, is all the more valuable for its frequency.

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[56] *B.G., supra n.7,* at paras 38 and 42; *Barakat*, *supra n.7,* at para 60.
[57] *A.(L.L.) v B.(A.), supra n.27,* at para 27.
[58] *Barakat*, *supra n.7,* at para 62.

108. And where Crown and complainants' counsel offer differing positions, the Crown can be free to advocate for other conceptions of the public interest without worrying about how that will affect the relationship with the complainant that must remain productive for the difficult trial ahead.

109. In short, complainant's counsel does not hinder, but rather helps the Crown do its job better. Crown counsel, as the guardian of the public interest, must of course keep front-of-mind the well documented history of systemic complainant mistreatment at the hands of a patriarchal justice system, and the great challenges that still remain in better serving sexual assault complainants. But the Crown is caught in a bind because while these considerations have to be front-of-mind, they cannot sanction any departure from Crown advocacy in the public interest wherever that public interest may lie in any particular case. Complainant's counsel frees the Crown from this intractable dilemma. When complainant's counsel is acting, the Crown can pursue the purest possible conception of the public interest, secure in the knowledge that they will not thereby be either undermining, or appearing to undermine, the imperative of making the criminal justice system better, more inclusive, more empathetic, and less traumatic, for complainants.

D. Section 1 Analysis

110. For the reasons outlined above, it is submitted that Justice Akhtar erred in finding that the provisions of ss. 278.92, 278.94(3), and 278.94(4) violated the accused's ss. 7 and 11(d) *Charter* rights. The definition of record is not overbroad, disclosure to the complainant does not violate the right to silence or against self-incrimination, and full participation of the complainant at the application stage does not interfere with Crown counsel's constitutional role.

111. If a violation is made out, the onus falls on the Crown to demonstrate that the violation represents a limit reasonable and demonstrably justified. The Appellant A.S. makes the following comments to assist the Court in this analysis.

112. In *R v Oakes*[59]*,* this Court outlined the factors to determine whether an impugned provisions is reasonable and demonstrably justified in a free and democratic society. The provisions must (i) serve a pressing and substantial objective, and be proportionate in that they are (ii) rationally connected to that objective, (iii) minimally impair the impacted *Charter* rights.

Pressing and Substantial

113. As noted by Justice Moldaver in *Barton* "Without a doubt, eliminating myths, stereotypes, and sexual violence against women is one of the more pressing challenges we face as a society".[60]

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[59] *R v Oakes,* [1986] 1 SCR 103 [*Oakes*].

[60] *Barton, supra n.6,* at para 1.

114. As noted above, the purposes of Bill C-51 include addressing historical injustices in the treatment of sexual assault complainants by the criminal justice system, removing from the fact-finding process discriminatory belief or bias based on stereotype and myth, fostering respect for the privacy and dignity of sexual assault complainants, and encouraging the reporting of sexual assaults.

115. Each of these concerns has been repeatedly expressed by this Court and the need to address them remains pressing and substantial. These problems are not the product of a bygone Victorian era.

Rationally Connected

116. As noted above in *Mills* this Court held:

> [58] The history of the treatment of sexual assault complainants by our society and our legal system is an unfortunate one. Important 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. **If constitutional democracy is meant to ensure that due regard is given to the voices of those vulnerable to being overlooked by the majority, then this court has an obligation to consider respectfully Parliament's attempt to respond to such voices. [Emphasis Added.]**

117. The legislative amendments were a direct response to this, and other concerns raised by the court with the intention of providing sexual assault complainants with a voice in a criminal justice system that has far too often traumatized and revictimized them. Providing complainants with a clear expression of the criminal justice system's intent to allow meaningful participation in the system in matters concerning their core privacy and dignity rights is not only connected to, but essential in achieving Parliament's pressing and substantial objectives.

Minimal Impairment

118. To the extent that the accused's rights are violated, disclosure of the materials that the accused seeks to rely on to the complainant and her counsel minimally impairs them. The amendments in Bill C-51 do not mandate a result; they merely provide procedural rules that ensure a complainant has the opportunity to be fully heard on her own *Charter* rights.

119. A complainant will of necessity have provided a statement to police which will have been disclosed to the accused. Any inappropriate subsequent use of defence application materials to tailor her testimony will be exposed if her evidence at trial is materially different from her initial statement.

120. To the extent that the accused must disclose records in his possession before relying on them at trial, this was an incremental and necessary legislative step by Parliament in order to fill the procedural

gap revealed in *Shearing*. Parliament carefully considered this issue and crafted a solution based on a constitutionally sound procedure that has successfully operated for decades in the context of the third-party records regime.

