SCC File No. 39133

**IN THE SUPREME COURT OF CANADA**
**(ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA)**

BETWEEN:

**HER MAJESTY THE QUEEN**

Appellant/
Respondent on Cross-Appeal
(Crown)

-and-

**J.J.**

Respondent/
Appellant on Cross-Appeal
(Accused)

-and-

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**WOMEN AGAINST VIOLENCE AGAINST WOMEN RAPE CRISIS CENTRE,**
**and BARBRA SCHLIFER COMMEMORATIVE CLINIC**

Interveners

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**FACTUM OF J.J., THE RESPONDENT/**
**APPELLANT ON CROSS-APPEAL**
**(Pursuant to Rules 42 and 43 of the *Rules of the Supreme Court of Canada*)**

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## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. Overview

1. The records screening regime in ss. 278.92 to 278.94 of the *Criminal Code* represents a seismic shift in the way our justice system operates in its search for truth. The regime eviscerates rules of evidence and disclosure that are essential to trial fairness. It does so by taking rules developed to address the unique problems of records production (s. 278.3) and extrinsic sexual activity evidence (s. 276) and applying them, inaptly, to a vast category of presumptively admissible and non-prejudicial evidence which is lawfully in the accused's possession.

2. Taken as a whole, the records screening regime is an ineffective, harmful, and ultimately unsalvageable legislative choice. The law before Bill C-51, properly applied, protected complainants and the trial process from the harms of improper, myth-based questioning and evidence. Problems arose not because the letter of the law was inadequate, but because the spirit of the law was not fully appreciated by justice system actors charged with applying it. The solution is not legislative, and has been largely achieved by this Court's call in *Barton* to "do better", an exhortation which prompted a tonal shift in how justice system actors prosecute, defend, judge and talk about sexual offence cases.[1]

3. The records screening regime has frustrated rather than facilitated *Barton*'s call to action. By demonizing the criminal accused's constitutionally protected and largely unproblematic right to privately investigate and test the Crown's case, Parliament invented an imaginary problem. The regime that purports to 'solve' the problem has heightened the risk of wrongful convictions, and increased the complexity and inefficiency of sexual offence prosecutions.

4. Sections 278.92 to 278.94 infringe J.J.'s. 7 liberty interests in a manner contrary to the principles of fundamental justice, namely, the right to a fair trial, full answer and defence, and the principle against self-incrimination. Specifically, the impugned legislation:

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

i. Interferes with the accused's right to cross-examine prosecution witnesses without significant and unwarranted restraint by permitting the complainant to participate in evidentiary decision-making before trial;

ii. Sets a stricter test for admitting defence evidence than is warranted or constitutionally permissible;

iii. Requires the accused to disclose detailed particulars of defence evidence and strategy to the prosecution before the Crown has made out a case to meet, violating the principle against self-incrimination and various related constitutional rights; and

iv. Injects a private party into the decision-making about the merits of the case, thus requiring the accused to defend himself against two adversaries at the admissibility hearing.

5. Sections 278.92 to 278.94 represent Parliament's legislative choice to protect complainants' interests, not their constitutionally protected rights. While Parliament is free to legislate in excess of constitutional minimums, it must do so in a *Charter*-compliant manner.

6. Here, the legislation is not *Charter*-compliant. The infringements on the accused's rights and the truth-seeking function of the trial cannot be saved through a balancing of interests under s. 7 or s. 1 of the *Charter*. The common law already provides strong protections against the misuse of private records in sexual offence prosecutions. The appropriate remedy is to declare the impugned legislation of no force and effect, effective immediately.

**B. <u>Additional facts</u>**

7. J.J. agrees with the facts outlined by the Crown respecting the constitutional challenge and proceedings in this case, and provides the following additional information.

8. Every party at the s. 278.92 admissibility hearing – the Crown, defence, and complainant's counsel – agreed that the records in J.J.'s possession were relevant and had probative value respecting issues critical to the trial. The Crown and complainant's counsel agreed that the records had impeachment value relevant to the complainant's credibility and reliability, as they contradicted her sworn evidence about what occurred on the day of the alleged assault. The records

also had corroborative value relevant to the accused's credibility and reliability. The credibility and reliability of the complainant and accused were the key issues for the jury to decide.[2]

9. Every party at the hearing also recognized the potential for prejudice flowing from the records. Defence counsel agreed that steps should be taken to mitigate the impact on the complainant's privacy and dignity interests, including redactions of the records and limits on the jury's ability to access the records once they became exhibits. Everyone also agreed that the jury should receive instructions directing them to the proper and improper uses of the evidence.

10. Despite the acknowledgement that the records were relevant and had some probative value, and the defence had articulated a legitimate purpose for their use that did not rely on myths or stereotypes, the complainant's counsel argued that the records should not be admitted.[3] Among other things, the complainant's counsel relied on the heightened admissibility standard in s. 278.92(2)(b) to justify excluding the evidence.[4] The Crown's position on admissibility was not entirely clear.[5]

11. On appeal, the Crown does not suggest that the records should not have been admitted.

12. Prior to J.J.'s trial, the Crown sought and received leave to appeal the trial judge's decision that the seven-day notice period in s. 278.93(4) of the *Criminal Code* violated the accused's right to a fair trial under s. 7 of the *Charter* in a manner that could not be justified under s. 1. After J.J.'s trial was complete, he sought and obtained leave to cross-appeal the trial judge's dismissal of his constitutional challenge to the remaining provisions in the records screening regime. As a result, the constitutionality of the records screening regime as a whole is before the Court.

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[2] Appeal Record ["AR"] Vol. IV, pp. 49-79.
[3] AR Vol. IV, pp. 60-77.
[4] AR Vol. IV, pp. 61, 65.
[5] AR Vol. IV, pp. 77-79.

## PART II – POINTS IN ISSUE

13. The parties collectively advance the following question for determination by the Court:

i. Does the "records screening regime" in ss. 278.92 to 278.94 of the *Criminal Code* violate s. 7, 11(c), and/or 11(d) of the *Charter of Rights and Freedoms* such that it should be declared of no force or effect?

14. J.J.'s positions on this question is as follows:

i. The operation of the records screening regime in ss. 278.92-278.94 of the *Criminal Code* as a whole violates the accused's right to a fair trial, right to make full answer and defence, and right to silence protected by ss. 7, 11(c), and 11(d) of the *Charter*.

## PART III – STATEMENT OF ARGUMENT

### A. Overview: the contextual landscape for assessing the regime

15. The context of this legislation is critical to assessing its constitutional validity. J.J. makes four points about the overarching context of the records screening regime.

16. First, the impugned legislation's broad scope differentiates it from the s. 276 regime upheld in *Darrach* and the third-party records regime upheld in *Mills*. Section 276 captures a narrow category of evidence that, by its nature, is rarely probative and always carries a high risk of prejudice to the truth-seeking function of the trial. The historical misuse of "extrinsic sexual activity" evidence, and its inherent danger to the integrity of the trial, justified the presumption of inadmissibility in s. 276.[6] Similarly, the third-party records regime protects complainants from unwarranted invasions of their privacy through compelled production of confidential materials never meant for the accused's eyes. The impugned legislation captures material that far exceeds both of these narrow categories of evidence.

17. The presumption implicit in the Crown's arguments on appeal – namely, that any evidence which engages the complainant's privacy interest is inherently irrelevant, misleading, or abusive

[6] *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Darrach*, 2000 SCC 46; *R. v. Mills*, [1999] 3 S.C.R. 668.

– is unfounded. In particular, there is no basis in the evidence or jurisprudence to conclude that all material engaging the complainant's privacy interest will distort the truth-seeking function of the trial. The existing case law applying the records screening regime shows that "records" will regularly be highly relevant, probative, and unrelated to myths and stereotypes.[7] The fact that the regime only applies to "records" in the hands of the defence but not in the hands of the Crown highlights the differences between the impugned legislation and the s. 276 regime. If the nature of the records was the reason for the limits on admissibility, then presumably the Crown would also be subject to similar restrictions on adducing such evidence (as is now the case with extrinsic sexual activity evidence).[8] Here, however, the Crown is free to use the complainant and accused's digital communications and other "records" whenever it benefits the Crown case, with no need for pre-screening.

18. Second, J.J.'s challenge to the legislation does not reflect the accused seeking to have a "perfect trial" or the rules most likely to result in an acquittal. Rather, J.J. just wants to regain access to the rules of procedure and evidence the justice system relies upon to ensure fairness in the vast majority of criminal trials. While sexual offence cases require increased attention to witnesses' privacy and dignity interests, this fact is insufficient to relegate a sexual assault accused into a "second class litigant" who can be deprived of fundamental fair trial protections.[9] The legislation is not merely disadvantageous to the defence. It fundamentally interferes with the accused's ability to effectively cross-examine prosecution witnesses, adduce relevant and probative evidence, and avoid self-incrimination during a proceeding that will decide their liberty.

19. Third, the impugned legislation poses a real danger to efficient and speedy trials of sexual offences. The breadth of s. 278.1 and s. 278.92 mean that records applications, including mid-trial applications, are going to become common features of the average – previously simple – sexual offence prosecution. The grant of standing to a complainant, and the complainant's right to be represented, poses particular dangers to trial efficiency. While defence and Crown counsel

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[7] See, for e.g., *R. v. R.M.R.*, 2019 BCSC 1093; *R. v. M.J.*, 2021 ONCJ 74; *R. v. Guindon*, 2020 ONSC 1035; *R. v. R.S.*, 2020 ONSC 1509; and the case at bar.
[8] *Barton* at paras. 79-80.
[9] *R. v. Shearing*, 2002 SCC 58 at para. 122.

regularly address evidentiary issues that arise during the course of a trial, mid-trial evidentiary issues become significantly more complicated if yet another counsel's schedule is involved.

20. Finally, prior to the enactment of Bill C-51, the common law and the *Criminal Code* provided strong protections for complainants and trial integrity in sexual offence cases. Even if this legislation is struck down, sexual assault complainants will remain protected from abusive or myth-based questioning and the introduction of private information that is irrelevant, not probative, unduly prejudicial, or which has a truth-distorting impact on the trial.

## B. The Court should follow the *Dagenais/Mentuck* approach for analyzing whether the legislation infringes the accused's s. 7 rights in a manner that cannot be justified

21. This Court has established two analytical approaches for assessing competing claims guaranteed by the *Charter*. First, the reconciliation approach, which internally limits the scope of each claimed right to avoid any possible conflicts, as in *Mills* and *Darrach*. Second, the *Dagenais/Mentuck* approach, which allows for *prima facie* conflicts between claimed rights but balances interests to resolve the conflict.[10]

### 1. The *Dagenais/Mentuck* approach is appropriate

22. J.J. submits that the *Dagenais/Mentuck* approach is the proper way to consider this constitutional challenge. Applying that analysis in this case requires the Court to address the following questions to determine whether the potential for deprivations of liberty flowing from the records screening regime accords with the principles of fundamental justice:

i. Does the operation of ss. 278.92-278.94 infringe the accused's right to a fair trial by creating a serious risk to trial fairness?

ii. Would striking down the legislation infringe the complainant's constitutional rights?

iii. If there is a conflict of rights, are ss. 278.92-278.94 justified on the *Oakes* framework?

23. In previously considering whether to resolve a potential rights conflict by restricting or excluding *presumptively relevant* evidence in sexual offence prosecutions, this Court used the

[10] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835.

*Dagenais/Mentuck* approach. In *N.S.*, the evidence in question was the complainant's demeanour. The complainant submitted that removing her niqab to testify would violate her freedom of religion. The accused argued that excluding the evidence undermined his right to a fair trial. The Court used the *Dagenais/Mentuck* approach to determine first if there was a conflict (i.e., were competing rights actually engaged?) and second, how to resolve it.[11] In *Shearing*, the evidence in question was the answers to proposed questioning about the complainant's private diary. The Supreme Court noted that the evidence was presumptively relevant ("the default position is that the defence is allowed to proceed with its cross-examination"[12]) and conducted a similar *Dagenais/Mentuck* style 'conflict resolution' analysis.

24. This analysis approach makes sense in this case because – unlike in other cases considering the constitutionality of legislation applicable to sexual offence prosecutions – it is not obvious and cannot be presumed that there is a competing set of rights engaged at all. The records screening regime is very different from the provisions at issue in *Mills* and *Darrach*. Those regimes govern extraordinary situations where the accused is attempting to secure or adduce material that is *presumptively irrelevant* by nature, and its production or use inherently prejudicial to trial fairness.[13] In contrast, the records screening regime governs the use of evidence for which no such presumption or prejudice exists.[14] Records in the accused's possession are often relevant, and there is certainly no risk of prejudice to the trial process – in the sense of misleading the trier of fact – when the accused uses a text message the complainant sent him to impeach her.

### 2. The *Darrach/Mills* reconciliation approach is not appropriate

25. The reconciliation approach was used in *Mills* to limit an accused's fair trial rights to accommodate a complainant's equality and privacy rights such that no infringement of s. 7 occurred. The *Mills* approach was later adopted in *Darrach* to limit the accused's use of historically

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[11] *R. v. N.S.*, 2012 SCC 72 at paras. 7-9.
[12] *Shearing* at para. 104.
[13] *Mills* at paras. 63-64.
[14] There will be cases where the accused will seek to use an irrelevant record. These can be addressed in the ordinary course, through an objection by the Crown and a demand that the defence prove relevance.

problematic and therefore presumptively inadmissible evidence relating to the complainant's extrinsic sexual activity.[15]

26. The reconciliation approach requires the Court to define the scope of the accused's rights in a contextual way that reconciles competing principles of fundamental justice. This approach says that "each principle of fundamental justice must be interpreted in light of those other individual and societal interests that are of sufficient importance that they may appropriately be characterized as principles of fundamental justice".[16] The result is that the accused's rights may be limited without a finding that they were infringed; the reasoning is that the *Charter* never intended the accused's rights to extend that far. The reconciliation approach recognizes, however, that the reconciliation between the accused's fair trial rights and other principles of fundamental justice can only go so far. Where the evidence "bears on the right to make full answer and defence, privacy rights must yield to the need to avoid convicting the innocent."[17]

27. There is good reason to restrict the reconciliation approach in *Darrach* and *Mills* to cases where the complainant's *constitutionally protected rights* (as opposed to just her interests) are obviously or automatically engaged. The reconciliation approach was appropriate in these cases because of the nature of the legislation at issue. In *Mills*, the legislation governed the production of the complainant's third-party records to the accused. Its objective was to protect the complainant's privacy *vis-à-vis the state* (hence the automatic engagement of s. 8). In *Darrach*, the legislation governed the admission of extrinsic sexual activity evidence, which is categorically prejudicial in the sense that it is always misleading and always capable of supporting illegal inferences (hence the automatic engagement of ss. 7, 8 and 15). In these two unique scenarios, the engagement of the complainant's *constitutional* equality, privacy, and dignity rights could be presumed. There was arguably no need for the preliminary analysis of whether they were engaged at all.

