



**SUPREME COURT OF CANADA**

**CITATION:** R. v. J.J., 2022 SCC  
28

**APPEALS HEARD:** October 5  
and 6, 2021

**JUDGMENT RENDERED:** June  
30, 2022

**DOCKETS:** 39133, 39516

**BETWEEN:**

**Her Majesty The Queen**

Appellant/Respondent on cross-appeal

and

**J.J.**

Respondent/Appellant on cross-appeal

- and -

**Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of Manitoba, Attorney General of Saskatchewan, Attorney General of Alberta, West Coast Legal Education and Action Fund, Women Against Violence Against Women Rape Crisis Centre, Barbra Schlifer Commemorative Clinic, Criminal Trial Lawyers' Association, Criminal Lawyers' Association (Ontario), Canadian Council of Criminal Defence Lawyers and Independent Criminal Defence Advocacy Society**  
Interveners

**AND BETWEEN:**

**A.S.**

Appellant

and

**Her Majesty The Queen and Shane Reddick**  
Respondents

- and -

**Attorney General of Canada, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Criminal Lawyers' Association (Ontario), Barbra Schlifer Commemorative Clinic, Women's Legal Education and Action Fund Inc., Criminal Defence Lawyers Association of Manitoba, West Coast Legal Education and Action Fund and Women Against Violence Against Women Rape Crisis Centre**  
Interveners

**CORAM:** Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

**JOINT REASONS FOR JUDGMENT:** Wagner C.J. and Moldaver J. (Karakatsanis, Martin, Kasirer and Jamal JJ. concurring)  
(paras. 1 to 196)

**REASONS DISSENTING IN PART:** Brown J.  
(paras. 197 to 320)

**REASONS DISSENTING IN PART:** Rowe J.  
(paras. 321 to 438)

**REASONS DISSENTING IN PART:** Côté J.  
(paras. 439 to 491)

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**Her Majesty The Queen**

*Appellant/Respondent on cross-appeal*

v.

**J.J.**

*Respondent/Appellant on cross-appeal*

and

**Attorney General of Canada,  
Attorney General of Ontario,  
Attorney General of Quebec,  
Attorney General of Nova Scotia,  
Attorney General of Manitoba,  
Attorney General of Saskatchewan,  
Attorney General of Alberta,  
West Coast Legal Education and Action Fund,  
Women Against Violence Against Women Rape Crisis Centre,  
Barbra Schlifer Commemorative Clinic,  
Criminal Trial Lawyers' Association,  
Criminal Lawyers' Association (Ontario),  
Canadian Council of Criminal Defence Lawyers and  
Independent Criminal Defence Advocacy Society**

*Interveners*

- and -

**A.S.**

*Appellant*

v.

**Her Majesty The Queen and  
Shane Reddick**

*Respondents*

and

**Attorney General of Canada,  
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Attorney General of Manitoba,  
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Criminal Lawyers' Association (Ontario),  
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West Coast Legal Education and Action Fund and  
Women Against Violence Against Women Rape Crisis Centre** *Interveners*

**Indexed as: R. v. J.J.**

**2022 SCC 28**

File Nos.: 39133, 39516.

2021: October 5, 6; 2022: June 30.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA  
ON APPEAL FROM THE ONTARIO SUPERIOR COURT OF JUSTICE

*Constitutional law — Charter of Rights — Fundamental justice — Right to  
silence — Self-incrimination — Right to fair hearing — Right to make full answer and*

*defence — Evidence — Sexual offences — Criminal Code provisions setting out record screening regime to determine admissibility of records relating to complainant that are in possession or control of accused — Whether record screening regime infringes accused’s Charter-protected rights — If so, whether infringement justified — Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(c), 11(d) — Criminal Code, R.S.C. 1985, c. C-46, ss. 276, 278.1, 278.92 to 278.94.*

In 2018, Parliament introduced ss. 278.92 to 278.94 (the “impugned provisions”) into the *Criminal Code* in an effort to remove barriers that have deterred victims of sexual offences from coming forward. These provisions were designed to protect the interests of complainants in their own private records when an accused has possession or control of such records and seeks to introduce them at a hearing in their criminal proceeding. Specifically, the provisions create procedures and criteria to assist a judge in deciding whether the records should be admitted, balancing the rights and interests of the accused, the complainant, and the public. Some of the procedural elements of these provisions also apply to s. 276 evidence applications, governing the admissibility of evidence of complainants’ prior sexual activity or history. Overall, the legislative changes created a new procedure for screening complainants’ private records in the hands of the accused, to determine whether they are admissible as evidence at trial, and a new procedure to provide complainants with additional participation rights in admissibility proceedings.

The procedure set out in the impugned provisions operates in two stages. At Stage One, the presiding judge reviews the accused's application to determine whether the evidence sought to be adduced is capable of being admissible. For s. 276 evidence applications, if the judge determines that the proposed evidence is not s. 276 evidence, the application will terminate. If the proposed evidence is s. 276 evidence but the judge concludes that it is not capable of being admissible, the application will be denied. If the s. 276 evidence is capable of being admissible, the application proceeds to a Stage Two hearing. For applications under the record screening regime, if the judge determines that the proposed evidence is not a "record" under s. 278.1, the application will terminate. If the proposed evidence is a "record" but the judge concludes that it is not capable of being admissible, the application will be denied. If the evidence is a "record" and it is capable of being admissible, the application proceeds to a Stage Two hearing. At the Stage Two hearing, the presiding judge decides whether the proposed evidence meets the tests for admissibility. For s. 276 evidence applications, the governing conditions are set out in s. 276(2), as directed by s. 278.92(2)(a) and in accordance with the factors listed in s. 276(3). For private record applications, the test for admissibility is whether the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. This determination is made in accordance with the factors listed in s. 278.92(3). Complainants are permitted to appear at the Stage Two hearing and make submissions, with the assistance of counsel, if they so choose.

By way of pre-trial applications, two accused, J and R, challenged the constitutionality of ss. 278.92 to 278.94, arguing that Parliament had jeopardized three fundamental rights guaranteed to accused persons under the *Charter*, namely: the right to silence and the privilege against self-incrimination under ss. 7 and 11(c); the right to a fair trial under ss. 7 and 11(d); and the right to make full answer and defence under ss. 7 and 11(d). In J's case, the application judge held that one provision of the record screening regime was unconstitutional; the Crown appeals that ruling, and J cross-appeals, contesting the constitutionality of the regime in its entirety. In R's case, the complainant S, who was granted the right to be added as a party by the Court, appeals from the application judge's ruling that impugned the constitutionality of the regime as a whole, effectively preventing her from participating in the record screening process.

*Held* (Côté, Brown and Rowe JJ. dissenting in part): Sections 278.92 to 278.94 of the *Criminal Code* are constitutional in their entirety, as they apply to both s. 276 evidence applications and private record applications. The Crown's appeal should be allowed, J's cross-appeal dismissed, S's appeal allowed and the application judges' rulings quashed.

*Per Wagner C.J. and Moldaver, Karakatsanis, Martin, Kasirer and Jamal JJ.:* Before determining the constitutionality of the impugned provisions, it is necessary to interpret them. First, it must be determined what qualifies as a "record" for private record applications, using s. 278.1 as the starting point. The definition of

“record” creates two distinct groups: (1) records that fall within enumerated categories; and (2) records that do not fall within the enumerated categories but otherwise contain personal information for which there is a reasonable expectation of privacy. Should an accused wish to tender an enumerated record, they must proceed with a s. 278.93(1) application, regardless of the specific content of the record. Non-enumerated records are those which contain personal information about complainants for which they have a reasonable expectation of privacy. These records contain information of an intimate or highly personal nature that is integral to the complainant’s overall physical, psychological or emotional well-being. A presiding judge should consider both the content and context of the record to determine whether a record contains such information. If it does, the accused must proceed with a s. 278.93(1) application.

Second, a purposive approach to the meaning of the word “adduce” should be adopted to include references to the content of a record made in defence submissions or the examination and cross-examination of witnesses. This interpretation is not limited to circumstances where evidence is entered as an exhibit.

Third, the scope of complainant participation has not been comprehensively defined in the impugned provisions. Where the presiding judge decides to hold a Stage One hearing to determine whether the record is capable of being admissible, the complainant’s participatory rights do not apply. Both the complainant and their counsel can attend the entire Stage Two hearing and make oral and written submissions to facilitate meaningful participation. The complainant’s right to make

submissions does not extend to the trial itself. Further, the complainant does not have the right to cross-examine the accused in the Stage Two hearing, either directly or through counsel. The complainant also may not lead evidence at the Stage Two hearing.

Fourth, the timing of applications is specified in s. 278.93(4), which requires that applications be brought “seven days previously”. Properly interpreted, “previously” refers to the Stage One inquiry where the presiding judge determines whether a Stage Two hearing is necessary. The Crown and clerk of the court must have at least seven days’ notice of the application before it is reviewed by the judge at Stage One. However, s. 278.93(4) states that the judge can exercise their discretion to truncate the notice period in the “interests of justice”. While the statutory language does not specify that these applications must be conducted pre-trial, this should be the general practice. Mid-trial applications should not be the norm.

The appropriate framework for the *Charter* analysis in the instant case is based on the Court’s prior jurisprudence, which recognized that both ss. 7 and 11(d) of the *Charter* are inextricably intertwined. These rights should be assessed together where they are co-extensive and separately where a concern falls specifically under one of the rights. As s. 7 should not be used to limit the specific guarantees in ss. 8 to 14 of the *Charter*, the conclusion that the ss. 7 and 11(d) analysis is co-extensive in the instant case should not be misconstrued as an internal limiting of s. 11(d) using s. 7 principles. Further, this approach should not be interpreted as a principle of broader application when accused persons raise both ss. 7 and 11(d). The appropriate

methodology for assessing multiple *Charter* breaches alleged by the accused may depend on the factual record, the nature of the *Charter* rights at play, and how they intersect; this methodology is highly context- and fact-specific.

A claimant must follow two analytical steps to establish that a law breaches s. 7 of the *Charter*: they must demonstrate that (1) the impugned provisions result in the deprivation of life, liberty or security of the person; and that (2) the deprivation violates principles of fundamental justice. Because both accused face the possibility of imprisonment in the instant appeals, the right to liberty in the first stage of the s. 7 analysis is engaged. Accordingly, the s. 7 analysis must focus on the second analytical step — the alleged breaches of the principles of fundamental justice.

The principles of trial fairness and the accused's right to make a full answer and defence are expressions of procedural principles of fundamental justice under s. 7, and are also embodied in s. 11(d). The key principles of s. 11(d) that apply are that (1) an individual must be proven guilty beyond a reasonable doubt; (2) the state must bear the burden of proof; and (3) criminal prosecutions must be carried out in accordance with due process. Section 11(d) does not guarantee the most favourable procedures imaginable for the accused, nor is it automatically breached whenever relevant evidence is excluded. The broad principle of trial fairness is not assessed solely from the accused's perspective; fairness is also assessed from the point of view of the complainant and community. While the emphasis on an accused's fair trial rights under s. 7 should be primary, the right to make full answer and defence and the right to a fair

trial are considered from the perspectives of the accused, the complainant, the community and the criminal justice system at large.

Any concerns regarding self-incrimination due to defence disclosure can be addressed through the concepts of full answer and defence and trial fairness rights embodied in the ss. 7 and 11(d) analysis. Since the accused is not compelled to testify, s. 11(c) of the *Charter* is not engaged.

The admissibility threshold in s. 278.92 does not impair fair trial rights as it does not breach ss. 7 or 11(d) of the *Charter*. The record screening regime embodies the fundamental principle governing the law of evidence — i.e., relevant evidence should be admitted, and irrelevant evidence excluded, subject to the qualification that the probative value of the evidence must outweigh its potential prejudice to the conduct of a fair trial. The accused's right to a fair trial does not include the unqualified right to have all evidence in support of their defence admitted. The admissibility threshold of the record screening regime establishes that private records are only admissible if the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. This is also one of the conditions for s. 276 evidence, which has been constitutionally upheld by the Court. Both regimes seek to protect complainants against harmful myths and stereotypes. The right to make full answer and defence will only be violated if the accused is prevented from adducing relevant and material evidence, the

probative value of which is not outweighed by its prejudicial effect. The admissibility threshold in the record screening regime does not give rise to such a violation.

Furthermore, the Stage One application process in s. 278.92 is not overbroad. Overbreadth must be understood relative to the legislative purpose. The record screening regime was intended to fill a legislative gap to ensure statutory protection of complainants' privacy and dignity, where the accused is in possession or control of their highly private records. Parliament enacted the record screening regime with a view to protecting the dignity, equality, and privacy interests of complainants; recognizing the prevalence of sexual violence in order to promote society's interest in encouraging victims of sexual offences to come forward and seek treatment; and promoting the truth-seeking function of trials, including by screening out prejudicial myths and stereotypes. The procedure for the record screening regime is not overbroad relative to this legislative purpose because it does not go further than is reasonably necessary.

As well, the definition of "record" in s. 278.1 supports the constitutionality of s. 278.92 because it will only capture materials that come within the enumerated categories, or that otherwise contain information of an intimate and highly personal nature that is integral to the complainant's overall physical, psychological, or emotional well-being. The screening of records that meet this definition is rationally connected to Parliament's objective of protecting the privacy and dignity interests of complainants. This narrow definition includes only evidence that has implications for complainants'

dignity. There will be cases where it is unclear whether evidence falls into the definition. But this, alone, does not render the regime overbroad. Also, just because a record is subject to screening does not mean it will be excluded at trial. Records that meet the admissibility threshold for screening can still be adduced at trial. Further, requiring an accused to bring an application to adduce materials that might contain information of an intimate and highly personal nature is consistent with the objective of the regime, since it respects both the accused's fair trial rights and the complainant's privacy and equality interests.

Likewise, the Stage One application process, set out in s. 278.93, is constitutional. With respect to ss. 7 and 11(d), the record screening regime does not require compelled defence disclosure in a manner that would violate an accused's right to a fair trial. First, there is no absolute rule against requiring the defence to disclose evidence to the Crown before the prosecution closes its case. Second, the record screening regime applies to a narrow set of evidence that implicates important interests of complainants in sexual offence cases and has the potential to create serious prejudice. Private records are analogous to s. 276 evidence, as they can also implicate myths that are insidious and inimical to the truth-seeking function of the trial. Like s. 276 evidence, private records encroach on the privacy and dignity of complainants. They too require screening to ensure trial fairness under ss. 7 and 11(d) of the *Charter*.

The complainant participation provisions in s. 278.94, which apply to the s. 276 regime and to the record screening regime (at Stage Two), do not violate the accused's fair trial rights protected by ss. 7 and 11(d) of the *Charter*. There is no support for the assumption that the application deprives the accused of knowing the complainant's initial reaction to the application evidence. There is no change from the previous regime, as the accused has not lost any right to Crown disclosure. In any event, there is no evidence that a complainant's initial emotional reaction to the application is inherently valuable, outside of myth-based reasoning that relies on stereotypes. If any new relevant information arises during the Crown's consultation with the complainant, then it has a duty to disclose this information to the accused. The provisions granting participatory rights to complainants have not altered the Crown's obligations.

As well, the complainant participation provisions in s. 278.94 have no impact on prosecutorial independence. The Stage Two hearing does not violate the right to a fair trial by disrupting the general structure of a criminal trial as a bipartite proceeding between the Crown and the accused. The participation of complainants is justified because they have a direct interest in whether their records, for which they have a reasonable expectation of privacy, are adduced in open court, and their contributions are valuable exactly because they are different from the Crown's. This limited standing on the issue of admissibility, however, does not turn complainants or their counsel into parties, much less quasi-prosecutors, usurping the role of the Crown on the ultimate issue of guilt. Complainants have no participatory rights in the trial itself; they are merely bringing their unique perspective on the impact that the

admission of the evidence will have on their privacy and dignity, which is directly relevant to the issue of admissibility. The presiding judge remains the final arbiter on admissibility and is entitled to accept or reject a complainant's submissions and weigh them against competing considerations.

Finally, complainant participation does not violate the accused's right to cross-examine the complainant without significant and unwarranted restraint. First, the right to cross-examine is not unlimited, and the accused is not entitled to proceed with an unfair or irrelevant cross-examination or ambush the complainant. The right to a fair trial does not guarantee the most advantageous trial possible, and requires consideration of the privacy interests of others involved in the justice system. The impugned provisions strike a balance that protects fundamental justice for accused persons and complainants. Second, there is no absolute principle that disclosure of defence materials inevitably impairs cross-examination and trial fairness. Complainant participation in a Stage Two hearing does not create such a risk; and providing advance notice to complainants that they may be confronted with highly private information is likely to enhance their ability to participate honestly in cross-examination. Third, the accused will still be able to test a complainant's evidence by comparing it to prior statements made to the police, which are available to the defence under the Crown's disclosure obligations. Fourth, complainants can be cross-examined on their access to the private record application; the accused can impugn the credibility and reliability of complainants by suggesting that they tailored their evidence to fit what they learned in the application. Finally, if there is a situation where advanced disclosure of the

application to a complainant will genuinely negate the efficacy of cross-examination, the accused may choose to bring the application during cross-examination to avoid the risk of witness tainting. The trial judge is then responsible for determining whether it is in the interests of justice to allow such an application.

In the absence of a finding that ss. 278.92 to 278.94 of the *Criminal Code* breach either ss. 7 or 11(d) of the *Charter*, it is unnecessary to canvass s. 1 of the *Charter*. And there are no s. 11(c) issues at play. Sections 278.92 to 278.94 of the *Criminal Code* are constitutional in their entirety, as they apply to both s. 276 evidence applications and private record applications.

*Per Brown J.* (dissenting in part): The record screening regime enacted under ss. 278.92 to 278.94 of the *Criminal Code* limits the accused's rights under ss. 11(c), 11(d) and 7 of the *Charter*. These limits are disproportionate and cannot be demonstrably justified in a free and democratic society. Therefore, ss. 278.92 to 278.94 should be struck down, with immediate effect, but only as those sections relate to the record screening regime. This would preserve the existing s. 276 regime restricting admissibility of other sexual activity evidence and the definition of "record" in the ss. 278.1 to 278.91 regime for production of third-party records. The record screening regime ought to be returned to Parliament to be narrowed.

First, there is agreement with Rowe J. with respect to the proper analytical framework to be applied where both s. 7 and s. 11(d) of the *Charter* are raised. The jurisprudence on s. 7 and its relationship to other sections of the *Charter*, including

s. 11, is doctrinally obscure and methodologically incoherent, being the product of 40 years of accumulated judicial *ad hoc*-ery. The majority's reasons extend this trajectory by using s. 7 not to protect the fair trial and due process guarantees under the *Charter*, but to erode them. Since the accused's rights are not in competition with any other set of rights, it is not necessary to decide whether the appropriate framework would be that which requires balancing or that which requires reconciling: there is nothing to balance, or reconcile. And even if competing *Charter* rights were engaged, previous jurisprudence would not be determinative of the constitutionality of the record screening regime, as it is not a principled extension of the common law and related codified schemes that have already survived constitutional scrutiny (i.e., the s. 276 and ss. 278.1 to 278.91 regimes). Rather, it raises a different problem, requiring a different solution; the analysis must therefore turn on the interpretation of the specific provisions and requires the application of the existing *Charter* framework.

The record screening regime is overbroad. As can be concluded from the proper interpretation of the terms "record" and "adduce", this regime renders presumptively inadmissible a remarkably broad range of records in the hands of the defence, capturing not only records that are sensitive or prejudicial, and it regulates their use in any manner. Properly interpreted, the definition of "record" is not limited to records created in a confidential context, nor is it limited to materials containing information of an intimate or highly personal nature that is integral to the complainant's overall physical, psychological or emotional well-being. For the purposes of the regime, a "record" is defined in s. 278.1 as anything that "contains personal information

for which there is a reasonable expectation of privacy”. Although the provision does not refer to electronic communications or personal correspondence, the legislative proceedings suggest that Parliament did intend to capture digital communications sent between the accused and complainant about the subject matter of the charge. Alongside the legislative debates emphasizing the protection of privacy and equality rights for all sexual assault complainants must also be read the Court’s jurisprudence recognizing that electronic communications often contain highly private content. The weight of the jurisprudence applying s. 278.92 has also concluded that the complainant retains a reasonable expectation of privacy in electronic communications sent to the accused. Therefore, an electronic communication is a “record” if it contains personal information giving rise to a reasonable expectation of privacy, as that term has been interpreted in the s. 8 jurisprudence, and this includes any communication concerning the subject matter of the charge, whether of an explicit sexual nature or not.

Furthermore, as the record screening regime applies both to material in the accused’s possession and the information contained in that material, it therefore regulates not only the use of the record itself but the information it contains. Accused persons must now bring an application anytime they intend to refer to the contents of a private record relating to the complainant, even if they do not seek to enter it into evidence or use it to impeach the complainant, but instead simply wish to refer to it in their own defence.

The focus in an overbreadth analysis is properly directed to the relationship between the law's purpose and its effects. Since the record screening regime captures all private records relating to the complainant that are in the accused's possession, which the accused intends to adduce or rely on in any manner, and which may include the accused's own digital conversations with the complainant about the subject matter of the charge, it could deprive individuals of liberty in situations that have no connection whatsoever to the object of the law. It requires disclosure of defence evidence that would not distort the truth-seeking process or significantly interfere with the complainant's privacy, all before the Crown makes out a case to meet. It follows that it goes too far and interferes with some conduct that bears no connection to its objective.

In addition, properly interpreted, the record screening regime limits the accused's rights under ss. 11(c), 11(d) and 7 of the *Charter* in four ways. First, the record screening regime forces accused persons to reveal, in detail, particulars of their own prior statements and cross-examination strategy and potential impeachment material, even before the Crown has laid out a case to be answered, as an application will be brought pre-trial in the vast majority of cases. This shifts away from foundational principles of the criminal trial process, violating the principle against self-incrimination, the right to silence, the presumption of innocence, and the related principle that the Crown must establish a case to meet before the accused can be expected to respond. While the Court approved advance disclosure to the Crown and complainant for evidence of other sexual activity, the principles stated are limited to

the application of s. 276, which is designed to exclude only irrelevant information, and relevant information that is more prejudicial to the administration of justice than it is probative. The same rationale does not apply to the record screening regime. Similarly, compelled production of confidential materials from third parties raises different sensitivity and privacy concerns compared to records in the accused's possession. While it is true that the law imposes limited obligations on parties to provide disclosure so as to justify questioning or admission of evidence in situations that do not unconstitutionally limit the right to silence, none of these instances remotely support the conclusion that the right to silence is unaffected by the record screening regime. The Court has never concluded that tactical burdens to provide pre-trial disclosure are automatically *Charter*-compliant. In any event, confronting an accuser with all relevant evidence is quite different than making tactical choices such as challenging a search warrant. The limits to the protection from self-incrimination and the right to silence are, on their own, fatal to the constitutionality of the regime. The violations to the self-incrimination principle are in no way attenuated by the later admission of the highly relevant and probative evidence.

Secondly, the advance disclosure requirement and complainant's participatory rights operate together to limit the accused's ability to effectively cross-examine the complainant, contrary to the presumption of innocence, the right to make full answer and defence and the right to a fair trial. The accused's right to make full answer and defence gives meaning and operation to the presumption of innocence — the most elementary manifestation of society's commitment to a fair trial. This

extends to calling the evidence necessary to establish a defence, and challenging the evidence called by the prosecution, without significant and unwarranted constraint. Unwarranted constraints on cross-examination may undermine the fairness of the trial, and increase the risk of convicting the innocent. Reasonable limits may be placed on the cross-examination of a complainant in a sexual assault trial to prevent it from being used for improper purposes. But cross-examination in respect of consent and credibility should be permitted where the probative value is not substantially outweighed by the danger of unfair prejudice that may flow from it. In sexual assault cases, cross-examination is often the only way to expose falsehoods, memory issues, and inconsistencies in the complainant's testimony. In many cases, advance disclosure of counsel's dossier or strategy may improperly shape the complainant's testimony, consciously or unconsciously, in a manner that cannot be readily exposed or mitigated at trial, thereby reducing the effectiveness of the cross-examination. The risks go beyond the explicit fabrication of evidence, and include the subtle manipulation of testimony by a witness to address the frailties or inconsistencies disclosed in advance by the defence. In many cases, there will also not be any pre-trial sworn statements on which the accused can impeach the complainant. While there is no right to ambush or whack a complainant with misleading or abusive cross-examination, confronting a complainant with inconsistencies that have not previously been disclosed is a well-established and often exceedingly effective aspect of cross-examination used to test the complainant's credibility. Impeachment of a Crown witness, including impeachment by surprise, is a legitimate and valuable defence tactic, which the regime eviscerates.

Thirdly, the fact that the record screening regime makes private records presumptively inadmissible when tendered by the defence, but presumptively admissible when tendered by the Crown, renders the trial unfair and undermines the regime's purpose. In this way, the regime differs from the s. 276 and ss. 278.1 to 278.91 regimes, and limits the right to a fair trial.

Fourthly, combined with the broad scope of "record" and advance notice requirement, the effect of the heightened standard of admissibility of defence evidence set by the record screening regime limits the rights to a fair trial and to make full answer and defence. The accused must establish, in advance of the complainant's testimony, that the records have significant probative value, meaning some relevant and probative evidence will necessarily be excluded. A judge may exclude evidence relevant to a defence allowed by law only where the prejudice substantially outweighs the probative value of the evidence. Section 278.92(2)(b) does violence to that principle by allowing admission of evidence only where it is of significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. Although the significant probative value standard in the s. 276 context was upheld, the same rationale does not apply *mutatis mutandis* to the record screening regime. While s. 276 addresses inherent damages and disadvantages in admitting sexual history evidence, the regime captures evidence that may well not have any distorting or damaging effect on the trial.

The limits on the accused's rights are not demonstrably justified. While the record screening regime has a pressing and substantial objective, it fails at the rational connection, minimal impairment, and final balancing stages of the s. 1 analysis. The one-sided nature of the obligations shows that it is not rationally connected to its objective as purported concerns for a complainant's privacy, dignity and equality interests, confidence in the justice system and integrity of the trial process are cast aside when those private records are sought to be adduced by the Crown. The regime is not the least drastic means of achieving the legislative objective. The broad definition of "record", combined with the heightened admissibility threshold, will result in the exclusion of defence evidence that is not prejudicial and is highly relevant. By requiring disclosure of potential defence evidence, strategy, and lines of cross-examination before the Crown has made out a case to meet, and by depriving the accused of establishing the relevance of that evidence based on the complainant's testimony, the regime does not minimally impair the right to silence, the presumption of innocence, or the principle against self-incrimination. By mandating advance notice and disclosure to both the Crown and complainant, and by giving the complainant a role in the admissibility determination before trial, the regime allows the Crown's key witnesses to reconcile inconsistencies and potentially alter their evidence in subtle ways that are difficult to test or expose in court. The deleterious effects on individual accused persons are substantial, and this is all quite independent of significant deleterious effects on the criminal justice system, including increased trial complexity and delay. A narrower regime could further the goals of empowering and protecting complainants in a real and substantial manner, while impairing the accused's rights to a lesser extent. The

harmful impacts and risk of wrongful convictions outweigh any potential benefits of the regime. The Crown has not demonstrated that the law's salutary effects outweigh its deleterious effects.

*Per Rowe J.* (dissenting in part): On the merits, there is agreement with Brown J. that ss. 278.92 to 278.94 of the *Criminal Code* are unconstitutional and of no force and effect except in so far as they apply to the existing s. 276 regime. The legislation restricts the fair trial rights of accused persons by placing limits on how they can conduct the cross-examination of Crown witnesses and what evidence they can introduce in support of their own defence, even if that evidence is highly probative and not prejudicial to the complainants. As well, the screening process introduced by the legislation violates ss. 11(c) and 11(d) by requiring the accused to disclose all records relevant to their defence before the Crown has established the case to meet.

In order to give proper effect to ss. 7, 11 and 1 of the *Charter*, the following approach should be applied: where a specific *Charter* guarantee, such as s. 11, is pleaded along with the broader guarantee in s. 7, the specific guarantee should be addressed first. If a violation of the specific *Charter* guarantee is found, there is no reason to proceed to s. 7. If there is no violation of the specific guarantee, or the violation is found to be justified under s. 1, the courts must then look to s. 7. This approach accords with the structure of the *Charter*, and with the text and purposes of the "Legal Rights" in ss. 7 to 14 and s. 1.

The methodological approach adopted by the majority in these appeals inverts the proper role of s. 7 by introducing internal limits on s. 7 rights into s. 11. However, s. 7 is a broad, rights-conferring provision. To construe it as a limit on other *Charter* rights is wrong in principle and, in the instant case, undermines the longstanding, fundamental right to a fair trial.

Ordinarily, a *Charter* right can only be limited in one of two ways: internally, through its own text, or by undertaking the balancing required in s. 1. Qualifying words used in the text of the *Charter* are the starting point for the interpretation of the scope of *Charter* rights and any internal limits. Sections 11(c) and 11(d) have few internal limits and can otherwise be limited only following a proportionality assessment under s. 1.

A limit on s. 11 based on s. 7 does not conform either to the architecture of the *Charter* or to the purposes of those provisions or of s. 1. There is no foundation for an analytical approach whereby ss. 11(c) and 11(d) rights can be limited by reference to internal limits in s. 7. This would involve a grave distortion of s. 7, which is a broad, rights-conferring provision.

The improper use of s. 7 to create limits on s. 11 results from an inconsistent interpretation of s. 7 that has given rise to doctrinal difficulties. The s. 7 jurisprudence has been unclear on how to identify and define the principles of fundamental justice. An expansive approach to these principles, which includes not only procedural protections, but also substantive ones, has given rise to considerable

uncertainty; it has contributed to s. 7 jurisprudence marked by indeterminacy and an ongoing lack of doctrinal clarity. These uncertainties are being introduced into s. 11.