121. Evidence that falls within the legislative scheme either due to its sexual content or as a result of its classification as a record is not absolutely barred and may still be admissible where the relevant statutory tests are met.

122. To the extent that the participatory rights of complainants infringe on the constitutional role of Crown counsel and therefore impede the accused's rights, they do so in a limited fashion. The complainant is entitled to participate on a single evidentiary issue at a pre-trial application. They are not entitled to participate, make submissions, or call evidence on the ultimate issue at trial.

E. Justice Akhatar erred in determining the constitutionality of the provisions in the absence of the complainant

123. As discussed above the rules of natural justice require that the court hear from the party to be impacted by a decision. The legislation in issue indisputably involves both the procedural and constitutional rights of complainants in sexual assault proceedings. The legislative scheme specifically sought to provide complainants with a meaningful voice in relation to these issues.

124. When the constitutionality of a legislative scheme granting participatory rights to complainants is in issue, it is both optically and substantively necessary, from the perspective of inclusiveness and to do justice to the issues, that an actual complainant be heard.[61]

125. It is both problematic and deeply ironic that the perspective of the complainant, whose *Charter* rights stand on equal footing with those of the accused was not heard in this case nor in the majority of cases that have considered this issue since the *Reddick* ruling, and that the Appellant A.S. was forced to resort to the exceptional step of an interlocutory third-party appeal to this court under s. 40 of the *Supreme Court Act* in order to be heard on the very issue of their participation on these issues.

126. Justice Akhtar erred in considering this constitutional question in the absence of the complainant and this Court ought to clarify that notice to the parties effected by a decision is necessary for a full hearing of the issues and required by the rules of natural justice.

[61] *R v Bickford,* 2020 ONSC 7510 at para 13 to 15. See also *Contra*: *R v A.M.* 2020 ONSC 7674.

F. Conclusion

127. Issues surrounding the use of private records relating to complainants in sexual assault trials are a long-standing and dark stain on the criminal justice system. This Court has commented on the insidious and pervasive nature of myths regarding sexual assault complainants on numerous occasions.

128. Over the last two decades Parliament and this Court have made efforts to address these issues by incrementally advancing the law to prevent accused persons from being able to pillory complainants with records and information that is simply not relevant to their allegations. This not only enhances the truth-seeking function of a trial, it protects the equally important rights of the complainants, provides complainants with a voice and agency in relation to their own private lives, and encourages the reporting of sexual offences. Additionally, the right to appear, make submissions, and be represented by counsel improves the administration of justice by ensuring that judges, as the gatekeepers of this kind of evidence, are in the best possible position to make these critical decisions.

129. Parliament has responded to the repeated warnings from this Court that complainants in sexual assault trials are particularly vulnerable to abuse and revictimization by the criminal justice system.

130. They have done so by incrementally advancing the law based on the model of processes and procedures that this Court has found constitutionally sound. Without resort to damaging and stereotypical assertions there is no reason why a complainant should not be provided the opportunity to be heard on the issue of the admissibility of their own records.

131. The Court in *Reddick* erred in finding that these provisions were unconstitutional and its decision ought to be reversed.

PART IV: SUBMISSIONS ON COST

132. The appellant does not seek costs and requests that no costs be awarded against it.

PART V: ORDER SOUGHT

133. The appellant requests that the appeal be allowed, and the finding of *Charter* infringement and the finding that ss. 278.92, 278.94(2) and 278.94(3) are of no force or effect pursuant to s. 52 of the *Constitution Act, 1982* be quashed.

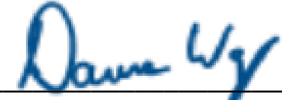
PART VI: SUBMISSIONS ON EFFECT OF PUBLICATION BAN AND RESTRICTION ON PUBLIC ACCESS

134. There is a s. 486.4 publication ban, on any information that would identify the complainant. The following documents in the Appeal Record contain information that is subject to the s. 486.4 publication ban: Tab 1 – *R v Reddick*, 2020 ONSC 7156 refers to the complainant by only the initial of her last name but discusses where she lives and specific dates that she visited Toronto which could be

used to identify her, additionally, Tab 4 – *R v Reddick*, Indictment No. CR-19-40000056-0000 identifies the complainant by her full name.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

DATED at Toronto, Ontario this 18th day of June, 2021.



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PART VII: TABLE OF AUTHORITIES

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SCC File No. 39516

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE SUPERIOR COURT OF JUSTICE FOR THE PROVINCE OF ONTARIO)

BETWEEN:

A.S

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

AND:

SHANE REDDICK

RESPONDENT

AND:

ATTORNEY GENERAL OF QUEBEC

INTERVENERS

APPELLANT'S FACTUM
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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