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[15] *Darrach*.
[16] *Darrach* at paras. 28-30.
[17] *Darrach* at para. 43, citing *Mills* at para. 94; see also *Seaboyer* at 603-604.

28. That is not the case here. The records screening regime is different because (a) the records are already in the accused's hands (i.e. no proposed state privacy invasion) and (b) there is nothing categorically misleading or prejudicial about them.

29. Jurisprudence from this Court casts doubt on whether the *Mills/Darrach* reconciliation approach was ever intended to operate outside of the context of applications to produce private records and/or admit presumptively inadmissible evidence. The majority in *Shearing* rejected the British Columbia Court of Appeal's understanding in that case that *Mills* had

> shifted the balance away from the primary emphasis on the rights of the accused" (para. 93) and introduced a "new direction" (para. 96). *Mills*, [Donald J.A.] wrote, "requires a reconsideration of the position of the complainant, and in particular the equality rights of the complainant, so as to effectively guard against procedures which deny complainants equal access to and benefit of the law".[18]

30. Justice Binnie emphasized that *Mills* was adjudicating an entirely different issue and that it was wrong to apply the rationale of the production regime to admissibility assessments. He cited an excerpt from L'Heureux-Dubé J.'s concurring opinion from *Mills*, where she had noted that "seeking to invoke the power of the state to violate the privacy rights of other individuals, *the applicant must show that the use of the state power to compel production* is justified in a free and democratic society."[19] This approach is not applicable in non-production cases. As Binnie J. concluded,

> "The essence of privacy", L'Heureux-Dubé J. emphasized at para. 119 [of *Mills*], "is that once invaded, it can seldom be regained." Thus, production would only be ordered where the salutary effects outweighed the deleterious effects of disclosure (para. 140). *This rationale simply does not apply to evidence already lawfully in the possession of the defence*.[20]

31. More recently, this Court signaled in *Frank* that the reconciliation approach should be confined to the third-party production and s. 276. In *Frank*, the Court considered the constitutionality of a residency requirement on the right to vote. The dissenting minority opined that s. 1 of the *Charter* authorizes internal "limits" to constitutional rights but can never justify an "infringement" to those rights. Chief Justice Wagner, writing for the majority, commented that

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[18] *Shearing* at para. 23.
[19] *Mills* at para. 131, emphasis added.
[20] *Shearing* at para. 105, emphasis added.

differences in approaches to the reasonable limits analysis are "largely semantic in nature". He further held that the Court's approach to *Charter* challenges was the product of "settled law" and requires answers to two questions: "the first is whether a *Charter* right has been infringed, while the second is whether that infringement can be justified in accordance with the *Oakes* framework."[21]

32. J.J. submits that the impugned legislation fails no matter what approach the Court takes to the *Charter* analysis. That said, applying the *Mills/Darrach* approach in this case would unnecessarily confuse the issue by presuming one of the key disputed facts – that upholding or striking down the legislation would actually engage the complainant's constitutionally protected rights (as opposed to just her interests). The *Dagenais/Mentuck* approach, by contrast, makes room for a proper assessment of that question.

### C. *Dagenais/Mentuck* step 1: The legislation violates the accused's s. 7 rights

33. The records screening regime violates the accused's s. 7 rights in a number of ways that are not consistent with the principles of fundamental justice:[22]

i. By requiring the accused to disclose detailed particulars of defence evidence and strategy to the complainant in advance of her testimony, the regime interferes with the accused's right to cross-examine without significant and unwarranted restraint. This undermines the accused's right to make full answer and defence and jeopardizes the search for truth. This was the breach found by the trial judge; she was correct to find it.

ii. The regime makes probative evidence presumptively inadmissible on the basis that it engages the complainant's privacy interest and is in the hands of the defence. It sets a stricter test for admitting defence evidence than is warranted or constitutionally permissible. Evidence that the accused would otherwise be free to adduce at trial and

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[21] *Frank v. Canada (Attorney General)*, 2019 SCC 1 at paras. 40, 42, 120-123; see also *Alberta v AUPE*, 2014 ABCA 197 at paras. 47-54.

[22] J.J. addresses the constitutional claims of violations of his right to a fair trial under s. 7 rather than s. 11(d): see *Darrach* at para. 23; *R. v. R.S.(A.)*, 2019 ONCJ 645 at para. 38.

which does not have an inherent truth-distorting effect is rendered presumptively inadmissible because it is lawfully in the hands of the accused.

iii. By requiring the accused to disclose detailed particulars of defence evidence and strategy to the prosecution before the Crown has made out a case to meet, the regime violates the principle against self-incrimination and the right to silence, both principles of fundamental justice underpinning and informing the fair trial right. It also violates the presumption of innocence under s. 11(c) of the *Charter*.

iv. The regime injects a private party into the decision-making about the merits of the case, thus requiring the accused to defend himself against two adversaries at the admissibility hearing, contrary to prosecutorial independence and the accused's right to a fair trial.

### 1. The records screening regime is broad in scope

34. The records screening regime applies in proceedings "in respect of" any of the sexual offences listed in s. 278.92(1)(a). A proceeding in respect of a listed sexual offence includes not only trials where the accused is charged with one of the listed offences, but "any proceeding in which an offence listed … has some connection to the offence charged, even if no listed offence was particularized in the charging document".[23]

#### *i. The regime requires the accused to submit a wide variety of "records" for pre-trial screening*

35. Section 278.92 renders all "records" in the accused's possession presumptively inadmissible in sexual offence prosecution. A "record" is anything that "contains personal information for which there is a reasonable expectation of privacy", except for records made by persons responsible for the investigation or prosecution of the offence.[24]

36. As a general rule, courts have interpreted the type of material in which a complainant may have a reasonable expectation of privacy very broadly. A "record" triggering the s. 278.92 regime is not limited to records created in a confidential context, like the specific examples included in s. 278.1. The material need not have a sexual aspect or even a high privacy interest. On the wording

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[23] *Barton* at paras. 72-73.
[24] Section 278.1 of the *Criminal Code*.

of s. 278.1, as interpreted in the jurisprudence, any material that contains the complainant's personal information, no matter how mundane, may qualify as a "record" for the purposes of the records screening regime.[25]

37. Courts have found that the records screening regime applies to a wide spectrum of defence-held evidence, including text messages, emails, and other communications the complainant voluntarily exchanged with the accused;[26] photographs and video-recordings of the complainant made by the accused or lawfully provided to the accused;[27] tribunal records;[28] and counselling records the accused obtained through a court order after bringing a successful third-party records application.[29] While some courts have interpreted the regime's scope as excluding communications the complainant voluntarily shared with the accused,[30] most have held that digital communications between the accused and the complainant *can be* private records, depending on the communication's contents, and therefore potentially trigger the application of the regime.[31] In this case, the trial judge conducted her constitutional analysis on the basis that everyday digital communications between the complainant and accused could be captured by the regime.[32]

38. This broad interpretation of the scope of s. 278.1 is consistent with the Court's decision in *Shearing*, where it held that the complainant's privacy interest in her diary was not extinguished because the accused was in possession of it. The Court also held that "mundane" personal information still attracted a privacy interest; the nature of the personal information went to the weight of the privacy interest, not whether or not it existed.[33]

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[25] *R. v. A.M.*, 2019 SKPC 46 at para. 22 ["*A.M. (Sask.)*"].
[26] *R.M.R.*; *T.A.*; *R. v. M.S.*, 2019 ONCJ 670; *R.S.*
[27] *M.J.*; *R. v. J.J.*, 2020 BCSC 1650 (*In Camera* Oral Ruling), AR Vol. IV, pp. 4-16.
[28] *Guindon*.
[29] *R. v. Boyle*, 2019 ONCJ 232 ["*Boyle* #2].
[30] *R. v. White*, 2020 ONSC 1808; *R. v. A.M.*, 2020 ONSC 1846 ["*A.M. (Ont.)*"]; *R. v. W.M.*, 2019 ONSC 6535; *R. v. Navia*, 2020 ABPC 20.
[31] *M.S.*; *R. v. McKnight*, 2019 ABQB 755; *R.M.R.*; *R. v. Mai*, 2019 ONSC 6691; *T.A.*; *R. v. D.L.B.*, 2020 YKTC 8 at paras. 41, 43, 76-77.
[32] *R. v. J.J*, 2020 BCSC 29 at para. 71 ["*J.J.* Breach Ruling"].
[33] *Shearing* at paras. 92, 148.

39. In light of the wording of s. 278.1 and the jurisprudence interpreting it, the records screening regime has incredibly broad scope in terms of the evidence it renders presumptively inadmissible when in the hands of the defence.

#### *ii. The regime appears to require pre-trial screening for a wide variety of "uses"*

40. The Crown submits that the accused should be required to bring a s. 278.92 application before the defence can cross-examine the complainant on information gleaned from the material in its possession, even if the accused does not seek to adduce the communication itself into evidence.[34] This interpretation of the meaning of "adduce" has some support in the jurisprudence.[35]

41. Without conceding the point, J.J. proceeds on the assumption that the records screening regime, on its face, applies to both actual material in the accused's possession (digital communication, photographs, etc.) and the information contained in that material. While this would broaden the scope of the section – perhaps nonsensically – it is arguably the only way to avoid the "loophole" that would result if counsel were permitted to simply read out the contents of private records during questioning. The resulting breadth of the scheme's apparent application is not a reason to read it down, but rather an indicator of its inaptness (s. 278.1 was never intended to be a "defence disclosure" metric) and ultimate unconstitutionality.

### 2. The records screening regime impairs the accused's ability to effectively cross-examine the complainant

42. The trial judge was correct to conclude that the notice period in s. 278.93(4), when considered in conjunction with the other requirements of the records screening regime, undermined the accused's fair trial rights by impairing the accused's ability to effectively cross-examine the complainant.[36] Providing details relating to the potential impeachment of the complainant to her, in advance of trial, puts a fair trial at risk as "[t]he integrity of a witness and the credibility of their testimony are brought into question when they gain access to relevant information prior to

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[34] Appellant's Factum at para. 86.
[35] *R. v. Boyle*, 2019 ONCJ 226 at paras. 24-28; *S.C. v. N.S.*, 2017 ONSC 5566 at para. 41.
[36] *J.J.* Breach Ruling at paras. 71-72, 82-84.

testifying… The tainting of witnesses, by any means, undermines the truth-seeking function of the trial."[37]

### *i. Cross-examination is essential to trial fairness*

43. Our adversarial system is premised on the belief that cross-examination is the ultimate means of demonstrating truth and testing veracity and reliability.[38] This proposition "is not just a vestige of past traditions. It remains a tried and true method, particularly when credibility issues must be resolved".[39] There can be no doubt as to the importance of cross-examination to not just the accused's interests, but also the broader societal interest in getting at the truth:[40]

> Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed.
>
> That is why the right of an accused to cross-examine witnesses for the prosecution — without significant and unwarranted constraint — is an essential component of the right to make full answer and defence.

44. One of the main purposes of cross-examination is to impeach a witness's credibility.[41] This Court has recognized that catching a witness in "self-contradictions" is one of the staples of effective cross-examination, and effective cross-examination lies at the core of a fair trial.[42]

45. The defence's ability to engage in this critical aspect of cross-examination is seriously undermined by the records screening regime.

### *ii. Advance disclosure to a witness undermines the ability to impeach generally*

46. As a general rule, witnesses are excluded from trial proceedings until after they have testified. The purpose behind orders excluding witnesses is to ensure the integrity of the trial and

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[37] *R.S.(A.)* at para. 70.
[38] *R. v. Osolin*, [1993] 4 S.C.R. 595 at 633-634; *R. v. Khelawon*, 2006 SCC 57 at paras. 48, 63.
[39] *Khelawon* at para. 63.
[40] *R. v. Lyttle*, 2004 SCC 5 at paras. 1-2, emphasis in original; see also paras. 41-46.
[41] *R. v. Titus*, [1983] 1 S.C.R. 259.
[42] *R. v. Henry*, 2005 SCC 76 at para. 3.

trial fairness. Revealing the evidence, defence theory, or the direction of the cross-examination to an anticipated witness creates the risk that the witness, upon hearing the evidence, will "alter, modify or change what she would otherwise state".[43] As put by Sopinka, Lederman, and Bryant in *The Law of Evidence in Canada*:[44]

> The purpose of excluding witnesses is to preserve a witness' testimony in its original state. A witness listening to the evidence given by another may be influenced by the latter's testimony and, accordingly, change his or her evidence to conform with it. Also, by being present in the courtroom and listening to testimony prior to giving evidence, he or she may be able to anticipate, and thereby reduce the effectiveness of, the cross-examination that will ultimately be faced.