There is also a lack of coherence in the s. 7 methodology and no clear guidance for how principles of fundamental justice are balanced with competing considerations in arriving at the scope of s. 7 rights, or whether such a balancing is appropriate. When engaging in an internal balancing under s. 7, the Court has sometimes categorized competing considerations as *Charter* rights, *Charter* values, or societal interests, but without a systematic or consistent approach to how these are to be weighed against one another, or even whether the considerations applicable to each category are different. It is not clear how *Charter* values and societal interests as opposed to *Charter* rights are defined; whether these rights, values or interests must engage s. 7 or at least amount to principles of fundamental justice in order to be part of the balancing; or, in the event of conflict between rights, interests and values, how one should decide which consideration prevails. These ambiguities mean that *Charter* rights can be weighed against *Charter* values and societal interests — unclear and amorphous concepts of uncertain legal origin and status that can be chosen from, at will, by a decision maker to arrive at a given result. The outcomes provide little certainty and little predictability, and open the door widely to conclusory decision-making.

Internal limits on s. 7 rights are being relied on by the majority in three ways to introduce limitations into s. 11. The first approach finds that ss. 11(c) and 11(d)

protect rights that illustrate principles of fundamental justice, and therefore these may be balanced against other considerations under s. 7. When s. 7 is given priority in the analysis, it subsumes ss. 11(c) and 11(d) and the latter can be limited without a s. 1 analysis. The second approach defines ss. 11(c) and 11(d) following consideration of other interests because they are inextricably intertwined with s. 7. The third approach holds that, because it is so closely related to s. 7, the definition of fairness in s. 11(d) includes considerations of the interests of the state and other parties. All these approaches conflate s. 7 with the other rights in ss. 8 to 14 of the *Charter* and tend to channel the entire constitutional analysis through s. 7. Such an analysis operates almost entirely outside the constitutional text, structure, and purposes of the various provisions. It defines the right to a fair trial by reference to the perspectives of the accused, the complainant, the community and the criminal justice system at large. However, the right to a fair trial under s. 11(d) is one that appertains to the accused only. The majority's approach limits the fair trial right of the accused based on societal interests analyzed through the vehicle of the principles of fundamental justice under s. 7. Instead, the proper methodology by which to have regard to such societal considerations is under s. 1 and not by using s. 7 as a mechanism to limit rights under s. 11.

In addition, as a practical matter, balancing s. 7 internally and using the outcome to limit s. 11 leads to a reversal of the burden of proof and a dilution of *Charter* protections. Under s. 11, an accused alleging a violation must prove it; if proven, the onus shifts to the state to justify the violation under s. 1. By contrast, if there is a

balancing of *Charter* rights, *Charter* values and societal interests under the principles of fundamental justice in s. 7, the burden is on the accused throughout. Accused persons must establish not only the content of the principle of fundamental justice that they allege is violated, but also that it is not outweighed by other considerations. Such an approach undermines the purpose of the broad protection of the right to a fair trial under s. 11 and the purpose of s. 1 to hold the state to the burden of proof to show that any limit is demonstrably justified in a free and democratic society. A further potentially anomalous result under this approach is that s. 11 may first be limited by s. 7 and then, when the usual s. 1 analysis is undertaken, s. 11 rights may be further limited. Most fundamentally, limiting s. 11 through s. 7 is contrary to the purposes of both ss. 7 and 11.

*Per Côté J.* (dissenting in part): There is agreement with Brown J. that the record screening regime does not come close to passing constitutional muster. There is also agreement with Rowe J.'s analytical approach in respect of s. 7 of the *Charter*. However, there is disagreement with the analyses and the conclusions of both the majority and Brown J. on the interpretation of “record” and “adduce”. A narrow interpretation should be preferred.

A proper interpretation of “record” as defined in s. 278.1 of the *Criminal Code* excludes any communications — electronic or otherwise — between the accused and the complainant other than communications made in the context of a professional relationship in which there was an expectation of some degree of confidentiality. Such

an interpretation better accords with the text of s. 278.1. Communications between the complainant and the accused are not specifically enumerated as records in that section. The common thread weaving through the enumerated records is the complainant's reasonable expectation that such records will not be publicly disclosed. The defining feature is not the highly personal nature of the information. Accordingly, unenumerated records will be documents containing personal information that the complainant expects not to be disclosed. These could be either (1) records created in a professional context for which there is an expectation of some degree of confidentiality, even if the relationship is not strictly confidential, or (2) records that are intended for the complainant's exclusive personal use and review.

In addition to being consistent with the text of s. 278.1, a narrower interpretation of "record" is more consistent with the section's legislative evolution and legislative history. By importing a definition of "record" from the regime for the production of third party records, which did not contemplate or include communications between the accused and the complainant, Parliament signaled an intention that such communications do not constitute records for the purposes of the record screening regime. As well, the record screening regime was enacted to address a gap in the law that arose where an accused legally came into possession of a record. The mischief to be remedied was not the admission at trial of voluntary communications between the complainant and the accused. This again weighs heavily in favour of an interpretation of "record" that excludes electronic communications between an accused and a complainant.

A narrow interpretation of “record” is also more consistent with the Court’s jurisprudence and with the common law meaning of the phrase “reasonable expectation of privacy”. Expectations of privacy are contextual, and must be assessed in light of the totality of circumstances. The key contextual factor is that an individual does not have an objectively reasonable expectation of privacy in communications *vis-à-vis* the recipient of the message. Where the accused’s liberty is at stake, a complainant’s expectation of privacy in communications with the accused is objectively unreasonable. The only exception to this category-based approach relates to messages exchanged in the context of a professional relationship in which there is an expectation of some degree of confidentiality. In such circumstances, the professional relationship and the corresponding expectation of some degree of confidentiality ground a reasonable expectation of privacy.

The majority’s approach fails fundamentally to assess whether the complainant’s expectation of privacy is objectively reasonable in the circumstances. It gives undue weight to the content of the communication, while simultaneously disregarding or minimizing other significant contextual factors. As a result, no meaningful guidance is offered on how to discern whether a message is subject to the record screening regime. As well, the majority’s conception of and approach to privacy is inconsistent with the idea that a reasonable expectation of privacy standard is normative rather than simply descriptive. The trial context is determinative.

There is quite simply no reason to depart from the common law meaning of the phrase “reasonable expectation of privacy” and the content-neutral approach that has been developed in relation to it. There is nothing in the text of s. 278.1 that suggests doing so is necessary. A content-neutral approach would also facilitate the operation of the record screening regime and would have the significant benefit of largely averting the need for motions for directions. The majority’s justification for jettisoning the content-neutral approach is unpersuasive and inconsistent with the fundamental premise of the record screening regime. It is also internally inconsistent their own reasons as well as being inconsistent with the Court’s jurisprudence.

It would not be difficult to meaningfully assess or protect a complainant’s privacy interests, as the focus should be on the expectation of privacy rather than on the content of the information. Records can attract a reasonable expectation of privacy — regardless of their content — based on the medium used to convey the information. In the record screening regime, the medium — and the expectation of privacy that exists in the context of that medium — is determinative.

Adopting a narrow category-based approach to the interpretation of “record” avoids many of the absurd results that inevitably follow from a broad interpretation. A broad interpretation will result in an absurd two-tiered system of admissibility that favours the Crown and will lead to the absurd consequence of having the record screening regime create a distinction between information exchanged orally and information exchanged through electronic means. A category-based approach

would have significant practical benefits in terms of trial efficiency as it would not be necessary to contextually assess each message in order to determine whether it constitutes a “record”.

With respect to “adduce”, given that the record screening regime is focused on physical records rather than on a category of evidence, its plain meaning should be adopted, as it relates directly to the physical record. Sections 278.92 and 278.93 of the *Criminal Code* are clear. An application is required only where an accused intends to introduce a copy of the actual record into evidence. It is not required where an accused intends only to ask questions about the information contained in the record, and not to adduce the record in evidence. Interpreting “adduce” more broadly leads to an inherent incongruity, preventing one accused from using relevant information merely because this accused possesses the best evidence of the information. An accused should be permitted to ask the complainant questions about any electronic conversations between them that are relevant to an issue at trial, and barring an evidentiary rule, should also be permitted to testify about electronic conversations with the complainant.

Even with narrower interpretations of “record” and “adduce”, Brown J.’s constitutional analysis remains overwhelmingly applicable. The record screening regime continues to force accused persons to reveal their defence before the Crown has made out a case to meet, contrary to the principle against self-incrimination, the right to silence, and the presumption of innocence. The regime continues to restrict the accused’s ability to cross-examine Crown witnesses by giving the complainant a role

in pre-trial admissibility determinations. The regime still makes private records presumptively inadmissible when tendered by the defence, but presumptively admissible when tendered by the Crown. Finally, the regime still sets a stricter test for admitting defence evidence than is warranted or constitutionally permissible. None of these limits on the accused's *Charter* rights can be justified under s. 1. The regime is not rationally connected to its objective, it is not minimally impairing, and its salutary effects do not outweigh its deleterious effects.

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By Côté J. (dissenting in part)

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*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, s. 238.

*Canadian Charter of Rights and Freedoms*, ss. 1, 7 to 14.

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 117.13(2), 145(10), 276, 276.1 to 276.5 [rep. 2018, c. 29, s. 22], 278.1 to 278.94, 347(6), 645(5), 648, 672.5(11), 694.1, 722(3), 722(9).

*Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, s. 2(1) “personal information”.

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APPEAL and CROSS-APPEAL from a decision of the British Columbia Supreme Court (Duncan J.), 2020 BCSC 349, [2020] B.C.J. No. 1526 (QL), 2020 CarswellBC 2403 (WL), declaring that the violation of s. 7 of the *Canadian Charter of Rights and Freedoms* by s. 278.93(4) of the *Criminal Code* cannot be saved by s. 1 of the *Charter*, and reading down the seven-day notice requirement in s. 278.93(4). Appeal allowed and cross-appeal dismissed, Côté, Brown and Rowe JJ. dissenting in part.

APPEAL from a decision of the Ontario Superior Court of Justice (Akhtar J.), 2020 ONSC 7156, 398 C.C.C. (3d) 227, 475 C.R.R. (2d) 290, [2020] O.J. No. 5412 (QL), 2020 CarswellOnt 18201 (WL), declaring that ss. 278.92, 278.94(2)

and 278.94(3) of the *Criminal Code* violate ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* and that the violations cannot be saved by s. 1 of the *Charter*.  
Appeal allowed, Côté, Brown and Rowe JJ. dissenting in part.

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The judgment of Wagner C.J. and Moldaver, Karakatsanis, Martin, Kasirer and Jamal JJ. was delivered by

THE CHIEF JUSTICE AND MOLDAVER J. —

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## I. Overview

[1] The criminal trial process can be invasive, humiliating, and degrading for victims of sexual offences, in part because myths and stereotypes continue to haunt the criminal justice system. Historically, trials provided few if any protections for complainants. More often than not, they could expect to have the minutiae of their lives and character unjustifiably scrutinized in an attempt to intimidate and embarrass them,

and call their credibility into question — all of which jeopardized the truth-seeking function of the trial. It also undermined the dignity, equality, and privacy of those who had the courage to lay a complaint and undergo the rigours of a public trial.

[2] Over the past decades, Parliament has made a number of changes to trial procedure, attempting to balance the accused's right to a fair trial; the complainant's dignity, equality, and privacy; and the public's interest in the search for truth. This effort is ongoing, but statistics and well-documented complainant accounts continue to paint a bleak picture. Most victims of sexual offences do not report such crimes; and for those that do, only a fraction of reported offences result in a completed prosecution. More needs to be done.

[3] These appeals concern the constitutionality of Bill C-51, a recent ameliorative effort by Parliament to remove the barriers that have deterred complainants from coming forward. This bill, which was enacted in 2018 (*An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, S.C. 2018, c. 29), introduced ss. 278.92 to 278.94 into the *Criminal Code*, R.S.C. 1985, c. C-46 ("impugned provisions"). These provisions were designed to protect the interests of complainants in their own private records when an accused has possession or control of the records and seeks to introduce them at a hearing in their criminal proceeding. Specifically, they create procedures and criteria to assist the judge in deciding whether the records should be admitted, balancing the rights and interests of the accused, the complainant, and the public. Some of the

procedural elements of the impugned provisions also apply to s. 276 evidence applications, as Parliament repealed the prior procedural provisions governing such applications.

[4] Prior to Bill C-51, there was no statutory procedure governing the admissibility of complainants' private records held by accused persons. There were, however, procedures governing the admissibility of evidence of complainants' prior sexual activity or history ("s. 276 regime") and of complainants' private records in the hands of third parties ("third party production regime"). This Court has affirmed the constitutionality of both regimes (see *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443). In order to contextualize Bill C-51, it is helpful to consider the regime changes that preceded it in further detail.

[5] The first set of legislative changes sought to expose and eliminate two insidious myths — commonly referred to as the “twin myths” — which allowed the use of complainants' prior sexual history to suggest that they were (1) less worthy of belief and/or (2) more likely to have consented to the alleged assault. These myths had long been used to attack the credibility and dignity of complainants, tarnish their reputations, and sideline the truth-seeking function of a criminal trial. Recognizing the harm caused by them, Parliament enacted legislation to govern the use of evidence relating to complainants' prior sexual history. While Parliament's first iteration of s. 276 was found to be overbroad in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, revised

provisions were found by this Court to be constitutionally compliant in *Darrach*. This general framework remains in place today, albeit in amended form.

[6] The second set of legislative changes sought to restrict what had become a routine practice — defence counsel seeking production of complainants' private records in order to engage in invasive attacks on their character. For example, defence counsel often sought production of medical records in order to advance myth-based arguments impugning the credibility and reliability of complainants who had previously consulted with psychiatrists or counsellors. This problem was first addressed in *R. v. O'Connor*, [1995] 4 S.C.R. 411, resulting in the creation of a common law procedure governing the production of complainants' private records by third parties. Parliament subsequently legislated its own procedure (ss. 278.1 to 278.91 of the *Criminal Code*), which drew upon but modified the *O'Connor* procedure. This Court affirmed the constitutionality of that regime in *Mills*, finding that it struck a reasonable balance between the rights of the accused, the rights of the complainant, and the public interest.

[7] A third problem emerged. In *R. v. Osolin*, [1993] 4 S.C.R. 595, the Court addressed a situation where the defence cross-examined the complainant on the basis of her personal medical records, which had come into the accused's possession. Similarly, in *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33, the Court was confronted with a situation where the accused sought to cross-examine the complainant based on entries in her own private diary, which happened to be in the accused's

possession. Since the accused already had the diary, there was no need to seek *production* through the third party production regime. The main issue was the *admissibility* of the diary. In the absence of legislation, the Court endorsed the use of motions brought at the instance of complainants to protect against the improper use of their private documents already in the hands of accused persons.

[8] Following *Osolin* and *Shearing*, it became clear that there was no legislation governing the admissibility of a complainant's private records in the hands of the accused, rather than a third party — even though the complainant's privacy and dignity interests are similar in both contexts. A 2012 Senate report recommended creating legislation designed to address this gap: a regime governing the admissibility of complainants' private records in the hands of the accused, using similar factors to those in the third party production regime (Standing Senate Committee on Legal and Constitutional Affairs, *Statutory Review on the Provisions and Operation of the Act to amend the Criminal Code (production of records in sexual offence proceedings): Final Report* ("2012 Senate Report"), at p. 19).

[9] Bill C-51 was Parliament's response. Among other features, it extended the protections provided to complainants in sexual offence trials in two ways. First, it created a new procedure to determine whether the complainant's private records in the hands of the accused are admissible as evidence at trial ("record screening regime"). Second, it provided complainants with additional participation rights in admissibility

proceedings under the new record screening regime and the pre-existing s. 276 regime for prior sexual history evidence (“complainant participation provisions”).

[10] In the two appeals presently before the Court, each accused (J.J. and Shane Reddick) brought a pre-trial application challenging the constitutionality of the impugned provisions, arguing that Parliament had moved too far in favour of protecting the interests of complainants, and in the process, had jeopardized three fundamental rights guaranteed to accused persons under the *Canadian Charter of Rights and Freedoms*, namely: the right to silence and privilege against self-incrimination under ss. 7 and 11(c); the right to a fair trial under ss. 7 and 11(d); and the right to make full answer and defence under ss. 7 and 11(d). The judges in both cases granted the applications and found the provisions unconstitutional, in whole or in part (see the *Charter* breach analysis in *R. v. J.J.*, 2020 BCSC 29, and the s. 1 analysis and decision on remedy in *R. v. J.J.*, 2020 BCSC 349; and see *R. v. Reddick*, 2020 ONSC 7156, 398 C.C.C. (3d) 227). In Mr. Reddick’s case, part of the application judge’s ruling included a finding that s. 278.92 was overbroad under s. 7 of the *Charter*.

[11] In J.J.’s case, this Court granted the Crown’s application for leave to appeal from the application judge’s interlocutory constitutional ruling, which held that part of the record screening regime was unconstitutional. The Court also granted J.J.’s later application for leave to cross-appeal on the issue of the constitutionality of the regime in its entirety. In Mr. Reddick’s case, the complainant, A.S., sought to challenge the application judge’s interlocutory constitutional ruling that effectively prevented her

from participating in the record screening process and declared the regime unconstitutional in its entirety. This Court granted A.S. the right to be added as a party to the proceedings because, being a complainant, she would not normally have been a party. The Court then granted A.S.'s application for leave to appeal. Mr. Reddick is a respondent on the appeal. The Crown is also a respondent, despite arguing (like A.S.) that the regime as a whole is constitutionally valid.

[12] The main arguments of the respondents J.J. and Mr. Reddick were as follows. First, the impugned provisions force the defence to disclose both its strategy and the details of its proposed evidence to the Crown prior to trial, thereby violating the right to silence and the privilege against self-incrimination. Second, the impugned provisions provide complainants with advanced notice of defence evidence and the purposes for which it is being adduced. As a result, complainants will be able to tailor their responses during examination-in-chief and cross-examination. This detracts from the right to make full answer and defence and from the truth-seeking function of trial. Finally, complainant participation in *voir dire*s threatens trial fairness, as it disrupts the structure of a criminal trial, inserts a third-party adversary into the process, and undermines the role of the Crown.

[13] For the reasons that follow, we would not give effect to these arguments. Properly construed, ss. 278.92 to 278.94 of the *Criminal Code* do not infringe upon ss. 7, 11(c), or 11(d) of the *Charter*. In the result, we would allow the Crown's appeal and dismiss J.J.'s cross-appeal; we would also allow A.S.'s appeal.

[14] We have had the benefit of reading the dissenting reasons prepared by our colleague Côté J. With respect, we cannot accede to her interpretation of the relevant statutory provisions, as we consider it to be unduly narrow and restrictive. We have also read the separate dissenting reasons of our colleagues Brown J. and Rowe J. Respectfully, they have mischaracterized our reasons and their effect and disregarded the principle of *stare decisis* — sweeping aside decades of this Court’s binding jurisprudence as “judicial *ad hoc*-ery”. Quite simply, their approach to the constitutional analysis must be rejected.

## II. Relevant Statutory Provisions

[15] The following provisions of the *Criminal Code* are relevant to these appeals:

### **Evidence of complainant’s sexual activity**

**276(1)** In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(a) is more likely to have consented to the sexual activity that forms the subject matter of the charge; or

(b) is less worthy of belief.

### **Conditions for admissibility**

(2) In proceedings in respect of an offence referred to in subsection (1), evidence shall not be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject matter of the charge, whether with the accused or with any other person, unless

the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 278.93 and 278.94, that the evidence

- (a) is not being adduced for the purpose of supporting an inference described in subsection (1);
- (b) is relevant to an issue at trial; and
- (c) is of specific instances of sexual activity; and
- (d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

### **Factors that judge must consider**

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

- (a) the interests of justice, including the right of the accused to make a full answer and defence;
- (b) society's interest in encouraging the reporting of sexual assault offences;
- (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (d) the need to remove from the fact-finding process any discriminatory belief or bias;
- (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (f) the potential prejudice to the complainant's personal dignity and right of privacy;
- (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- (h) any other factor that the judge, provincial court judge or justice considers relevant.

### **Interpretation**

(4) For the purpose of this section, *sexual activity* includes any communication made for a sexual purpose or whose content is of a sexual nature.

...

### **Definition of *record***

**278.1** For the purposes of sections 278.2 to 278.92, *record* means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

...

### **Admissibility — accused in possession of records relating to complainant**

**278.92(1)** Except in accordance with this section, no record relating to a complainant that is in the possession or control of the accused — and which the accused intends to adduce — shall be admitted in evidence in any proceedings in respect of any of the following offences or in any proceedings in respect of two or more offences at least one of which is any of the following offences:

(a) an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3; or

(b) any offence under this Act, as it read from time to time before the day on which this paragraph comes into force, if the conduct alleged would be an offence referred to in paragraph (a) if it occurred on or after that day.

### **Requirements for admissibility**

(2) The evidence is inadmissible unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 278.93 and 278.94,

(a) if the admissibility of the evidence is subject to section 276, that the evidence meets the conditions set out in subsection 276(2) while taking into account the factors set out in subsection (3); or

(b) in any other case, that the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

### **Factors that judge shall consider**

**(3)** In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

**(a)** the interests of justice, including the right of the accused to make a full answer and defence;

**(b)** society's interest in encouraging the reporting of sexual assault offences;

**(c)** society's interest in encouraging the obtaining of treatment by complainants of sexual offences;

**(d)** whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

**(e)** the need to remove from the fact-finding process any discriminatory belief or bias;

**(f)** the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

**(g)** the potential prejudice to the complainant's personal dignity and right of privacy;

**(h)** the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

**(i)** any other factor that the judge, provincial court judge or justice considers relevant.

### **Application for hearing — sections 276 and 278.92**

**278.93(1)** Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 278.94 to determine whether evidence is admissible under subsection 276(2) or 278.92(2).

### **Form and content of application**

**(2)** An application referred to in subsection (1) must be made in writing, setting out detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial, and a copy of the application must be given to the prosecutor and to the clerk of the court.

### **Jury and public excluded**

**(3)** The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.

### **Judge may decide to hold hearing**

(4) If the judge, provincial court judge or justice is satisfied that the application was made in accordance with subsection (2), that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice and that the evidence sought to be adduced is capable of being admissible under subsection 276(2), the judge, provincial court judge or justice shall grant the application and hold a hearing under section 278.94 to determine whether the evidence is admissible under subsection 276(2) or 278.92(2).

### **Hearing — jury and public excluded**

**278.94(1)** The jury and the public shall be excluded from a hearing to determine whether evidence is admissible under subsection 276(2) or 278.92(2).

### **Complainant not compellable**

(2) The complainant is not a compellable witness at the hearing but may appear and make submissions.

### **Right to counsel**

(3) The judge shall, as soon as feasible, inform the complainant who participates in the hearing of their right to be represented by counsel.

### **Judge's determination and reasons**

(4) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part of it, is admissible under subsection 276(2) or 278.92(2) and shall provide reasons for that determination, and

(a) if not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;

(b) the reasons must state the factors referred to in subsection 276(3) or 278.92(3) that affected the determination; and

(c) if all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.

### **Record of reasons**

(5) The reasons provided under subsection (4) shall be entered in the record of the proceedings or, if the proceedings are not recorded, shall be provided in writing.

### III. Issues

[16] These appeals call into question the constitutionality of ss. 278.92 to 278.94 of the *Criminal Code*. It is alleged that the impugned provisions violate the rights of accused persons under ss. 7, 11(c) and 11(d) of the *Charter* and should be struck down.

### IV. Analysis

#### A. *Statutory Interpretation of the Provisions*

[17] Before determining the constitutionality of the impugned provisions, it is first necessary to interpret them. The modern principle of statutory interpretation assists us in this exercise: “. . . the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21).

[18] As a rule, “[c]ourts must presume that Parliament intended to enact constitutional, [*Charter*-compliant] legislation and strive, where possible, to give effect to this intention” (*Mills*, at para. 56; see also R. Sullivan, *Statutory Interpretation*

(3rd ed. 2016), at pp. 307-8; *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110, at paras. 28-29). Furthermore, this Court stated in *Mills* that “if legislation is amenable to two interpretations, a court should choose the interpretation that upholds the legislation as constitutional” (para. 56, referring to *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078).

(1) Overview of the Impugned Provisions

[19] With these interpretive tools in mind, we begin by providing an overview of the provisions to set the foundation for the more detailed interpretation of each section.

[20] As a preliminary matter, the procedures outlined in ss. 278.92 to 278.94 apply to two types of evidence:

- (1) Evidence of complainants’ prior sexual history under s. 276 (“s. 276 evidence”), which was previously subject to its own procedure. This type of evidence requires “s. 276 applications”. Prior to Bill C-51, s. 276 evidence was subject to the procedures in ss. 276.1 to 276.5 of the *Criminal Code*, which have since been repealed.
- (2) Other records in the possession or control of the accused that fall within the definition of s. 278.1, which do not concern prior sexual history. This type of evidence requires “private record applications”.

[21] The procedure set out in the impugned provisions operates in two stages, as follows.

(a) *Stage One*

[22] Pursuant to s. 278.93(2), the accused must prepare an application which “set[s] out detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial”.

[23] At Stage One, the presiding judge reviews the accused’s application to determine whether the evidence sought to be adduced is capable of being admissible having regard to the threshold tests set out in s. 278.92(2)(a) and (b) and the applicable factors in ss. 276(3) or 278.92(3), depending on the type of evidence.

[24] We note what is, in our view, a drafting error in the English text of s. 278.93(4). As written, this section requires the judge at Stage One to assess whether the proposed evidence is “capable of being admissible under subsection 276(2)”. However, it is clear that s. 276(2) only applies to evidence of complainants’ prior sexual history. This leaves no “capable of being admissible” threshold for private records at Stage One. This sentence must be meant to refer to s. 278.92(2), which sets out both the threshold for evidence of prior sexual history (s. 278.92(2)(a)) and the threshold for private records (s. 278.92(2)(b)). This is consistent with the Attorney General of Ontario’s explanation of the Stage One process in its factums. Moreover, it is consistent with the French text of the provision, which does not refer to s. 276(2)

when setting out the threshold for determining whether a record is “capable of being admissible” in s. 278.93(4).

[25] The use of s. 276(2) as the only threshold in the English version is a drafting error that leads to “a glaring absurdity, the origin of which is evident” (Sullivan (2016), at p. 298). Specifically, it is evident that the phrase “capable of being admissible under subsection 276(2)” is a holdover from the prior procedural regime, which only applied to s. 276 evidence. As a result, we proceed on the understanding that the “capable of being admissible” threshold in s. 278.93(4) is intended to refer to evidence that is “capable of being admissible” under s. 278.92(2).

[26] Section 278.93(4) stipulates that the accused must provide a copy of the application to the court and the Crown, at least seven days before the presiding judge reviews the application, unless otherwise ordered. Advanced disclosure to the Crown is necessary to provide the Crown with an opportunity to consider its position regarding whether the evidence is capable of being admissible.

[27] The legislation does not specify how the Stage One inquiry is to be conducted. In our view, this is a matter left to the discretion of the presiding judge, in accordance with their trial management powers. The Stage One inquiry may proceed as an application in writing, an oral hearing, or both, as the judge sees fit. The jury and public are excluded from the Stage One inquiry, no matter how it proceeds, under s. 278.93(3).

[28] For s. 276 evidence applications, if the judge determines that the proposed evidence is not s. 276 evidence, the application will terminate. If the proposed evidence is s. 276 evidence but the judge concludes that it is not capable of being admissible under s. 276(2) (as directed by s. 278.92(2)(a)), the application will be denied. If the s. 276 evidence is capable of being admissible, the application proceeds to a Stage Two hearing pursuant to s. 278.93(4).

[29] For private record applications, if the judge determines that the proposed evidence is not a “record” under s. 278.1, the application will terminate. If the proposed evidence is a “record” under s. 278.1 but the judge concludes that it is not capable of being admissible under s. 278.92(2)(b), the application will be denied. If the evidence is a “record” and it is capable of being admissible, the application proceeds to a Stage Two hearing pursuant to s. 278.93(4).

(b) *Stage Two*

[30] At the Stage Two hearing, the presiding judge decides whether the proposed evidence meets the tests for admissibility set out in s. 278.92(2).

[31] For s. 276 evidence applications, the governing conditions are set out in s. 276(2), as directed by s. 278.92(2)(a). This determination is made in accordance with the factors listed in s. 276(3).

[32] For private record applications, the test for admissibility is set out in s. 278.92(2)(b), namely: the evidence is admissible if it “is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice”. This determination is made in accordance with the factors listed in s. 278.92(3).

[33] Complainants are permitted to appear at the Stage Two hearing and make submissions, with the assistance of counsel, if they so choose (s. 278.94(2) and (3)).

(c) *Overlap Between Section 276 Evidence and Private Records Under Section 278.1*

[34] Section 276 of the *Criminal Code* prohibits the use of evidence of complainants’ prior sexual history to support the “twin myths” in sexual offence trials. At some point in the process, the presiding judge may determine that the proposed evidence is *both* s. 276 evidence and a private record under s. 278.1 (e.g., an email containing an explicit photo of a prior sexual interaction). If the judge determines that the evidence falls under both categories, then it should be treated as s. 276 evidence.

(2) What Is a Record?

[35] To determine what qualifies as a “record” for private record applications, the starting point is s. 278.1. It reads as follows:

**278.1** For the purposes of sections 278.2 to 278.92, **record** means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

[36] The definition of “record” in s. 278.1 applies to ss. 278.2 to 278.92 of the *Criminal Code*, which includes both the third party production regime (ss. 278.2 to 278.91) and the record screening regime (ss. 278.92 to 278.94).

[37] In this section, we first provide a brief overview that explains the two general groups of records under s. 278.1: enumerated records and non-enumerated records. We then provide guidance on what qualifies as a non-enumerated record. To do so, we consider Parliament’s intent, the statutory text, and relevant jurisprudence, from which we derive a methodology for determining whether evidence falls within the definition of “record” for purposes of the record screening regime. Finally, we provide guidance on two specific types of records: (1) communications; and (2) records of an explicit sexual nature related to the subject matter of the charge.