47. This reasoning applies in the civil context too, including cases involving sexual assault allegations:[45]

> As I have said, r. 30.1 provides for a prohibition regarding use but with exceptions. There is nothing in the Rule that establishes any requirement that a party must seek the approval of the court before he/she/it relies on one of the exceptions. If there had been an intention to require such approval, the Rule could have so provided. Indeed, to the extent that the Rule is based on the observations of the Court of Appeal in *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (C.A.), it would appear that such approval was expressly not contemplated as it related to the exception for impeachment purposes. As Morden A.C.J.O said, at para. 54:
>
> > It could defeat the impeachment process to require the leave of the court before discovered material could be used for this purpose: [citation omitted].
>
> This same concern is identified in *Juman*. In that decision, the rationale for the implied undertaking was discussed at length. It was made clear that the implied undertaking applied to all material disclosed in the course of a civil proceeding and that such material could only be used, outside the four corners of that litigation, if the court so authorized. However, *Juman* also makes clear that no such authorization is required if the purpose for the use of the disclosed material is to

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[43] *R. v. Green*, [1998] O.J. No. 3598 (Gen. Div.) at para. 21; *R. v. Collette* (1983), 6 C.C.C. (3d) 300 (Ont. H.C.) at 306 (Ont. H.C.); *R. v. Latimer*, [2003] O.J. No. 3841 (S.C.) at para. 27, per O'Connor J; *R. v. Spence*, 2011 ONSC 2406 at para. 38; *R. v. White* (1999), 42 O.R. (3d) 760 (C.A.) at para. 20.
[44] Cited in *R. v. Lindsay*, 2019 ABQB 372 at para. 10.
[45] *S.C. v. N.S.*, emphasis added.

challenge prior evidence given by one of the parties to that litigation. As Binnie J. said, at para. 41:

> Another situation where the deponent's privacy interest will yield to a higher public interest is where the deponent has given contradictory testimony about the same matters in successive or different proceedings. If the contradiction is discovered, the implied undertaking rule would afford no shield to its use for purposes of impeachment.

48. In academic writing, Tilbor and Kilback have recognized that even well-intentioned witnesses can be affected by early disclosure of evidence and strategy by the defence, noting that "[t]he risks go beyond the explicit manufacture, fabrication or shading of evidence. The problem extends to the subtle manipulation of testimony by a witness to meet the disclosed problems that will be raised by the witness' evidence. The danger that could arise as a result of this sort of tailoring of the Crown case lends support to opponents of defence disclosure."[46]

49. Like witness exclusion orders, ss. 10 and 11 of the *Canada Evidence Act* – which permit cross-examination on a prior statement without production to the witness – seek to protect trial fairness by reducing the possibility of tainting the witness's evidence.[47]

50. Keeping information from a witness advances, not frustrates, the search for truth.[48] Procedural limitations on the ability to do so endanger trial fairness and risk wrongful convictions:[49]

> The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution.
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> …
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> In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled. The defence which the law gives with one hand, may be taken away with the

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[46] Michael Tilbor and Keith Kilback, "Defence Disclosure: Is it Written in Stone" (2000) 43 Crim LQ 393.
[47] *R. v. Dobberthein*, [1975] 2 S.C.R. 560; *R.S.(A.)* at footnote 35.
[48] *R.S.(A.)* at paras. 68-72.
[49] *Osolin* at 664, citing McLachlin J. (as she then was) in *Seaboyer* (emphasis added).

> other. Procedural limitations make possible the conviction of persons who the criminal law says are innocent.

### *iii. The principles underlying the importance of cross-examination apply equally in sexual assault cases*

51. The importance of cross-examination to the search for truth is not attenuated in sexual assault trials. To the contrary, the accused's ability to effectively cross-examine the complainant is of paramount importance because the complainant's evidence is often the main or sole source of evidence against the accused.[50]

52. In addition, the outcome of the trial often turns on the complainant's credibility or reliability. In cases where the question is whether the sexual activity was consensual or whether it actually occurred, the ability to challenge the complainant's version of events is particularly important; because consent is subjective, cross-examination of the witness who asserts non-consent is the only way to effectively challenge the Crown's offer of proof on that essential element of the offence:[51]

> In *R. v. Anandmalik* (1984), 6 O.A.C. 143, at p. 144, the Ontario Court of Appeal recognized that the importance of cross-examination becomes even more critical when credibility is the central issue in the trial:
>
> > In a case where the guilt or innocence of the [accused] largely turned on credibility, it was a serious error to limit the [accused] of his substantial right to fully cross-examine the principal Crown witness. It would not be appropriate in the circumstances to invoke or apply the curative provisions of s. 613(1)(*b*)(iii) [now s. 686(1)(*b*)(iii)].
>
> The Manitoba Court of Appeal echoed these sentiments in *R. v. Wallick* (1990), 69 Man. R. (2d) 310, at p. 311:
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> > Cross-examination is a most powerful weapon of the defence, particularly when the entire case turns on credibility of the witnesses. An accused in a criminal case has the right of cross-examination in the fullest and widest sense of the word as long as he

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[50] *J.J.* Breach Ruling at para. 72.
[51] *Lyttle* at paras. 69-70, emphasis added; see also *Osolin* at 644.

> does not abuse that right. Any improper interference with the right is an error which will result in the conviction being quashed.

53. These rights have equal force in the context of a sexual assault trial. In *Osolin*, the Court addressed whether the complainant's right to privacy justified restricting cross-examination on her counselling records. Justice Cory held that cross-examination on these records should be allowed where its purpose is to elicit evidence relevant to trial issues, including consent and the complainant's credibility. Cross-examination on these documents, though detrimental to the complainant's privacy interests, were required in order to ensure a fair trial and avoid a miscarriage of justice.[52]

54. *Osolin* post-dated *Seaboyer* but pre-dated *Darrach*. However, the Court's decisions in *Lyttle* and *Shearing*, which post-date *Darrach*, once again confirm the need to allow the accused to engage in effective cross-examination of the complainant in sexual offence cases in order to achieve trial fairness:[53]

> More recently, in *R. v. Shearing*, [2002] 3 S.C.R. 33, 2002 SCC 58, while recognizing the need for exceptional restraint in sexual assault cases, Binnie J. reaffirmed, at paras. 121-22, the general rule that "in most instances the adversarial process allows wide latitude to cross-examiners to resort to unproven assumptions and innuendo in an effort to crack the untruthful witness . . .". As suggested at the outset, however, wide latitude does not mean unbridled licence, and cross-examination remains subject to the requirements of good faith, professional integrity and the other limitations set out above (paras. 44-45). See also *Seaboyer*, *supra*, at p. 598; *Osolin*, *supra*, at p. 665.

55. The principles outlined above were not swept away by Gonthier J.'s statement in *Darrach* that, in s. 276 cases, a complainant is entitled to advance notice the defence is seeking to tender sexual activity evidence and defence counsel is not entitled to "ambush" the complainant with this type of information. In *Darrach*, Gonthier J. held as follows:[54]

> 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

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[52] *Osolin* at 663-667, 672-675.
[53] *Lyttle* at para. 50, emphasis added.
[54] *Darrach* at para. 55, emphasis added.

> 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.

56. Justice Gonthier's statement in *Darrach* cannot be divorced from its context. Specifically:

i. The issue in *Darrach* was whether the complainant could be cross-examined about sexual history extrinsic to the allegations. Because s. 276 evidence is, by its nature, outside the four corners of the indictment, it is reasonable to infer that the complainant will be surprised when it comes up at trial.

ii. The subject of the proposed cross-examination in a s. 276 case is inherently intensely intimate and potentially embarrassing. Sexual behaviour is a unique form of human interaction.

iii. The nature of the evidence in a s. 276 application is presumptively irrelevant and highly prejudicial due to its association with myths, stereotypes, and other improper reasoning that jeopardizes the truth-seeking function of the trial.

iv. The statutory scheme under consideration in *Darrach* made no provision for notice to the complainant and the Court made no reference to the notice provisions governing applications for production of third-party records.

57. Justice Gonthier's statement cannot be read as a generalized prohibition on surprising a witness in cross-examination with contradictory evidence. Nor does it require the parties in a sexual offence prosecution to tell the complainant all about the defence theory, evidence, and anticipated questions. It is, at most, a s. 276-specific reminder that extrinsic sexual activity is always prejudicial, and – because it is often temporally distant, intimate and historically prone to misuse – likely to cause undue confusion and distress if brought up without warning. In *Darrach*, the Court's analysis relied on these assumptions about s. 276 evidence. The reference to "ambush" related to the unique problems associated with the specific type of evidence at issue, not cross-examination of a sexual assault complainant writ large.

58. This analysis was followed in *D.L.B.*, a constitutional challenge to the impugned legislation.[55] In finding the records screening regime violated the accused's right to make full answer and defence by impairing the accused's ability to effectively cross-examine the complainant, the Court rejected the Crown's interpretation of *Darrach*:

> …The [Crown] respondent asserts that this element of surprise effectively amounts to a defence by ambush, noting that the case law is clear that an accused has no constitutional right to ambush the complainant.
>
> However, proper impeachment through cross-examination is not, in my view, the equivalent of defence by ambush. The former is an entirely legitimate and appropriate tactic in defending an accused on a criminal charge. Defence by ambush as defined by the Supreme Court of Canada, in cases like *Darrach*, relates to ambushing the complainant with misleading evidence intended to put the complainant on trial by evoking one of the twin myths. It is untenable to suggest that an accused cannot use records, which may or may not take a complainant by surprise, for the legitimate purpose of testing the complainant's credibility, the very goal of cross-examination.

59. The concerns underpinning Gonthier J.'s comment in *Darrach* do not apply to records captured by the records screening regime. Impeachment with relevant records relating to non-sexual topics, or to the subject matter of the charge, is inherently less likely to surprise or provoke a fear of abuse based on historical misuse. No additional protection to the integrity of the trial is offered by providing a witness with an advanced opportunity to learn why their evidence is legally relevant to the broader case, or to prepare answers to specific questions.

60. Since *Darrach*, the Court has repeatedly reinforced the importance of the right to cross-examine sexual assault complainants without significant and unwarranted restraint, which confirms that Gonthier J.'s comment is limited to s. 276 evidence. In *Shearing* and, more recently, in *R.V.*, the Court confirmed that the accused retains the right to cross-examine Crown witnesses without significant and unwarranted restraint.[56]

61. Yet the rule against ambushing a complainant with sexual activity evidence has been elevated by some courts into a more generalized principle – unsupported by evidence – that traditionally effective forms of cross-examination are ineffective and even counterproductive for

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[55] *D.L.B.* at paras. 68-69.
[56] *Shearing* at paras. 121-122; *R. v. R.V.*, 2019 SCC 41 at paras. 38-41.

sexual assault complainants. The rationale for advance notice in records' cases appears to be that asking the witness questions based on records, or impeaching her with them, without notice, frustrates the search for truth because "private records…when put to a complainant with inadequate prior notice, logically invites a response that is generated by fear, humiliation, confusion or anxiety, and not one that is comprehensive and responsive, and conducive to getting at the truth."[57] On this logic, any questioning of a sexual assault complainant about private matters could require pre-trial disclosure to the complainant. Given the nature of much of the evidence and issues in many sexual offence prosecutions, this could effectively mean defence disclosure of the bulk of the complainant's anticipated cross-examination in advance of any sexual offence trial.

62. Accepting this proposition would mark an abandonment of the adversarial system's understanding of the search for truth based on foundationless assumptions about sexual assault complainants. Absent psychological evidence that this is uniquely true of sexual offence complainants (none of which has been offered before this Court or any other court that has entertained the argument), this position reflects either the paternalistic assumption that sexual assault complainants are uniquely fragile and incapable of holding to their oath during an uncomfortable examination, or the legally incorrect presumption that sexual assault complainants are telling the truth.[58] Either way, the Court should reject this position and its unsupported reimagination of the right against s. 276 "ambush" as a broader right of complainants to prepare answers for difficult questions in advance.

### *iv. The records screening regime's defence disclosure and notice requirements impair the accused's ability to make full answer and defence*

63. The accused does not have an automatic right to an admissibility hearing for records captured by the records screening regime. To be granted a hearing, the accused must first provide the prosecutor and court clerk with a written application "setting out detailed particulars of the evidence the accused seeks to adduce and the relevance of that evidence to an issue at trial".[59] It follows that, if the accused fails to provide sufficient particulars of the defence evidence and how they seek to use the evidence at trial, the judge could deny the accused an admissibility hearing.

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[57] *M.S.* at para. 105.
[58] *R. v. Thain*, 2009 ONCA 223 at para. 32; *R. v. Downey*, 2013 NSCA 101at paras. 19-20.
[59] Section 278.93(1)-(2).

This would, of course, mean that the defence would not be permitted to rebut the statutorily-created presumption that the accused's evidence is inadmissible.

64. The notice period created by s. 278.93(4) creates a further hurdle for the accused to clear before a judge will grant the accused the opportunity to establish the evidence's admissibility. Pursuant to s. 278.93(4), the judge must be satisfied that the accused gave their written application to the prosecutor and court clerk "at least seven days" before the hearing, "or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice". If the accused cannot establish that they complied with this notice period, the defence would again not be permitted to rebut the presumption that evidence in the accused's possession is inadmissible.

65. The Court's constitutional analysis must proceed on the basis that s. 278.93(4) is meaningful and creates a seven-day notice period for s. 278.92 admissibility hearings. If the defence fails to comply with the notice period, they risk the court denying them the opportunity to rebut the presumption that records in the accused's possession are inadmissible. As a result, no matter the relevance or probity of the evidence, the accused could not tender it in their defence at trial. In the context of a criminal prosecution where the accused faces significant punishment if convicted, this is not a risk most defence counsel will be willing to take.

### *v. The records screening regime impedes the search for truth by restricting the accused's ability to effectively cross-examine the complainant*

66. The notice requirement in s. 278.93(4) creates a procedural limitation on the right to cross-examination which undermines the search for truth at trial. Unlike the approach approved of by the Court in *Shearing*, where the admissibility of the proposed evidence is discussed in a *voir dire* during trial, s. 278.93(4) requires advanced notice to the complainant of detailed particulars of the way in which the complainant's evidence will be challenged.

67. The notice period means that, as a practical matter, the complainant will receive details of the accused's defence, evidence, and strategy before ever providing sworn evidence in the case. In J.J.'s case, the complainant had testified at a preliminary inquiry. Since that time, however, Parliament has eliminated preliminary inquiries for most sexual offences.[60] Police statements need

[60] *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, S.C. 2019, c. 25 (Bill C-75), s. 238.

not be provided under oath. Further, any accused charged summarily or who elects to have their trial in a provincial court do not have the option of a preliminary inquiry to assess the complainant's version of events prior to providing the complainant with notice under s. 278.93(4).

68. The nature of the disclosure required by s. 278.93(2) increases the likelihood that the complainant will intentionally or unintentionally tailor their evidence in response to receiving notice of the s. 278.92 admissibility hearing. The complainant is told about not only the defence evidence but also the defence's reasons for tendering it. This may involve the disclosure of important aspects of the defence theory of the case – including the particular frailties in the complainant's evidence that the defence seeks to prove through adducing the record at issue. A witness who has knowledge of the defence case "is in a position to tailor his or her evidence" and "escape the grasp of contradiction".[61]

69. The Crown's comparison of the notice period to other circumstances where complainants may learn of defence evidence, such as after a mistrial or retrial, is inapposite. These scenarios are fundamentally different. In a mistrial or retrial scenario, the accused had the opportunity to confront the witness with contradictory evidence and establish material inconsistencies before a trier of fact and at a time when the complainant did not know the defence theory or anticipated questions. That opportunity generated a transcript that can be used to pin the complainant down to the same account on a retrial, in the event that her knowledge of the case changes her evidence.[62]

70. That opportunity – to confront the witness with impeachment material before she has had an opportunity to educate herself about it – is what the accused loses when the complainant is given access to materials on a s. 278.92 application in advance of trial. Unlike in the retrial scenario, the accused has had no opportunity to examine the complainant before she educated herself and is not armed with a record of untainted evidence to protect against subsequent tailoring.

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[61] *R.S.(A.)* at para. 71. See also *A.M.* (Sask.) at paras. 36-40; *R. v. Anderson*, 2019 SKQB 304 at paras. 19-22 ("*Anderson 2019*"]; *R. v. Anderson*, 2020 SKQB 11 at paras. 10-12; *R. v. J.S.*, [2019] A.J. No. 1639 (Q.B.) at paras. 12-14, 22-25, 27; *R. v. S.S.* (23 April 2020) SK QB CRM 194 of 2018 (S.K.Q.B.) at paras. 6-10; *D.L.B.* at paras. 65, 70-71, 78; *W.M.* at paras. 22, 54; *Mai* at para. 14.

[62] *D.L.B.* at para. 70.

Here, the accused is required to give the complainant information about the impeachment value of defence evidence before the complainant ever gives evidence under oath.

71. Moreover, as a general rule, the possibility of unfortunate mistrial or retrial scenarios cannot become a vehicle for depriving the accused of well-established *Charter* rights in other contexts. Taken to its extreme, this reasoning could be used to justify ordering defence disclosure in every case. In theory, *any* case could be retried. In any retrial, "disclosure" of the defence theory and strategy will have already occurred. If the fact that defence disclosure is unavoidable in some contexts justifies defence disclosure in other contexts, there is nothing to stop Parliament from legislating general defence disclosure requirements in all criminal trials. The Court should not adopt an approach that seeks to put all accused persons on the same playing field as the most unfortunate ones.

72. In addition to the timeline of the notice period, the procedure associated with it increases the risk to trial fairness. Because the regime requires notice and defence disclosure in advance of trial, outside of the courtroom, the accused is not able to know the complainant's initial reaction to the record – including any different explanations or versions of events the complainant gave upon initially learning of the disclosure. This prevents the accused from exploring information that would help the trier of fact understand the circumstances in which the complainant came to know of the defence material and strategy, or other information that could impact the weight that should be given to the complainant's response to the records. The defence is thus prevented from exploring evidence relevant to the impact of the defence disclosure on the complainant's evidence, and is prevented from presenting that evidence to the trier of fact.

73. In addition, where the complainant is represented by counsel, the ability of the defence to explore the extent of the complainant's knowledge or understanding of the defence evidence or strategy is complicated by the complainant's solicitor-client privilege. A represented complainant will likely gain knowledge of the defence application through privileged communications with their counsel. The defence would not be permitted to cross-examine the complainant on the information the complainant received from their lawyer.[63]

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[63] *R.S.(A.)* at para. 72.

74. Section 648 of the *Criminal Code* poses another potential limitation on the accused's ability to highlight relevant circumstances surrounding the complainant's knowledge of the defence case. Section 648 provides that in a jury trial, it is impermissible to transmit in any way information regarding any portion of the trial at which the jury was not present before the jury retires to consider its verdict. Interpreted strictly, this ban prevents the accused from fleshing out the circumstances in which the complainant came to know the defence evidence and anticipated cross-examination.

75. Given these various restrictions, a trier of fact will not be well-positioned to assess the weight to be given to the complainant's evidence or conduct a proper assessment of credibility and reliability. The circumstances in which the complainant received advanced notice of the defence evidence and anticipated lines of cross-examination are relevant factors going to weight. The limits the regime imposes on the defence's ability to explore these circumstances compounds the harm of advanced notice to the complainant to the truth-seeking function of the trial.

76. The ultimate aim of a criminal trial is to ascertain the truth.[64] Permitting the accused to engage in effective cross-examination is essential to achieving this objective. By requiring the accused to disclose defence evidence and strategy respecting the cross-examination of the complainant in advance of the complainant testifying, the impugned legislation does real harm to the truth-seeking function of the trial. As a majority of the Court held in *Shearing*, the limits on the scope of cross-examination in sexual offence trials do

> not turn persons accused of sexual abuse into second-class litigants. It simply means that the defence has to work with facts rather than rely on innuendoes and wishful assumptions. This means, in turn, that the defence should not be prevented from getting at the facts.[65]

### 3. The records screening regime impairs the accused's ability to adduce relevant, probative, and otherwise admissible evidence in their defence

#### *i. The general rule is that defence evidence should be admitted*

77. Courts have and continue to take a cautious approach to exclusion of evidence tendered by the defence. The first clear statement of the law came with the Court's decision in *Wray*, where

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[64] *Mills* at paras. 74-76.
[65] *Shearing* at para. 122.

the Court recognized a discretion to exclude Crown evidence that operated unfairly, but only where it was "gravely prejudicial to the accused … and whose probative force in relation to the main issue before the court is trifling".[66] Over the next two decades, culminating in *Seaboyer*, the Court altered this balance, eventually concluding that Crown evidence should be excluded where "its probative value is outweighed by the prejudice which may flow from it."[67]

78. Importantly, the Court was careful not to apply the same standard to evidence tendered by the defence. The Court recognized that a trial judge should exercise great care in excluding defence evidence, as it is "a fundamental tenet of our judicial system that an innocent person must not be convicted". As such, "[i]t follows. . . that the prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law."[68] This differential approach to the balancing was re-affirmed by the Court in *Shearing* and, more recently, in *Grant* and *Goldfinch*.[69]

79. Section 278.92 imposes a higher bar than the fundamental principle set out in *Seaboyer*. It requires an accused person to show that the evidence possesses "significant" probative value in a rigorous pre-trial screening regime. The necessary corollary of this higher threshold for admission is that defence evidence that is relevant and has some probative value to an issue at trial may be excluded from evidence.

### *ii. Problematic and prejudicial evidence requires more rigorous screening and, for one category of evidence, a higher evidentiary threshold*

80. The creation of a higher standard for admission of defence evidence cannot be justified in relation to the broad category of evidence captured by the impugned legislation. The wording of s. 278.92 matches the wording of s. 276(2), which was upheld as being constitutional in *Darrach*. That wording is only constitutional, however, with respect to evidence of extrinsic sexual activity. It does not apply to the type of evidence being addressed by s. 278.92, because the nature of the evidence captured by the two regimes is very different.

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[66] *R. v. Wray*, [1971] S.C.R. 272 at 293
[67] *Seaboyer* at 609.
[68] *Seaboyer* at 611.
[69] *Shearing* at para. 76; *R. v. Goldfinch*, 2019 SCC 38 at para. 32; *R. v. Grant*, 2015 SCC 9 at para. 19.

81. The generally permissive rule in favour of admitting defence evidence in *Seaboyer* may be departed from, but only for good reason. In all cases, the party adducing evidence bears the burden of proving its relevance. This often happens informally:

> The parties instinctively sift through the mass of information available to them and bring forth what is relevant and material. In practice, it is inevitable that some evidence, which is either irrelevant or immaterial or both, will be heard, but, in many cases this evidence will be harmless and will not raise any concern. In other cases, the trier of fact will have to be instructed to disregard the inadmissible evidence.[70]

82. It is open to Parliament and the courts to replace this imperfect assessment with a rigorous process that acknowledges the especially high risk of harm caused by certain problematic types of evidence. Such procedures eliminate the "inevitable" introduction of inadmissible information that occurs with an informal approach. In this way, defence-led evidence may become subject to pre-trial screening regimes and the questions of probative value and prejudice require a formal pre-trial motion to satisfy the trial judge that a particularly problematic piece of evidence is worth admitting and will not invoke moral or reasoning prejudice in a jury. Hearsay and bad character evidence are two such examples. The defence knows it must bring a pre-trial motion to admit them. This is because of the inherent dangers of hearsay and bad character evidence to the search for truth.[71]

83. Even in these situations, however, the more permissive defence-evidence standard from *Seaboyer* applies. As the Court recently noted in the context of considering other forms of potentially-problematic defence evidence, "while the principles in *Seaboyer* will always apply, they play out differently in different situations."[72] Prior to the enactment of s. 278.92, s. 276 was the only rule of evidence that imposed both a pre-trial screening requirement to guard against inherent prejudice *and* a substantively higher admissibility threshold for the defence.

84. The higher threshold attaching to s. 276 evidence is either one significant exception to the rule that the principles in *Seaboyer* will always apply, or a confusingly-worded articulation of the *Seaboyer* test that is unique to sexual activity evidence. Either way, the higher evidentiary

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[70] *R. v. L.B.* (1997), 35 O.R. (3d) 35 ( C.A.), note 13, emphasis added.
[71] See, for e.g., *Khelawon* at paras. 34, 42; *R. v. Scopelliti* (1982), 34 O.R. (2d) 524 (C.A.).
[72] *Grant* at para. 41.

threshold in s. 276(2) is only constitutional because of the historically problematic nature of the evidence to which it applies. The enhanced hurdle for admission created by the requirement of "significant" probative value was only acceptable because extrinsic sexual activity evidence is fundamentally different than other types of evidence, and has historically been more difficult for trial judges and juries to handle properly. The elevated standard of probative value was an acknowledgement of the harm caused by the improper introduction of sexual activity evidence and the justice system's historical misuse of it.[73] The requirement of showing significant probative value was essentially a statutory recognition of the extremely high potential for prejudice given the nature of the evidence. As Gonthier J. put it: "evidence of sexual activity must be significantly probative if it is to overcome its prejudicial effect. The *Criminal Code* codifies this reality".[74] He went on to clarify that it was constitutionally permissible to prohibit the accused from adducing "relevant information that is not 'significantly' probative, a rule of evidence that protects the trial *from the distorting effects of evidence of prior sexual activity*".[75]

85. Like the Supreme Court, the Ontario Court of Appeal also saw the "higher threshold" in s. 276 as a situation-specific exception to the rule presumptively permitting relevant defence evidence. The Court of Appeal held that Parliament's decision to include the term "significant" "is, likely, a recognition that, by reason of the inherent nature of the prejudice which will inevitably flow from the reception of evidence of the complainant's sexual activity, the s. 276(2)(c) test for admission will not be met unless the probative value is significant."[76]

### *iii. The policy concerns justifying pre-trial screening and a higher evidentiary threshold do not apply to private records*

86. The legal and policy concerns justifying the higher evidentiary threshold and rigorous pre-trial screening requirement for sexual activity evidence do not apply to the records captured by the impugned legislation. By creating a presumption of inadmissibility and a rigorous pre-trial screening regime for a massive category of evidence in the absence of categorical concerns about its truth-distorting nature, or moral or reasoning prejudice, the legislation unjustifiably violates the

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[73] *Darrach* at para. 40.
[74] *Darrach* at para. 41.
[75] *Darrach* at para. 42, emphasis added.
[76] *R. v. Darrach*, 1998 CanLII 1648 (Ont. C.A.) at p. 7, emphasis added.

accused's rights to a fair trial, to make full answer and defence, and to the presumption of innocence.

87. The higher evidentiary threshold is only constitutional with respect to evidence of the complainant's other sexual activity. It cannot be justified with respect to the type of evidence being addressed by s. 278.92 for three reasons.

88. First, private records do not, by their nature, have the potential to distort the search for truth. While some may, this cannot be categorically said for the vast number of records protected under section 278.1. Indeed, in the vast majority of cases applying the s. 278.92 regime to private records in the hands of the accused, the evidence was admitted because there was no substantial risk to the truth-seeking function of the trial.[77] In contrast, *all* extrinsic sexual activity evidence has the potential to distort the search for truth by implicitly inviting twin-myth or stereotypical reasoning. That was the justification for the presumption of inadmissibility in s. 276.[78]

89. Second, extrinsic sexual history will generally be both much more sensitive and much less likely to become the subject of a defence application than evidence captured by the impugned legislation. As noted above, s. 278.1 safeguards records for which there is any reasonable expectation of privacy, no matter how slight. Text messages and other digital communications between an accused and complainant, though attracting a diminished expectation of privacy, are still sufficient to trigger the records screening regime. Further, if s. 278.92 "adducing" of the record happens every time an accused uses a record as the good-faith basis for their questioning of a witness, the records screening regime will be regularly triggered.

90. Third, the Crown bears no equivalent burden. While Crown counsel now have an obligation at common law to seek advance permission to introduce their witnesses' extrinsic sexual activity, they have no equivalent obligation to seek advance permission from the trial judge to introduce private records or preview the questions they will ask about them. The regular *Seaboyer* admissibility standard for Crown evidence (i.e. more probative than prejudicial) applies, and there are no mandatory procedural requirements or judicial screening. Unlike the defence, the Crown is

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[77] *R.M.R.*; *T.A.*; *M.S.*; *R.S.*; *M.J.*; *Guindon*.
[78] *Seaboyer*; *Darrach*.

free to make tactical mid-trial choices about which private records to lead or which ones to use as the basis for examination-in-chief (or cross-examination under s. 9 of the *Canada Evidence Act*). They may do so without judicial approval, and by meeting an admissibility threshold that is *lower* than the standard that applies to the same evidence in the hands of the defence.