(a) *Two Groups of Records*

[38] The definition of “record” creates two distinct groups: (1) records that fall within the enumerated categories (“enumerated records”); and (2) records that do not

fall within the enumerated categories but otherwise contain personal information for which there is a reasonable expectation of privacy (“non-enumerated records”).

[39] Enumerated categories of records, as defined in s. 278.1, include “medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature”. In our view, these categories were enumerated in the definition because they are the types of records likely to contain personal information for which there is a reasonable expectation of privacy. Should an accused wish to tender a record that falls within an enumerated category, they must proceed with a s. 278.93(1) application, regardless of the specific content of the record.

[40] However, Parliament’s use of the word “includes” in the definition signals that the list of enumerated categories was not meant to be exhaustive. This is confirmed in *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, where Karakatsanis J., writing for the Court, stated that the list of enumerated records in s. 278.1 “provides an illustrative list of some of the types of records that usually give rise to a reasonable expectation of privacy. However, documents that do not fall into the listed categories will still be covered by the *Mills* regime if they contain [personal] information that gives rise to a reasonable expectation of privacy” (para. 22).

[41] In other words, records that do not fall within one of the enumerated categories but are nevertheless included within the scope of the regime are records

which contain personal information about complainants for which they have a reasonable expectation of privacy. We expand on this below.

(b) *Identifying Non-Enumerated Records*

[42] Ultimately, we conclude that a non-enumerated record will only be captured by s. 278.1, in the context of the record screening regime, if the record contains information of an intimate or highly personal nature that is integral to the complainant's overall physical, psychological or emotional well-being. Such information will have implications for the complainant's dignity. As we will explain, this threshold is informed by interpreting the text and scheme of the record screening regime. We then provide a framework for assessing whether a piece of evidence qualifies as a non-enumerated record that must be vetted under the record screening regime.

(i) Text and Scheme of the Record Screening Regime

[43] The text and scheme of the record screening regime reveal Parliament's intention to narrow the scope of records. Parliament deliberately limited the regime to "personal information for which there is a reasonable expectation of privacy". Both elements of this phrase — "personal information" and "reasonable expectation of privacy" — serve to delimit the scope of records and shed light on the nature of the privacy interests at issue, as do the factors set out in s. 278.92(3).

## 1. *Personal Information*

[44] The term “personal information” invokes the concept of informational privacy. Informational privacy protects the ability to control the dissemination of intimate and personal details about oneself that go to one’s “biographical core” (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; see also *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at paras. 45-48). As this Court held in *R. v. Dymont*, [1988] 2 S.C.R. 417, informational privacy is “based on the notion of the dignity and integrity of the individual” (p. 429).

[45] Complainants have privacy interests in highly sensitive information about themselves, the disclosure of which can impact on their dignity. As this Court has observed in the past, the “dissemination of highly sensitive personal information” can result “not just in discomfort or embarrassment, but in an affront to the affected person’s dignity” (*Sherman Estate v. Donovan*, 2021 SCC 25, at para. 7). To reach the level of an impact on dignity, an intrusion on informational privacy must “transcend personal inconvenience by reason of the highly sensitive nature of the information that might be revealed” (*Sherman Estate*, at para. 75; see also para. 73).

## 2. *Reasonable Expectation of Privacy*

[46] The term “reasonable expectation of privacy” has an established meaning in common law, most frequently considered in the s. 8 *Charter* jurisprudence. When Parliament uses a common law term or concept in legislation, those terms and concepts

“inform the content and meaning of these words in [the] section” (*R. v. Jarvis*, 2019 SCC 10, [2019] 1 S.C.R. 488, at para. 56; R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 543). As a result, the jurisprudence regarding a “reasonable expectation of privacy” informs our interpretation. As this Court recognized in *Jarvis*, “the s. 8 case law represents a rich body of judicial thought on the meaning of privacy in our society” (para. 59). We refer to s. 8 jurisprudence for its foundational principles, but our interpretation of a reasonable expectation of privacy here is specific to s. 278.1: what it means and how it applies in the context of the record screening regime. Contrary to our colleague Brown J.’s dissenting reasons (at para. 201), our context-specific interpretation of a reasonable expectation of privacy cannot be “applied across the board” with the potential to interfere with the s. 8 jurisprudence.

[47] In particular, two principles from the s. 8 jurisprudence are instructive in determining whether complainants have a reasonable expectation of privacy under s. 278.1, as it applies to the record screening regime: (1) the person claiming a privacy right must have a subjective expectation of privacy that is objectively reasonable in the circumstances (*R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45; see also *Jarvis*, at paras. 35-43); and (2) a reasonable expectation of privacy only engages legally recognized privacy interests (*Mills*, at para. 99). Both of these principles establish that the privacy interests at issue must meet a high threshold.

[48] However, we do not adopt the content-neutral approach from the s. 8 jurisprudence. Under s. 8, a content-neutral approach ensures that an accused may still have a reasonable expectation of privacy regardless of the legal or illegal nature of the items sought (*R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 36; *R. v. Wong*, [1990] 3 S.C.R. 36, at pp. 49-50). Section 8 protects against unreasonable state search and seizure, therefore, the state is not permitted to engage in *ex post facto* reasoning to justify unconstitutional searches. This rationale does not apply in the present context as state search and seizure is not at issue.

[49] Furthermore, some interveners have submitted that certain mediums of communication (e.g., text messages) should be categorically excluded from the record screening regime, regardless of their content. However, it would be difficult to meaningfully assess or protect complainants' privacy interests within the strictures of a content-neutral approach, as in s. 8 of the *Charter*. The definition of "record" in s. 278.1, as it applies in the context of the record screening regime, does not focus on the medium by which the information was shared. It clearly specifies that "any form of record" is captured under the record screening regime if there is personal information for which there is a reasonable expectation of privacy. Records do not attract a reasonable expectation of privacy simply because of the medium used to convey them. The more important consideration is the sensitivity of the information contained in the record.

[50] Nor is a reasonable expectation of privacy for the purposes of the record screening regime exactly the same as it is for the third party production regime. We acknowledge that the definition of “record” in s. 278.1 is also used in the third party production regime; however, a reasonable expectation of privacy is always context-specific. As this Court has made clear, the privacy interests in a record being *produced* to the accused are different from the privacy interests at play when the accused seeks to have the record *admitted* as evidence in court (*Shearing*, at para. 96). In sum, while our interpretation of a reasonable expectation of privacy is informed by the s. 8 jurisprudence, including the third party production regime which impacts the s. 8 *Charter* rights of complainants, our analysis of this term only applies to the record screening regime context.

3. *Factors in Section 278.92(3)*

[51] The factors outlined in s. 278.92(3) shed light on the interests implicated by the record screening regime, reinforcing our conclusion that Parliament intended to safeguard highly personal information related to complainant dignity. These factors include:

- (a) the interests of justice, including the right of the accused to make a full answer and defence;
- (b) society’s interest in encouraging the reporting of sexual assault offences;
- (c) society’s interest in encouraging the obtaining of treatment by complainants of sexual offences;

- (d) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (e) the need to remove from the fact-finding process any discriminatory belief or bias;
- (f) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (g) the potential prejudice to the complainant's personal dignity and right of privacy;
- (h) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- (i) any other factor that the judge, provincial court judge or justice considers relevant.

[52] A complainant's privacy interests in the information contained in a record are meant to be assessed against these competing factors. If the information in a record does not engage the factors designed to protect the complainant's personal dignity and privacy interests, or does so only marginally, this would be a clear indication that the document is not a record at all.

[53] In our view, s. 278.1 presupposes that a certain level of privacy must be engaged; namely, this provision concerns only records that could cause "potential prejudice to the complainant's personal dignity". These factors suggest that the scheme is not intended to catch more mundane information, even if such information is communicated privately. Moreover, given the accused's right to make full answer and defence, mere discomfort associated with lesser intrusions of privacy will generally be tolerated. In this context, a complainant's privacy in open court "will be at serious risk

only where the sensitivity of the information strikes at the subject's more intimate self" (*Sherman Estate*, at para. 74).

(ii) Framework to Apply

[54] In light of Parliament's intent, the relevant jurisprudence and the statutory scheme, a non-enumerated record will fall within the definition of s. 278.1 if it contains information of an intimate and highly personal nature that is integral to the complainant's overall physical, psychological or emotional well-being. Such information will have implications for the complainant's dignity. As previously stated, this interpretation is specific to the record screening regime. To determine whether a record contains such information, a presiding judge should consider both the content and context of the record.

1. *Content*

[55] When determining whether proposed evidence constitutes a non-enumerated record, the interpretive principle of *eiusdem generis* ("of the same kind") applies. In other words, general words in a definition take their meaning from the more specific words — in this case, the records that are specifically enumerated (*Canada v. Canada North Group Inc.*, 2021 SCC 30, at para. 63). Therefore, if the information in a non-enumerated record is similar to what would be contained in an enumerated record, this is a useful indicator that it raises significant privacy interests and should be subject to the record screening regime. The common thread weaving through the

enumerated records is that they contain information of an intimate and highly personal nature that is integral to the complainant's overall physical, psychological or emotional well-being. This type of content could include, but is not limited to, discussions regarding mental health diagnoses, suicidal ideation, prior physical or sexual abuse, substance abuse or involvement in the child welfare system.

[56] For example, if complainants communicate details about their own medical history, this is the kind of information that would be found in a medical record over which they have a reasonable expectation of privacy. It would therefore be subject to the record screening regime. In contrast, mundane information such as general emotional states, everyday occurrences or general biographical information would typically not give rise to a reasonable expectation of privacy.

## 2. *Context*

[57] A court should also consider the context in which the record came into existence. When assessing context, courts must apply a normative and common-sense approach. Whether a communication or document is a "record that contains personal information for which there is a reasonable expectation of privacy" must reflect societal understandings about the fundamental right to be free from unwanted intrusion into our personal lives. As this Court recognized in *Jarvis*, at para. 68, "[w]hether a person *reasonably* expects privacy is necessarily a normative question that is to be answered in light of the norms of conduct in our society" (emphasis in original). Expectations of privacy are contextual and must be assessed in light of the "totality of the

circumstances” (*R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 26; see also *Edwards*, at para. 45). Three contextual factors, which are non-exhaustive, may be relevant to this analysis.

[58] First, a court may consider the reason why the complainant shared the private information in question. This Court has recognized that a person’s reasonable expectation of privacy with respect to information will vary depending on the purpose for which the information is collected (*Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 75). For example, in *Quesnelle*, this Court accepted that a person may divulge information to an individual or organization with the expectation that it be used only for a specific purpose.

[59] Second, the relationship between the complainant and the person with whom the information was shared informs the context. As Wagner C.J. wrote in the context of a complainant’s reasonable expectation of privacy in *Jarvis*, at para. 29, “[r]elevant considerations may include whether the relationship was one of trust or authority and whether the observation or recording constituted a breach or abuse of the trust or authority that characterized the relationship.” That said, it must be understood that “[t]he circumstances (or nature of the relationship) in which information is shared are not determinative: the reasonable expectation of privacy is not limited to trust-like, confidential, or therapeutic relationships” (*Quesnelle*, at para. 27). In other words, a relationship of trust is not necessary, but in some cases it may be sufficient, to establish a reasonable expectation of privacy.

[60] Third, courts may consider where the record was shared and how it was created or obtained. Records produced in the private domain (e.g., one-on-one communications between the complainant and accused) may attract an enhanced reasonable expectation of privacy; records created or obtained in the public domain, where they could be accessed by multiple people or the general public (e.g., social media or news media), are less likely to attract a reasonable expectation of privacy. That said, the fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest through additional dissemination that would increase access to the information (*Sherman Estate*, at para. 81). In other words, there are different degrees of publicity, and in some cases a complainant may have a reasonable interest in preventing information from being disseminated in court proceedings, even if it was not perfectly private before. Similarly, the fact that a record was created or obtained surreptitiously by the accused, without the complainant’s knowledge, would also be relevant as part of the contextual analysis. Such a record would be more likely to attract a reasonable expectation of privacy.

(iii) Specific Types of Records

1. *Communications*

[61] Communications form the most contentious type of evidence. Given that “any form of record” is captured under the record screening regime, electronic or non-electronic communications relating to complainants will fall within the definition of “record” if they contain “personal information for which there is a reasonable

expectation of privacy”. Indeed, communications may contain precisely the kind of information Parliament intended to safeguard.

[62] Justice Côté in dissent maintains that complainants have no reasonable expectation of privacy in communications with the accused (unless they are in confidential/professional relationships); on the contrary, they should expect the accused to rely on such evidence to defend themselves at trial (para. 463). With respect, we disagree. Complainants should not “lose” their expectation of privacy the moment they step forward to report a sexual offence. The fact that they may have chosen the wrong person to trust should not be determinative of their privacy interest in the context of alleged sexual violence. Our colleague’s approach is antithetical to Parliament’s objective of protecting complainant privacy and dignity during the course of a criminal trial (s. 278.92(3)(g)), as well as the objective of encouraging reporting (s. 278.92(3)(b)). Under our approach, we take into account the trial context while also considering the nature of the communication at the time it took place.

[63] As a baseline, to be caught by the record screening regime, the communication must “relat[e] to [the] complainant” in some manner (s. 278.92(1)). The complainant may be the sender or recipient of the communication, or the content of the communication pertains to the complainant.

[64] If the communication in question falls within a category of enumerated records, it is unnecessary to inquire further regarding the reasonable expectation of privacy. For example, e-mails exchanged between an accused who is a psychologist

and their client regarding therapeutic goals for treatment would properly fall within the definition of s. 278.1 as therapeutic records — a category of enumerated records. If the communication does not fall within an enumerated category, the content- and context-based analysis set out above applies to determine whether the communication contains personal information for which there is a reasonable expectation of privacy.

2. *Records of a Sexual Nature (Not Covered by Section 276)*

[65] One type of non-enumerated record that will often engage a reasonable expectation of privacy is a record of an explicit sexual nature that is not covered by s. 276 (for example, explicit communications, videos or photographs of a sexual nature relating to the subject matter of the charge). Complainants may have a reasonable expectation of privacy in these types of records, given the dignity concerns that can arise.

[66] It is helpful to clarify why evidence of an explicit sexual nature that relates to the subject matter of the charge may be caught by the record screening regime even if it is not s. 276 evidence. In addition to creating the record screening regime for private records, Bill C-51 also added s. 276(4), which specifies that sexual activity “includes any communication made for a sexual purpose or whose content is of a sexual nature”. This provision applies to sexual activity *other than* the sexual activity that forms the subject matter of the charge (s. 276(2)). Any communication regarding such sexual activity would fall within the s. 276 regime.

[67] Accordingly, the only records of an explicit sexual nature that could be subject to the record screening regime outside of the s. 276 context would be records pertaining to the complainant, in the possession or control of the accused, that relate to the sexual activity which forms the subject matter of the charge. For clarity, “subject matter of the charge” refers to the components of the *actus reus* of the specific charge that the Crown must prove at trial. These types of records are likely to engage the complainant’s reasonable expectation of privacy under the content and context framework described above.

(iv) Summary of the Analytical Process

[68] Having defined the scope of “records”, we will now provide an outline of the analytical process that should be applied by a court to determine if evidence constitutes a “record”.

[69] The presiding judge should first determine if the proposed evidence contains information that falls under s. 276. If the evidence falls under both ss. 276 and 278.1, as stated above, the judge should assess the evidence as s. 276 evidence.

[70] If the proposed evidence does not fall under s. 276, the judge should then determine whether it is a “record” under s. 278.1. If the evidence does not come within one of the enumerated categories, the inquiry should focus on whether it contains personal information for which there is a reasonable expectation of privacy. Where the

evidence is found to be an enumerated or non-enumerated record, the record screening regime is engaged.

[71] A non-enumerated record will be caught by the record screening regime if it contains information of an intimate and highly personal nature that is integral to the complainant's overall physical, psychological or emotional well-being. Such information will have implications for the complainant's dignity. This assessment considers the content and context of the record. Electronic communications are subject to this analysis like all forms of records. In addition, records of an explicit sexual nature not covered by s. 276 because they concern the subject matter of the charge will often attract a reasonable expectation of privacy and fall under the record screening regime.

[72] When it is unclear whether the evidence is a "record", counsel should err on the side of caution and initiate Stage One of the record screening process. To be clear, under the record screening regime, the accused will be in possession or control of the evidence at issue, and they will know the context in which the evidence arose. For this reason, the accused will be well equipped to discern whether the evidence is a "record" and to make submissions on this point, if need be.

### (3) Who Do the Impugned Provisions Apply to?

[73] Section 278.92(1) states that the record screening regime is intended to apply to records in the *accused's* control or possession, which the accused intends to adduce. Accordingly, the Crown is not bound by the record screening regime when

seeking to admit private records relating to complainants. Had Parliament intended for the Crown to be bound by the regime, it would have signalled this in the text of ss. 278.92 to 278.94.

[74] In so concluding, we recognize that in *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, this Court held that s. 276(1) applies to the Crown based on the common law principles of *Seaboyer*, even though s. 276(2) refers only to the accused (para. 80; see also *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237, at para. 78; *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, at para. 142). But Parliament signalled its intention that the Crown be bound through the text of s. 276(1). As *Barton* explains, the language of s. 276(1), “which confirms the irrelevance of the ‘twin myths’, is categorical in nature and applies irrespective of which party has led the prior sexual activity evidence” (para. 80). Accordingly, in the context of s. 276 evidence, the Crown remains obliged to bring the equivalent common law application (commonly referred to as a *Seaboyer* application) where it seeks to introduce evidence of a complainant’s prior sexual history. There is no analogue to s. 276(1) in the record screening regime for private records — throughout, the text refers only to the accused. Unlike in the s. 276 context, the Crown is not required to bring a screening application for private records it seeks to introduce into evidence.

[75] Our colleague Brown J. criticizes the fact that the record screening regime applies only to the accused and not the Crown, should the Crown seek to adduce the same records. Leaving aside the statutory language, which is clear on the issue, trial

fairness “[does] not guarantee defence counsel the right to precisely the same privileges and procedures as the Crown” (*Quesnelle*, at para. 64, citing *Mills*, at para. 111). In our view, such is the case here. These statutory procedures do not apply to the Crown.

(4) When Is Evidence “Adduced” Such That an Application Is Required?

[76] The parties and interveners disagree about the meaning of “adduce” in ss. 278.92(1), 278.93(2) and 278.93(4). The disagreement focuses on whether “adduce” only includes entering evidence as an exhibit at trial, or if it applies as well to the use of the information contained within the record for the purposes of cross-examination. Justice Côté in dissent would adopt the narrow interpretation. In contrast, our interpretation of “adduce” is not limited to circumstances where evidence is entered as an exhibit. Instead, we adopt a purposive approach that includes references to the content of a record made in defence submissions or the examination and cross-examination of witnesses. Specifically, under the record screening regime, the accused must screen records when they seek to use information during a hearing that they specifically learned from those records. If they have independent knowledge of the information, gathered from sources that do not rely on the complainant’s private records, they may use this information without invoking the record screening regime (subject to other applicable evidentiary rules and trial procedures).

[77] We reject the narrow interpretation of “adduce” for several reasons. First, limiting “adduce” to entering an exhibit at trial would create a loophole in the regime, as the accused could simply refer to the evidence in their submissions or

cross-examination. This loophole would not serve to meaningfully protect complainants' dignity and privacy interests as contemplated by the impugned provisions.

[78] Second, a narrow interpretation would not address the concern in *Shearing*, where the central issue was the accused's ability to cross-examine the complainant on the contents of her diary, even though he did not enter the diary itself as an exhibit. Since the 2012 Senate Report identified the *Shearing* situation as one of the motivating factors for its recommendations, it would be illogical to interpret the impugned provisions in a manner that would not address the very situation at issue in that case.

[79] Third, the 2012 Senate Report contemplated a broad application for the record screening regime, to account for circumstances where the accused is in possession of a complainant's records "and wishes to use these records for the purposes of cross-examination or seeks to introduce them into evidence" (p. 19). The accused could use the record to advance groundless myths and stereotypes not just by entering it as an exhibit but, for example, by using it in cross-examination. Parliament intended to include these situations.

[80] Finally, the French version of s. 278.92(1) translates "intends to adduce" to "*se dispose à présenter en preuve*" and points towards a broader interpretation where evidence is presented in the trial proceeding, regardless of whether it is formally entered as an exhibit. Similarly, the term "*la preuve*" in the French version of ss. 278.93(2) and 278.93(4) refers to evidence broadly and is not limited to exhibits.

Had Parliament intended a more narrow interpretation, the statutory language in French or English would have reflected such an intention.

[81] In conclusion, the use of the word “adduce” in the impugned provisions captures the content of the record that is referenced by the accused during the trial, even if the record is not formally entered as an exhibit.

(5) What Is the Appropriate Timing of an Application?

[82] There is also disagreement about the timeframe, specified in the record screening regime, in which an application must be provided to the Crown and to the court. More specifically, s. 278.93(4) stipulates the following:

(4) If the judge, provincial court judge or justice is satisfied that the application was made in accordance with subsection (2), that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice and that the evidence sought to be adduced is capable of being admissible under subsection 276(2), the judge, provincial court judge or justice shall grant the application and hold a hearing under section 278.94 to determine whether the evidence is admissible under subsection 276(2) or 278.92(2).

[83] Lower courts have come to different conclusions on whether the word “previously” refers to seven days before the Stage One inquiry, the Stage Two hearing, or the trial. The purpose of the seven-day notice period, as explained in the *House of Commons Debates*, is to “ensure that all parties have adequate time to prepare” for the

application process (vol. 148, No. 195, 1st Sess., 42nd Parl., June 15, 2017, at p. 12789 (Marco Mendicino)).

[84] Properly interpreted, “previously” refers to the Stage One inquiry where the presiding judge determines whether a Stage Two hearing is necessary. The Crown and clerk of the court must have at least seven days’ notice of the application before it is reviewed by the judge at Stage One. However, s. 278.93(4) states that the judge can exercise their discretion to truncate the notice period in the “interests of justice”.

[85] While the statutory language does not specify that these applications must be conducted pre-trial, in our view, this should be the general practice. The encouragement of pre-trial applications in the record screening regime mirrors the approach endorsed previously under the s. 276 regime (see, for example, *Goldfinch*, at para. 145). There should be consistency between s. 276 evidence applications and private record applications because both now proceed under ss. 278.92 to 278.94.

[86] There may be situations that require a trial judge to either revisit a prior admissibility determination under s. 278.92 or to allow a new application mid-trial (see *R.V.*, at para. 75; *Barton*, at para. 65). Judges maintain this discretion as part of their inherent trial management power. Furthermore, in light of s. 278.93(4), judges have discretion to allow an application to be brought at a shorter interval than seven days before the Stage One hearing when it is in the “interests of justice”. However, as a general rule, private record applications should be brought at the pre-trial stage of the proceedings. There is good reason for this. If mid-trial applications become routine,

this would result in frequent adjournments, significant delays, scheduling difficulties — particularly in jury trials — and potential unfairness to the accused. Mid-trial applications could also harm complainants and discourage the reporting and prosecution of sexual offences. One example of where a mid-trial application may be in the “interests of justice” is if the record was only discovered during the course of the trial.

(6) What Is the Scope of Complainant Participation?

[87] Complainant participation is a new procedural component introduced by the impugned provisions, and its scope has not been comprehensively defined by Bill C-51. Accordingly, we look to Parliament’s purpose in enacting Bill C-51 to inform what we consider to be the proper approach.

[88] Section 278.94(2) provides that a complainant is “not a compellable witness” at the Stage Two hearing, but may “appear and make submissions”. Section 278.94(3) directs that “[t]he judge shall, as soon as feasible, inform the complainant who participates in the [Stage Two] hearing of their right to be represented by counsel.”

[89] Where the presiding judge decides to hold a Stage One oral hearing to determine whether the record is capable of being admissible, the complainant’s participatory rights do not apply. Similarly, the complainant is not entitled to provide written submissions if the Stage One inquiry proceeds only as a written application.

Parliament did not incorporate complainants' participatory rights in s. 278.93 when referring to the Stage One inquiry. Complainants' participatory rights are specifically attached to Parliament's use of the word "hearing", which refers to a Stage Two hearing.

[90] The complainant participation provisions, ss. 278.94(2) and 278.94(3), apply to both s. 276 and private record applications. Within the statutory parameters we discuss below, the presiding judge retains significant discretion to determine the appropriate procedure in each case.

(a) *Complainant's Receipt of Application*

[91] While the complainant participation provisions do not directly address a complainant's receipt of the application, it can be reasonably inferred that the complainant must have sufficient knowledge of the record to meaningfully participate in the Stage Two hearing pursuant to s. 278.93(4) (if the presiding judge determines that such a hearing is necessary).

[92] Section 278.93(4) provides that the accused must provide a copy of the application to the prosecutor and clerk of the court. When the Crown receives the application prior to the Stage One inquiry, it should provide a general description of the nature of the record and of its relevance to an issue at trial to the complainant and/or the complainant's counsel. The seven-day notice period prior to Stage One provides the complainant with time to retain counsel in anticipation of the accused's application

being granted under s. 278.93(4). At the same time, only a general description is required at this stage because it is not yet clear whether a Stage Two hearing involving the complainant will be required.

[93] If the presiding judge determines that the record is capable of being admissible under Stage One, the Crown should typically disclose the contents of the application to enable the complainant and/or the complainant's counsel to prepare for the Stage Two hearing. This facilitates the complainant's meaningful participation. This process is similar to the prior procedure for s. 276 applications in which the Crown had the discretion to consult with the complainant (*Darrach*, at para. 55).

[94] Receipt of the application after the presiding judge determines that the process should continue to Stage Two also allows the complainant to make an informed decision about the extent to which they wish to participate in the Stage Two hearing.

[95] A complainant's receipt of the application where a Stage Two hearing is required is a reflection of one of the components of the *audi alteram partem* principle: that those who will be affected by a proceeding be informed of the proceeding in addition to having an opportunity to be heard (*Telecommunications Workers Union v. Canada (Radio-television and Telecommunications Commission)*, [1995] 2 S.C.R. 781, at para. 29; *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536, at para. 27). It would be difficult for a complainant to "appear and make submissions" on the issue of the admissibility of their private records without information about what records are at issue and the purpose for which the accused proposes to adduce them.

[96] Importantly, the presiding judge retains the discretion to direct that the application not be disclosed to the complainant or that portions of it be redacted. This may arise based on a party's or the judge's own concerns about the impact of disclosure on trial fairness.

(b) *Complainant's Attendance and Submissions*

[97] The complainant participation provisions do not specify the extent to which complainants and/or their counsel can participate in the Stage Two hearing. In our view, both can attend the entire Stage Two hearing to facilitate meaningful participation. If there are concerns at the Stage Two hearing that a complainant's attendance would compromise trial fairness, the judge may, in their discretion, exclude the complainant as required.

[98] The provisions also do not specify the scope of complainants' submissions. In our opinion, subject to the judge's discretion to ensure trial fairness, meaningful participation allows complainants or their counsel to make oral and written submissions at the Stage Two hearing. There may be circumstances where complainants wish to provide either oral or written submissions, but not both. The presiding judge retains the discretion to permit this.

[99] Importantly, a complainant's right to make submissions does not extend to the trial itself. Complainants' participatory rights are strictly confined to the Stage Two

hearing, and only regarding the admissibility of the evidence which the accused seeks to adduce.

(c) *Complainant's Ability to Cross-Examine and Lead Evidence*

[100] There are two reasons why, in our view, complainants do not have the right to cross-examine the accused in the Stage Two hearing, either directly or through counsel. First, the legislation makes no mention of a right to cross-examine. In other parts of the *Criminal Code* where Parliament has decided to confer a right of cross-examination, it has done so expressly (see, for example, ss. 117.13(2), 145(10), 347(6), and 672.5(11)).

[101] Second, prohibiting cross-examination does not prevent complainants or their counsel from participating meaningfully at the Stage Two hearing. Meaningful participation can occur through complainants' written or oral submissions. Where it is thought to be necessary to cross-examine the accused at the Stage Two hearing, it is within the sole prerogative of the Crown to do so.

[102] Similar principles apply to prevent complainants from leading evidence at the Stage Two hearing. Absent clear statutory language, complainants may not do so. Other *Criminal Code* provisions expressly grant third parties the right to lead evidence, such as victims in the victim impact statement process (ss. 722(3) and 722(9)). Should complainants have relevant evidence they wish to tender, this can be disclosed to the Crown and presented by the Crown if it so chooses.

(7) Are Motions for Direction Permitted, and Can Complainants Participate?

[103] In light of the uncertainty regarding the scope of records, some defence counsel have on occasion brought a motion for directions before engaging in the procedure under ss. 278.92 to 278.94, to determine whether the particular evidence comes within the definition of a “record” under s. 278.1. Motions for directions are not explicitly contemplated by the statutory language of the record screening regime: they are purely a discretionary exercise of the presiding judge’s trial management power.

[104] The test we have articulated for interpreting s. 278.1 is designed to assist counsel and judges in reducing the need for motions for directions. However, in cases where the accused does bring a motion for directions, the presiding judge must decide whether the proposed evidence is a “record”. Where, in the opinion of the judge, the evidence is clearly a “record”, the judge should deal with the matter summarily and order the accused to proceed with a private record application. Equally, where the judge is uncertain whether the proposed evidence is a “record”, they should instruct the accused to proceed with an application. Only if the judge is clearly satisfied that the proposed evidence does not constitute a “record” should they direct that the accused need not bring an application.

[105] In deciding the motion for directions, we are of the view that the presiding judge retains the discretion to provide notice to complainants and allow them to participate. This discretion is available to the judge because the motion for directions itself involves an exercise of the trial management power.

(8) Do Complainants Have Appeal Rights Under the Impugned Provisions?