91. Ultimately, the legislation is unconstitutional because the evidentiary and procedural requirements for admissibility depend not on the type of evidence, but on the fact that it is evidence in the hands of the defence. This is not a valid foundation for the records screening regime. The fact that the evidence is in the hands of the defence is, on its own, incapable of giving rise to any concerns that would require the protection provided by these elevated procedural and substantive hurdles. While the defence does not have the Crown's *Boucher* obligations, defence counsel are bound by common law restrictions on cross-examination and provincial Rules of Professional Conduct to avoid frivolous arguments or vexatious conduct and to act competently in their client's defence. In sexual offence cases, that means knowing about and how to avoid evidence and submissions that depend on improper myth-based inferences or stereotypical reasoning. The Court made this clear in *Lyttle*:[79]

> The right of cross-examination must therefore be jealously protected and broadly construed. But it must not be abused. Counsel are bound by the rules of relevancy and barred from resorting to harassment, misrepresentation, repetitiousness or, more generally, from putting questions whose prejudicial effect outweighs their probative value.

92. Thanks to Parliament's enactment of s. 486 of the *Criminal Code,* no complainant in a prosecution for an enumerated offence will ever be cross-examined by a self-represented accused – only counsel who have a legal and ethical obligation not to cause unnecessary discomfort.

93. The fact that there is no equivalent procedural or substantive burden on the Crown is a sound indicator that there is no constitutional justification for subjecting good faith questions about a record to the high admissibility threshold and procedural requirements previously reserved for profoundly prejudicial and private extrinsic sexual activity evidence. If evidence of this type in the

[79] *Lyttle* at para. 44, emphasis added.

hands of the Crown does not trigger significant enough concerns to justify pre-trial screening and an elevated evidentiary burden, then evidence in the hands of the defence cannot do so.

### 4. The legislation's disclosure requirements violate the accused's right to silence

94. The records screening regime requires a form of defence disclosure that violates the principle against self-incrimination and the underlying s. 7 right to silence and right to a fair trial. Before tendering records (either during cross-examination or as part of the defence case) in which the complainant has an expectation of privacy, the accused must apply to do so under s. 278.93 and s. 278.94. As part of that application, the accused must provide "*detailed particulars* of the evidence that the accused seeks to adduce and the *relevance of that evidence* to an issue at trial."[80] This information must be disclosed to the Crown and complainant at least seven days before the admissibility hearing, unless the court orders otherwise.

95. Requiring the accused to provide these details – either in advance of trial or during the Crown case – breaks the "general rule [that] there is no obligation resting upon an accused person to disclose either the defence which will be presented or the details of that defence before the Crown has completed its case."[81] So-called 'exceptions' to the rule, such as the common law obligation to disclose an alibi, are not true exceptions, either because they are not mandatory or because they do not require disclosure until the Crown case is complete.

96. The most relevant exception to the principle against defence disclosure is the pre-trial screening requirement for extrinsic sexual activity evidence under s. 276. But even this is not a real exception, nor is it a justification for the illegal disclosure obligation mandated by the records screening regime.

#### *i. History of the right to silence: general resistance to compelled defence disclosure*

97. The principle against self-incrimination is a foundational concept in the Canadian criminal justice system. In *P.(M.B.)*, Lamer C.J., for a majority of the Court, described the principle against self-incrimination as "perhaps the single most important organizing principle in criminal law…firmly rooted in the common law" and a principle of fundamental justice within s. 7 of

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[80] Section 278.93, emphasis added.
[81] *R. v. Chambers*, [1990] 2 S.C.R. 1293 at 1319.

the *Charter*.[82] The principle against self-incrimination rests on the concept of individual sovereignty. As explained by J.H. Wigmore, "the individual is sovereign and ... proper rules of battle between government and individual require that the individual ... not be conscripted by his opponent to defeat himself."[83] In *P.(M.B.)*, the Court emphasized that the criminal law protects an accused.

98. During a criminal prosecution, the principle against self-incrimination is protected and supported by various interrelated s.7 rights: the right to silence, the presumption of innocence and the right to make full answer and defence. Their common purpose is to protect individuals from being conscripted to assist the Crown in prosecuting him, either by announcing a defence or by producing evidence.[84] The right to silence exists because there is no obligation resting upon an accused person to disclose their defence before the close of the Crown case.[85] The presumption of innocence requires the defence to be left alone by the state before trial "on the excellent ground that it is better that a guilty man go unpunished than that an innocent man be convicted.[86] The right to make full answer and defence is closely tied to the idea that the defendant is entitled to put the Crown to strict proof of its case before deciding whether and how to respond. As Iacobucci J. stated in *Rose*:[87]

> One aspect [of the right to make full answer and defence] is the right of the accused to have before him or her the full "case to meet" before answering the Crown's case by adducing defence evidence. The right to know the case to meet is long settled, and it is satisfied once the Crown has called all of its evidence, because at that point all of the facts that are relied upon as probative of guilt are available to the accused in order that he or she may make a case in reply: see *R. v. Krause*, [1986] 2 S.C.R. 466, at p. 473, per McIntyre J.; John Sopinka, Sidney Lederman and Alan Bryant, *The Law of Evidence in Canada* (1992), at p. 880. This aspect of the right to make full answer and defence has links with the right to full disclosure and the right to engage in a full cross-examination of Crown witnesses, and is concerned with the

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[82] *R. v. P.(M.B.)*, [1994] 1 S.C.R. 555
[83] Cited in *R.S.(A.)* at para. 41.
[84] *P.(M.B.)*, at paras. 36-37; *R. v. Hebert*, [1990] 2 S.C.R. 151; *R. v. Singh*, 2007 SCC 48; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.
[85] *Chambers* at 1319.
[86] *R. v. Peruta* (1992), 78 C.C.C. (3d) 350 (Que C.A.) at 357.
[87] *R. v. Rose*, [1998] 3 S.C.R. 262 at para. 102, emphasis added. See also the concurring reasons of L'Heureux-Dubé J., at para 61, who noted that "[t]here is a general principle that the Crown should set out its case, make disclosure, and put forward all its evidence before the accused must defend against that evidence."

> right to respond, in a very direct and particularized form, to the Crown's evidence. Inherent in this aspect of the right to make full answer and defence is the requirement that the Crown act prior to the defence's response.

99. The absence of a duty of disclosure on the defence, if not a right in and of itself, is a further manifestation of these interrelated rights and the underlying principle. The defence is typically not required to disclose defence evidence or theories before trial because it "has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role."[88]

100. This constitutionally protected resistance to pre-trial cooperation is not only vital to the accused, but it is also fair to the prosecution. The Crown is not entitled to a "full" or inquisitorial prosecution and acts only in and for the public.[89] In pointing out that "the search for truth is advanced rather than retarded by disclosure of all relevant material", the Court in *Stinchcombe* was explicitly referring to relevant material held by the state. Its justification for imposing a one-sided disclosure obligation was "that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done."[90] As Professor Stalker has noted:

> A truly reciprocal obligation on the defence would mean that the defence must provide all the information it has collected to the Crown. But none of the reasons that apply to the Crown apply to the accused… The accused and his or her defence counsel are not public servants; they are not collecting information for the public good… While defence lawyers are officers of the Court and their ethical obligations forbid them from hiding physical evidence, they are not required to produce it in a way that incriminates their client… The system has recognized that the right of the accused and, to a large extent, defence counsel, to look after the accused's own interests in preparing for trial without much consideration for the interests of society.[91]

101. The general prohibition on defence disclosure is therefore both well-entrenched as a matter of constitutional law, and intrinsically linked to the presumption of innocence, the right to silence,

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[88] *Stinchcombe* at 333.
[89] Anne Stalker, "*Charter* Roadblocks to Defence Disclosure" (2002) 40 Alta L Rev 701 at 706-707 ["Stalker"].
[90] *Stinchcombe* at 335.
[91] Stalker at 706-707.

the right to full answer and defence, and the right to a fair trial. Recognizing the nature of these protections, one commentator concluded that "it will in fact be very difficult to enact a piece of legislation to require defence disclosure that does not run afoul of the right to silence" and that "when one examines the whole picture that has been painted by s. 7 analysis, it is clear that [limiting defence disclosure] is appropriate for justice, not contrary to it."[92]

### *ii. The infringement of the right to silence caused by s. 278.93 is independent from concerns about complainant participation*

102. The violation of the accused's fundamental pre-*Charter* entitlement to remain silent until the Crown has offered a case to meet arises independently from J.J.'s complaints about the impact of the records screening regime on full answer and defence. Even if complainants had no access to defence disclosure, and even if the concerns about full answer and defence outlined above did not exist, the disclosure obligation to the Crown would violate the principle against self-incrimination and the related principle that the defence has no duty to help build the case against him.

103. While bound by quasi-ministerial obligations, Crown counsel also have an obligation to prosecute their case diligently, pursue convictions where there is a reasonable prospect of conviction, and protect the complainant's rights by – among other things – preparing the complainant adequately to testify. While the Crown can undertake not to share or use a particular item of defence disclosure, it cannot forgo its duty to the administration of justice. Compelled disclosure, especially a regime like this, which routinely requires the defence to produce not only his cross-examination strategy and potential impeachment material but also *his own prior statements* (e.g., in the form of text messages exchanged with the complainant), inevitably equips the Crown with tools to inculpate the accused that it would not otherwise have had.

104. Armed with the accused's application to use private records – and leaving aside the possibility of complainant involvement or tainting – the fact remains that the Crown can ask questions of the complainant during preparation that the Crown might not otherwise have thought of. The prosecution may also be armed with prior statements by the accused that are directly

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[92] Stalker at 711, 715.

relevant to the alleged offence and which it could use to develop cross-examination questions or even impeach the accused.

### *iii. 'Exceptions' to the principle against defence disclosure are rare, and they respect the right to silence*

105. There are few exceptions to the general rule against defence disclosure. Those that do exist are limited in scope and are not true exceptions. They include:

106. Alibi: The accused has a tactical obligation to disclose an alibi to the state in a timely way. An alibi defence negates the possibility of the accused having committed the crime. Because alibis are so exculpatory and so easy to invent, they must be examined "with care."[93] Unless the accused discloses his alibi to the Crown with sufficient notice to permit scrutiny, the possibility that the alibi is false continues to exist and reduces the probative force of the evidence.[94] In appropriate cases, the trial judge may instruct the jury to consider the absence of proper notice in assessing the weight of the alibi.[95]

107. Alibi disclosure obligations are different from, and less problematic than, the disclosure obligations in the records screening regime. First, alibi disclosure is tactical, not mandatory. The defence can lead alibi evidence without notice: "the requirements of disclosure are minimal and the consequences only a matter of weakening the evidence, not excluding it." Second, the need for even a tactical disclosure obligation stems from the unique nature of the defence: "it can be more easily fabricated than other evidence because it is not connected with the main factual issue and therefore with the other evidence the Crown has collected."[96]

108. Expert Evidence: To help "stimulate efficiency in the trial process and ensure that parties are afforded adequate time to prepare for the evidence of the proposed expert witness", any party

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[93] *R. v. Cleghorn*, [1995] 3 S.C.R. 175 at 188-189.
[94] *R. v. Mahoney* (1979), 50 C.C.C (2d) 380 (Ont CA), affirmed [1982] 1 SCR. 834 ; *P.(M.B.)*. See similarly *Cleghorn* at 180, per Iacobucci J., noting that "improper disclosure can only weaken alibi evidence; it cannot exclude the alibi."
[95] *R. v. Russell* (1936), 67 C.C.C. 28 (S.C.C.).
[96] Stalker at 711. Courts have resisted any attempt to expand the notion of what constitutes an alibi, holding that it is an error to impose the disclosure obligation when the accused's defence does not raise fabrication concerns: *R. v. Wright*, 2009 ONCA 623; *R. v. Rawn*, 2015 ONCA 396.

calling an expert witness must notify the other party of its intention 30 days before trial.[97] The accused must also provide the name of the witness, a description of the area of expertise, and a statement of qualifications. Even this limited exception to the rule against defence disclosure recognizes and respects the principle against self-incrimination and associated rights. While the Crown must disclose its expert's report "within a reasonable period before trial", the defence need only do so at the close of the Crown's case.[98] Moreover, unlike the defence disclosure obligation in s. 278.93, failing to comply does not stop the defence from leading the evidence. Instead, the trial judge shall grant an adjournment and allow the Crown expert to be recalled, if necessary.[99]

109. *Charter* challenges: The defence must file material in advance of a *Charter* challenge to strike down legislation or exclude evidence. This obligation has no impact on any of the s.7 rights discussed above. As in this case, where the constitutional challenge was decided in the absence of the records, *Charter* applications can be advanced without disclosing the defence's evidence or strategy on the merits. Challenges to admissibility only affect evidence of which the Crown is aware. *Charter* notices need not provide "detailed particulars" as required by the records screening regime. The accused need only provide "reasonable notice" and a general description of the infringement and the remedy.[100] There is no requirement to provide the Crown with the material on which the defence intends to impeach relevant police officers at the *Charter voir dire*.

110. Even those who advocate for broader approaches to defence disclosure do not generally suggest that disclosing the details of particular pieces of evidence is desirable, or that disclosure be made pre-trial. For example, one of the earlier articles to advocate for defence disclosure, by Professors Tanovich and Crocker, merely suggested that the defence be required to disclose: (1) the names and statements of witnesses, other than the accused, whom it plans to call to testify; (2) notice of any defence that will be presented; and (3) the reports of experts. Recognizing the importance of the right to silence, the broadest of these obligations – the statements of witnesses and expert reports – would only be disclosable at the end of the Crown case.[101] In the same vein,

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[97] *R. v. Parada*, 2016 SKCA 102 at para. 39; ss. 657.3(3) to (7) of the *Criminal Code*.
[98] Section 657.3(3)(c).
[99] Section 657.3(4).
[100] *R. v. Dwenychuk*, 1992 ABCA 316 at para. 12.
[101] David Tanovich and Lawrence Crocker, "Dancing with *Stinchcombe's* Ghost: A Modest Proposal for Reciprocal Defence Disclosure" (1994), 26 CR (4th) 333. See similarly Goran

after reviewing the procedures in place in other countries, Maude advocated for the defence to provide "[in] general terms the nature of the defence, the parts of the Crown's case objected to, and any questions of law which will be raised".[102] Referring to the broader disclosure obligations in place in a few U.S. states, he recognized that "the requirement that the Crown 'meet its case' prior to disclosure would appear to infringe somewhat on such a wide-ranging scheme".[103]

111. The records screening regime is therefore an unprecedented departure from the *Charter* (and pre-*Charter*) protection against self-incrimination and the traditional case-to-meet principle. Given the broad scope of the regime, it can be expected that applications will be made in many cases to adduce a wide spectrum of evidence. Given that sexual assault cases often involve parties who are known to each other, it is likely, especially in today's age of electronic communication, that the defence will need to divulge evidence in its possession on a regular basis.

### *iv. The justifications for ss. 276 and 278.3 defence disclosure do not apply to private records*

112. The disclosure requirements in s. 276 and third-party records applications do not support the proposition that defence disclosure is broadly permissible in sexual offence cases. The reasoning underlying the defence disclosure obligation in these regimes is inapplicable to the broad category of evidence that triggers the disclosure requirements in s. 278.93.

113. With respect to the s. 276 regime, extrinsic sexual activity evidence poses unique dangers; it reinforces "concrete social prejudices" and causes "concrete harms" to sexual assault victims.[104] Evidence of extrinsic sexual activity is seldom relevant to issues at trial, and as a consequence, the potential mischief posed by restricting its use is relatively minor. On the other side of the scale, the potential for mischief that would arise if this evidence was freely allowed to enter trials is very high because of its tendency to support twin myth reasoning (moral reasoning prejudice). Section 276 ensures that this inherently prejudicial evidence is excluded unless the accused can satisfy the

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Tomljanovic, "Defence Disclosure: Is the Right to "Full Answer" the Right to Ambush" (2002) 40 Alta L Rev 689 at 699.

[102] Brian Maude, "Reciprocal Disclosure in Criminal Trials: Stacking the Deck Against the Accused or Calling Defence Counsel's Bluff" (1999) 37 Alta L Rev 715 at 734 ["Maude"].

[103] Maude at 735.

[104] *Goldfinch* at para. 37.

court that the situation demands admission.[105] As a result, added procedures – including some compelled disclosure –are justified insofar as they guard against this prejudice.

114. In *Darrach*, this Court recognized a "tactical compulsion" to provide particulars of extrinsic sexual activity evidence. This tactical pressure is justified because "it is a basic rule of evidence that the party seeking to introduce evidence must be prepared to satisfy the court that it is relevant and admissible" and "evidence of prior sexual activity is of limited admissibility".[106] It is not a blank cheque to demand defence disclosure in every sexual offence prosecution.

115. It is the nature of the evidence, and its normal irrelevance and inherent prejudice, that makes the s. 276 defence disclosure obligation constitutionally compliant. The accused must provide disclosure *to overcome the presumption of irrelevance*. In that context only, particulars are "necessary for the trial judge to be able to assess the relevance of the evidence in accordance with the statute", and thus "an essential part of the legislative scheme".[107] As such, compulsion does not violate the ordinary rules against defence disclosure. There is no equivalent justification to order defence disclosure of private records, which are neither presumptively irrelevant (indeed, they frequently relate directly to the accused's innocence or complainant's credibility – see, e.g., video recantation, prior inconsistent statements, and photos contradicting the complainant's evidence[108]) nor inherently prejudicial.

116. The inaptness of the *Darrach* Court's "tactical burden" rationale to non-s. 276 cases is illustrated by divorcing the proposition from its context and taking it to its logical conclusion. If one ignores the type of evidence at issue in *Darrach*, that Court's suggestion that the defence bears only a tactical burden (as opposed to a legal obligation) to disclose its case leads inevitably to the conclusion that the accused can be constitutionally obligated to provide particulars *in any case where he wants to cross-examine witnesses or advance a defence*. Parliament could even create a law requiring the accused in every case "to provide particulars in advance of trial of any evidence

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[105] *Goldfinch* at para. 81.
[106] *Darrach* at paras. 46-49.
[107] *Darrach* at para. 59.
[108] *M.J.*; *R.M.R.*; the present case.

they choose to adduce into evidence during cross-examination of a Crown witness or as part of his own case."

117. The reasoning leading to that facile but logical conclusion is as follows:

i. Technically, once the Crown provides disclosure showing it can establish a case to meet, the accused *chooses* whether to advance a defence. He can, of course, refuse to do so, but will likely be convicted. In that sense, "choosing" to advance a defence is always a tactical obligation.

ii. Since calling a defence is always a tactical burden, the *Charter* is not infringed.

118. With respect to the s. 278.3 records production regime, the Court's decision in *Mills* is similarly unhelpful because it is fundamentally different; it addresses a situation in which the accused has no presumptive right to the information in question, and, as a consequence, no right to remain silent. The *Mills* regime, including the need for pre-trial disclosure and a high threshold ("likely relevance") for production, reflects the substantial interference with complainants' privacy rights when the state orders them to produce highly private information to the very person they are accusing of sexual abuse. Allowing accused persons to engage in "fishing expeditions" without adequately protecting complainants' rights is inherently prejudicial to the integrity of the trial and the administration of justice. There is a real risk that victims of sexual abuse, and the reputation of the justice system, will suffer harm if production is not closely monitored. On the other side of the scale, there is generally no risk to the fair trial right if the accused does not get the records, few of which may be relevant and even fewer admissible. It is the intrusiveness of the proposed state privacy invasion, and the comparatively limited benefit, that justifies placing the burden on the accused to establish likely relevance by providing a detailed account of his defence.

119. As noted by this Court in *Shearing* (outlined at paras. 29-30 above), the decision to order production is fundamentally different from the decision to admit evidence. The s. 278.3 rationale for placing a more onerous obligation on the defendant to justify his request – i.e., avoiding the inherently serious invasion of privacy that arises when the state orders the witness to share private

information with the accused – "simply does not apply to evidence already in the lawful possession of the defence."[109]

120. Analogizing the records screening regime to the *Darrach* or *Mills* regime ignores the very real differences between the provisions, as well as the unique problem that the s. 276 regime was trying to solve. *Darrach* and *Mills* both address extraordinary situations where the accused is attempting to obtain or adduce evidence that is presumptively irrelevant. The s. 278.92 regime addresses evidence for which no such presumption exists. The limitations considered here are likely to impact probative evidence on a regular basis, often by unduly restricting the ability to question the complainant with prior inconsistent statements or similar contradictory evidence.

121. Before s. 278.92 was enacted, s. 276 was the *only* provision in the *Criminal Code* that compelled pre-trial disclosure from the defence. This extraordinary procedure cannot simply be adopted automatically for private records because both categories of evidence pertain to "sensitive information" and because both types of evidence have the potential to lead to impermissible inferences. The constitutional analysis demands much more.

### 5. The legislation's injection of a second adverse party into the admissibility hearing violates the accused's right to a fair trial

#### *i. The regime creates a statutory exception to the general rule of witness exclusion and grants the complainant party status at the admissibility hearing*

122. Section 278.94(2) creates a statutory exception to the general rule excluding witnesses in a criminal trial. This provision grants the complainant – typically the key Crown witness in a sexual assault trial – the ability to appear and make submissions at the admissibility hearing. Some (though not all) courts have extended the complainant standing at any preliminary hearing to determine whether the material in the accused's possession is a "record" triggering the need for an admissibility hearing.[110]

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[109] *Shearing* at paras. 104-105.
[110] See, for e.g., *Mai*; *R.M.R.*; *Marello* (standing granted); *R. v. Roland*, 2020 BCPC 130; *R. v. J.J.*, 2020 BCSC 1649 (Oral Ruling Re Standing), AR Vol. IV, pp. 1-3 (standing denied).

123. The statutory grant of standing has the effect of extending the accused's disclosure and notice obligations to the complainant.[111] This distinguishes the s. 278.92 regime from the s. 276 regime upheld in *Darrach* which only required disclosure to the Crown.

124. Section 278.94 also has the effect of injecting a private party – the complainant – into the decision-making process in a criminal prosecution against the accused. The regime's grant of standing means that a key Crown witness is empowered to hear evidence, tender unsworn evidence, and make arguments about why the accused should not be permitted to tender evidence in the trial between the accused and the state. This standing is not expressly granted to the complainant's counsel, though s. 278.94(3) provides that a complainant has the right to be represented by counsel.

125. Neither the complainant nor her counsel are bound by the quasi-ministerial duties to which Crown counsel is subject.[112] The complainant is a private party representing private interests. In *Reddick*, Aktar J. held that this distinction was a significant factor undermining the constitutionality of the records screening regime:

> In any criminal trial, it is the Crown who decides whether to oppose defence motions seeking to adduce evidence. They do so in their quasi-judicial role seeking to ensure justice is done. As conceded by the Crown, a complainant has a self-interest in the trial and owes no duty or obligation to the accused or the court.
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> …
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> Troublingly, the current framework allows the complainant and their representative to potentially ignore the Crown's conclusion in a given case that the proposed defence evidence and/or cross-examination is admissible. It permits the complainant to oppose the defence application thereby potentially setting up a dispute that pits them against the Crown—the very institution responsible for prosecuting the charges. Leaving aside the *Charter* consequences, this development does nothing to enhance the administration of justice.

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[111] *R. v. Simon*, 2019 ABPC 186 at para. 58; *R. v. Barakat*, [2019] O.J. No. 705 (C.J.) at paras. 4-7; *R. v. F.A.*, 2019 ONCJ 391 at para. 64; *R. v. T.P.S.*, 2019 NSSC 48 at paras. 33-35. In *R. v. R.S.(A)*, 2019 ONCJ 877, the court limited the complainant's access to the accused's materials.
[112] *Boucher v. The Queen*, [1955] S.C.R. 16; *R. v. Reddick*, 2020 ONSC 7156 at paras. 85-89.

126. Further, as a practical matter, the complainant's right to participate through counsel creates the risk of delaying trials.[113] Generally speaking, any defence application to admit evidence – including mid-trial – cannot be heard until the complainant's counsel is briefed and available.

### *ii. Inviting the complainant to participate offends the principle of prosecutorial independence and the right to a fair trial*

127. As noted above, s. 278.94 grants standing to the complainant to act as a full participant at the admissibility hearing. As part of the process, the accused must provide detailed particulars respecting the evidence at issue in the form of an affidavit or *viva voce* evidence.[114] If he decides to swear an affidavit, he must also submit to cross-examination in the course of the *voir dire*.[115] The provisions which permit a complainant to appear and to retain counsel have been interpreted to mean that the complainant or their counsel may cross-examine the accused.[116]

128. The complainant's participation infringes on the principle of prosecutorial independence by injecting a partisan advocate into the trial process and calling upon the accused to meet the case of a second adverse party. A criminal trial is solely a contest between the state and the charged individual. The principles of fundamental justice require that the prosecution of a criminal case be independent and free from partisan concerns. The purpose of a criminal trial is not to secure a conviction but to lay before a trier of fact credible and relevant evidence. Prosecutors are ministers of justice and essentially *unlike* private litigants.

129. The impugned legislation's grant of standing to the complainant fundamentally alters this constitutional paradigm. It introduces a stranger into the litigation, providing a witness with "party-like" status and a "party-like" ability to control or derail the process.

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[113] *M.S.* at para. 97; *Reddick* at paras. 72-73.
[114] *Seaboyer* at 636; *Darrach* at para. 44.
[115] *Darrach* at para. 61.
[116] *F.A.* at para. 64; *Simon* at para. 57.

130. Situations in which the accused must face "more than one prosecutor", or in which two parties with interests adverse to the accused appear to be "piling on", lack the appearance of fairness.[117]

131. On top of this, complainants are not bound by the Crown's public duties of fairness articulated in *Boucher*, which requires the prosecutor to be free from partisan concerns.[118] A complainant naturally has an interest in seeing the accused convicted; as a result, it is impossible that he or she will approach the matter in a "detached manner."[119] A complainant, unlike the Crown, may be motivated to take a position or pursue a line of cross-examination simply to shield herself from the legitimate testing of her evidence, make the accused uncomfortable, or to increase the complexity of the litigation in the hope that the accused will not have the means to continue it.

132. By requiring the accused to defend himself against both the Crown and the complainant at the admissibility hearing, the appearance of fairness is fundamentally undermined.

### D. *Dagenais/Mentuck* step 2: The legislation does not engage the complainant's constitutional rights and striking it down would not compromise them

133. A complainant's constitutional rights to privacy and equality do not entitle her to an elevated admissibility threshold for private records, advance notice of all private information about her that may be adduced in evidence, or personal participation in a criminal trial between the accused and state. J.J. submits that the records screening regime is a parliamentary choice to legislate in excess of constitutional minimums.

134. It is a fundamental maxim that where there is a right (here equality and privacy) there is a remedy (the opportunity to see it protected by the court).[120] What is *not* fundamental is an absolute

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[117] See, for e.g., *R. v. Finta*, (1990) 1 O.R. (3d) 183 (C.A.) at para. 11; *R. v. Mayers*, 2011 BCCA 268 at para. 8.
[118] *Boucher* at 24, per Rand J.; *R. v. Cawthorne*, 2016 SCC 32 at paras. 22-23.
[119] See, for e.g., *R. v. O'Connor*, (1993) 82 C.C.C. (3d) 495 (B.C.C.A.) at 508; *Gajewski (Re)*, 2020 ONCA 4 at paras. 34-35. See also *R. v. United States of America* (2004) 71 O.R. (3d) 141 (Ont. S.C.): "Fairness to the accused demands that anyone who speaks in opposition to his or her interests in a criminal prosecution does so bearing the duties and restraints placed on Crown counsel."
[120] *R. v. Hape*, 2007 SCC 26 at paras. 85-94

right to seek that remedy in a particular way. In particular, the right to advance notice and party status in a case affecting one's constitutional rights is not a principle of fundamental justice.[121]

135. With respect to the elevated admissibility threshold and advance notice, there is no question that these features of a criminal trial are not necessary to preserve the complainant's constitutional rights. If they were, then the legislation as it stands violates the *Charter* by failing to require the Crown to pre-vet and disclose to the complainant (or any other similarly vulnerable witness) the private records the Crown intends to introduce. No one has ever suggested this is necessary for the legislation to pass constitutional muster.

136. A witness has the right to judicial supervision of the use of her private records in a public court. The witness does not have a right to see this supervision exercised in a particular way, at a particular time, or to know in advance exactly how or what private records will be used. As noted above, it is in this context that the Court's comment in *Darrach* denying the accused the right to ambush the complainant must be understood.