[106] Complainants are only participants at the Stage Two hearing, not parties to the trial proceeding itself. In the vast majority of cases, there will be no further recourse if they are unsatisfied with a decision to admit s. 276 evidence or a private record at trial. Parliament did not contemplate appeal rights for complainants in the statutory language of ss. 278.92 to 278.94.

[107] However, complainants do have the ability to appeal a Stage Two hearing decision using the two limited appeal routes that already exist for third party interlocutory appeals in criminal cases: (1) challenging a provincial court order through an application for *certiorari* in superior court; or (2) seeking leave to appeal to this Court pursuant to s. 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26 (A. (L.L.), at para. 24).

[108] As with all interlocutory criminal appeals, these appeal routes are extremely limited. *Certiorari* applications by third parties are limited to jurisdictional errors and errors of law on the face of the record, if the order has a final and conclusive character (*R. v. Awashish*, 2018 SCC 45, [2018] 3 S.C.R. 87, at para. 12). Since the determination of whether to admit the evidence is a discretionary decision made by the judge, absent exceptional circumstances, complainants are unlikely to succeed on *certiorari* applications.

[109] Leave to appeal to this Court is similarly narrow as an appeal route for complainants. We granted leave to appeal to A.S. in this matter because novel constitutional issues were raised. Interlocutory appeals of criminal matters before this Court, absent clear constitutional issues, are exceedingly rare.

[110] Judges must always be mindful of the challenges inherent in interlocutory criminal appeals, having particular regard to the principle of judicial economy, the potential disruption of jury trials, and the risk of running afoul of the accused's s. 11(b) *Charter* rights. Accordingly, interlocutory appeals arising out of s. 276 or private record applications should be rare and restricted to clearly exceptional circumstances.

#### B. *Charter Analysis*

[111] Having interpreted the relevant provisions, we turn now to their constitutionality. Our constitutional analysis focuses on the new elements introduced by the impugned provisions: the record screening regime and the complainant participation provisions. The constitutionality of the general procedure for s. 276 applications is not before us and was resolved by this Court in *Darrach*.

[112] The respondents J.J. and Mr. Reddick contend that the impugned provisions violate three fundamental rights guaranteed to accused persons under the *Charter*: the right to silence and privilege against self-incrimination under ss. 7 and 11(c); the right to a fair trial under ss. 7 and 11(d); and the right to make full answer

and defence under ss. 7 and 11(d). We begin with the relevant framework under which the *Charter* analysis must be conducted.

(1) Analytical Framework

[113] In *Mills*, the Court used s. 7 of the *Charter* as the governing analytical framework to assess the constitutionality of the third party production regime for complainant records. Similarly, in *Darrach*, this Court assessed the constitutionality of the s. 276 regime under s. 7 of the *Charter*. While violations under s. 11 of the *Charter* were also alleged in these cases, the s. 7 analysis was dispositive. Similarly, in these appeals, ss. 7 and 11(d) are co-extensive with the exception of J.J.’s arguments regarding overbreadth of the record screening regime, which must be properly analyzed under s. 7. Any concerns regarding self-incrimination due to defence disclosure can be addressed through the concepts of full answer and defence and trial fairness rights embodied in the ss. 7 and 11(d) analysis. Concerns about testimonial compulsion fall under s. 11(c), but they pose no problem here because accused persons are not compelled to testify.

[114] Our colleagues Brown J. and Rowe J. object to our analytical framework on the basis that s. 11(d) should be analyzed before s. 7, which is more “general”. Our *Charter* analysis considers the relevance of both ss. 7 and 11(d), which this Court has long recognized are “inextricably intertwined” (*Mills*, at para. 69, quoting *Seaboyer*, at p. 603). Following the approach adopted by this Court for decades, we assess these rights together where they are co-extensive and separately where a concern falls

specifically under one of the rights (see *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at pp. 536-38; *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, at p. 460; *R. v. Levogiannis*, [1993] 4 S.C.R. 475, at p. 494; *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, at para. 19; *Darrach*; *Mills*, at para. 69). Accordingly, we consider the rights to a fair trial and to make full answer and defence separately from overbreadth, which is specifically enshrined as a principle of fundamental justice within s. 7. Moreover, we agree with our colleagues' assertion that s. 7 should not be used to "limit" the specific guarantees in ss. 8 to 14. Our conclusion that the ss. 7 and 11(d) analysis is co-extensive in these appeals should not be misconstrued as an "internal limiting" of s. 11(d) using s. 7 principles.

[115] Further, our approach in these appeals should not be interpreted as a principle of broader application when accused persons raise both ss. 7 and 11(d) in future *Charter* cases. The appropriate methodology for assessing multiple *Charter* breaches alleged by the accused may depend on the factual record, the nature of the *Charter* rights at play, and how they intersect. This Court has repeatedly affirmed that the methodology for assessing multiple alleged *Charter* breaches is highly context- and fact-specific (*R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at para. 37; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at para. 36; *Mills*, at para. 63; F. Iacobucci, "Reconciling Rights' The Supreme Court of Canada's Approach to Competing Charter Rights" (2003), 20 *S.C.L.R.* (2d) 137, at p. 156).

(2) Key Principles of Section 7 of the Charter

[116] A claimant must follow two analytical steps to establish that a law breaches s. 7 of the *Charter*: they must demonstrate that (1) the impugned provisions result in the deprivation of life, liberty or security of the person; and that (2) the deprivation violates principles of fundamental justice. These appeals engage both procedural principles of fundamental justice (the rights to a fair trial and to make full answer and defence, and the privilege against self-incrimination) and substantive principles of fundamental justice (overbreadth).

[117] As stated in *Mills*, we accept that the right to liberty in the first stage of the s. 7 analysis is engaged because the accused “faces the possibility of imprisonment” (para. 62). Accordingly, our s. 7 analysis focuses on the second analytical step — the alleged breaches of the principles of fundamental justice.

[118] Section 7 requires the principles of fundamental justice to be balanced relationally. The emphasis on an accused’s fair trial rights under s. 7 should be primary (*Shearing*, at paras. 130-32; *Mills*, at para. 94; D. Stuart, *Charter Justice in Canadian Criminal Law* (7th ed. 2018), at pp. 284-86; K. Roach, “The Protection of Innocence Under Section 7 of the Charter” (2006), 34 *S.C.L.R.* (2d) 249, at pp. 280-81). But the spectrum of interests reflected in the principles of fundamental justice requires a court to avoid viewing any particular principle in isolation from the others (*Mills*, at para. 73). And “[n]o single principle is absolute and capable of trumping the others; all must be defined in light of competing claims” (*Mills*, at para. 61).

[119] Unlike in *Mills*, complainants' s. 8 rights are not engaged in these appeals because the state does not compel production of complainants' records. However, like in *Darrach*, the privacy, dignity, and equality interests of complainants are at play in the course of a criminal trial for a sexual offence.

[120] In *Darrach*, this Court further recognized that encouraging the reporting of sexual violence and protecting the security and privacy of witnesses were relevant principles of fundamental justice in the context of protecting complainants in sexual offence trials (para. 25). Elaine Craig explains the uniquely invasive nature of sexual offence trials and the privacy implications that result: "Simply put, sex, and all things related, are socially constructed as deeply private. The impact of an intrusion into the privacy of a sexual offence complainant will often be qualitatively worse than a similar breach with respect to the alleged victim of a fraud or theft, for example" ("Private Records, Sexual Activity Evidence, and the *Charter of Rights and Freedoms*" (2021), 58 *Alta. L. Rev.* 773, at pp. 801-2; see also *Mills*, at para. 91, citing *M. (A.)*, at para. 30). As a result, *Darrach* adopted a similar approach to *Mills*, despite the fact that the s. 276 regime was about admissibility of evidence rather than state-compelled production and thus s. 8 was not engaged (paras. 23-24 and 28).

[121] Accordingly, our analysis of the principles of fundamental justice under s. 7 adopts the balancing process that was applied in *Mills* and *Darrach*. Like s. 11(d), the right to make full answer and defence and the right to a fair trial are considered from the perspectives of the accused, the complainant, the community and the criminal

justice system at large (*O'Connor*, at paras. 193-94, per McLachlin J., as she then was). In this manner, ss. 7 and 11(d) are complementary. As previously mentioned, the framework for analyzing multiple *Charter* breaches is context- and fact-specific. The Court recently demonstrated the highly context-specific nature of this assessment in *R. v. Brown*, 2022 SCC 18, at para. 70. In these appeals, the correct approach to “balancing” under s. 7 is similar to *Mills* and *Darrach*, due to the nature of the alleged *Charter* infringements and the highly invasive privacy consequences for complainants that follow directly from their participation in a trial for a sexual offence in open court.

[122] This approach is not contrary to this Court’s jurisprudence in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, and *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, which indicate that “competing moral claims and broad societal benefits are more appropriately considered at the stage of justification under s. 1” rather than under s. 7 (*Carter*, at para. 79). Here, we are not balancing “competing moral claims” but rather assessing the fairness of trial procedures. Nothing in those decisions prohibits the “full appreciation of [the relevant] principles of fundamental justice as they operate within a particular context” (*Mills*, at para. 63).

(3) Key Principles of Section 11(d) of the *Charter*

[123] Section 11(d) states that any person charged with an offence has the right “to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”. The principles of trial fairness and

the accused's right to make a full answer and defence are expressions of procedural principles of fundamental justice under s. 7, and are also embodied in s. 11(d) (*R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 15; *Mills*, at para. 69).

[124] The key principles of s. 11(d) that apply in the present case are as follows: (1) an individual must be proven guilty beyond a reasonable doubt; (2) the state must bear the burden of proof; and (3) criminal prosecutions must be carried out in accordance with due process (*R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 121).

[125] Section 11(d) does not guarantee “the most favourable procedures imaginable” for the accused, nor is it automatically breached whenever relevant evidence is excluded (*Goldfinch*, at para. 30; *Quesnelle*, at para. 64). As this Court affirmed in *Darrach*, an accused is not “entitled to have procedures crafted that take only [their] interests into account. Still less [are they] entitled to procedures that would distort the truth-seeking function of a trial by permitting irrelevant and prejudicial material at trial” (para. 24). Nor is the broad principle of trial fairness assessed solely from the accused's perspective. Crucially, as this Court stated in *Mills*, fairness is also assessed from the point of view of the complainant and community (para. 72, citing *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155, at p. 198). We now turn to consider the constitutionality of each of the impugned provisions.

(4) Section 278.92 — Threshold for Admissibility

[126] As a preliminary point, we emphasize that the record screening regime clearly does not render essential evidence inadmissible, such as prior inconsistent statements for the purpose of credibility or reliability assessments. Where the balance tips in favour of admitting the evidence because of its significance to the defence, it will be admitted for that purpose. By the same token, the record screening regime prohibits the accused from using the evidence for impermissible, myth-based purposes — just like the s. 276 regime. This is not a novel proposition. Indeed, no evidence can be admitted unless it meets the relevance and materiality thresholds for admissibility (*Seaboyer*, at p. 609; *Goldfinch*, at para. 30).

(a) *Section 278.92 Does Not Impair Fair Trial Rights*

[127] Section 278.92(2)(b) establishes that private records are only admissible if “the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice”. Similarly, this admissibility threshold is one of the conditions for s. 276 evidence, codified in s. 276(2)(d) (as directed now by s. 278.92(2)(a)) and constitutionally upheld in *Darrach*.

[128] The respondents J.J. and Mr. Reddick argue that the admissibility threshold for private records violates the accused’s right to a fair trial because it impairs their

right to make full answer and defence. Specifically, the concern is that the accused will be prevented from adducing relevant and probative evidence in their defence.

[129] The record screening regime embodies the fundamental principle governing the law of evidence: “. . . relevant evidence should be admitted, and irrelevant evidence excluded, subject to the qualification that the value of the evidence must outweigh its potential prejudice to the conduct of a fair trial” (*Seaboyer*, at p. 631). An accused’s right to a fair trial does not include the unqualified right to have all evidence in support of their defence admitted. Many exclusionary rules exist in Canadian criminal law to prevent the Crown or defence from distorting the truth-seeking function of the trial process, which is an integral component of trial fairness (*Mills*, at para. 74).

[130] Moreover, when assessing the prejudicial effect, or the “costs”, of admitting potential evidence, trial judges should consider its effect on all aspects of trial fairness, including “the practicalities of its presentation, the fairness to the parties and to witnesses, and the potentially distorting effect the evidence can have on the outcome of the case” (D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 47 (emphasis added)). In the present context, trial judges must consider the “prejudicial effect” of admitting a record as evidence at trial, which includes the effect on complainants whose private information is implicated.

[131] In *Darrach*, at para. 39, this Court found that the phrase “significant probative value” in the s. 276 context simply requires that the evidence not “be so trifling as to be incapable, in the context of all the evidence, of raising a reasonable

doubt”. The Court used language that specified that its analysis on the threshold was specific to s. 276, noting: “In light of the purposes of s. 276, the use of the word ‘significant’ is consistent with both the majority and the minority reasons in *Seaboyer*” (para. 41 (emphasis added)). However, at para. 26, *Darrach* recognized the analogous legislative purposes behind the s. 276 regime and the third party production regime, which relies on s. 278.1:

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

The similarity between the use of s. 276 and s. 278.1 evidence recognized in *Darrach* supports our view that the admissibility threshold in s. 278.92(2)(b) is constitutional.

[132] An important similarity between s. 276 evidence and private records is that they both seek to protect complainants against harmful myths and stereotypes. Specifically, a key purpose of s. 276 is to prevent the accused from adducing evidence that engages the “twin myths” about sexual offence complainants: that complainants are more likely to have consented or are less worthy of belief by reason of past sexual activity that they engaged in (*Darrach*, at para. 32). While the enumerated records in s. 278.1 do not necessarily engage the twin myths, which relate specifically to prior sexual activity, this Court has recognized that many other problematic myths and stereotypes may be at play — e.g., individuals who consult with mental health professionals are not credible and reliable; failure to immediately report a sexual

offence means that it did not occur; drug and alcohol use demonstrates bad character; a “real victim” will avoid all contact with the perpetrator after the fact (*Mills*, at para. 119; see also *R. v. Lavallee*, [1990] 1 S.C.R. 852, at pp. 871-72; *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at p. 134). Our colleague Brown J.’s dissenting reasons focus only on the “twin myths” implicated specifically by s. 276 evidence; they fail to meaningfully recognize the risks posed by other myths, including those listed above.

[133] In sum, the right to make full answer and defence will only be violated if the accused is prevented from adducing relevant and material evidence, the probative value of which is not outweighed by its prejudicial effect. Section 278.92 does no such thing. With respect to private record applications, the admissibility threshold in s. 278.92(2)(b) and the factors in s. 278.92(3) require the judge to weigh the potential prejudice arising from the proposed evidence, including whether it is myth-based or unjustifiably intrusive on a complainant’s privacy, against the extent of its probative value. It follows, in our view, that the admissibility threshold in s. 278.92(2) does not breach ss. 7 or 11(d) of the *Charter*.

(b) *Section 278.92 Procedure Is Not Overbroad*

[134] The respondent J.J. argues that s. 278.92 violates the accused’s rights under s. 7 of the *Charter* because it is overbroad. Specifically, he says that the record screening regime forces the accused to disclose a wide range of records to the Crown and the complainant, going beyond what is necessary to accomplish Parliament’s objectives. Furthermore, in Mr. Reddick’s case, the application judge concluded that

s. 278.92 was overbroad because it subjected all “records” under s. 278.1 to the record screening regime, even if the records would not perpetuate myths and stereotypes about sexual offence complainants (paras. 43-49 and 77).

[135] To be clear, the constitutionality of the definition of “record” set out in s. 278.1 is not in issue. The concern is the *application* of the definition in the context of the record screening regime in s. 278.92 — specifically, with respect to the resulting impacts on self-incrimination and cross-examination.

[136] It is a principle of fundamental justice that a law cannot be overbroad. A law is overbroad when it is “so broad in scope that it includes *some* conduct that bears no relation to its purpose” (*Bedford*, at para. 112 (emphasis in original)). For an impugned provision to be overbroad, there must be “no rational connection between the purposes of the law and *some*, but not all, of its impacts” (*Bedford*, at para. 112 (emphasis in original)).

[137] Overbreadth must be understood relative to the legislative purpose, which can be discerned from three factors: (1) statements of purpose in the legislation; (2) the text, context and scheme of the legislation; and (3) extrinsic evidence, such as legislative history and evolution (*R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at para. 31, citing *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485, at para. 31). The “appropriateness” of the legislative purpose has no place in this inquiry, and this Court must start from the presumption that the legislation is appropriate and lawful (*Safarzadeh-Markhali*, at para. 29, citing *Moriarity*, at para. 30).

[138] We have already discussed these factors in extensive detail above, so we will not duplicate the analysis here. However, we note that the relevant factors for discerning the purpose of the provisions are the following. First, the legislative history demonstrates that the record screening regime was intended to fill a legislative gap to ensure statutory protection of complainants' privacy and dignity, where the accused is in possession or control of their highly private records. Second, the legislative text and scheme — including the specification of “personal information for which there is a reasonable expectation of privacy” and the factors set out in s. 278.92(3) — provides further guidance on the relevant objectives.

[139] Taking these factors into account, we conclude that Parliament enacted this regime with a view to (1) protecting the dignity, equality, and privacy interests of complainants; (2) recognizing the prevalence of sexual violence in order to promote society's interest in encouraging victims of sexual offences to come forward and seek treatment; and (3) promoting the truth-seeking function of trials, including by screening out prejudicial myths and stereotypes. Section 278.92 is not overbroad relative to this legislative purpose because it does not go further than is reasonably necessary to achieve these three goals (*Safarzadeh-Markhali*, at para. 50).

[140] The definition of “record” will only capture materials that come within the enumerated categories, or that otherwise contain information of an intimate and highly personal nature that is integral to the complainant's overall physical, psychological, or emotional well-being. Screening records that meet this definition is rationally

connected to Parliament’s objective of protecting the privacy and dignity interests of complainants. This narrow definition does not include evidence that does not have implications for complainants’ dignity — for example, communications containing scheduling matters.

[141] Of course, there will be cases where it is unclear whether evidence falls into the definition of “record”. But this, alone, does not render the regime overbroad. It is important to emphasize that just because a record is subject to screening does not mean it will be excluded at trial. Records that meet the admissibility threshold can be adduced at trial. Further, requiring an accused to bring an application to adduce materials that might contain information of an intimate and highly personal nature is consistent with the objective of the regime, since it respects both the accused’s fair trial rights and the complainant’s privacy and equality interests.

[142] Protecting complainants’ privacy rights in such circumstances requires a preventative approach, that is, an approach that guards complainants’ reasonable expectation of privacy at the point of admission. As this Court observed in *O’Connor*, once privacy is invaded, “it can seldom be regained” (para. 119). It is necessary to determine the nature and gravity of what is at stake before it is adduced at trial. The requirement on accused persons to disclose these records in advance — even where it is unclear to what extent the evidence would have a bearing on complainants’ dignity — is still rationally connected to the overarching objective of the regime.

[143] While it is possible that not every record tendered in practice will fall neatly within this definition, Parliament was alive to this concern and enacted several procedural safeguards to ensure that any resulting impact was not divorced from the law's broader objective. These include, as discussed above, judges' discretionary ability to limit the disclosure of applications to complainants before hearings, as well as the ability to hold mid-trial applications where necessary in the interests of justice. Where there is ambiguity regarding the application of the record screening regime, these discretionary aspects of the procedure ensure that any impact on the accused's rights is consistent with Parliament's objective.

(5) Section 278.93 — Stage One Application to Hold Hearing

(a) *General Principles: The Right to Silence and the Principle Against Self-Incrimination*

[144] The principle against self-incrimination imposes limits on the extent to which an accused can be used as a source of information about his or her own criminal conduct (*R. v. S.A.B.*, 2003 SCC 60, [2003] 2 S.C.R. 678, at para. 33). The right to silence is closely entwined with the principle against self-incrimination (*R. v. White*, [1999] 2 S.C.R. 417, at para. 44). As this Court explained in *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 2, the right to “stand silent before the accusations of the state” is “intimately linked to our adversarial system of criminal justice and the presumption of innocence”. Both preserve the “basic tenet of justice” that the Crown

must establish a case to meet before the accused is expected to respond (*R. v. P. (M.B.)*, [1994] 1 S.C.R. 555, at p. 579).

[145] The principle against self-incrimination is manifested in several specific constitutional and common law rules that apply both before and during trial. Before trial, the law protects an accused from being conscripted into assisting their own prosecution. It does so through the confessions rule, the right to remain silent when questioned by state agents, and the absence of a general duty to disclose (*P. (M.B.)*, at p. 578; *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405, at para. 21). During the conduct of a trial, the principle against self-incrimination is reflected in (1) the s. 11(c) prohibition against testimonial compulsion; (2) the s. 11(d) presumption of innocence and the burden on the Crown to prove its case beyond a reasonable doubt; and (3) the s. 13 protection against self-incrimination in other proceedings.

[146] Residual protection against self-incrimination is also provided under s. 7 of the *Charter* (*P. (M.B.)*, at p. 577). The residual s. 7 protection, however, is context-dependent and does not provide “absolute protection” against “all uses of information that has been compelled by statute or otherwise” (*White*, at para. 45); nor should one “automatically accept that s. 7 comprises a broad right against self-incrimination on an abstract level” (*Thomson Newspapers*, at p. 538).

[147] Together, these rights inform the underlying principle “that it is up to the state, with its greater resources, to investigate and prove its own case, and that the

individual should not be conscripted into helping the state fulfil this task” (*P. (M.B.)*, at p. 579).

[148] The parties and interveners in this case have raised the specific issues of testimonial compulsion and “defence disclosure” in support of their contention that the record screening regime violates the principle against self-incrimination. We would not give effect to these arguments for the following reasons.

(b) *No Self-Incrimination Under Section 11(c) Due to Testimonial Compulsion*

[149] We first turn to s. 11(c) of the *Charter*, which guarantees that “[a]ny person charged with an offence has the right . . . not to be compelled to be a witness in proceedings against that person in respect of the offence”. This right is limited to testimonial compulsion and applies only where a person is (1) compelled to be a witness (2) in proceedings against that person (3) in respect of the offence (*Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737, at para. 68). It does not apply to protect against the disclosure of physical evidence (*R. v. Beare*, [1988] 2 S.C.R. 387), including documentary evidence that is not created due to state compulsion (*R. v. Anderson* (2002), 57 O.R. (3d) 671 (C.A.), at paras. 17-18).

[150] The record screening regime places no burden on the accused to submit an affidavit and undergo cross-examination. If an affidavit is submitted in support of the application, “[i]t need not be the accused [themselves] who presents evidence; it can be anyone with relevant information who can personally testify to its truth” (*Darrach*,

at para. 53). Nor does it require the accused to testify. The accused is simply not compelled to be a witness within the meaning of s. 11(c) by the operation of ss. 278.92 to 278.94.

(c) *No Defence Disclosure Undermining Right to a Fair Trial*

[151] Continuing on to ss. 7 and 11(d), the record screening regime does not require compelled “defence disclosure” in a manner that would violate an accused’s right to a fair trial.

[152] Section 278.93 requires that an accused bring an application setting out detailed particulars of the evidence they seek to adduce and its relevance to the case. The respondent J.J. submits that this, in effect, compels the defence to disclose evidence and reveal its strategy. He submits that this runs afoul of the principle that an accused has no disclosure obligations. This principle, in J.J.’s view, flows from the related principles of the right to silence, the presumption of innocence, and the right against self-incrimination. The respondent J.J. and the intervener the Criminal Trial Lawyers’ Association (“CTLA”) both submit that the record screening regime violates the principle against defence disclosure, therefore forcing defendants to self-incriminate. We would not give effect to this argument.

[153] To be clear, this concern is separate from the argument about full answer and defence, in which the predominant concern is that disclosure of evidence to a *complainant* will impede effective cross-examination. Here, the argument is that it is

inappropriate to require the defence to disclose its case to the *Crown*, regardless of any subsequent disclosure to witnesses.

(i) The Right to Silence Does Not Entail an Absolute Rule Against “Defence Disclosure”

[154] There is no absolute rule against requiring the defence to disclose evidence to the Crown before the prosecution closes its case.

[155] The respondent J.J. and the intervener CTLA cite Cory J.’s comment in *R. v. Chambers*, [1990] 2 S.C.R. 1293, that “[a]s a general rule 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” (p. 1319). They also rely on this Court’s comment in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, that “the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution” (p. 333).

[156] We do not agree that these statements, read in their proper context, establish a general rule against defence disclosure. In *Chambers*, the Court held that an accused is entitled to remain silent in the face of questioning by police officers, and that it is inappropriate for the Crown to ask the trier of fact to draw an adverse inference against an accused who exercises this right. This does not support J.J. and CTLA’s position that there is a general rule against “defence disclosure”. Understood properly, it means that *where there is no disclosure required*, the trier of fact cannot draw an

adverse inference from the defence choosing not to disclose. It does not stand for the proposition that the defence can never be required to disclose its theory or the evidence in support of it before the Crown has closed its case.

[157] Furthermore, *Stinchcombe* did not close the door on the possibility of defence disclosure. The Court commented that a duty on the defence to disclose evidence — reciprocal to the duty of the Crown — “may deserve consideration by this Court in the future” (p. 333). The Court clearly did not contemplate the absolute rule against defence disclosure which J.J. and CTLA espouse.

[158] There are many examples in the criminal trial process where the defence is required to disclose aspects of its defence theory and evidence in support of it. For example, if the defence wishes to adduce evidence of an alibi, it must provide advance disclosure to the Crown in “a timely way”, and the disclosure must be “sufficiently particular to enable the authorities to meaningfully investigate” (*R. v. Tomlinson*, 2014 ONCA 158, 307 C.C.C. (3d) 36, at para. 121). Where the defence fails to provide timely and sufficient notice (which will typically be before trial), the trier of fact “may draw an adverse inference” when assessing the worth of the alibi (*Tomlinson*, at para. 122).

[159] In addition, if an accused wants to lead evidence of a deceased victim’s propensity for violence, they must bring a *Scopelliti* application. A screening procedure for this type of evidence is permitted because it “is likely to arouse feelings of hostility against the [victim]” (*R. v. Scopelliti* (1981), 34 O.R. (2d) 524 (C.A.), at pp. 538-39).

As such, “there must inevitably be some element of discretion in the determination whether the proffered evidence has sufficient probative value for the purpose for which it is tendered to justify its admission” (*Scopelliti*, at p. 539).

[160] Finally, evidence of complainants’ prior sexual history must be screened before it can be admitted under s. 276. Parliament required this process because such evidence may mislead the trier of fact by invoking discredited myths about the credibility of sexual offence complainants, thus distorting the truth-seeking function of the trial (see *Darrach*, at paras. 21, 32, 35 and 42). All three of these screening mechanisms are permitted because of the *potential* prejudice that could result from the admission of the evidence.

[161] The respondent J.J. contends that the record screening regime applies to a broader range of evidence than the examples discussed above. Further, he argues that the logic underlying the record screening regime could apply to *all* defence evidence, which could mean the defence may be required to disclose its entire case.

[162] We do not accept this “slippery slope” argument. The record screening regime does not apply to all defence evidence; it is specifically tied to the legislative purpose of protecting complainants’ highly private records in sexual offence trials. Like the former s. 276 regime, s. 278.92 screening in the context of private record applications applies to a narrow set of evidence that implicates important interests of complainants in sexual offence cases and has the potential to create serious prejudice. Private records are analogous to s. 276 evidence, as they can also implicate myths that

are insidious and inimical to the truth-seeking function of the trial (*Darrach*, at paras. 26 and 28). Like s. 276 evidence, private records encroach on the privacy and dignity of complainants. They too require screening to ensure trial fairness under ss. 7 and 11(d) of the *Charter*.

[163] In sum, to encourage the reporting of sexual offences and promote the truth-seeking function of a trial, the record screening regime is designed to catch records which both implicate complainants' privacy and dignity in sexual offence cases and which have the potential to engage truth-distorting myths. Interpreted properly, the class of records subject to screening is tailored to Parliament's objective, and the logic underlying the record screening regime does not apply more broadly to other types of defence evidence. It is permissible to require screening of this evidence because of the potential prejudice that could result from its admission.

(ii) The *P. (M.B.)* Concern About Crown Advantage Does Not Apply

[164] The respondent J.J. and the intervener CTLA have also raised a related concern that, under the record screening regime, the Crown is given notice of the defence theory and the evidence in support of it, which the Crown can then use to improve its case in advance of trial. In this way, the accused is conscripted into assisting in their own prosecution. To support this argument, J.J. and CTLA rely on *P. (M.B.)*, in which this Court discussed the dangers of allowing the Crown to reopen its case after an accused has embarked on their defence.

[165] In *P. (M.B.)*, the Court held that “the Crown should not, as a general rule, be permitted to reopen [its case] once the defence has started to answer the Crown’s case” (p. 580). The rationale for this general rule is as follows:

What is so objectionable about allowing the Crown’s case to be reopened after the defence has started to meet that case is that it jeopardizes, indirectly, the principle that an accused not be conscripted against him- or herself. . . . [T]here is a real risk that the Crown will, based on what it has heard from the defence once it is compelled to “meet the case” against it, seek to fill in gaps or correct mistakes in the case which it had on closing and to which the defence has started to respond. [Emphasis in original; pp. 579-80.]

The respondent J.J. and the intervener CTLA submit that the record screening regime raises similar concerns to those identified in *P. (M.B.)*. Specifically, the regime requires the defence to disclose some evidence, which the Crown can use to “fill in gaps or correct mistakes” in its case. This, they say, constitutes self-incrimination as contemplated in *P. (M.B.)*.