137. No further *constitutional* protection is offered by providing the witness with an advanced opportunity to learn why the accused says her evidence is legally relevant to the broader case, or to prepare answers to specific questions. The complainant may prefer it, but she is not entitled to it in order for the proceeding to be conducted constitutionally. If she were, then any number of vulnerable witnesses in a criminal trial (including vulnerable accused) would be entitled to notice of both parties' theory of the case and proposed impeachment material before being asked to submit to questioning.

138. With respect to participation, even accused persons have no absolute right to participate in proceedings where their liberty is at issue. For example, a detainee whose liberty is at risk is excluded from *ex parte* proceedings in security certificates under the *Immigration and Refugee Protection Act*.[122] Their interests are protected by the appointment of special advocates. Similarly, where a s. 38 claim under the *Canada Evidence Act* is made in the context of criminal proceedings, an accused is not entitled to ·participate in *ex parte* submissions made by the Attorney General of

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[121] *R. v. Rodgers*, 2006 SCC 15 at para. 47; *R. v. Dyck*, 2008 ONCA 309 at paras. 129-132.
[122] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 83.

Canada. In some instances, the Federal Court may appoint an *amicus* to protect the accused's interests. An accused may even be removed from participation in his trial.[123]

139. Participatory rights do not always require personal participation. Certainly, personal participation does not justify altering the scope of a fair trial. If it did, the only logical conclusion would be that the regime created in *Seaboyer*, codified in s. 276, and affirmed in *Darrach* was unconstitutional in that it violated the complainant's constitutional right to participate in the hearing. In other words, if a complainant has a constitutional right to participate in admissibility hearings in a sexual offence case, the approach to s. 276 applications has been unconstitutional for almost three decades. We know this is not the case because the Court in *Darrach* said so.[124]

140. Instead, what has occurred with the enactment of the records screening regime is a parliamentary decision to afford extra-constitutional participatory rights in this realm. This is legislative choice, not an artefact of constitutional protection.[125]

141. Nor is there a risk, if the impugned legislation is struck down, that complainants' rights to privacy and equality will be violated. Their rights in this regard are comprehensively and adequately protected by s. 276, as it was pre-Bill C-51, and the related common law rules.[126] The Court in *Darrach* confirmed that the pre-Bill C-51 legislation appropriately balanced the complainant's constitutional rights in sexual offence prosecutions. The pre-Bill-C-51 statutory and common law regimes offered all the judicial supervision required to protect vulnerable witnesses' equality and privacy. These laws, properly applied, protect witnesses from being asked questions or confronted with evidence that relies on myths or stereotypes. If the records screening regime is struck down, the court and Crown will still be able to protect the complainant's privacy and dignity in sexual offence prosecutions:

i. The s. 276 regime will continue to exist and offer complainants the protection of pre-trial screening and an elevated burden of proof before the accused can elicit evidence

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[123] *Canada Evidence Act*, R.S.C. 1985, c C-5, s. 38.11(2); *Criminal Code*, s. 650(2)(b).
[124] *Darrach* at para. 3.
[125] *R. v. White*, [1999] 2 S.C.R. 417 at para. 47.
[126] *Anderson 2019* at paras. 24-25; *J.S.* at paras. 22, 28-34; *A.M. (Sask.)* at paras. 39, 43; *A.M. (Ont.)* at para. 12; *D.L.B.* at para. 80; *R.S.(A.)* at para. 96.

of other sexual activity. Properly interpreted, that regime enhances trial fairness by excluding misleading evidence from sexual offence prosecutions while preserving the accused's right to make full answer and defence by admitting relevant evidence. It also encourages the reporting of sexual violence and protecting "the security and privacy of the witnesses."[127]

ii. The common law has the tools required to protect witness dignity and privacy. In cases where counsel seek to make improper use of Crown evidence, the court can apply the *Seaboyer/Osolin* test to exclude it. This test requires courts to conduct a similar balancing act and consider virtually the same factors as a judge considering admissibility under s. 276.[128] In cases where the evidence is admissible but prejudicial, the judge can give a limiting instruction, which juries are presumed to understand and follow.[129]

iii. In cases where the defence seeks to adduce a complainant's private record during cross-examination, this Court can instruct defence counsel to alert the court and Crown to the existence of the potentially private document, and encourage the Crown to object or the Court to hold a mid-trial *voir dire* – as was done in *Shearing* – or otherwise supervise the use of the record to minimize the privacy invasion as much as is compatible with the fair trial right.

142. The desire to do better to remedy the failings of the justice system and society generally respecting sexual offences is not a reason to uphold harmful, unhelpful, and ultimately unconstitutional legislation. This objective – expressed recently in *Barton*[130] – is undoubtedly important and must be pursued. But the problem in *Barton* was not that the statutory and common law rules were inadequate. The problem was that the justice system participants in that case failed to apply them. No legislation or common law rule can protect witnesses if judges and lawyers do not follow its letter and understand and adopt its spirit.

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[127] *Seaboyer* at 606; *Darrach* at paras. 19, 21.
[128] *Seaboyer* at 611-612; *Osolin* at 667-672.
[129] *R v. Corbett*, [1988] 1 S.C.R. 670 at 692-693, 695; *Osolin* at 671-672.
[130] *Barton* at para. 1.

143. It is illustrative of the relative unhelpfulness of the impugned legislation to consider how the trial judge's supervision of the private records in this case would have unfolded if Bill C-51 had never been enacted and if all justice system actors had followed the common law rules articulated in *Seaboyer*, *Osolin*, and *Shearing*. Pursuant to the common law, this is how the matter would have been required to proceed:

i. At the point where the record became relevant, the defence would have alerted the trial judge to the existence of sensitive evidence in its possession that it intended to adduce to impeach the complainant. If the defence had not raised the issue because the complainant's privacy interest was not apparent or was disputed, the Crown would have objected and the same process would have been initiated.

ii. The Crown would have acknowledged the records' relevance as impeachment material, as it did here.

iii. The parties would have proposed various accommodations aimed at minimizing the impact on the complainant's comfort and privacy, as they did here. The trial judge would have ordered further redactions or other accommodations of the impeachment material.

iv. The trial judge would then have permitted relevant questioning and impeachment of the complainant using the records, as she did here.

v. The Crown could – and would in future, if so instructed by this Court – advise the complainant of her right to retain counsel. If the complainant, trial judge or Crown thought the complainant had an "important and distinct" perspective on a particular issue, they could grant her limited intervener standing at common law.[131]

144. Every protective measure taken by the trial court in this case could and would have been taken at common law. The Crown has not appealed J.J.'s conviction, or argued that the outcome

[131] *Hydro One Networks Inc. v. Ontario Energy Board*, 2019 ONSC 3763 at para. 27.

or interest balancing in the ultimate s. 278.92 application was unfair, or that the cross-examination violated the complainant's constitutional rights.

145. Parliament is free to legislate in excess of constitutional minimums. In doing so, however, it must do so in a *Charter*-compliant manner respecting existing rights.

146. It has not done so here. Elevating the admissibility threshold for defence evidence, granting the complainant access to defence disclosure, and granting the complainant standing in a criminal proceeding to make submissions on the admissibility of evidence is not part of a complainant's constitutional protection and, therefore, cannot be used to justify restrictions on an accused's right to a fair trial.[132]

147. Finally, it must be remembered that protecting vulnerable complainants from *unnecessary* abuse or discomfort at the hands of judicial actors (a constitutional problem) is not the same thing as protecting them from *necessary* discomfort (an unfortunate reality of testifying in both sexual and non-sexual offence prosecutions). Answering uncomfortable questions is inherent to the unpleasant task of being a witness. In *Seaboyer*, L'Heureux-Dubé J. explicitly disavowed reliance on the term "rape shield" to describe the s. 276 regime because it wrongly implied that its purpose was "solely to shield a complainant from the rigours of cross-examination at trial", when it fact it was "neither the only [purpose], nor necessarily the most important."[133] Even vocal critics of how the Canadian justice system treats sexual assault complainants recognize that discomfort is inevitable for a complainant in a sexual assault prosecution.[134] The mere fact that questions or evidence may make a witness uncomfortable is not a basis to disallow them.

### E. *Dagenais/Mentuck* step 3: The legislation is not saved through a balancing of interests

148. If the Court accepts J.J.'s argument that the legislation is not necessary to protect the complainant's interests, that ends the constitutional analysis. The legislation automatically fails to

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[132] *Rodgers* at para. 49.
[133] *Seaboyer* at 648.
[134] Elaine Craig, *Putting trials on trial: sexual assault and the failure of the legal profession* (Montréal: McGill Queen's University Press, 2018), at 7.

pass constitutional muster if the fair trial rights of the accused are being compromised to protect the complainant's interests (as opposed to protected rights).

149. A law that violates s. 7 of the *Charter* is unlikely to be saved under s. 1.[135] The records screening regime is no exception. The right to a fair trial occupies a place of "primacy" in the justice system. This is no different in sexual assault cases. As the Ontario Court of Appeal noted in *P.S. v. Ontario*:[136]

> The Supreme Court stated in *Suresh*, at para. 78, quoting from *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 S.C.R. 486, [1985] S.C.J. No. 73, at p. 518 S.C.R., that s. 7 violations will be saved by s. 1 only in "exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like". The court added in *Charkaoui*, at para. 66, that "violations of the principles of fundamental justice, specifically the right to a fair hearing, are difficult to justify under s. 1". There appears to be no case where the Supreme Court has held that a violation of s. 7 was justified under s. 1….

150. This Court has consistently held in sexual assault cases that other interests must cede to the need to ensure a fair trial. In *Seaboyer*, McLachlin J. (as she then was) held:[137]

> [I]t can be argued that important as it is to take all measures possible to ease the plight of the witness, the constitutional right to a fair trial must take precedence in case of conflict. As Doherty puts it (at p. 66):
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> > Every possible procedural step should be taken to minimize the encroachment on the witness's privacy, but in the end if evidence has sufficient cogency the witness must endure a degree of embarrassment and perhaps psychological trauma. This harsh reality must be accepted as part of the price to be paid to ensure that only the guilty are convicted.

151. In *Shearing*, Binnie J., citing *Mills*, held:[138]

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[135] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 518; *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 129.

[136] 2014 ONCA 900 at para. 130. Only one section 7 infringement has been justified under s. 1 by a Canadian court: an overbroad *Highway Traffic Act* provision in *R. v. Michaud*, 2015 ONCA 585.

[137] *Seaboyer* at 617-618.

[138] *Shearing* at para. 132, emphasis in original.

> Moreover, even in terms of *production* of third party documents, I do not, with respect, agree that "*Mills* has shifted the balance away from the primary emphasis on the rights of the accused" because *Mills* itself affirms the primacy – in the last resort – of the requirement of a fair trial to avoid the wrongful conviction of the innocent. *Mills* states in para. 94 that
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> > where the information contained in a record directly bears on the right to make full answer and defence, privacy rights must yield to the need to avoid convicting the innocent.

152. Finally, and more recently, in *N.S.* McLachlin C.J. wrote:[139]

> On an individual level, the cost of an unfair trial is severe. The right to a fair trial is a fundamental pillar without which the edifice of the rule of law would crumble. No less is at stake than an individual's liberty - his right to live in freedom unless the state proves beyond a reasonable doubt that he committed a crime meriting imprisonment. This is of critical importance not only to the individual on trial, but to public confidence in the justice system.
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> …
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> …[W]here the liberty of the accused is at stake, the witness's evidence is central to the case and her credibility vital, the possibility of a wrongful conviction must weigh heavily in the balance[.] ...

153. In this case, there are no competing constitutional rights. No balancing of interests is needed to resolve J.J.'s claim. Parliament's interest in protecting other non-constitutional "interests" will not abrogate the principles of fundamental justice so as to alter trial fairness.

154. If, however, the Court finds that the complainant's constitutional interests would be engaged by striking down the records screening regime, the next step in the *Dagenais/Mentuck* analysis is to determine if the competing rights claims can be reconciled through accommodation and, if a conflict cannot be avoided, through case-by-case balancing.

155. The legislation fails on this this final step as well. Given the broad scope of the records screening regime, and the extent of its constitutional deficiencies, there is no way to reconcile it with the accused's right against self-incrimination, fair trial right, right to make full answer and defence, and presumption of innocence violated by the legislation. Like in *Seaboyer*, Parliament's absolutist approach to prioritizing the interests of a complainant over those of an accused is

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[139] *N.S.* at paras. 38, 44.

constitutionally deficient. The impugned legislation creates a serious risk to trial fairness that cannot be justified. It fails to properly balance the competing interests.

### 1. Parliament's objective – properly understood – is pressing and substantial

156. In order to be justified, a limit to a constitutional right must support a "pressing and substantial" objective. Said differently, the objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom.[140] Identification of the objective that is said to be pressing and substantial is crucial to a limitations analysis and must be done with precision. The objective to be identified is that served by the challenged provision and not the legislative scheme as a whole. Otherwise, the Court risks identifying an overly broad objective that artificially inflates concerns. This said, the overall legislative context can be considered in identifying the objective of the specified provision.[141]

157. J.J. accepts that Parliament's objective in enacting the regime, *properly understood*, is pressing and substantial.

158. Parliament's *valid* purpose in creating the records screening regime was to protect sexual assault complainants' privacy, equality, and dignity by creating a formal screening mechanism for complainant records that were never meant for the accused's eyes or personal use. With Bill C-51, Parliament aimed to implement the 2012 recommendation of the Senate Standing Committee that the government "[address] evidentiary issues the Supreme Court of Canada identified in the case of *R. v. Shearing*".[142] As noted above, *Shearing* was a case in which the accused ended up in possession, legally but unbeknownst to the complainant, of her personal diary, and sought to use it in cross-examination. The Committee made several recommendations based on that fact pattern, and hypothetical scenarios involving a complainant's therapeutic records. It noted:[143]

> The committee could imagine similar problems [to *Shearing*] arising where a person alleges that he or she was the victim of a sexual assault by that person's psychologist. Since the psychologist would have access to the records of a

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[140] *R. v. Oakes*, [1986] 1 S.C.R. 103 at para. 73.
[141] *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21 at para. 20.
[142] Standing Senate Committee on Legal and Constitutional Affairs, "Final Report: Statutory Review on the Provisions and Operation of the *Act to amend the Criminal Code (production of records in sexual offence proceedings)*" (December 2012) at pp. 17-20 ["Senate Report"].
[143] Senate Report at p. 18.