[166] In our view, J.J. and CTLA have taken *P. (M.B.)* out of context. The Court in that case discussed the specific concerns arising from the Crown reopening its case after the defence had started to give evidence at trial. At that point, the Crown is not permitted to correct its own error or omission — “enough is enough” (*P. (M.B.)*, at p. 580). Once the Crown has closed its case, it generally cannot move the goalposts after the accused has embarked on their defence (see *R. v. G. (S.G.)*, [1997] 2 S.C.R. 716, at para. 38). As such, the trial judge’s discretion to allow the Crown to reopen its case is very much constrained.

[167] The “ambit” of that discretion also falls on a scale: it “becomes narrower as the trial proceeds because of the increasing likelihood of prejudice to the accused’s defence as the trial progresses” (*G. (S.G.)*, at para. 30). The trial judge has broad discretion before the Crown has closed its case; more limited discretion after the Crown has closed but before the defence has elected whether or not to call evidence; and extremely narrow discretion once the defence has already begun to answer the Crown’s case (*G. (S.G.)*, at para. 30).

[168] These concerns from *P. (M.B.)* and *G. (S.G.)* do not arise in the context of private record applications. The record screening process generally takes place before trial, well before the Crown has begun — let alone finished — making its case. Following the logic of *G. (S.G.)*, at this juncture, the likelihood of prejudice to the accused is at the lower end of the scale. We considered these authorities bearing in mind the context in which they were decided — i.e. the Crown was reopening its case — instead of considering them to be abstract and undefined statements of principle relating to the pre-trial screening of evidence.

[169] While an application must disclose the evidence at issue and its relevance to the case, this is not tantamount to revealing the entire defence theory in response to which the Crown could, hypothetically, tailor its prosecution. The application process is limited to the admissibility of the highly private records sought to be adduced. The guilt or innocence of the accused is not at issue in the record screening regime; the proceedings relate solely to the admissibility of a particular class of evidence sought to

be adduced by the accused. The risk of the Crown co-opting this evidence to strengthen its case is accordingly limited. As such, the defence cannot be said to be assisting the Crown's prosecution.

[170] In conclusion, we are satisfied that s. 278.93 is constitutional under ss. 7 and 11(d) of the *Charter*. First, the accused is not compelled to testify and, therefore, s. 11(c) of the *Charter* is not engaged. Second, there is no absolute rule against defence disclosure. The screening of private records is appropriate because the evidence has a high potential for prejudice; it does not constitute a disguised form of self-incrimination.

(6) Section 278.94 — Stage Two Hearing Procedure

[171] Section 278.94 governs the procedure for the Stage Two hearing. The regime provides for complainant participation in s. 278.94(2) and (3). Section 278.94(2) permits complainants to appear and make submissions, and s. 278.94(3) stipulates that judges must, as soon as feasible, inform complainants who participate in the hearing of their right to be represented by counsel.

[172] The respondent Mr. Reddick submits that these provisions violate the accused's fair trial rights protected by ss. 7 and 11(d) of the *Charter*. In particular, he argues that (1) accused persons will be deprived of relevant information regarding complainants' initial reaction to the proposed evidence, thereby violating their right to make full answer and defence; (2) prosecutorial independence will be jeopardized by

adding an additional adversary against the accused; and (3) complainants will tailor their evidence at trial in response to the application. For the reasons that follow, we would not give effect to these submissions.

(a) *No Deprivation of Relevant Evidence*

[173] As discussed above, if the judge determines that a Stage Two hearing is required, complainants must be informed of the relevant information in the application to enable their meaningful participation. Mr. Reddick argues that complainants' receipt of this information through counsel will deprive the defence of relevant Crown disclosure. The argument assumes that the complainant will be provided with information about the contents of the application in the absence of the Crown (i.e. the defence will send the application to the complainant's counsel directly). Therefore, the accused will be deprived of Crown disclosure about the complainant's "initial reaction" to the application, including their emotional responses.

[174] There is no statutory support for the assumption that the application will be sent directly to complainants without the involvement of the Crown. The legislation is silent about complainants' entitlement to receive the application. Consistent with the former practice under s. 276, the Crown is responsible for consulting complainants regarding the application. Therefore, there is no change from the s. 276 regime. Accused persons have not "lost" any Crown disclosure to which they were originally entitled. Moreover, complainants have always had the ability to consult counsel regarding s. 276 evidence applications.

[175] In any event, Mr. Reddick has not given any reason to believe that “initial reaction” evidence of complainants’ emotional state is inherently valuable, outside of myth-based reasoning that relies on the stereotype that there is only one “appropriate reaction” to the disclosure of private information. Of course, if any new relevant information arises during the Crown’s consultation with a complainant, then it has a duty to disclose this information to the accused. The provisions granting participatory rights to complainants have not in any way altered the Crown’s *Stinchcombe* obligations.

(b) *No Impact on Prosecutorial Independence*

[176] Mr. Reddick argues that a complainant’s participation in the Stage Two hearing violates the right to a fair trial because it disrupts the general structure of a criminal trial as a bipartite proceeding between the Crown and the accused. Mr. Reddick also argues that the participation of complainants and their counsel interferes with prosecutorial independence. We disagree.

[177] Complainant’s participation is justified because they have a direct interest in whether their records, for which they have a reasonable expectation of privacy, are adduced in open court. In *A. (L.L.)*, L’Heureux-Dubé J. (writing for the majority on this point) found that a sexual assault complainant had standing to appeal a decision regarding the production to the accused of her private records in the hands of a third party (either through *certiorari* with respect to provincial court orders or through s. 40 of the *Supreme Court Act* for superior court orders, both of which were discussed above

in paras. 111-12). She found that complainants had a “direct and necessary interest in making representations” and would be “directly affected by a decision regarding the production of [their] private records” (para. 28). That reasoning applies equally in this context and underlies complainants’ standing to participate in the admissibility hearing.

[178] This limited standing on the issue of admissibility, however, does not turn complainants or their counsel into parties, much less quasi-prosecutors, usurping the role of the Crown. Participation by complainants does not change the bipartite nature of the criminal trial. There is no issue of a complainant acting as a “second prosecutor” on the ultimate issue of guilt where, as here, the complainant has no participatory rights in the trial itself. As this Court noted at para. 66 of *Darrach*, the purpose of an evidentiary *voir dire* is not to determine the guilt or innocence of the accused. Instead, the complainant is bringing their unique perspective on the impact that the admission of the evidence will have on their privacy and dignity, which is directly relevant to the issue of admissibility. The presiding judge remains the final arbiter on admissibility and is entitled to accept or reject the complainant’s submissions and weigh them against the competing considerations.

[179] An important justification for complainants’ participation is that they have a unique perspective on the nature of the privacy interest at stake in their own records. Far from becoming a “second prosecutor”, a complainant’s contributions are valuable exactly because they are different from the Crown’s. This may also strengthen the appearance of prosecutorial independence because the Crown no longer bears the

burden of representing or conveying to the judge the complainant's perspective on whether the records should be admitted. This is especially significant where the complainant and Crown differ on the issue of admissibility.

[180] There are other situations in which third parties are permitted to participate in criminal trials where they have interests at stake. For example, victims providing victim impact statements at sentencing hearings or media participants making submissions regarding publication bans both have participatory rights in the courtroom. These participatory rights do not distort the bipartite nature of the criminal proceeding.

(c) *No Violation of the Right to Cross-Examine*

[181] As explained above, complainants will receive information about the application from the Crown in order to facilitate their participation in the hearing. Given that most applications should be made before trial, complainants will generally receive this information before they testify. Section 278.94 also confers participation rights at the Stage Two hearing, which allows complainants to hear the defence's oral arguments regarding relevance and probative value of the evidence (unless the judge decides that some exclusion is necessary to protect trial fairness).

[182] Both J.J. and Mr. Reddick submit that a complainant's knowledge of the evidence in the application, as well as the defence theory as to why it is relevant, will impair the defence's right to cross-examine without significant and unwarranted restraint. They submit that by participating in the Stage Two hearing, complainants will

be able to tailor their responses in cross-examination at trial to explain away discrepancies and diminish the impact of the defence's line of questioning. Since credibility and reliability will often be central to the trial of a sexual offence, complainant participation violates the accused's right to make full answer and defence. We disagree with this submission for several reasons.

[183] First, the right to cross-examine is not unlimited. The accused is not entitled to proceed with an unfair or irrelevant cross-examination only because they consider it to be their most effective strategy. This is both unfair to complainants and contrary to the interests of justice. In *Osolin*, L'Heureux-Dubé J., dissenting, but not on this point, noted that "[t]he rights of the accused to both adduce evidence and cross-examine are not unlimited but must be first, circumscribed by the question of relevance and second, balanced by countervailing factors such as the privacy interests of the witness and the prejudice to both the witness and the trial process" (pp. 631-32). In this case, ambushing complainants with their own highly private records at trial can be unfair to complainants and may be contrary to the search for truth.

[184] Ultimately, the right to a fair trial does not guarantee "the most advantageous trial possible from the accused's perspective" nor does it guarantee "perfect justice" (*R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 28; see also *O'Connor*, at para. 193). Rather, the guarantee is fundamentally fair justice, which requires consideration of the privacy interests of others involved in the justice system (*O'Connor*, at paras. 193-94, per McLachlin J.). Even if it would be ideal from the

accused's perspective to cross-examine complainants on "every scintilla" of information in an attempt to discredit or shake them, the *Charter* guarantees no such right (*O'Connor*, at paras. 193-94). In the present case, the impugned provisions strike a balance that protects fundamental justice for accused persons and complainants.

[185] Second, it is incorrect to assume that advanced disclosure prevents effective cross-examination or impairs the search for truth. Accused persons receive extensive disclosure from the Crown, yet there is no assumption that their testimony is less reliable or credible as a result. Indeed, this Court in *Stinchcombe* soundly rejected this suggestion:

Refusal to disclose is also justified on the ground that the material will be used to enable the defence to tailor its evidence to conform with information in the Crown's possession. For example, a witness may change his or her testimony to conform with a previous statement given to the police or counsel for the Crown. I am not impressed with this submission. All forms of discovery are subject to this criticism. There is surely nothing wrong in a witness refreshing his or her memory from a previous statement or document. The witness may even change his or her evidence as a result. This may rob the cross-examiner of a substantial advantage but fairness to the witness may require that a trap not be laid by allowing the witness to testify without the benefit of seeing contradictory writings which the prosecutor holds close to the vest. The principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all relevant material. [Emphasis added; p. 335.]

Therefore, contrary to the submission of J.J. and Mr. Reddick, there is no absolute principle that disclosure of defence materials inevitably impairs cross-examination and trial fairness.

[186] In civil proceedings, both parties participate in extensive pre-trial discovery and disclosure of documents and witnesses, without raising the issue of “witness tainting”. Although surprise was historically a “weapo[n] in the arsenal” of adversarial trials in general, its decline has resulted from the acceptance of the principle that “justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met” (*Stinchcombe*, at p. 332). This Court applied that principle in *Darrach*, holding that “[t]he right to make full answer and defence does not include the right to defend by ambush” (para. 55). Similarly, in the third party production regime, complainants receive a copy of the production application and have the ability to participate in the hearing concerning the likely relevance of that evidence in advance of cross-examination.

[187] “Witness tainting” is not a concern that precludes effective cross-examination with respect to Crown disclosure in criminal trials or civil proceedings. For the same reasons, complainant participation in a Stage Two hearing does not create a risk of “witness tainting” that impermissibly impairs the search for truth or the effectiveness of cross-examination. Providing advance notice to complainants that they may be confronted with highly private information in open court is likely to enhance their ability to participate honestly in cross-examination. Specifically, they are likely to be better equipped to respond rather than being blindsided with the use of their private records. In addition, the requirement that an application be disclosed in advance of trial ensures that sexual offence complainants

are informed about the implications of participating in the trial process (Craig, at pp. 808-9; *R. v. M.S.*, 2019 ONCJ 670, at para. 92 (CanLII)). This in turn promotes just and fair trials.

[188] Third, the accused will still be able to test a complainant's evidence by comparing it to prior statements made to the police. These statements are available to the defence under the Crown's *Stinchcombe* obligations. If the complainant's evidence has changed significantly between the police statement and the trial, this will be readily apparent to the trier of fact, and the accused will be able to cross-examine on that basis (whether or not the police statement was made under oath) (see Craig). Triers of fact can assess whether they believe the complainant and adjust the weight they give to the complainant's evidence.

[189] Fourth, complainants can be cross-examined on their access to the private record application. The accused can impugn the credibility and reliability of the complainant by suggesting that they tailored their evidence to fit what they learned in the application. To the extent that our colleague Brown J. suggests that ss. 645(5) and 648 of the *Criminal Code* render such cross-examination impermissible, we disagree.

[190] Finally, s. 278.93(4) provides judges with the discretion to hear applications at a shorter interval than seven days before the hearing if it is in the "interests of justice". Trial judges also have the discretion to hear an application mid-trial in the interests of justice. The respondents J.J. and Mr. Reddick are concerned about "witness tainting" because complainants generally receive the application and

participate in the Stage Two admissibility hearing before they take the stand at trial. However, if there is a situation where advanced disclosure of the application to a complainant would genuinely negate the efficacy of cross-examination, the accused may choose to bring the application during cross-examination to avoid the risk of “witness tainting”. The trial judge is then responsible for determining whether it is in the interests of justice to allow such an application. In doing so, trial judges should be mindful of the trial delay risks that will arise due to the bifurcation of trial. To be clear, mid-trial applications should not be the norm.

(7) Final Conclusions Regarding Constitutionality

[191] In the absence of a finding that ss. 278.92 to 278.94 of the *Criminal Code* breach either ss. 7 or 11(d) of the *Charter*, it is unnecessary for us to canvass s. 1 of the *Charter*. And as discussed earlier, there are no s. 11(c) issues at play.

V. Disposition

[192] Sections 278.92 to 278.94 of the *Criminal Code* are constitutional in their entirety, as they apply to both s. 276 evidence applications and private record applications.

[193] Accordingly, we would allow the Crown’s appeal and dismiss J.J.’s cross-appeal; we would also allow A.S.’s appeal. The application judges’ constitutional rulings in both matters are hereby quashed.

## VI. Costs

[194] In J.J.'s case, there will be no order as to costs, whether with respect to the Crown's appeal or to J.J.'s cross-appeal, as this is a criminal matter without exceptional circumstances.

[195] In the other appeal, A.S. brought a motion to appoint counsel pursuant to s. 694.1 of the *Criminal Code*. Section 694.1 does not contemplate appointments of counsel for parties other than accused individuals and, accordingly, A.S.'s motion must be denied.

[196] However, A.S. provided an important perspective before this Court on behalf of complainants on a novel constitutional question at her own expense. Pursuant to this Court's costs jurisdiction under s. 47 of the *Supreme Court Act*, we exercise our discretion in these exceptional circumstances to order the Attorney General of Ontario to pay A.S.'s costs before this Court. As such, A.S.'s appeal is allowed with costs to A.S. in this Court, in accordance with the tariff of fees and disbursements set out in Schedule B of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

The following are the reasons delivered by

BROWN J. —

## I. Introduction

[197] In *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 625, this Court held that Parliament, in rightly seeking to abolish the “outmoded, sexist-based use” of evidence of a complainant’s prior sexual activity, “oversho[t] the mark” by rendering inadmissible “evidence which may be essential to the presentation of legitimate defences and hence to a fair trial”. In so doing, the Court added, Parliament created “the real risk that an innocent person may be convicted” (p. 625).

[198] These appeals arise from a measure that also imposes precisely that risk. The records screening regime enacted under ss. 278.92 to 278.94 of the *Criminal Code*, R.S.C. 1985, c. C-46, represents an unprecedented and unconstitutional erosion by Parliament of the fair trial rights of the presumptively innocent — who, it should be borne in mind, will sometimes be *actually* innocent. It seriously impedes the ability of such persons to *prove* that innocence, by making presumptively inadmissible all private records relating to the complainant that are in the possession of the accused and which the accused intends to adduce in a sexual offence prosecution. It is the *only* evidentiary rule that mandates pre-trial disclosure of defence evidence and strategy, *before the Crown has made out a case to meet*, and even where the evidence sought to be relied on is *neither irrelevant nor inherently prejudicial*.

[199] In upholding this regime as constitutional, the majority points reassuringly to supposed “similarities” between the records screening regime and two related statutory schemes: s. 276’s provisions restricting admissibility of other sexual activity

evidence — initially struck down in *Seaboyer* but then narrowed by Parliament and upheld in *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443; and ss. 278.1 to 278.91’s framework for production of third-party records — upheld in *R. v. Mills*, [1999] 3 S.C.R. 668. Since the accused’s right to full answer and defence and the rule against defence disclosure are not absolute, the logic goes, Parliament can go even further in departing from them. The majority’s analysis is thus reducible to a simple syllogism: (1) these rights are not absolute and have been limited in similar ways; (2) those limits were judged constitutional; (3) therefore, this new limit is constitutional.

[200] But casting these two schemes as “similar” miscasts both them and our jurisprudence. The majority fails to account for the actual mechanics and effects of the records screening regime. It is broader in its purpose, scope, and impact on the accused’s rights. It goes further than s. 276 and ss. 278.1 to 278.91 by giving the complainant a right to advance notice and to “appear and make submissions”, and applies to a wider range of records, many of which will often be highly relevant and probative. It is not limited to materials that were created in a confidential context or wrongly fell into the accused’s hands, such as a complainant’s psychiatric report. And, crucially, it also captures the *accused’s own digital communications* with the complainant about the *subject matter of the charge* — including, but not limited to, messages in which the complainant denies the offence ever occurred, indicates a motive to fabricate, suggests an inability to remember core events, or provides an inconsistent version of the alleged incident. That is a difference in kind, not in degree.

[201] In short, and in a field which calls for a context-specific analysis, the majority cannot plausibly claim that regimes which are designed to deal with production, or with evidence that is inherently prejudicial, can be applied across the board to deal with admissibility or with evidence that will often be relevant and highly probative. Nor for that matter can the Attorney General of Canada credibly maintain that Parliament struck the right balance where it has crudely jammed procedures from one regime onto another.

[202] Responding to arguments that no one made, the majority emphasizes that the right to cross-examination is “not unlimited” (para. 183) and that no one has a right to a “perfect” trial (para. 184). But this trivializes the concerns about this regime. And it skates around a certain reality of our criminal justice system, being that these rights, while not absolute, are of the most fundamental order and have been departed from only in *particular, constrained circumstances*.

[203] My reasons focus on the constitutional infirmities of this specific legislation. Properly interpreted, the records screening regime limits the accused’s rights under ss. 11(c), 11(d) and 7 of the *Canadian Charter of Rights and Freedoms* in four ways:

1. It forces accused persons to reveal their defence before the Crown has made out a case to meet, contrary to the principle against self-incrimination, the right to silence, and the presumption of innocence. Accused persons must disclose not only their

cross-examination strategy and potential impeachment material, but also *their own prior statements*, even *before the Crown has opened its case*. While the majority's analysis fails to answer whether the accused's communications with the complainant about the subject matter of the charge qualify as "records", as I will explain, they are clearly captured. Accused persons cannot therefore even *refer to the contents* of those communications in their own defence without first bringing an application. Even if the records are ultimately admitted, the accused's rights have been limited.

This alone is fatal to the regime's constitutionality.

2. It restricts the accused's ability to cross-examine Crown witnesses by giving the complainant a role in pre-trial admissibility determinations. The defence must generally disclose its application to the Crown and complainant at least seven days before the admissibility hearing, which risks tainting the complainant's evidence and restricts the accused's ability to impeach the complainant at trial. Cross-examination remains a core component of the right to full answer and defence and the right to a fair trial. In sexual assault cases, it is often the only way

to expose falsehoods, memory issues, and inconsistencies in the complainant's testimony.

3. It makes private records presumptively inadmissible when tendered *by the defence*, but presumptively admissible when tendered *by the Crown*. The prosecution is not bound by the records screening regime and can freely adduce private records in support of a conviction, without pre-trial screening. It is only when the defence wants to use *the same private information* to raise a reasonable doubt that it becomes dangerous. This undermines the purpose of the regime and is contrary to the right to a fair trial.
4. It sets a stricter test for admitting defence evidence than is warranted or constitutionally permissible. The accused must establish, in advance of the complainant's testimony, that the records have *significant* probative value, meaning some relevant and probative evidence will necessarily be excluded. Combined with the broad scope of "record", this limits the presumption of innocence and the right to full answer and defence.

[204] These limits are disproportionate and cannot be demonstrably justified in a free and democratic society. In pursuing a legitimate purpose, Parliament has proceeded in a ham-fisted manner, without regard for fundamental rights of accused persons. The regime is not merely disadvantageous to the defence; it interferes

significantly with the accused's ability to avoid self-incrimination, effectively cross-examine prosecution witnesses, and adduce relevant and probative evidence during a proceeding that will decide their liberty. While the regime may advance Parliament's objective of protecting complainants' privacy, dignity, and equality, it does so only marginally, and at the expense of core fair trial rights.

[205] Parliament has legislated a formula for wrongful convictions. Indeed, it has all but guaranteed them. Like the Court that decided *Seaboyer*, I would not tolerate that inevitability. And like the regime at issue in *Seaboyer*, the records screening regime ought to be returned to Parliament to be narrowed. Parliament could have achieved its objective in a *Charter*-compliant way.

## II. Legislative Background

[206] Two related legislative schemes preceded the records screening regime:

1. The s. 276 regime, enacted in 1992, limits the use of evidence of a complainant's other sexual activity during trials for sexual offences. Prior to the enactment of s. 278.92, s. 276 was the only evidentiary rule that imposed a presumption of inadmissibility exclusively on defence evidence, which it did by categorically prohibiting evidence of a complainant's sexual history when used to support one of two general inferences (*Darrach*, at para. 2). This Court upheld its constitutionality in *Darrach*, explaining that

s. 276 is “designed to exclude irrelevant information and only that relevant information that is more prejudicial to the administration of justice than it is probative” (para. 43).

2. The ss. 278.1 to 278.91 regime, enacted in 1997, regulates the production of third-party records to accused persons in sexual offence proceedings. This Court upheld its constitutionality in *Mills*, concluding that the regime was “carefully tailored to reflect the problem Parliament was addressing” — preserving an accused’s access to private records that may be relevant, while protecting the privacy rights of complainants and witnesses (para. 99).

[207] Following the enactment of those regimes, it became apparent that admissibility of documents in the possession of the accused in which the complainant has a privacy interest raised a “quite different problem” (*R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33, at para. 133). In *R. v. Osolin*, [1993] 4 S.C.R. 595, and *Shearing*, this Court stated a common law process for admissibility of records in the accused’s possession.

[208] In 2012, the Standing Senate Committee on Legal and Constitutional Affairs reviewed the third-party record regime. It recommended that Parliament consider creating “a procedure governing the admissibility and use during trial of a complainant’s private records, as defined in section 278.1 of the *Criminal Code*, which

are not wrongfully in the hands of the accused” (*Statutory Review on the Provisions and Operation of the Act to amend the Criminal Code (production of records in sexual offence proceedings): Final Report*, at p. 20). In response, on December 13, 2018, Parliament enacted the records screening regime.

[209] As I have already noted more generally, the records screening regime makes presumptively inadmissible any record in the accused’s possession relating to the complainant for which there is a reasonable expectation of privacy and which the accused intends to adduce (ss. 278.1 and 278.92(1)). The proposed evidence is inadmissible, *unless* (1) it is admissible under s. 276, where s. 276 applies (s. 278.92(2)(a)); or in any other case, (2) it is “relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice” (s. 278.92(2)(b)). Further, s. 278.92(3) enumerates nine factors that the judge shall consider in determining admissibility, including “any other factor that the judge . . . considers relevant” (s. 278.92(3)(i)).

[210] Under s. 278.93(1), the accused must make an application to determine whether such evidence is admissible under ss. 276(2) or 278.92(2). Section 278.93(2) sets out the form and content of the application. The application “must be made in writing, setting out detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial”. That application must be filed and *given to the Crown* and the clerk of the court “at least seven days previously, or

any shorter interval that the judge . . . may allow in the interests of justice” (s. 278.93(4)). If the judge is satisfied that the application has been properly served and that the evidence is “capable of being admissible”, the judge shall hold a threshold screening hearing to determine whether the evidence is admissible under ss. 276(2) or 278.92(2).

[211] The admissibility hearing is held *in camera* (s. 278.94(1)). The complainant is not compellable at the hearing but *may appear and make submissions* (s. 278.94(2)). The complainant has the right to be represented by counsel (s. 278.94(3)).

### III. Analysis

#### A. *Preliminary Points Regarding the Majority’s Analytical Structure*

[212] I first offer this brief comment on the proper analytical framework to be applied where both ss. 7 and 11(d) of the *Charter* are raised.

[213] I concur with Rowe J.’s reasons. The jurisprudence on s. 7 and its relationship to other sections of the *Charter*, including (as here) s. 11, is doctrinally obscure and methodologically incoherent, being the product of 40 years of accumulated judicial *ad hoc*-ery. The majority’s reasons regrettably extend this trajectory in a particularly regressive manner by using s. 7 not to *protect* the fair trial and due process guarantees under the *Charter*, but to *erode* them. This, in form and effect, makes

Rowe J.'s case that our s. 7 jurisprudence is increasingly "being used as the instrument to imperil [fair trial] protection" (Rowe J.'s reasons, at para. 431). That our law has come to this curious point is, to put it mildly, remarkable and unfortunate.

[214] That said, in order to fully respond to the submissions and the majority's reasons, I apply the framework from *Mills* and *Darrach* that they invoke. The majority dismisses the dissenting reasons out of hand, saying that we disregard the principle of *stare decisis* (para. 14). This is simply incorrect: in finding the regime unconstitutional, I apply the governing framework. More to the point, however, the majority's plea of *stare decisis* is no answer to the extraordinary convolutions in the s. 7 jurisprudence that Rowe J. recounts and which, as I say, the majority's judgment perpetuates.

[215] I also observe, respectfully, that the majority provides no useful guidance for courts that will in future cases have to apply the existing framework. My colleagues describe the "methodology" for assessing multiple alleged *Charter* breaches as "highly context- and fact-specific" and say that it "may depend on the factual record, the nature of the *Charter* rights at play" and "how they intersect" (whatever that means) (para. 115). Similarly, they urge a "full appreciation of the relevant principles of fundamental justice as they operate within a particular context" (para. 122, citing *Mills*, at para. 63). None of this can plausibly be described as a "methodology". It is, rather, quite the opposite, and instead makes the case that the exercise is indeed pure *ad hoc*-ery, and will continue to be so.

[216] Secondly, we heard submissions regarding the framework to be applied where a complainant’s constitutionally protected rights are at stake — that is, whether “balancing” under *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, or “reconciling” under *Mills* and *Darrach* is the appropriate framework. It is not necessary for me to decide this since, in my view, the accused’s rights are not in competition with any other set of rights here. Unlike the evidence under ss. 278.1 to 278.91 considered in *Mills*, the records at issue here are already in the accused’s hands, leaving no s. 8 concern for invasion of privacy by the state to be shown (*Shearing*, at para. 95). And unlike s. 276 evidence considered in *Darrach*, there is nothing categorically prejudicial about the records captured by ss. 278.92 to 278.94, and thus it is not obvious that “the privacy, dignity, and equality interests of complainants” are “at play” (again, whatever that means) (majority reasons, at para. 119). There is therefore nothing to balance, or reconcile. Further, while the majority peremptorily announces that “encouraging the reporting of sexual violence and protecting the security and privacy of witnesses” are principles of fundamental justice (at para. 120), that proposition is simply not borne out on closer inspection. As Rowe J. observes at para. 370 of his reasons, *Seaboyer* did not recognize those goals as principles of fundamental justice and it is unlikely they would meet the current test.

[217] Even if this case did “engage” competing *Charter* rights, *Darrach* and *Mills* would not be determinative of the constitutionality of the records screening regime. By way of background, various Attorneys General say that Parliament

extended the *Criminal Code*'s existing protections simply to fill a "gap" where the defence already possesses private records relating to the complainant. And so the Crown characterizes the records screening regime as "a principled extension of the common law and related codified procedural and evidentiary schemes that have already survived constitutional scrutiny" (A.F. in J.J.'s case, at para. 1). The majority indiscriminately embraces this view, saying the same conclusion should follow here.

[218] I disagree. The records screening regime is unlike the s. 276 and ss. 278.1 to 278.91 regimes. As counsel for J.J. explained, "[i]t raises a different problem, requiring a different solution" (transcript, day 1, at p. 45). Those regimes govern situations where the accused attempts to secure or adduce material that is presumptively irrelevant by nature, and whose production or use is inherently prejudicial to trial fairness. In contrast, the records screening regime governs the use of materials in the accused's possession that are *often relevant, probative, and not inherently prejudicial*. There will, for example, rarely be a risk of prejudice to the trial process (in the sense of misleading the trier of fact) where an accused impeaches the complainant using a text message that the complainant sent to the accused, and which is not relied on for myth-based reasoning.

[219] As to s. 276, this Court has emphasized more than once that it captures a narrow category of evidence, and for good reason. In *Seaboyer*, the Court explained that its purpose was to abolish the old common law rules permitting admission of the complainant's sexual conduct which is of little probative value and calculated to

mislead the jury (p. 604). And in *Darrach*, Gonthier J. repeatedly emphasized that s. 276 aims to exclude only *irrelevant and misleading* evidence (paras. 19, 21, 25, 37, 42, 45 and 58). That justification was definitively expressed in the following passages:

An accused has never had a right to adduce irrelevant evidence. Nor does he have the right to adduce misleading evidence to support illegitimate inferences: “the accused is not permitted to distort the truth-seeking function of the trial process” (*Mills, supra*, at para. 74). Because s. 276(1) is an evidentiary rule that only excludes material that is not relevant, it cannot infringe the accused’s right to make full answer and defence. . . .

...

Prior sexual activity is, like hearsay, character evidence and similar fact evidence, restricted in its admissibility. If the defence seeks to adduce such evidence, it must establish that it supports at least some relevant inference.

...

Evidence of prior sexual activity will rarely be relevant to support a denial that sexual activity took place or to establish consent. [Emphasis added; paras. 37, 46 and 58.]

[220] But none of this is true of records captured by the regime established under ss. 278.92 to 278.94. Before us, the Crown argued that private records are “equally capable of raising the same concerns that animate section 276” including “the potential for myth-based reasoning . . . that extend[s] beyond the twin myths” (transcript, day 1, at p. 11). Counsel did not clarify which myths she was referring to. The majority similarly asserts that private records are “analogous to s. 276 evidence, as they can also implicate myths that are insidious and inimical to the truth-seeking function of the trial” (para. 162). This is another entirely peremptory assertion. There is no basis in the

evidence or jurisprudence for concluding that all material engaging the complainant's privacy interest that is in the accused's possession will distort the truth-seeking function of the trial. Moreover, it is belied by the case law applying the records screening regime to date, which demonstrates that "records" will often be highly relevant, probative, and unrelated to myths and stereotypes. This is all quite apart from the regime's broad application to "records" in the hands of the defence but not in the hands of the Crown, which further highlights the differences between the impugned legislation and the s. 276 regime.

[221] As for ss. 278.1 to 278.91, that regime is concerned with *production* of records from third parties, not the *admissibility* of records already in the accused's possession. The former are highly private and often confidential records that were never intended for the accused's eyes. In *Mills*, the Court explained that the scope of the accused's right to full answer and defence must be determined in light of the competing privacy and equality rights of complainants and witnesses. This exercise is necessarily *context-specific*. Where the accused seeks to rely on information "that will only serve to distort the truth-seeking purpose of a trial", privacy and equality concerns are paramount (para. 94). On the other hand, "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" (para. 94 (emphasis added)). This Court in *Shearing* made clear that the same rationales governing production do not apply to admissibility (paras. 105-7).

[222] I therefore cannot agree that the constitutionality of the records screening regime flows from this Court's statements in *Mills* and *Darrach*. Indeed, it would appear that those statements militate *against* the regime's constitutionality. The records screening regime renders presumptively inadmissible the same types of records that would be produced to the accused under the *Mills* regime as being necessary for full answer and defence at a preliminary stage.

[223] Rather, the analysis turns on the interpretation of the specific provisions, particularly the following phrases:

1. "record";
2. "which the accused intends to adduce";
3. the complainant may "appear and make submissions";
4. "seven days previously, or any shorter interval that the judge . . . may allow in the interests of justice".

[224] I would find that the records screening regime violates both s. 11 and s. 7. For that reason, applying the existing *Charter* framework and responding to the parties' submissions, I proceed to consider the records screening regime element by element rather than duplicating the analysis by considering ss. 11 and 7 breaches separately.

[225] With those structural points in mind, I now turn to consider the constitutionality of the records screening regime by, first, discerning its scope, then showing the four ways in which the regime limits the accused's *Charter* rights.

B. *The Records Screening Regime Limits the Accused's Rights Under Sections 11(c), 11(d) and 7 of the Charter*

(1) Overbreadth

[226] The records screening regime renders presumptively inadmissible a remarkably broad range of records in the hands of the defence, capturing not only records that are sensitive or prejudicial — contrary to the majority's view. Further, it regulates their use in any manner. These conclusions flow, respectively, from the proper interpretation of the terms “record” and “adduce”.

(a) “*Record*”

[227] As I will explain, properly interpreted, the definition of “record” is not limited to records created in a confidential context — such as therapeutic or medical records. Nor is it limited to materials containing “information of an intimate or highly personal nature that is integral to the complainant's overall physical, psychological or emotional well-being” (majority reasons, at para. 42). Crucially, as explained below *and conceded by the Crown*, it may capture digital communications sent between the accused and complainant about the subject matter of the charge.

[228] My colleagues in the majority attempt to rein in the definition of “record”, promising “guidance” on that matter (para. 37). But instead, recognizing that including *all* digital communications would render the regime overbroad, the majority reads limits into s. 278.1 that do not appear in the text, were not argued by the parties, and are inconsistent with Parliament’s intent. Four main problems with the majority’s interpretive exercise arise.

[229] First, as Côté J. also observes (at para. 466), the majority’s interpretation gives no helpful guidance on the central question: whether communications between the accused and complainant about the subject matter of the charge are captured by the definition of “record”. My colleagues declare that s. 278.1 captures only records that could cause “potential prejudice to the complainant’s personal dignity” (para. 53), which may include “discussions regarding mental health diagnoses, suicidal ideation, prior physical or sexual abuse, substance abuse or involvement in the child welfare system” (para. 55). According to the majority, “the scheme is not intended to catch more mundane information” such as “general emotional states, everyday occurrences or general biographical information” (paras. 53 and 56).

[230] No explanation is offered of how these limits are implicit in the text (which is unsurprising, since they are not). The majority claims to “consider Parliament’s intent” (para. 37), but completely absent from my colleagues’ interpretive exercise is any explanation of how that intent, as they see it, is to be drawn from the text. Nor do my colleagues even refer to the legislative proceedings, aside from their (paradoxical)

observation that “the 2012 Senate Report contemplated a broad application for the record screening regime” (para. 79 (emphasis added)). We are simply left with a vague, unelaborated contextual analysis, and no practical guidance. Under the majority’s approach, it is unclear, for instance, whether the following communications between the accused and complainant would be subject to the screening regime:

1. messages from the complainant after an alleged sexual assault indicating she did not remember the events or providing an inconsistent version of events as compared to her police statement;
2. angry or abusive messages sent between the parties during a breakdown of their relationship referring back to the alleged sexual assault;
3. sexualized or flirtatious text conversations before or after the alleged sexual assault, arranging plans to meet again.

[231] Do any of these records contain information “of an intimate and highly personal nature that is integral to the complainant’s overall physical, psychological or emotional well-being”? Are they records “of an explicit sexual nature” that “concern the subject matter of the charge” (majority reasons, at para. 71)? The answer is not obvious (or even discernible) on the majority’s analysis, yet knowing this is critical to the accused’s ability to mount a defence. If those communications are captured, the accused cannot refer to them when responding to the Crown’s case, without having

disclosed them in advance. As the majority observes, communications between the complainant and accused are the most contentious and litigated aspect of the records screening regime. (For instance, see *R. v. A.C.*, 2020 ONSC 184 (emails between the accused and the complainant regarding the breakdown of their marriage); *R. v. Navaratnam*, 2021 ONCJ 272, 488 C.R.R. (2d) 214 (records of communications with the complainant from before and after the alleged assault); *R. v. Whitehouse*, 2020 NSSC 87, 61 C.R. (7th) 400 (records of communications between the accused and the complainant and the complainant and third parties); *R. v. McKnight*, 2019 ABQB 755, 7 Alta. L.R. (7th) 195 (text messages sent by the complainant to the accused); *R. v. A.M.*, 2020 ONSC 8061, 397 C.C.C. (3d) 379 (WhatsApp messages sent between the accused and the complainant during their marriage); *R. v. S.R.* (2021), 488 C.R.R. (2d) 95 (Ont. S.C.J.) (WhatsApp messages between the accused and his former spouse).)

[232] Secondly, the majority’s definition of “personal information” and “reasonable expectation of privacy” is inexplicably narrow. *Sherman Estate v. Donovan*, 2021 SCC 25, was a civil case addressing the specific situation where “[p]roceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person’s dignity” (para. 7 (emphasis added)). The majority uses that “narrower dimension of privacy” to define *all* “personal information” under s. 278.1. This definition is, however, inconsistent with privacy legislation that uses the same phrase. For instance, the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, s. 2(1), defines “personal information” broadly as any

“information about an identifiable individual”. My colleagues’ interpretation also creates different tiers of reasonable expectations of privacy under s. 8 and under s. 278.1, despite their own observation that s. 8’s “terms and concepts ‘inform the content and meaning of the words in [the] section’” (para. 46). And the majority’s definition leaves unanswered questions regarding the third-party records regime, which they acknowledge is governed by the same definition (para. 36). Though the majority emphasizes that their interpretation is “specific to the record screening regime” (para. 54), they do not explain how the *same words* can logically be interpreted in two different ways while remaining true to the legislative intent.

[233] Thirdly, the majority’s interpretation contradicts *Shearing*. The complainant’s diary recorded only “mundane” entries — yet the Court held that the nature of the content did “not at all eliminate her privacy interest” (para. 148; see also paras. 85 and 112). As the complainant in *Shearing* put it: “Whether it’s mundane or exciting or boring, it’s still mine” (para. 87 (emphasis added)). While the majority acknowledges, at para. 78, that the circumstances of *Shearing* represented “one of the motivating factors” for the Senate Committee’s recommendations, *that evidence would likely not be captured under their definition*. Ironically, while my colleagues recognize that “it would be illogical to interpret the impugned provisions in a manner that would not address the very situation at issue in that case” (para. 78), that is precisely what they have done. This contradiction reveals how far they have strayed from Parliament’s intent. It also leaves important questions unanswered. Will other records containing more “mundane” information be governed by the common law under *Shearing*, or

admitted without screening? If a digital conversation contains both sensitive and mundane information, will the defence still have to disclose the entire string of messages?

[234] Finally, the majority's analytical process will prove complex and time-consuming. The upshot of the contextual analysis is that the net is cast extremely wide. The majority directs that, "[w]hen it is unclear whether the evidence is a 'record', counsel should err on the side of caution and initiate Stage One of the record screening process" (para. 72). With respect, given the majority's treatment of the meaning of "record", this will be unclear in *most* cases, and most accused persons will as a consequence be forced to disclose early and often. The majority's own reasons confirm this. They contemplate that accused persons may bring motions for directions to avoid having to disclose everything, but this adds a further procedural step not contemplated by the legislation. Further, the majority recognizes this may not resolve the issue, since the presiding judge may still be "uncertain" about "whether the proposed evidence is a 'record'" (para. 104). Where that occurs, the majority also says, the judge "should instruct the accused to proceed with an application" (para. 104). In the result, accused persons will have to disclose all the communications in their possession so the trial judge can sift through each message to determine if it contains "information of an intimate and highly personal nature".

[235] If, then, the majority's legislative refinements to Parliament's broad definition of "record" are unsustainable, what *does* that definition capture? A "record"

is defined for the purposes of the records screening regime as anything that “contains personal information for which there is a reasonable expectation of privacy” (s. 278.1). While this Court in *Mills* (at paras. 78 and 97-101) approved substantially the same definition of “record” as applied to the third-party record regime, it does not follow that it can be endorsed as applied to the records screening regime. The principles underlying the regimes are different; in *Mills*, the Court considered the scope of “record” in the context of *production* of records — such as personal health and counselling records — from third parties, not *admissibility* of records already in the accused’s possession. Further, neither Parliament when enacting this definition in 1997, nor the Court when upholding its constitutionality in 1999, considered digital communications.

[236] An interpretive question therefore arises: when Parliament borrowed the definition of “record” from s. 278.1, did it intend to capture digital communications in the records screening regime? The provision does not refer to electronic communications or personal correspondence. The enumerated types of records are those either subject to professional confidentiality obligations (such as medical and child adoption records) or intended exclusively for the complainant’s own use (such as diaries). That said, the phrase “and includes” indicates that the list is not exhaustive. This Court in *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, rejected the argument that s. 278.1 was meant to capture only records shared in the context of “trust-like, confidential, or therapeutic relationships”, and confirmed that documents not falling within the enumerated list are nonetheless included if they contain information giving rise to a reasonable expectation of privacy (paras. 22-23 and 27).

[237] While the majority’s analysis is painstakingly non-committal on this point, the legislative proceedings suggest that Parliament did indeed intend to capture digital conversations between the accused and complainant.<sup>1</sup> Significantly, during debate on the records screening regime in the Senate, the Hon. Murray Sinclair referenced the trial of *R. v. Ghomeshi*, 2016 ONCJ 155, 27 C.R. (7th) 17, where defence counsel impeached the complainants using text messages exchanged with the accused (*Debates of the Senate*, vol. 150, No. 233, 1st Sess., 42nd Parl., October 3, 2018, at p. 6419). Parliament received a proposal from defence lawyers to exclude from the Bill’s ambit digital correspondence between the complainant and accused in which there is a joint privacy interest, but Parliament did not accede to that request (*R. v. R.M.R.*, 2019 BCSC 1093, 56 C.R. (7th) 414, at para. 34; Crown’s submissions in A.S.’s case, transcript, day 1, at p. 128).

[238] Alongside the legislative debates emphasizing the protection of privacy and equality rights for all sexual assault complainants must also be read this Court’s jurisprudence recognizing that electronic communications often contain highly private content (*R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608). While the ultimate concern under s. 8 is whether there is a reasonable expectation of privacy as against the state, the jurisprudence contemplates that individuals may also have a reasonable

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<sup>1</sup> Remarks of the Director General and Senior General Counsel, Criminal Law Policy Section, Department of Justice Canada (Carole Morency), *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 47, 1st Sess., 42nd Parl., June 20, 2018, at p. 82 (“The provision in Bill C-51 seeks to do something similar, with respect to communications such as emails and texts that were previously prepared, sent to the accused, are of a sexual purpose or about sexual activity in the past, to restrict and prevent their use for irrelevant purposes, which the Supreme Court has held applies to the case of twin myths. That’s not probative and it’s irrelevant to the consideration before the court” (emphasis added)).

expectation of privacy as against *other individuals*, and that these expectations may arise from some of the same concerns (*R. v. Jarvis*, 2019 SCC 10, [2019] 1 S.C.R. 488, at para. 58). The weight of the jurisprudence applying s. 278.92 has concluded that the complainant retains a reasonable expectation of privacy in electronic communications sent to the accused (see, e.g., *R. v. M.S.*, 2019 ONCJ 670, at para. 68 (CanLII); *McKnight*, at paras. 13 and 25; *R.M.R.*, at para. 33; *R. v. D.L.B.*, 2020 YKTC 8, 460 C.R.R. (2d) 162, at paras. 76-77).

[239] All of this compels the conclusion that an electronic communication (such as an email or text message) is a “record” if it contains personal information giving rise to a reasonable expectation of privacy, as that term has been interpreted in the s. 8 jurisprudence. This would include *any* communication concerning the subject matter of the charge, whether of an “explicit sexual nature” or not.

(b) “*Adduce*”

[240] I agree with the majority that the records screening regime applies both to material in the accused’s possession, and the information contained in that material. It therefore regulates not only the use of the record itself but the information it contains (majority reasons, at para. 76). Meaning, accused persons must apply if they intend merely to *refer* to the contents of any communication with the complainant, *even in their own defence*, contrary to the principle against self-incrimination, the presumption of innocence, and the right to silence.

[241] On the point of its constitutionality, there should be no misunderstanding as to the consequences of the breadth of meaning to be given to “adduce”. Accused persons must now bring a s. 278.92 application anytime they intend to refer to the *contents* of a private record relating to the complainant, even if they do not seek to enter it into evidence or use it to impeach the complainant, but instead simply wish to *refer to it in their own defence*. In contrast, the Crown would be free to use the same text message exchange from the accused to support the complainant’s narrative. As the defence argues, the resulting breadth of the regime’s 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” (R.F. in J.J.’s case, at para. 41).

(c) *Conclusion on Overbreadth*

[242] The focus in an overbreadth analysis is properly directed to the relationship between the law’s purpose and its effects (*R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485, at para. 24). The analysis proceeds in two steps. First, a court must identify the purpose of the law. Then, it must determine whether the law deprives individuals of life, liberty or security of the person in cases that do not further the object of the law (assuming a lawful legislative objective) (*R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at paras. 24-31; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 58, 93, 101, 108 and 111-12; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at paras. 26-27).

[243] The purpose of the records screening regime, based on the text and legislative history, is threefold: (1) ensuring that a complainant’s privacy, dignity and equality interests are considered when determining whether private records are admissible; (2) improving victim and community confidence in the justice system, which will likely encourage victims to report sexual crimes; and (3) maintaining the integrity of the trial process by refusing to admit evidence potentially rooted in myths and stereotypes which risk jeopardizing the truth-seeking function of the trial.

[244] The breadth of this regime suggests two possible justifications, being either that every record in the hands of the accused has the inherent potential to engage myths and stereotypes; or, the risk that some private records might advance myths and stereotypes is sufficiently severe to justify capturing all kinds of material that will not have this effect. Since no evidence of the relationship between private records in the hands of the accused and myth-based reasoning has been presented, the first justification cannot stand. It follows that Parliament must have relied on the second justification, which is by its terms demonstrative of overbreadth. As J.J.’s counsel put it, “[i]f the purpose of the regime is to exclude presumptively irrelevant and prejudicial records, then reasonable expectation of privacy is an inapt indicator of that type of danger” (transcript, day 1, at p. 51).

[245] The majority concludes that the “requirement on accused persons to disclose these records in advance — even where it is unclear to what extent the evidence would have a bearing on complainants’ dignity — is still rationally connected

to the overarching objective of the regime” (para. 142). But that conclusion is only possible because of two flaws, upon which their entire analysis rests: their departure from legislative intent as to the meaning of “record”; and their refusal to squarely (and thus meaningfully) address obvious concerns raised by the parties and interveners about advance disclosure, the right to silence, and the right to cross-examine.

[246] It is this simple. The records screening regime requires disclosure of defence evidence that would not distort the truth-seeking process or significantly interfere with the complainant’s privacy, all before the Crown makes out a case to meet. Since it captures all private records relating to the complainant that are in the accused’s possession, which the accused intends to adduce *or rely on in any manner*, and which may include *the accused’s own digital conversations with the complainant* about the subject matter of the charge, it could deprive individuals of liberty in situations that have no connection whatsoever to the object of the law. It follows that it goes too far and interferes with some conduct that bears no connection to its objective (*Bedford*, at para. 101; application judge’s reasons in A.S.’s case (*R. v. Reddick*, 2020 ONSC 7156, 398 C.C.C. (3d) 227), at para. 49).

(2) Disclosure of Detailed Particulars of Evidence

[247] The records screening regime compels accused persons to disclose “detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial” to the Crown “seven days previously, or any shorter interval that the judge . . . may allow in the interests of justice” (s. 278.93(2) and (4)).

In effect — and there was really no dispute about this at the hearing of these appeals — this requires accused persons to disclose, in detail, particulars of *their own* prior statements and strategy, even before the Crown has laid out a case to be answered. This is contrary to the principle against self-incrimination, the right to silence, the presumption of innocence, and the principle that the Crown must establish a case to be met before the accused can be reasonably expected to respond.

[248] The phrase “seven days previously” has been interpreted both strictly and flexibly in decisions that have considered the records screening regime. I agree with the majority that the strict interpretation is the correct one and that an application should be brought pre-trial in the vast majority of cases (majority reasons, at para. 86). While the majority offers one example of where mid-trial applications should be permitted in “the interests of justice” (para. 86), such instances should, properly understood, be exceptional. The notice period may be abridged only where the accused can point to an exceptional circumstance and where the court finds it is “in the interests of justice” to do so — for example, where identity is at issue or new and unanticipated information is elicited through cross-examination.

[249] The effect on the liberty of the subject represented by the records screening regime is unprecedented. Never before has the state compelled disclosure of defence evidence that is neither presumptively irrelevant nor prejudicial, before the close of the Crown’s case. This is not some tinkering around the edges of the rules of evidence. It shifts away from foundational principles of our criminal trial process, violating the

principle against self-incrimination, the right to silence, the presumption of innocence, and the related principle that the Crown must establish a “case to meet” before the accused can be expected to respond (*R. v. P. (M.B.)*, [1994] 1 S.C.R. 555, at pp. 577-78).

[250] Section 11(c) of the *Charter* provides that any person charged with an offence has the right “not to be compelled to be a witness in proceedings against that person in respect of the offence”. This denotes, *inter alia*, that *no duty* rests on an accused to disclose the details of its defence before the Crown has completed its case (*R. v. Chambers*, [1990] 2 S.C.R. 1293, at p. 1319). The defence has *no obligation* to assist the prosecution, and the absence of a reciprocal disclosure obligation is an expression of the principle against self-incrimination (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326, at p. 333; *P. (M.B.)*, at pp. 577-78). These principles, which the majority skates over, were explained by Lamer C.J. in *P. (M.B.)*:

Perhaps the single most important organizing principle in criminal law is the right of an accused not to be forced into assisting in his or her own prosecution. . . . [A]n accused is under no obligation to respond until the state has succeeded in making out a *prima facie* case against him or her. In other words, until the Crown establishes that there is a “case to meet”, an accused is not compellable in a general sense (as opposed to the narrow, testimonial sense) and need not answer the allegations against him or her.

The broad protection afforded to accused persons is perhaps best described in terms of the overarching principle against self-incrimination, which is firmly rooted in the common law and is a fundamental principle of justice under s. 7 of the *Canadian Charter of Rights and Freedoms*. As a majority of this Court suggested in *Dubois v. The Queen*, [1985] 2 S.C.R. 350, the presumption of innocence and the power imbalance between the state and the individual are at the root of this principle and the procedural and evidentiary protections to which it gives rise.

Before trial, the criminal law seeks to protect an accused from being conscripted against him- or herself by the confession rule, the right to remain silent in the face of state interrogation into suspected criminal conduct, and the absence of a duty of disclosure on the defence: *R. v. Hebert*, [1990] 2 S.C.R. 151. With respect to disclosure, the defence in Canada is under no legal obligation to cooperate with or assist the Crown by announcing any special defence, such as an alibi, or by producing documentary or physical evidence. . . .

. . .

All of these protections, which emanate from the broad principle against self-incrimination, recognize that it is up to the state, with its greater resources, to investigate and prove its own case, and that the individual should not be conscripted into helping . . . fulfil this task. [Emphasis added; pp. 577-79.]

[251] The majority attempts to distinguish *P. (M.B.)*, saying it addressed only specific concerns arising from the Crown re-opening its case after the defence began giving evidence at trial (para. 166). But this ignores the very *rationale* behind limiting reopening of the Crown's case: because "the right of accused persons not to be conscripted against themselves will be compromised" (*R. v. G. (S.G.)*, [1997] 2 S.C.R. 716, at para. 38). The majority further says the likelihood of prejudice to the accused is lower before trial (at para. 168), but neither *P. (M.B.)* nor *G. (S.G.)* contemplated pre-trial defence disclosure. Significantly, however, each case confirmed that "the most significant concern is that the accused will have responded to the Crown's case without knowing the full case to be met" (*G. (S.G.)*, at para. 42 (emphasis added)). This same concern arises with the records screening regime. In light of all this, the very suggestion there is no possibility of prejudice where the accused is required to disclose trial evidence and strategy before the Crown has even opened its case is extraordinary.

[252] The Crown in J.J.'s case makes three arguments supporting the records screening regime's compliance with the right to silence and principle against self-incrimination.

[253] First, the Crown says that the records screening regime is substantially identical to the procedures governing s. 276 and ss. 278.1 to 278.91 applications (A.F. in J.J.'s case, at para. 116), adding that this Court upheld the requirement to file a detailed affidavit in *Darrach*. While those provisions do not provide for formal notice to the complainant, the Court assumed that the Crown would likely consult with the complainant (*Darrach*, at paras. 9 and 55). And in *Mills*, the Court upheld the requirement to serve a written application on the complainant detailing why the record is likely relevant.

[254] The majority accepts this argument, remarking that the records screening regime does not apply to all defence evidence but "to a narrow set of evidence that implicates important interests of complainants . . . and has the potential to create serious prejudice" (para. 162). But simply asserting it to be so does not make it so. As discussed, it applies to a broad swathe of evidence that is not inherently prejudicial or irrelevant. The majority further asserts that, like s. 276 evidence, s. 278.92 evidence can implicate "insidious" myths and encroach on the privacy and dignity of the complainant, so "[private records] too require screening to ensure trial fairness" (para. 162). But this ignores that evidence relying on the twin myths will *already* be captured under s. 276. While the majority criticizes my analysis for not "meaningfully"

recognizing “other problematic myths and stereotypes” aside from the twin myths (at para. 132), my colleagues miss the point. Nobody disputes that records in the accused’s possession *could* implicate other myths. My point is that it cannot be assumed that such records *inherently* do so — which distinguishes them from third-party records and evidence of other sexual activity. This is a point for which my colleagues steadfastly fail to account — an omission which in my respectful view should cast serious doubt upon their entire analysis.

[255] *Darrach* and *Mills* are no answer to the self-incrimination problems raised by the records screening regime. While this Court approved advance disclosure to the Crown and complainant in *Darrach* for evidence of other sexual activity, the principles stated in *Darrach* are limited to the application of s. 276, which is designed to exclude *only* irrelevant information, and relevant information that is more prejudicial to the administration of justice than it is probative (*Darrach*, at paras. 43 and 45). Compelling the accused to bring an application with particulars did not impact the right to silence in *Darrach* because no one has an unfettered right to adduce irrelevant or prejudicial evidence (Criminal Trial Lawyers’ Association Factum in J.J.’s case (“CTLA Factum”), at para. 12). That same rationale does not apply here (see, e.g., *R. v. J.S.*, [2019] A.J. No. 1639 (QL) (Q.B.), at para. 23; *R. v. A.M.*, 2019 SKPC 46, 56 C.R. (7th) 389, at para. 39). Moreover, the s. 276 regime only requires an affidavit to explain the relevance of evidence, not potential *disclosure* of evidence that could assist the Crown in proving its case — a fundamental difference for which, again, the majority fails to account.

[256] Similarly, the *Mills* decision was concerned with compelled *production* of confidential materials from third parties, not *admissibility*, and raises different sensitivity and privacy concerns compared to records in the accused's possession (*D.L.B.*, at paras. 73-74). For that reason, this Court in *Mills* did not consider the impact of advance document disclosure on the accused's cross-examination rights (*R. v. Farah*, 2021 YKSC 36, at para. 78 (CanLII)).

[257] Secondly, the Crown emphasizes that the right to silence and case-to-meet principle are not absolute. The Crown refers to eight circumstances in which the accused "may be required to provide disclosure of some aspect of their defence if they wish to raise a reasonable doubt" (A.F. in J.J.'s case, at para. 117). The majority adopts this argument, offering two examples — aside from the s. 276 regime — where the defence is required to provide advance disclosure: alibi evidence and *Scopelliti* applications (majority reasons, at paras. 158-59). It is true that the law imposes limited obligations on parties to provide disclosure so as to justify questioning or admission of evidence in three situations that do not unconstitutionally limit the right to silence:

1. as part of a *voir dire* where the accused bears the burden of proof (for instance, a notice of constitutional question or *Garofoli* application);
2. after the Crown has closed its case (for instance, expert evidence, *Corbett* applications, and alibi evidence); or

3. in respect of evidence that is presumptively inadmissible because of its inherently prejudicial qualities (for instance, s. 276, hearsay, and bad character evidence) (CTLA Factum, at paras. 6-8).

[258] None of these instances remotely support the majority's conclusion that the right to silence is unaffected by the records screening regime. The examples in category (1) are not about raising a reasonable doubt, since the *voir dire* has no impact on the accused's guilt or innocence (CTLA Factum, at para. 7). Further, when the accused brings a *Charter* challenge, it is not required to disclose particulars of evidence or trial strategy, and certainly not its own prior statements. Two of the examples in category (2) — expert evidence and *Corbett* applications — do not require the accused to disclose anything until the prosecution's witnesses have testified and the Crown has made out a case to meet. The third example (alibi evidence) is truly a tactical choice because there is no legal requirement to disclose an alibi (CTLA Factum, at para. 8). The examples in category (3) — evidence of other sexual activity, hearsay, or bad character — are, by their nature, typically unreliable, misleading, or pose a serious risk of prejudicing the trial if admitted without screening (CTLA Factum, at para. 9). Since no one has an unfettered right to adduce irrelevant or prejudicial evidence, the law quite rightly requires the accused to show a basis for admissibility in those situations.

[259] These situations relied upon by the Crown and the majority are simply not comparable. The records screening regime requires the accused to disclose, *to the complainant and to the Crown before the Crown has made out a case to meet*, detailed

particulars of the accused's evidence and its relevance to an issue at trial. None of it need be irrelevant or inherently prejudicial, and much of it will not be so. Certainly, some records will be highly sensitive, while others might invite improper reasoning, such as counselling records used to establish that the complainant is the sort of person who would require therapy or to compare the complainant's behaviour to that of a "true" victim. Given the broad range of records captured by the screening regime, each record could fall somewhere differently on the probative-prejudicial spectrum; it is impossible to determine in the abstract. Yet Parliament has attempted to do exactly that by treating, from the outset, an *entire category of evidence* as sufficiently dangerous to warrant limiting the right to silence.

[260] The Crown's final argument on the right to silence and principle against self-incrimination relies on a passage from *Darrach* where the Court held that the right to silence was not impacted because the "compulsion" to provide disclosure was only "tactical" (A.F. in J.J.'s case, at para. 99; *Darrach*, at para. 47). But the Court in *Darrach* never concluded that tactical burdens to provide pre-trial disclosure are automatically *Charter*-compliant. Gonthier J.'s comments must be considered in the context of the type of evidence at issue, which was s. 276 evidence, and his conclusion that tactical pressure to disclose was not "premature or inappropriate" was largely premised on its inherently prejudicial and irrelevant nature (paras. 46, 55 and 59).

[261] Moreover, confronting an accuser with all relevant evidence is quite different than making tactical choices such as challenging a search warrant. I accept

J.J.'s argument that, if bringing a s. 278.92 application to rely on the accused's *own communications* about the subject matter of the charge to challenge the Crown's case or raise a defence can be minimized as a "tactical" decision, the same could apply to *all* defence evidence, such that the accused could, constitutionally, be compelled to reveal *all* potential evidence or questioning material prior to trial (R.F., at paras. 115-117; see also CTLA Factum, at para. 17). As the CTLA emphasizes, "the right to silence cannot yield in other circumstances or it would effectively cease to exist" (para. 17). Such a result would be contrary to this Court's precedents in *Chambers* and *P. (M.B.)* and cannot be what the Court envisioned in *Darrach*. The majority dismisses this as a "slippery slope" argument (para. 162). I say with respect that, in doing so, the majority minimizes legitimate and obvious concerns raised by these parties and interveners about the impacts of its ruling, as if these concerns were unworthy of taking seriously. It is no answer simply to impugn a concern as a "slippery slope" argument. After all, some slopes *are* slippery.