> complainant's counselling sessions, defence counsel could use those records as a basis for cross-examination in a sexual assault trial.

159. The 2012 Senate Committee and the government that enacted Bill C-51 both thought *these situations* should have been governed by a pre-trial admissibility screening mechanism. There was no corresponding expression of Parliamentary concern over the accused using his personal correspondence with the complainant in such a way.

160. It has been said that Parliament's "true" purpose in enacting the legislation was to create a "Ghomeshi" bill that would ensure greater comfort to complainants in a sexual assault proceeding. This alternative objective is not borne out by the Hansard. If it were, it is not sufficiently important in the context of a criminal trial to warrant overriding the principles of fundamental justice. Indeed, the Court in *Seaboyer* explicitly commented that the right to a fair trial must take precedent over the "plight of a witness." Accommodations can be made, but they cannot risk trial fairness or risk the conviction of an innocent person.[144]

**2. The measures adopted are not proportional**

161. J.J. accepts that there is a rational connection between the records screening regime and Parliament's interest in creating a formal screening mechanism for problematic *Shearing* evidence. The regime is not saved under s. 1, however, because it does not minimally impair the rights of accused persons charged with sexual offences and because its deleterious effects outweigh its salutary effects.

162. The records screening regime does not minimally impair the rights of people charged with sexual offences. Before Bill C-51, the law, properly applied, already protected complainants and witnesses against unnecessary violations of their rights. Now, the law offers little additional protection at great expense to the accused's fair trial rights.

163. If Parliament's goal was to protect sexual assault complainants' privacy, equality and dignity by providing a "pre-vetting" or screening mechanism for *Shearing*-type records that were

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[144] *Seaboyer* at 617-618.

never meant for the accused to see or use (or subject to professional confidentiality obligations), it overstepped the mark in four ways:

i. By applying the screening regime to all private records (including those which the complainant shared with the accused voluntarily) rather than the subset of problematic records that Parliament truly meant to capture;

ii. By requiring the screening process to take place pre-trial, thereby forcing the accused to disclose his theory, evidence, and proposed line of questioning to the Crown before there was a case to meet;

iii. By granting the complainant a right of standing to participate in the admissibility hearing, thereby forcing the accused to disclose his theory, evidence, and strategy to the Crown's key witness, in violation of what would normally be a witness exclusion order; and

iv. By rendering the records presumptively inadmissible and elevating the admissibility threshold, thereby making it more likely that relevant, probative defence evidence will be excluded from the trial.

164. This "solution" to the *Shearing* problem thus goes far beyond Parliament's legitimate concern. The records screening regime is aimed at preventing an accused from misusing information that – while lawfully in his possession – was never meant to be or was subject to professional confidentiality obligations. It does not serve this purpose to require courts to pre-vet the accused's digital communications with the complainant or publicly-available materials.

165. The deleterious effects of the legislation are significant. The provisions require the accused to give up his right to remain silent and compromise his right to a fair trial with respect to evidence in a variety of situations where myths and stereotypes will have nothing to do with the matter. Rather than concentrating on records that invoke myths and stereotypes as a matter of course, the records screening regime compels disclosure of all material for which there is a reasonable expectation of privacy, regardless of its probative value. This includes electronic communications from the complainant that, to illustrate with just a few examples, deny the offending ever occurred, provide proof of alibi, indicate a motive to fabricate, suggest an absence of memory regarding core

events, and provide inconsistencies with statements about the alleged incident provided to police. None of this evidence advances myths or stereotypical reasoning, and this is far from a comprehensive list of possibilities. The potential list of examples is endless, because there are no limitations on the type of evidence that can be captured by the provision, and relevance is always a matter determined by particular factual circumstances.

166. The deleterious effects of this legislation will also be felt by society more broadly. The records screening regime creates unnecessary delay, increases trial complexity, and promulgates interlocutory appeals. None of these scenarios are conducive to society's interest in the efficient adjudication of criminal charges, nor the accused's interest in the same.[145]

167. The salutary effects of the impugned legislation – beyond what the common law already provides – are minimal. At most, they provide some measure of comfort to a complainant that her privacy concerns are conveyed to the presiding judge as she wishes and that truly harmful records are not making their way haphazardly into the public record without proper judicial attention being paid. These are all concerns that could be accommodated through lesser means. J.J. takes no issue with the proposition established in *Osolin* and *Shearing* that where the Crown makes an objection about admissibility, a *voir dire* to examine the probative value and prejudice of the evidence is acceptable.[146] Under *Shearing*, the proposed evidence is discussed in a *voir dire* during the course of trial (in that case, during cross-examination).[147] This pre-Bill C-51 framework is perfectly appropriate.

168. The Crown's position respecting the legislation suggests two possibilities about the breadth of the provision: (1) every record in the hands of the accused has the potential to engage myths and stereotypes; or (2) the sheer risk of some myths and stereotypes contained in private records is sufficiently severe to justify sweeping in all kinds of material that will not have this effect (even though no evidence of the relationship between private "records" and myths and stereotypes has been presented). There is no basis in the evidence or jurisprudence applying this legislation to

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[145] *Mills* at para 20; *R. v. Awashish*, 2018 SCC 45 at paras. 10, 12.
[146] *Osolin* at 671-672; *Shearing* at para. 100.
[147] *Shearing* at paras. 83-84.

support either proposition. The reality is that this poorly-crafted law is overly broad, confused in its application, and ultimately unnecessary to achieve the ends the Crown suggests are so pressing.

169. At its core, this is the real problem with the Crown's attempt to justify this law. Does s. 278.92 advance the objectives of preventing evidence with the *potential* to engage myths and stereotypes from being adduced, while simultaneously protecting the privacy interests of complainants? It undoubtedly does. Of course, the same could be said if Parliament were to enact a provision that prohibited cross-examination of the complainant entirely. Indeed, any provision requiring pre-trial disclosure from the accused and an evidentiary hearing to vet the nature of proposed cross-examination, regardless of its triggering focus, would invariably capture material that would impact both of these interests and prevent prejudicial evidence from entering the trial.

170. But this overlooks the critical fact that by capturing all material possessing a reasonable expectation of privacy in the hands of the accused, the records screening regime inevitably renders presumptively inadmissible a huge swath of useful, relevant, and probative material critical to the truth-seeking function of the trial. In doing so, it violates the accused's constitutional right to not be deprived of his liberty except in accordance with the principles of fundamental justice. In short, it creates a serious and unnecessary infringement of core fair trial rights for the purpose of advancing the government's objectives in a marginal way. As a consequence, it is not a reasonable limit on *Charter* rights and does not satisfy the s. 1 standard.

## F. The remedy is to strike down the legislation

171. J.J. submits that the only solution to the unconstitutionality of the records screening regime is an order striking it down in its entirety.[148]

172. Eliminating the notice period in s. 278.93(4) does not solve the fair trial problems described above. While that would *better* protect the fair trial rights of the accused than the current scheme, the accused would still be required to share defence evidence and strategy before he is in a position to decide whether the Crown has established a case to meet. On top of that, the practical impact of entering into a *voir dire* during cross-examination could result in situations which frustrate the accused's attempt to control the pace or structure of cross-examination. Judges have been rightly

[148] *R. v. Hall*, 2002 SCC 64 at paras. 120-122, per Iacobucci J. (re: constitutional remedies).

criticized for interfering with defence cross-examination where their involvement "removed from examining counsel the right to frame the critical question or questions as he saw fit and at a time he gauged to be appropriate having regard to the cadence of the cross-examination."[149] Reading down the notice requirement has a similar effect. Interrupting the order and flow of counsel's cross-examination to accommodate mid-trial delays for admissibility hearings and rulings is not an adequate solution to the constitutional problem wrought by the impugned legislation.

173. J.J. submits that the constitutional failings of this legislation cannot be fixed through reading down. The appropriate remedy in this case is to strike down ss. 278.92 to 278.94 in their entirety. This approach will leave Parliament "free to consider how to best revise" the records screening scheme in a manner that brings it into compliance with the *Charter*.[150]

174. J.J. does not seek to strike down ss. 278.92 to 278.94 as it applies to evidence that is also subject to s. 276. As outlined above, the justification for the s. 276 scheme is not directly applicable to non-s. 276 material. J.J. agrees with the Crown that if the legislation cannot be upheld under s. 1, the Court should declare the law of no force and effect respecting s. 278.92 applications only.[151]

175. Suspending a declaration of invalidity would not be appropriate in this case. Such suspensions must be rare. Given the scope – and recognized adequacy – of the pre-Bill C-51 common law and statutory protections, there is no identifiable public or constitutionally recognized interest that would be endangered by an immediate declaration.[152] In contrast, many defendants currently before the courts are wrestling with difficult decisions about whether and to what extent they should give up their right to silence in order to effectively defend themselves. Each case in which the defendant produces records in compliance with an unconstitutional scheme causes unfairness that cannot be undone, even by a declaration of invalidity, as the Crown and its key witness will already be fixed with the knowledge that was illegally provided to them. In these circumstances, it would be unfair to continue subjecting accused persons to unconstitutional deprivations of their liberty. The legislation should be struck down immediately.

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[149] *R. v. Watson* (2004), 191 C.C.C. (3d) 144 (Ont. C.A.) at para. 16.
[150] *R. v. Boudreault*, 2018 SCC 58 at para. 101.
[151] Appellant's Factum at para. 161.
[152] *Ontario (Attorney General) v. G*, 2020 SCC 38 at para. 83.

## PART IV – SUBMISSIONS ON COSTS

176. J.J. does not seek costs and asks that no costs be ordered against him.

## PART V – NATURE OF THE ORDER REQUESTED

177. J.J. requests that the appeal be dismissed, the cross-appeal allowed, and the records screening regime declared of no force or effect respecting s. 278.92 applications.

## PART VI – SUBMISSIONS ON SEALING ORDER AND PUBLICATION BAN

178. J.J. adopts the Crown's submissions on the sealing order and publication ban.

All of which is respectfully submitted this 19th day of March, 2021.

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## PART VII – TABLE OF AUTHORITIES AND LEGISLATION

**STATUTORY PROVISIONS**

| | |
|---|---|
| *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 (Bill C-51) | C-51, *Loi modifiant le Code criminel et la Loi sur le ministère de la Justice et apportant des modi,cations corrélatives à une autre loi*, 2018, c.29 (Project De Loi C-51) |
| *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, S.C. 2019, c. 25* (Bill C-75), s. 238 | *Loi modifiant le Code criminel, la Loi sur le système de justice pénale pour les adolescents et d'autres lois et apportant des modifications corrélatives à certaines lois*, S.C. 2019, c. 25 (Project De Loi C-75), s. 238 |
| *Canada Evidence Act*, R.S.C. 1985, c. C-5<br><br>ss. 10, 11, 38.11(2) | Loi sur la preuve au Canada, L.R.C. (1985), ch. C- 5<br><br>ss. 10, 11, 38.11(2) |
| *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982*, being | *Charte canadienne des droits et libertés, partie 1 de la Loi constitutionnelle de 1982*, |

| | |
|---|---|
| Schedule B to the Canada Act 1982 (UK), 1982, c. 11<br><br>ss. 1, 7, 8, 11(c), 11(d), 13, 15, 28, 52(1) | constituant l'annexe B de la loi canadienne de 1982 (UK), 1982, c 11<br><br>ss. 1, 7, 11(c), 11(d), 15, 28, 52(1) |
| *Criminal Code*, R.S.C. 1985, c. C-46<br><br>ss. 276, 276.1, 276.2, 278.1, 278.3, 278.92, 278.93, 278.94, 648, 650(2)(b), 657.3 | *Code Criminel*, L.R.C. (1985), ch. C-46<br><br>ss. 276, 276.1, 276.2, 278.1, 278.3, 278.92, 278.93, 278.94, 648, 650(2)(b), 657.3 |
| *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 83 | *Loi sur l'immigration et la protection des réfugiés* (L.C. 2001, ch. 27), s. 83 |

| **SECONDARY SOURCES** | **At Para.** |
|---|---|
| Craig, Elaine. *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession*. Montréal: McGill-Queen's University Press, 2018. | 147 |
| Brian Maude, "Reciprocal Disclosure in Criminal Trials: Stacking the Deck Against the Accused or Calling Defence Counsel's Bluff" (1999) 37 Alta L Rev 715 | 110 |
| Anne Stalker, "*Charter* Roadblocks to Defence Disclosure" (2002) 40 Alta L Rev 701 | 100-101, 107 |
| David Tanovich and Lawrence Crocker, "Dancing with *Stinchcombe's* Ghost: A Modest Proposal for Reciprocal Defence Disclosure" (1994), 26 CR ($4^{th}$) 333 | 110 |
| Michael Tilbor and Keith Kilback, "Defence Disclosure: Is it Written in Stone" (2000) 43 Crim LQ 393 | 48 |
| Goran Tomljanovic, "Defence Disclosure: Is the Right to "Full Answer" the Right to Ambush" (2002) 40 Alta L Rev 689 | 110 |

**LEGISLATIVE HISTORY**

Standing Senate Committee on Legal and Constitutional Affairs, "Final Report: Statutory Review on the Provisions and Operation of the *Act to amend the Criminal Code (production of records in sexual offence proceedings)*" (December 2012)

SCC File No. 39133

**IN THE SUPREME COURT OF CANADA**
**(ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA)**

BETWEEN:

**HER MAJESTY THE QUEEN**

APPELLANT/RESPONDENT IN CROSS-CLAIM
(Crown)

-and-

**J.J.**
RESPONDENT/APPELLANT IN CROSS-APPEAL
(Accused)

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**NOTICE OF CONSTITUTIONAL QUESTION**
**(Pursuant to Rule 33(2) of the *Rules of the Supreme Court of Canada*)**

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TAKE NOTICE that I, Rebecca McConchie, counsel for the respondent/appellant in cross-appeal J.J., assert that the cross-appeal raises the following constitutional question:

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

AND TAKE NOTICE that an attorney general who intends to intervene with respect to this constitutional question may do so by serving a notice of intervention in Form 33C on all other parties and filing the notice with the Registrar of the Supreme Court of Canada within four weeks after the day on which this notice is served.

Dated at Vancouver, British Columbia this 22nd day of January, 2021.

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