[262] The limits to the protection from self-incrimination and the right to silence are, on their own, fatal to the constitutionality of the records screening regime. While the Crown argues that the regime is simply a screening device through which highly relevant and probative evidence may pass, the violations to the self-incrimination principle are in no way attenuated by their later admission: "The harm is done by conscription" (transcript, day 2, at p. 73). Even where defence evidence is ultimately admitted, the regime still limits an accused's s. 11(c) and (d) and s. 7 rights. I turn now to another aspect of that concern.

(3) Restrictions on Cross-Examination of Crown Witnesses

[263] As already noted, the records screening regime compels accused persons to give advance notice to the complainant and Crown seven days before the hearing, and to provide detailed particulars of the evidence they wish to rely on, complete with an explanation of why it is relevant to an issue at trial. Where that relevance pertains to the frailties in the Crown's case or theory of the defence case, the accused must therefore reveal them. The regime also permits the complainant to appear and make submissions at the admissibility hearing. Taken together, these provisions limit the accused's ability to effectively cross-examine the complainant, contrary to the presumption of innocence, the right to make full answer and defence and the right to a fair trial.

[264] As a preliminary point, I do not see the complainant's entitlement under s. 278.94(2) and (3) to retain counsel and to appear and make submissions at the admissibility hearing as necessarily a concern. The question is how far those participatory rights extend.

[265] I agree with the majority's interpretation that the complainant should have access to the application record once it passes the threshold screening (that is, once a judge determines the evidence is capable of being admissible) (majority reasons, at para. 93). A provision entitling the complainant to retain counsel and make submissions should be interpreted in a manner that permits counsel to make meaningful submissions. While the majority suggests that complainants have only limited standing

to address the impacts on their privacy and dignity interests (para. 178), in point of fact the legislation permits them to make submissions on admissibility, which is broader than complainant participation in the *Mills* regime. Nevertheless, I agree with the majority that the regime does not contemplate a right to cross-examine the accused, or to adduce evidence at the hearing (paras. 100-102). It follows, then, that I would not accept the application judge's conclusion in A.S.'s case that the regime threatens prosecutorial independence and effectively makes the complainant a second prosecutor (paras. 91 and 102).

[266] I return, then, to my point that the advance disclosure requirement and complainant's participatory rights operate together to limit the accused's right to cross-examine the complainant. The analysis necessarily starts with the presumption of innocence, which is no mere legal nicety. It is the most elementary manifestation of society's commitment to a fair trial, grounded in the precept, "basic to our concept of justice", that "the innocent must not be convicted" (*Seaboyer*, at p. 606). It is "a hallowed principle lying at the very heart of criminal law" that "confirms our faith in humankind" (*R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 119-20; see also *R. v. Myers*, 2019 SCC 18, [2019] 2 S.C.R. 105, at para. 1). Such breathless statements can often be safely dismissed as mere judicial puffery. But not these. The significance of the presumption of innocence to our system of criminal justice simply cannot be understated. And, while it is expressly protected in s. 11(d), it is also "inextricably intertwined" with the broader protection of life, liberty and security of the person

contained in s. 7 (*R. v. Rose*, [1998] 3 S.C.R. 262, at para. 95, citing *Seaboyer*, at p. 603).

[267] Giving meaning and operation to the presumption of innocence is the accused's right to make full answer and defence. This extends to calling the evidence necessary to establish a defence, and challenging the evidence called by the prosecution (*Seaboyer*, at p. 608). Full answer and defence is not unqualified; relevant evidence can be excluded where the exclusion is justified by a ground of law or policy, such as where the evidence is unduly prejudicial or likely to distort the fact-finding process (*Seaboyer*, at p. 609; *Mills*, at paras. 74-75). But a rule which “prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law justifying the exclusion runs afoul of our fundamental conceptions of justice and what constitutes a fair trial” (*Seaboyer*, at p. 609).

[268] The accused's right to cross-examine Crown witnesses without significant and unwarranted constraint is a key element of the right to make full answer and defence and the right to a fair trial (*R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 24; *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237, at para. 39). Unwarranted constraints on cross-examination may undermine the fairness of the trial (*R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, at para. 2; *N.S.*, at para. 24), and increase the risk of convicting the innocent. As this Court recognized in *Lyttle*, cross-examination is often the only way to expose the truth:

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. [Emphasis in original; paras. 1-2.]

[269] The importance of cross-examination was recently restated in *R.V.*:

Generally, a key element of the right to make full answer and defence is the right to cross-examine the Crown's witnesses without significant and unwarranted restraint: *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, at paras. 1 and 41; *Osolin*, at pp. 664-65; *Seaboyer*, at p. 608. The right to cross-examine is protected by both ss. 7 and 11(*d*) of the *Charter*. In certain circumstances, cross-examination may be the only way to get at the truth. The fundamental importance of cross-examination is reflected in the general rule that counsel is permitted to ask any question for which they have a good faith basis — an independent evidentiary foundation is not required: *Lyttle*, at paras. 46-48. [Emphasis added; para. 39.]

[270] As these statements recognize, cross-examination may be *the only way* for an accused to avail itself of its right to make full answer and defence — that is, to challenge the Crown's case, and to raise a reasonable doubt in the trier of fact's mind. This is particularly so in sexual assault cases, where the complainant will often be the only witness to testify (*Farah*, at para. 74). This Court in *Lyttle*, at para. 70, cited with approval the reasons of the Manitoba Court of Appeal in *R. v. Wallick* (1990), 69 Man. R. (2d) 310, at para. 2:

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

[271] As this Court has also recognized, reasonable limits may be placed on the cross-examination of a complainant in a sexual assault trial to prevent it from being used for improper purposes (*Osolin*, at pp. 665-66). But the Court has also recognized that cross-examination in respect of consent and credibility should be permitted where the probative value is *not substantially outweighed* by the danger of unfair prejudice that may flow from it (*Osolin*, at p. 671). And so, the Court has understood that allowing the accused “wide latitude” to cross-examine the complainant in sexual offence cases is crucial to achieving trial fairness (*Lyttle*, at para. 50, citing *Shearing*, at paras. 121-22).

[272] To all this, the majority says only that the right to cross-examine is not violated here because there is no right to “ambus[h]” the complainant with highly private records at trial or cross-examine the complainant on “every scintilla” of information (paras. 183-84). Their analysis assumes that any cross-examination on s. 278.92 records would be unfair or irrelevant, which is demonstrably not so. It also mischaracterizes the defence arguments. The common law *already* protects complainants from unfair or irrelevant cross-examination. J.J. and Mr. Reddick seek merely to preserve their *remaining* right to cross-examine prosecution witnesses “without significant and unwarranted constraint” (*Lyttle*, at para. 2). This Court in

*Darrach* did not remove the right to contemporaneous cross-examination on private information. Gonthier J. simply confirmed that the defence cannot “ambush” complainants with *inherently prejudicial and irrelevant evidence*:

Section 276 does not require the accused to make premature or inappropriate disclosure to the Crown. For the reasons given above, the accused is not forced to embark upon the process under s. 276 at all. As the trial judge found in the case at bar, if the defence is going to raise the complainant’s prior sexual activity, it cannot be done in such a way as to surprise the complainant. The right to make full answer and defence does not include the right to defend by ambush. [Emphasis added; para. 55.]

[273] Those comments were clearly intended to apply *only* to presumptively inadmissible evidence of prior sexual activity. They cannot be divorced from their context. The issue in *Darrach* was whether the complainant could be cross-examined about her sexual history extrinsic to the allegations. The proposed cross-examination was intensely intimate and potentially embarrassing, and the evidence was presumptively irrelevant. Thus, Gonthier J.’s statement was “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” (R.F. in J.J.’s case, at para. 57). To suggest that it was an unqualified statement that the right to make full answer and defence excludes the right to surprise the complainant is baseless and, further, corrosive of the accused’s right to make full answer and defence (see majority reasons, at paras. 183-84).

[274] The majority minimizes the defence concerns by echoing that the right to a fair trial does not entitle the accused to the most favourable procedures imaginable (see paras. 125 and 184). And, as this Court has repeatedly intoned, accused persons are not entitled to a “perfect trial” (*R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 194; *R. v. Carosella*, [1997] 1 S.C.R. 80, at para. 74; *R. v. Cook*, [1998] 2 S.C.R. 597, at para. 101; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 72; *G. (S.G.)*, at para. 101; *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 362; *R. v. Harrer*, [1995] 3 S.C.R. 562, at paras. 14 and 45; *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3, at para. 97; *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 28; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 22). But, and with respect, this “answers” an argument that nobody has made. Nobody is seeking “perfection” here; we are already a long way from the most favourable trial. Eventually, at some point on the long road that the majority has taken from “Perfect Trial” to “Unfair Trial”, the refrain that there can be “no perfect trials” wears thin. It cannot be used *ad infinitum* to chip away at fair trial guarantees.

[275] The majority offers a second reason that the right to cross-examine is not violated here. They say that, since “witness tainting” is not a concern where the Crown provides disclosure to the accused under *Stinchcombe*, or where both parties in civil proceedings disclose their records, it follows that it is not a concern here (paras. 185-86). This assertion is thwarted by basic organizing principles of criminal law. The search for the truth is not the only relevant consideration when defence disclosure is at issue. Unlike the Crown or a defendant in civil proceedings, the accused

faces the greater power of the state and a potential loss of liberty. For those reasons, the accused has (until now) benefited from the presumption of innocence and the right to remain silent until the Crown makes out a case to meet (see, e.g., *P. (M.B.)*, at pp. 577-79). Further, neither *Stinchcombe* nor civil procedure rules require the other party to disclose its *strategy or theory* of the case.

[276] The majority further declares that the notice and disclosure requirements *enhance* trial fairness. They assert that providing advance notice to complainants that they may be confronted with highly private information in open court will better equip them to respond (para. 187). The Crown in J.J.’s case, the complainant A.S., and several intervenors made similar arguments, saying “ambush”-style cross-examination that aims to “disorient and discombobulate” a witness hinders rather than promotes the truth-seeking function, and that a prepared complainant is less likely to be emotional and more likely to provide logical and coherent responses (A.F. in J.J.’s case, at para. 131; A.F. in A.S.’s case, at para. 55; I.F. of AGO, at paras. 27-35; I.F. of AGNS in J.J.’s case, at paras. 81-82; I.F. of LEAF, at paras. 27 and 29; I.F. of WCLEAF-WAVAW in A.S.’s case, at para. 19).

[277] There is a certain unreality to the Crown’s claims. As this Court has observed, “trials are not — nor are they meant to be — tea parties”, particularly where the right of an accused to make full answer and defence is at stake (*Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772, at para. 3). At the very least, this submission relies on social science “evidence” that is not properly before this Court.

And it completely ignores the witness exclusion rule, which is itself grounded on the premise that advance disclosure of counsel's dossier or strategy comes with the significant risk that complainants' evidence will *as a consequence* be tailored or tainted (application judge's reasons in A.S.'s case, at para. 57). The requirement to provide detailed particulars requires accused persons to reveal frailties in the Crown's evidence that they seek to prove through the record and through its subjection to cross-examination.

[278] This speaks to why we have the witness exclusion rule: to preserve testimony in its original state (*R. v. Lindsay*, 2019 ABQB 372, 95 Alta. L.R. (6th) 163, at para. 10, citing S. N. Lederman, A. W. Bryant and M. K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (5th ed. 2018), at §16.34). To elaborate, it addresses a basic feature of human nature: witnesses who learn, in advance of testifying, of certain accounts that are inconsistent with their own version of events, may, consciously or unconsciously, change their own evidence to conform to what they have learned or to otherwise reconcile them, thereby reducing the effectiveness of the cross-examination they will ultimately face. In other words, “[r]evealing 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 [it] would otherwise state’” (R.F. in J.J.’s case, at para. 46, citing *R. v. Green*, [1998] O.J. No. 3598 (QL), 1998 CarswellOnt 3820 (WL) (C.J. (Gen. Div.)), at para. 21, *Re Collette and The Queen* (1983), 6 C.C.C. (3d) 300 (Ont. H.C.), at p. 306, *R. v. Latimer*, 2003 CanLII 49376 (Ont. S.C.J.), at para. 27, per O’Connor J., *R. v.*

*Spence*, 2011 ONSC 2406, 249 C.R.R. (2d) 64, at para. 38, and *R. v. White* (1999), 42 O.R. (3d) 760 (C.A.), at pp. 767-68).

[279] The concerns of J.J. and Mr. Reddick about witnesses tailoring evidence do not, contrary to arguments raised by the Crown, rely on stereotypical assumptions about the untrustworthiness of sexual assault complainants. There is no mystery or stigmatization at work here. As I say, these concerns speak more generally to a trait of human nature, and therefore to a temptation which most if not all witnesses would feel in these circumstances. While there is no right to “ambush” or “whack” a complainant with misleading or abusive cross-examination, confronting a complainant with inconsistencies that have not previously been disclosed is a well-established and often exceedingly effective aspect of cross-examination used to test the complainant’s credibility. The court in *D.L.B.*, at paras. 68-69, reached the same conclusion, explaining that proper impeachment through cross-examination is not the equivalent of defence by ambush but rather “an entirely legitimate and appropriate tactic in defending an accused on a criminal charge”. In many cases, advance disclosure may improperly shape complainants’ testimony, consciously or unconsciously, in a manner that cannot be readily exposed or mitigated at trial (*Farah*, at paras. 83-88).

[280] It is true, as the Attorney General of Canada observes, that complainants often become aware of defence strategy after a mistrial has occurred or where a retrial is ordered (I.F. in J.J.’s case, at paras. 47-48; see also A.F. in J.J.’s case, at para. 120). But this comparison is not well taken. In such situations, accused persons will have had

an opportunity to confront complainants *before* their strategy in doing so becomes apparent. And the transcript of those confrontations can be put to the complainants if their evidence changes at the retrial. Compelling advance defence disclosure before the complainant has given evidence *at all* is a different situation entirely.

[281] The majority's third reason for finding no violation of the right to cross-examine is that the accused will still be able to test the complainant's evidence by comparing it to prior police statements (para. 188). The Crown similarly argued that complainants can be cross-examined about their access to materials or participation in the application, as occurred at J.J.'s trial. Complainants can still be discredited by suggestions that they tailored their evidence or that their credibility is undermined by the knowledge they gained from reviewing the accused's application in advance. The Crown in J.J.'s case and the complainant A.S. add that, where the complainant provided a statement to the police or testified at a preliminary hearing, any modifications in their evidence will be ripe for cross-examination (A.F. in J.J.'s case, at para. 118; A.F. in A.S.'s case, at para. 61).

[282] As J.J. observes, however, preliminary inquiries are no longer available for sexual assault cases involving adults (R.F., at para. 67; *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, s. 238). And statements to the police are not always given under oath. In many cases, then, there will not be any pre-trial sworn statements on which the accused can impeach the complainant.

[283] Where the application is brought before a jury trial, there is a further limit on the accused's ability to cross-examine the complainant on her knowledge of the defence case. Section 648(1) of the *Criminal Code* provides that "no information regarding any portion of the trial at which the jury is not present shall be published in any document or broadcast or transmitted in any way before the jury retires to consider its verdict". Combined with s. 645(5), that provision has been interpreted as automatically banning publication of any pre-trial motion that ordinarily must be dealt with in the absence of the jury, "to ensure that a jury would not be potentially exposed to, or biased by, the content or rulings of proceedings conducted by the trial judge in their absence" (*R. v. Stobbe*, 2011 MBQB 293, 277 Man. R. (2d) 65, at para. 13 (emphasis added)). The majority says, without explanation, that s. 648 would not prevent cross-examination here (para. 189), but that is just not so. Again, it prohibits, *inter alia*, "transmi[ssion] in any way". And if counsel could *transmit* that same information by questioning the complainant about a pre-trial motion, it would defeat the purpose of a publication ban. The Crown may well therefore argue that the accused cannot cross-examine the complainant or make closing submissions at trial about the circumstances in which the complainant received notice of the defence evidence and anticipated cross-examination.

[284] To summarize, then. The advance notice and disclosure requirement, combined with the complainant's participation, interferes with cross-examination contrary to ss. 7 and 11(d). The requirement to provide detailed particulars means that accused persons may have to disclose frailties in the complainant's evidence that they

seek to prove by relying on the record at issue. Even witnesses seeking to give truthful testimony could subconsciously tailor their evidence. The risks go beyond the explicit fabrication of evidence, and include the subtle manipulation of testimony by a witness to address the frailties or inconsistencies disclosed in advance by the defence (R.F. in J.J.'s case, at para. 48, citing M. D. Tochor and K. D. Kilback, "Defence Disclosure: Is it Written in Stone?" (2000), 43 *C.L.Q.* 393). Again, and contrary to the assertions of many Attorneys General and interveners, this concern is not based on stereotypical reasoning about the untrustworthiness of sexual assault complainants, but simply a recognition of human nature. Even where the accused can establish an inconsistency against the complainant's police statement, the complainant will be given an opportunity to reconcile competing accounts.

[285] And that is where the danger of wrongful conviction lies. Impeachment of a Crown witness, including impeachment by surprise, is a legitimate and valuable defence tactic, which the regime eviscerates. The comments of Rothery J. in *R. v. Anderson*, 2019 SKQB 304, 61 C.R. (7th) 376, are apt:

The reality is that the defence may not even know what records may be useful on cross-examination until the Crown has concluded the complainant's examination-in-chief. The defence may not be able to prove that a record has "significant probative value" as required by s. 278.92(2)(b), or any probative value at all, in a vacuum. These procedural screening requirements eviscerate the most valuable tool available to the defence in a sexual assault trial.

The nature of this offence is one that usually occurs in private, without any witnesses other than the complainant and the accused. Often, it is a case of "she said, he said" (or in this trial, "he said, he said"). The defence must be permitted to test the veracity of a complainant, within the

constraints of cross-examination as articulated in *Lyttle* and *R.V.* That is, the complainant's questions must be relevant, and their prejudicial effect must not outweigh their probative value. The complainant's privacy rights associated with records in the accused's possession must give way to the accused's rights under ss. 7 and 11(d) of the *Charter*, that is, an unencumbered cross-examination. The balance is incontrovertibly in the accused's favour. [paras. 21-22]

[286] All this, I stress, applies where the information being disclosed (and potentially excluded) is part of the Crown's case to meet, has probative value, and carries no inherent prejudicial effect. Full answer and defence is centrally implicated here. It is almost certain that tying the defence's hands in this way will result in the conviction of innocent persons. And because that "threat of convicting an innocent individual strikes at the heart of the principles of fundamental justice", "where the information contained in a record directly bears on the right to make full answer and defence", this Court has maintained that "privacy rights must yield to avoid convicting the innocent" (*Mills*, at paras. 89 and 94).

(4) All Private Records Are Presumptively Inadmissible by the Defence but Presumptively Admissible by the Crown

[287] The records screening regime is triggered not by the nature or content of a record, but by the identity of the party seeking to use it. *The Crown* can freely adduce private records in support of a conviction, without complainant participation or pre-trial screening. It is only when *the defence* seeks to use *the same private information* to raise a reasonable doubt that it becomes "dangerous". In this way, the records screening

regime differs from the s. 276 and ss. 278.1 to 278.91 regimes, and limits the right to a fair trial.

[288] The s. 276 regime, of course, applies to the Crown *and* the accused. This logically follows from s. 276's focus on the nature and content of records. Simply put, the nature and content of the record are the nature and content of the record; they do not change, depending on who possesses it. Not so with the records screening regime. If, as the Crown says, the nature and content of the record justify limits on admissibility, then the Crown would be similarly bound by its restrictions. Instead, the Crown is free from the strictures of disclosure and pre-screening to use private records and digital communications between the complainant and the accused, while the accused is precluded from using *the selfsame records* in its defence (R.F. in J.J.'s case, at para. 17).

[289] As to the regime for production of third-party records, s. 278.2(2) extends the application of the regime to "any person", including the Crown. And so, s. 278.2(3) requires *the Crown* to notify the accused of any private records in the prosecutor's possession (see *Mills*, at para. 103).

[290] In contrast, the records screening regime applies only where *accused persons* are in possession of records that they intend to adduce in their own defence. This limits the accused's right to a fair trial under ss. 7 and 11(d). The majority stresses that trial fairness does not guarantee the defence "precisely the same privileges and procedures as the Crown" (para. 75), a point that no one disputes. But my colleagues

fail to squarely address the questions raised: whether the fact that *this* regime applies only to the defence renders the trial unfair, whether the purpose of the records screening regime is undermined by its one-sidedness, and whether this divergence from the s. 276 and ss. 278.1 to 278.91 regimes weakens the majority's reliance on *Darrach* and *Mills*. I would answer all three questions in the affirmative. The majority's response does not even begin to account for this glaring unfairness.

(5) Heightened Standard of "Significant Probative Value"

[291] My colleagues in the majority ignore the heightened evidentiary standard imposed by s. 278.92 and its implications for full answer and defence. Indeed, they misstate it by asserting that "the right to make full answer and defence will only be violated if the accused is prevented from adducing relevant and material evidence, the probative value of which is not outweighed by its prejudicial effect" (para. 133). That is manifestly not the standard Parliament adopted; and even if it were, it would not conform to the *Charter*.

[292] While *Crown* evidence should be excluded if its probative value is outweighed by the prejudice which may flow from it, "[t]he presumption of the accused's innocence leads us to strike a different balance where defence-led evidence is concerned" (*R. v. Grant*, 2015 SCC 9, [2015] 1 S.C.R. 475, at para. 19). A judge may exclude evidence relevant to a defence allowed by law only where the prejudice *substantially* outweighs the probative value of the evidence (*Grant*, at para. 19, citing *Seaboyer*, at p. 611). The differential approach flows from the presumption of

innocence and is crucial to safeguarding the right to a fair trial and the right to make full answer and defence (*Seaboyer*, at pp. 611-12). It has, as such, been identified as a principle of fundamental justice (see, e.g., *Seaboyer*, at p. 611; *R. v. Samaniego*, 2020 ONCA 439, 151 O.R. (3d) 449, at para. 147, aff'd 2022 SCC 9; *R. v. Pereira*, 2008 BCSC 184, 247 C.C.C. (3d) 311, at para. 106). The *Seaboyer* standard was affirmed in *Shearing*, where the Court considered whether the potential prejudice of allowing the accused to cross-examine the complainant on her diary *substantially outweighed* its probative value to the defence (paras. 107-9 and 150; see also *Osolin*, at p. 671).

[293] Section 278.92(2)(b) does violence to this principle by allowing admission of evidence only where it is of “significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice”. This is not an unknown standard. In *Darrach*, this Court upheld the “significant probative value” standard in the s. 276 context, concluding that it serves only “to exclude evidence of trifling relevance that, even though not used to support the two forbidden inferences, would still endanger the ‘proper administration of justice’” (para. 41). But this must be understood in light of the Court’s actual reasoning. Section 11(d) was not breached in *Darrach* because the regime served to protect the trial from the *distorting effects* of evidence of prior sexual activity (paras. 41-42). The Court held that the heightened test “serves to direct judges to the serious ramifications of the use of evidence of prior sexual activity for all parties in these cases” (para. 40).

[294] The same rationale does not apply *mutatis mutandis* to the records screening regime. While s. 276 addresses inherent “damages and disadvantages” in admitting sexual history evidence (*Seaboyer*, at p. 634), the records screening regime captures evidence that may well not have *any* distorting or damaging effect on the trial. In other words, it applies, distorting effects *or not*. Notably, the third-party records regime, which uses the same definition of “record”, does not apply the same heightened standard, instead allowing the judge to order production if the records are “likely relevant” and if production is necessary to the interests of justice (*Mills*, at para. 139).

[295] Combined with the broad scope of “record” and advance notice requirement, the effect of the heightened standard for admissibility of defence evidence limits the rights to a fair trial and to make full answer and defence under ss. 7 and 11(d). The records screening regime makes *all* private records in the hands of the accused presumptively inadmissible. Accused persons must, in their written applications, provide sufficient particulars of the records and of how they intend to use the evidence at trial, in order for the judge to conclude the evidence is capable of meeting the heightened standard for admissibility. These detailed particulars will often include defence strategy and prior statements of the accused, and must be provided to both the Crown and complainant, *before* the complainant has testified and before the Crown has made out a case to meet. And because of the advance notice requirement in s. 278.93(4), the accused cannot establish the significant probative value of a record via cross-examination. Failure by the accused to meet any of these hurdles, including

the seven-day notice requirement, could result in exclusion of relevant and probative evidence.

[296] The Crown in oral submissions emphasized that the accused can meet this high threshold because “in the vast majority of cases an inconsistency will have arisen before trial” (transcript, day 1, at p. 17). Counsel referred to the facts in J.J.’s case, where an inconsistency crystallized at the preliminary inquiry. Where that does not occur, the Crown said the trial judge may have discretion to hear the application after the complainant’s direct or cross-examination.

[297] For three reasons, these reassurances are hollow. First, as discussed above, preliminary inquiries are no longer available for many sexual offences, meaning there will be few opportunities for an inconsistency to crystallize before trial. Secondly, the interference with cross-examination goes beyond prior inconsistencies. For instance, a private record may disclose a motive to fabricate, and the regime would require the defence to explain in advance how they intend to use that information to show a motive. Thirdly, most defence counsel will not take the risk of waiting until mid-trial to bring an application. They will be forced to disclose early and often, even where an inconsistency has not arisen.

C. *The Limits on the Accused’s Rights Under Sections 11(c), 11(d) and 7 Are Not Demonstrably Justified*

(1) Overview of the Section 1 Analysis

[298] The majority interprets the accused's rights narrowly and balances them against the complainant's interests to avoid any conflict, but this does not account for the obvious limits under s. 11(c) and (d) and s. 7. The only question should be whether the Crown has proven those limits are demonstrably justified.

[299] To constitute a reasonable limit justified under s. 1 of the *Charter*, the impugned provision must first have a pressing and substantial objective. Further, the means chosen to achieve that objective must be (1) rationally connected to the objective; (2) minimally impairing of the *Charter* right; and (3) proportionate as between the objective and the limit it imposes (including a balancing of its salutary and deleterious effects).

[300] Limits on the principles of fundamental justice are not easily justified, but this Court has left open that possibility (*Bedford*, at para. 129; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 95). An impugned provision “may be saved under s. 1 if the state can point to public goods or competing social interests that are themselves protected by the *Charter* . . . . Courts may accord deference to legislatures under s. 1 for breaches of s. 7 where, for example, the law represents a ‘complex regulatory response’ to a social problem” (*Safarzadeh-Markhali*, at para. 57, citing *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 37).

[301] For the reasons that follow, the limits on the accused's rights occasioned by the records screening regime cannot be demonstrably justified in a free and

democratic society. While the regime has a pressing and substantial objective, it fails at the rational connection, minimal impairment, and final balancing stages.

(2) Pressing and Substantial Objective

[302] I accept the Crown's submissions that the records screening regime has a pressing and substantial objective. That objective, as I have already mentioned and as revealed by the statutory text and the legislative history, is threefold:

1. ensuring that a complainant's privacy, dignity and equality interests are considered when determining whether private records are admissible;
2. improving victim and community confidence in the justice system, which will likely encourage victims to report sexual crimes; and
3. maintaining the integrity of the trial process by refusing to admit evidence potentially rooted in myths and stereotypes which risk jeopardizing the truth-seeking function of the trial.

(3) Rational Connection

[303] To establish a rational connection, the Crown must show, on the basis of reason or logic, that there is a causal connection between the limit on the right and the

objective (*Carter*, at para. 99, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 153).

[304] If the records screening regime rendered *all* records containing personal information of the complainant presumptively inadmissible, irrespective of which party seeks to rely on them, the causal connection between the regime and its objective would be clear. Doing so might well ensure that a complainant's privacy, dignity and equality interests are considered when determining whether private records are admissible, promote confidence in the justice system and preserve the integrity of the trial process. But that is not what the records screening regime does. Purported concerns for a complainant's privacy, dignity and equality interests, confidence in the justice system and integrity of the trial process are cast aside when those private records are sought to be adduced *by the Crown*. The one-sided nature of the obligations under the records screening regime is not, therefore, demonstrative merely of the rights-limiting nature of the regime; it also shows that it is not rationally connected to its objective.

(4) Minimal Impairment

[305] Resting on the Crown is the burden of showing that the limit on the right is reasonably tailored to the objective, such that there is no less rights-limiting means of achieving the objective "in a real and substantial manner" (*Hutterian Brethren*, at para. 55). The point is that the limit on *Charter* rights should be confined to what is reasonably necessary to achieve the state's object (*Carter*, at para. 102).

[306] The Attorneys General and the complainant A.S. note that the records screening regime does not *absolutely* exclude any evidence; rather, it merely provides procedural rules allowing a complainant to be heard. They say the complainant's participation is limited and that any tailoring of evidence can be exposed at trial. The Crown says that the regime is minimally impairing because it (1) applies only to sexual offence prosecutions; (2) captures only private records; (3) provides flexibility to ensure protection of the accused's rights; (4) gives complainants a voice in the process; and (5) "fills a gap but goes no further" (R.F. in A.S.'s case, at para. 76).

[307] These submissions severely understate the impact on the accused's rights. They also avoid the question to be answered: whether the records screening regime, with its heavy impact on the accused's rights under s. 11(c) and (d) and s. 7, is the least drastic means of achieving the legislative objective (*Carter*, at para. 103). For three reasons, it is not.

[308] First, the records screening regime applies to *all* private records, including the accused's own communications with the complainant about the subject matter of the charge, and not to a subset of records that were created in a confidential context or wrongly fell into the accused's hands, as in *Shearing*. The broad definition of "record", combined with the heightened admissibility threshold, will result in the exclusion of defence evidence that is not prejudicial (because it does not inherently rely on myths or distort the truth-seeking process) and is highly relevant. This is not minimally impairing of the right to full answer and defence.

[309] Secondly, by requiring disclosure of potential defence evidence, strategy, and lines of cross-examination *before* the Crown has made out a case to meet, and by depriving the accused of establishing the relevance of that evidence based on the complainant's testimony, the regime does not minimally impair the right to silence, the presumption of innocence, or the principle against self-incrimination. The list of factors to be judicially balanced in deciding to admit the evidence are considered only *after* the evidence passes the initial screening stage. By that point, accused persons will have already given up their right to silence by providing detailed particulars, which may well impact the Crown's witness preparation and, as a consequence, the complainant's testimony.

[310] Thirdly, by mandating advance notice and disclosure to both the Crown and complainant, and by giving the complainant a role in the admissibility determination before trial, the regime allows the Crown's key witnesses to reconcile inconsistencies and potentially alter their evidence in subtle ways that are difficult to test or expose in court. This is not minimally impairing; rather, it potentially eviscerates the effectiveness of cross-examination, particularly in sexual assault trials where the complainant will often be the only witness. And, I repeat, it raises the near certain prospect of innocent persons being convicted.

[311] That last point deserves special emphasis. Rather than effecting a minimal impairment, this ham-fisted measure is an instance of legislative overkill. It shows little to no regard for the rights of accused persons, some of whom will be not only

*presumptively* innocent, but *actually* so — although, in many such cases, no longer *provably* so, since their sole tool for demonstrating their innocence has been statutorily neutered. And yet, there are obvious and less harmful means of achieving Parliament’s goals. A narrower regime could further the goals of empowering and protecting complainants in a real and substantial manner, while impairing the accused’s rights to a lesser extent. Without seeking to limit Parliament’s discretion, but merely to show that its objective could be achieved in *Charter*-compliant ways, I note that a constitutional regime might include the following features:

1. “Record” would be expressly defined to include only categories of documents containing personal information relating to the complainant for which there is a high expectation of privacy, a risk to dignity, and an inherent risk of prejudice — for instance, records that the accused obtained illegally or by virtue of a position of authority and records subject to professional confidentiality obligations. Importantly, this definition would exclude the accused’s own communications.
2. An admissibility *voir dire* would be held at the time the record becomes relevant. A *voir dire* would be required irrespective of which party seeks to adduce the record.
3. The adducing party would have to alert the court to the need for a *voir dire* before introducing the record.

4. Trial judges would consider common law rules to protect against unnecessary privacy invasions and improper reasoning.
5. Trial judges would have discretion to grant the witness participatory rights on the *voir dire* when it would be in the interests of justice.

(5) Proportionality of Effects

[312] The final stage of the proportionality inquiry entails making a judgment call, requiring courts to examine the broader picture by “balanc[ing] the interests of society with those of individuals and groups” (*R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 58 (text in brackets in original), citing *Oakes*, at p. 139). When balancing the salutary and deleterious effects, the courts must accord the legislature a measure of deference (*Carter*, at para. 97).

[313] The deleterious effects on individual accused persons are substantial. The records screening regime severely limits the right to silence, the privilege against self-incrimination, the presumption of innocence, full answer and defence, and the right to a fair trial. Rather than concentrating on records that inherently invoke myths and stereotypes, the records screening regime compels advance disclosure of *all* material for which there is a reasonable expectation of privacy, with no regard to its probative value or whether it would actually advance improper myth-based reasoning. The potential list of examples could include electronic communications from the

complainant that deny the offence ever occurred, that provide proof of alibi, that indicate a motive to fabricate, that suggest an absence of memory regarding core events, or that provide an inconsistent version of the alleged incident. In the face of this, the Crown's submission in A.S.'s case that "the impact on the accused is not substantial" because they retain their ability to adduce relevant evidence capable of raising a reasonable doubt and to meaningfully challenge the complainant's evidence through cross-examination cannot really be taken seriously (para. 77).

[314] This is all quite independent of significant deleterious effects on the criminal justice system, including increased trial complexity and delay. It is not difficult to foresee the confusion that will abound in sexual assault trials involving s. 276, ss. 278.1 to 278.91 and s. 278.92 evidence, where multiple applications will be required at different stages, all applying different standards of proof and potentially prompting separate appeals, at which the complainant may have standing to appear or to cross-appeal. Consider the following scenario:

1. The accused was in a caregiver relationship with the complainant, who alleges that he sexually assaulted her multiple times over several years. As an aggravating factor, the Crown argues that he was in a position of trust as evidenced by the fact that he paid her rent. The accused seeks production of her lease documents and banking records from third parties under ss. 278.1 to 278.91, using

the broader definition of “record” that now applies only to the *Mills* regime.

2. Further, there are thousands of text messages between the complainant and the accused spanning the relevant years. Most of the messages contain mundane content, but some directly discuss the alleged offences, while others discuss prior sexual activity that was consensual. The accused brings a motion for directions to determine which text messages (or parts of messages) are captured by the narrower definition of “record” that now applies only to the ss. 278.92 to 278.94 regime. The complainant is permitted to appear on the motion to make submissions regarding her privacy interest. The motions judge rules that most messages do not meet the definition of “record” but is uncertain about 100 messages with varying degrees of sensitivity. The judge orders the accused to bring a s. 278.92 application to determine the admissibility of those messages. The accused is unsure how to provide “detailed particulars” of the text messages without disclosing their content. Since the messages are crucial to his defence and he believes the complainant will tailor her evidence if he discloses them in advance, he decides to wait until mid-trial to bring the s. 278.92 application.

3. In the meantime, before trial, the accused brings a separate s. 276 application for the messages containing sexual history evidence, some of which is contained in the same messages as the evidence relevant to the charges. This requires the accused to disclose particulars of several key messages relating to his defence of consent to the Crown and complainant.
  
4. After the complainant testifies at trial, the accused files a s. 278.92 application and argues it is “in the interests of justice” to admit the records mid-trial. The trial judge disagrees, ruling that the accused should have brought the application pre-trial and that the accused cannot refer to the content of those statements at the trial. In the accused’s testimony, he refers to different parts of text message conversations that were found to be “mundane”. The Crown objects because other related messages were ruled inadmissible under s. 278.92 and it would be prejudicial to discuss those conversations at all. The judge adjourns to hear argument and provide further instructions.

[315] To be sure, this is just one illustration of the deleterious effects that this regime *will* visit on the criminal justice system.

[316] The parties supporting the records screening regime, however, assert many benefits: (1) protecting the complainants’ privacy, equality and security rights; (2)

allowing complainants to participate in the admissibility process; (3) encouraging reporting of sexual offences; and (4) preventing the introduction of evidence that may distort the truth-seeking function of the trial. I accept that the regime slightly increases the common law protections provided by *Osolin* and *Shearing* with respect to the complainants' privacy, equality and security. It also gives complainants a formal right to participate in decisions impacting those interests. But the other purported benefits are not made out. There is no evidence that the regime increases reporting of sexual assaults. Further, there is no reason to believe that it would, since the regime is not aimed at excluding distorting or misleading evidence, allowing as it does the Crown to adduce private records without screening.

[317] While I am mindful of the need to accord deference to Parliament's choice of means and legislative objective, this is not a close call. The harmful impacts and risk of wrongful convictions outweigh any potential benefits of the regime. I agree with the reasoning of other courts that have concluded the records screening regime impairs the accused's right to silence, right to a fair trial, and right to make full answer and defence to such an extent that the Crown has not demonstrated that the law's salutary effects outweigh its deleterious effects (see, e.g., *R. v. Anderson*, 2020 SKQB 11, 461 C.R.R. (2d) 128, at para. 13; *D.L.B.*, at para. 87).

#### IV. Conclusion

[318] I end where I began, with *Seaboyer*, and in particular the reasons given by McLachlin J. (as she then was) for striking down the earlier iteration of s. 276:

I conclude that the operation of s. 276 of the *Criminal Code* permits the infringement of the rights enshrined in ss. 7 and 11(d) of the *Charter*. In achieving its purpose — the abolition of the outmoded, sexist-based use of sexual conduct evidence — it overshoots the mark and renders inadmissible evidence which may be essential to the presentation of legitimate defences and hence to a fair trial. In exchange for the elimination of the possibility that the judge and jury may draw illegitimate inferences from the evidence, it exacts as a price the real risk that an innocent person may be convicted. The price is too great in relation to the benefit secured, and cannot be tolerated in a society that does not countenance in any form the conviction of the innocent. [Emphasis added; p. 625.]

[319] For the same reasons, I say the price of the records screening regime is too great. I earlier described the rights at stake here, while not absolute, as being of the most fundamental order that have been limited only in particular and constrained circumstances that will not necessarily arise here (and, where they do, they will be captured by those earlier restrictions — that is, by the s. 276 regime). In light of the majority's unfortunate judgment to the contrary, I dissent.

[320] To be clear, I would strike down ss. 278.92 to 278.94 of the *Criminal Code*, with immediate effect, but only as those sections relate to the records screening regime. This would preserve the existing s. 276 regime and the definition of “record” in the ss. 278.1 to 278.91 regime. I agree with counsel for J.J. that “reading down” the provisions would not respect Parliament's intent and could have unexpected effects on the related legislative regimes. It falls to Parliament to consider how best to bring the regime into compliance with the *Charter*.

The following are the reasons delivered by

ROWE J. —

I. Overview

[321] The accused persons J.J. and Shane Reddick brought separate constitutional challenges in British Columbia and Ontario to ss. 278.92 to 278.94 of the *Criminal Code*, R.S.C. 1985, c. C-46, arguing these provisions violate ss. 7, 11(c) and 11(d) of the *Canadian Charter of Rights and Freedoms*. The British Columbia Supreme Court and the Ontario Superior Court agreed and struck the provisions down in whole or in part (see the *Charter* breach analysis in *R. v. J.J.*, 2020 BCSC 29, and the s. 1 analysis and decision on remedy in *R. v. J.J.*, 2020 BCSC 349; and see *R. v. Reddick*, 2020 ONSC 7156, 398 C.C.C. (3d) 227).

[322] On the merits of these appeals, I agree with Brown J. that ss. 278.92 to 278.94 of the *Criminal Code* are unconstitutional and therefore of no force and effect except in so far as they apply to the existing s. 276 regime. The legislation in this case restricts the fair trial rights of accused persons by placing limits on how they can conduct the cross-examination of Crown witnesses and what evidence they can introduce in support of their own defence, even if that evidence is highly probative and not prejudicial to the complainants. The screening process introduced by the legislation violates ss. 11(c) and 11(d) by requiring the accused to disclose all records relevant to their defence before the Crown has established the case to meet.

[323] In my view, the main issue in these appeals is that the Crown and a number of interveners invite the Court to rely on s. 7 to limit the rights protected by s. 11 of the *Charter* on the basis that this approach has previously been adopted in *R. v. Mills*, [1999] 3 S.C.R. 668, and *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443. For the reasons that follow, I decline to do so.

[324] During these appeals, the Crown has maintained that the constitutional questions in this case, regardless of the section considered, can be resolved through an *ad hoc* balancing of rights, interests and values that leads to the conclusion that the impugned provisions are constitutional. The key to this argument is that a limit on trial fairness justified under s. 7 also limits fair trial rights under s. 11. In essence, the Court is urged to introduce internal limits on s. 7 rights into s. 11.

[325] This approach to ss. 7 and 11 does not conform with the text or purposes of those provisions or with the structure of the *Charter*. The scope of rights under ss. 11(c) and 11(d) is to be ascertained by the text and purposes of those provisions. Any limits on those rights must then be justified under s. 1 and not through an interpretation of s. 7. To do otherwise inverts the proper role of s. 7, which is a broad, rights-conferring provision. To construe it as a limit on other *Charter* rights is wrong in principle and, in this case, undermines the longstanding, fundamental right to a fair trial.

[326] In these reasons, I first examine the purpose and content of the constitutional right to a fair trial. Second, I outline the purpose and content of s. 7 and

examine how the problems in that jurisprudence are distorting the interpretation and application of s. 11. Third, I explain why this is inappropriate.

[327] Finally, I set out an approach that gives proper effect to ss. 7, 11 and 1. Where a specific *Charter* guarantee (here, s. 11) is pleaded along with the broader guarantee in s. 7, the specific guarantee should be addressed first. If a violation of the specific *Charter* guarantee is found, there is no reason to proceed to s. 7. If there is no violation of the specific guarantee, or the violation is found to be justified under s. 1, the courts must *then* look to s. 7. This approach accords with the structure of the *Charter*, and with the text and purposes of the “Legal Rights” in ss. 7 to 14 and s. 1.

## II. There Is a Constitutional Right to a Fair Trial

[328] I begin by examining the scope of the right to a fair trial.

### A. *Introduction to the Right to a Fair Trial*

[329] The need to ensure that a criminal trial is fair has long been recognized in our justice system as key to guarding against wrongful conviction and against arbitrary deprivation of liberty. An impartial and independent justice system exists to ensure trials are fair.

[330] Section 11 of the *Charter* sets out the right of every accused person to a fair trial.

[331] Section 11 is part of the section of the *Charter* entitled “Legal Rights”, which also contains ss. 7 to 10 and 12 to 14. Section 11 sets out the rights of a person “charged with an offence”, including the right to a trial within a reasonable time (s. 11(b)), the right not to be compelled as a witness in proceedings against oneself (s. 11(c)), the presumption of innocence (s. 11(d)), the right to reasonable bail (s. 11(e)), and the right to the benefit of the lesser punishment (s. 11(i)).

[332] These appeals concern primarily the rights protected by s. 11(d) and, to a lesser extent, s. 11(c).

B. *Scope of Rights Protected by Section 11(d)*

[333] Section 11(d) provides:

**11** Any person charged with an offence has the right

...

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

[334] As with all *Charter* rights, s. 11(d) is to be interpreted purposively (*R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 119; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 499; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293, at paras. 178-85).

[335] Section 11(d) provides for interlocking substantive and procedural protections including: 1) the right to be presumed innocent until proven guilty; 2) the right to fair procedures; 3) the right to cross-examine Crown witnesses without significant and unwarranted restraint; and 4) the right to silence before a case to meet is made out, which is common to ss. 11(c) and 11(d). Together, they protect the fair trial rights of the accused. I expand on these rights below.

(1) Right to Be Presumed Innocent Until Proven Guilty

[336] The right to be “presumed innocent until proven guilty” appears in the text of s. 11(d).

[337] The presumption of innocence has long been considered a central organizing idea of a fair criminal justice system. This Court has held that the presumption of innocence is the “golden thread of criminal justice” (*R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 27).

[338] The presumption of innocence means that an accused charged with an offence must be proven guilty beyond a reasonable doubt. The state bears the burden of proof (*Oakes*, at p. 121).

(2) Right to Fair Procedures

[339] In addition to its substantive content, s. 11(d) provides for certain procedural guarantees that flow from the presumption of innocence in order to secure trial fairness. These requirements include proof of guilt according to law in a fair and public hearing by an independent and impartial tribunal (*Oakes*, at p. 121).

(3) Right to Cross-Examine Crown Witnesses Without Significant and Unwarranted Restraint

[340] Another procedural guarantee protected by s. 11(d) is the right of the accused to cross-examine adverse witnesses without significant or unwarranted restraint (*R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, at paras. 41-43). As this Court explained in *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 663: “There can be no question of the importance of cross-examination. . . . It is the ultimate means of demonstrating truth and of testing veracity. . . . The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused.”

[341] The right to cross-examine without significant and unwarranted restraint must “be jealously protected and broadly construed”; it can extend to protection for the “rhythm” or scope of cross-examination (*Lyttle*, at paras. 44 and 7). 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” (para. 44).

(4) Right to Silence Before a Case to Meet Is Made Out

[342] Finally, the presumption of innocence is closely linked to the right to silence and the protection against self-incrimination. Sections 11(c) and 11(d), as well as s. 13 of the *Charter*, recognize and reinforce the state's burden to establish a criminal case against accused persons before they need respond either by testifying or by calling other evidence (*Dubois v. The Queen*, [1985] 2 S.C.R. 350, at pp. 357-58).

C. *Scope of Rights Protected by Section 11(c)*

[343] Section 11(c) provides:

**11** Any person charged with an offence has the right

...

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

[344] As explained above, the purpose of s. 11(c) is to protect against self-incrimination and preserve the accused's right to silence. The accused has a right not to furnish testimonial information which the prosecutor can use in presenting the case to meet (D. M. Paciocco, "Self-Incrimination: Removing the Coffin Nails" (1989), 35 *McGill L.J.* 73, at p. 90; S. Coughlan and R. J. Currie, "Sections 9, 10 and 11 of the Canadian Charter", in E. Mendes and S. Beaulac, eds., *Canadian Charter of Rights and Freedoms* (5th ed. 2013), 793, at p. 845). This would apply, for example, to records that contain the accused's own words about the subject matter of the charge. Aspects of the accused's right to silence before a case to meet is made out are protected by both ss. 11(c) and 11(d).

D. *Permissible Limits on Sections 11(c) and 11(d)*

[345] Having examined the content of ss. 11(c) and 11(d), it is necessary to review how these rights may be limited.

[346] Ordinarily, a *Charter* right can only be limited in one of two ways: 1) internally, through its own text; or 2) by undertaking the balancing required in s. 1 of the *Charter* (P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 38:1; see, for example, *Fleming v. Ontario*, 2019 SCC 45, [2019] 3 S.C.R. 519, at para. 111). I expand on each type of limitation below.

(1) Internal Limits: Definition of Fair Trial

[347] Qualifying words used in the text of the *Charter* are the starting point for the interpretation of the scope of *Charter* rights and any internal limits.

[348] Sections 11(c) and 11(d) have few internal limits. They apply only to persons “charged with an offence”. Section 11(c) protects an accused only from being compelled as a “witness” in “proceedings against that person in respect of the offence”, usually meaning proceedings with true penal consequences. Section 11(d) provides that the presumption of innocence ceases to operate following conviction. There is no indication in the text of either provision that they can be limited by operation of s. 7.

(2) Section 1

[349] Other than internal limits that appear in the text of the *Charter* provisions themselves, the only other limits provided for are in s. 1 of the *Charter*. Section 1 reads:

**Rights and freedoms in Canada**

**1** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[350] Section 1 establishes that the only external limits applicable to *Charter* rights are those prescribed by law as can be demonstrably justified in a free and democratic society. This means that the rights protected by ss. 11(c) and 11(d) cannot be altered by statute. However, a statute may limit s. 11 rights, if those limitations meet the criteria of s. 1.

[351] This Court set out the proper analysis to be undertaken under s. 1 in *Oakes*. The *Oakes* analysis is rigorous. If an infringement of a *Charter* right is established, the onus of justifying it is on the party seeking to uphold the limitation (pp. 136-37).

[352] What has been offered to the Court in this case in no way conforms to the thorough examination of the legislation, its effects and consequences that is required under *Oakes*. Simply put, no *Oakes* analysis tailored to the particular operation or elements of ss. 11(c) or 11(d) was placed before the Court; that is to say, the Crown offered no s. 1 analysis that focused on exactly how an infringement of ss. 11(c) or 11(d) could be justified. This is extraordinary. The Crown not only failed to meet the

high standard required by s. 1 and the *Oakes* test; rather it denied that it needed to do so. The majority has adopted a similar view.

III. A Limit on Section 11 Based on Section 7 Does Not Conform Either to the Architecture of the *Charter* or to the Purposes of Those Provisions, or Section 1

[353] Instead of relying on the permissible limits on s. 11 rights described above, the Crown submitted that this case can be resolved under s. 7 and that the s. 7 finding would also be determinative of the s. 11 issues.

[354] There is simply no foundation for an analytical approach whereby ss. 11(c) and 11(d) rights can be limited by reference to internal limits in s. 7. This involves a grave distortion of s. 7, which is a broad, rights-conferring provision. Instead, s. 7 is used here as a limit on other constitutional rights. This departs fundamentally from the view that s. 7 is broader than the other “Legal Rights” in ss. 8 to 14, such that it can supplement those rights.

[355] Yet, the Crown urges this Court to find that, based on our jurisprudence, s. 7 can be used to undercut other “Legal Rights”. To address this argument it is necessary to review s. 7 in some detail.

[356] Below I review the content of s. 7 and how its inconsistent interpretation has given rise to doctrinal difficulties that the Court has on occasion introduced into the interpretation of s. 11. As I explain, this Court’s jurisprudence on defining the scope

and proper application of s. 7 is inconsistent. The Court has been unclear on how to identify and define the principles of fundamental justice. There is no clear guidance on how to undertake internal balancing in s. 7, nor even as to whether such balancing is appropriate. I then review how those uncertainties are being introduced into s. 11. Finally, I explain why such an approach constitutes a fundamental undermining of the right to a fair trial and, in so doing, departs from the text and architecture of the *Charter*.

A. *Section 7*

[357] Section 7 provides that:

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[358] This Court described the purpose of s. 7 in *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at para. 77:

. . . the dominant strand of jurisprudence on s. 7 sees its purpose as guarding against [those] deprivation[s] of life, liberty and security of the person . . . “that occur as a result of an individual’s interaction with the justice system and its administration”: *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 65. “[T]he justice system and its administration” refers to “the state’s conduct in the course of enforcing and securing compliance with the law” (*G. (J.)*, at para. 65).

[359] In order to determine whether there is a violation of s. 7, the Court applies a three-step analysis (*R. v. White*, [1999] 2 S.C.R. 417, at para. 38):

- 1) Is there a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests?
- 2) If so, one must identify and define the relevant principles of fundamental justice.
- 3) Is the deprivation in accordance with the relevant principle or principles of fundamental justice?

[360] Although this test is well-established, applying it in practice has proven difficult. The reach of s. 7 can extend beyond the administration of justice, which may “be implicated in a variety of circumstances” (*Gosselin*, at para. 78), and its boundaries remain unsettled. For this reason, s. 7 has been described by commentators as “elusiv[e]” and “mysterious” (T. Lipton, “All Charter Rights Are Equal, But Some Are More Equal than Others” (2010), 52 *S.C.L.R.* (2d) 449, at p. 449).

[361] Unlike ss. 11(c) and 11(d), s. 7 contains significant internal limits. Once a deprivation of life, liberty or personal security is established, it can nonetheless be shown that the deprivation is in accordance with the “principles of fundamental justice”. It is at this stage of the analysis where many difficulties arise.

B. *The Content of the Principles of Fundamental Justice in Section 7*

[362] The first difficulty with interpreting s. 7 is in giving concrete meaning to the “principles of fundamental justice”. The foundational case on the meaning of s. 7 remains *Re B.C. Motor Vehicle Act*. At p. 509, this Court commented that the interpretation of s. 7 and all *Charter* rights should preserve the opportunity for “growth, development and adjustment to changing societal needs” to ensure the *Charter* continues to be a “living tree” that is capable of responding to the needs of the moment. This Court stated that the principles of fundamental justice “cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7” (p. 513).

(1) The Principles of Fundamental Justice Have Substantive and Not Only Procedural Content

[363] In *Re B.C. Motor Vehicle Act*, the Court was asked whether the “principles of fundamental justice” have both procedural and substantive content. Some extrinsic evidence indicated that when the *Charter* was drafted, the intended meaning of the term “principles of fundamental justice” was similar to that connoted by the phrase “procedural due process” (*Minutes of the Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, No. 46, 1st Sess., 32nd Parl., January 27, 1981, at pp. 32 and 42, and pp. 33-36 (Mr. Strayer, Assistant Deputy Minister, Public Law); see also the evidence of the Minister of Justice, the Hon. J. Chrétien, at p. 43). Nonetheless, the Court adopted a broad definition of the principles of fundamental justice and decided that they include

not only procedural protections, but also substantive ones (*Re B.C. Motor Vehicle Act*, at pp. 498-500).

[364] This expansive approach to the principles of fundamental justice gave rise to considerable uncertainty; it has contributed to s. 7 jurisprudence marked by indeterminacy and an ongoing lack of doctrinal clarity (see, for example, N. R. Hasan, “Three Theories of ‘Principles of Fundamental Justice’” (2013), 63 *S.C.L.R.* (2d) 339, at p. 341).

(2) Difficulties Identifying the Principles of Fundamental Justice

[365] One consequence of *Re B.C. Motor Vehicle Act* is persistent incoherence in identifying the principles of fundamental justice.

[366] For years after *Re B.C. Motor Vehicle Act*, there was no settled methodology for identifying the principles of fundamental justice. Many principles of fundamental justice that were recognized were stated in broad generalizations which risked “transform[ing] s. 7 into a vehicle for policy adjudication” (*Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 9).

[367] With time, it became clear that a greater degree of clarity with respect to the meaning of the principles of fundamental justice was needed for the interpretation of s. 7 to be workable in practice. This Court sought to provide greater structure in

*Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at pp. 591-92, and subsequently in *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 113. The Court finally settled on the current criteria for identifying a principle of fundamental justice in *Canadian Foundation for Children, Youth and the Law*, at para. 8. The Court adopted the following three-pronged test:

Jurisprudence on s. 7 has established that a “principle of fundamental justice” must fulfill three criteria: *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, at para. 113. First, it must be a legal principle. This serves two purposes. First, it “provides meaningful content for the s. 7 guarantee”; second, it avoids the “adjudication of policy matters”: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. Second, there must be sufficient consensus that the alleged principle is “vital or fundamental to our societal notion of justice”: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 590. The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice. Third, the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results. Examples of principles of fundamental justice that meet all three requirements include the need for a guilty mind and for reasonably clear laws. [Emphasis added.]

[368] Nonetheless, the definition of the principles of fundamental justice remains malleable, particularly given the need to identify a “sufficient consensus” about the importance of a legal principle.

[369] The consequences and potentially idiosyncratic applications of an unsettled definition of the principles of fundamental justice can readily be seen in this case.

[370] For example, the majority continues to rely on the unexplained assertions in *Mills* and *Darrach* that “protecting the security and privacy of witnesses” qualifies as a principle of fundamental justice (para. 120). *Mills* and *Darrach* claim to rely on *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (*Mills*, at para. 72; *Darrach*, at para. 25). Yet, *Seaboyer* does not support this proposition. In that case, McLachlin J. (as she then was) noted that the *goals* of an earlier version of s. 276 of the *Criminal Code* — the avoidance of unprobative and misleading evidence, the encouraging of reporting and the protection of the security and privacy of the witnesses — “conform to our fundamental conceptions of justice” (p. 606). These goals were not themselves recognized as principles of fundamental justice. Moreover, *Seaboyer* pre-dates the test set out in *Canadian Foundation for Children, Youth and the Law*. It is doubtful that this test would be met if it were applied to the goals of “protecting the security and privacy of witnesses”. These aims, while laudable, are neither legal principles, nor sufficiently precise to be principles of fundamental justice.

[371] The majority also refers to “dignity” and “equality”, even where neither have ever been recognized as principles of fundamental justice. The role these concepts play in the majority’s reasoning is unclear. I would note, parenthetically, that the recognition of “equality” as a principle of fundamental justice under s. 7 would have far reaching implications that extend far beyond the matters at issue in this case.

[372] Another difficulty with the malleable definition of the “principles of fundamental justice” is that it is not always clear in what circumstances “societal

interests” may be relevant to identifying principles of fundamental justice. “Societal interests” are considered in more depth below, in relation to internal balancing within s. 7. However, a different (and preliminary) question is whether any societal interests are *themselves* principles of fundamental justice. There remains no settled answer to this question, as among others.

C. *How Do the Principles of Fundamental Justice Operate to Limit Section 7 Rights?*

(1) The Methodological Approach for How the Principles of Fundamental Justice Operate to Limit Section 7 Rights Is Inconsistent

[373] There is a lack of coherence not only in the definition of the principles of fundamental justice, but also in the methodology for how principles of fundamental justice are balanced with competing considerations to arrive at the scope of s. 7 rights, or whether such a balancing is appropriate.

[374] The Court has on occasion dealt with s. 7 cases where one or more parties argued that finding a violation of s. 7 would undermine the rights or interests of third parties or societal interests. In such circumstances, the Court has previously considered that all of these competing considerations should be internally balanced under s. 7, to define them so they do not conflict with each other (*Mills*, at para. 21; *Seaboyer*, at pp. 603-4).

[375] When engaging in an internal balancing under s. 7, the Court has occasionally categorized competing considerations as *Charter* rights, *Charter* values, and societal interests, but has not adopted a systematic or consistent approach to how these are to be weighed against one another, or even whether the considerations applicable to each category are different. It is not clear: 1) how *Charter* values and societal interests as opposed to *Charter* rights are defined; 2) whether these rights, values or interests must engage s. 7 or at least amount to principles of fundamental justice in order to be part of the balancing in s. 7; or 3) in the event of conflict between rights, interests and values, how one should decide which consideration prevails.

[376] The lack of a sound methodology is evident when one considers how the Court has dealt with conflicts between *Charter* rights, *Charter* values (an open and malleable category) and societal interests (an even more open and more malleable category).

(a) *One Party's Charter Rights vs. Other Charter Rights*

[377] It is argued by the Crown and a number of interveners that this case engages the *Charter* rights of multiple persons, including the accused and complainants — referred to by counsel for A.S. in the hearing as “three-dimensional” *Charter* rights. (One wonders whether such metaphors do more to obscure than illuminate doctrinal questions.) It is submitted, on this basis, that all of these competing rights should be reconciled under s. 7.

[378] The Court has determined that where giving effect to a s. 7 right may conflict with a competing *Charter* right of another party, courts should engage in a “balancing” approach as set out in *Mills*. The majority of the Court in that case said, at para. 21:

As this Court’s decision in *Dagenais, supra*, makes clear, *Charter* rights must be examined in a contextual manner to resolve conflicts between them. Therefore, unlike s. 1 balancing, where societal interests are sometimes allowed to override *Charter* rights, under s. 7 rights must be defined so that they do not conflict with each other. The rights of full answer and defence, and privacy, must be defined in light of each other, and both must be defined in light of the equality provisions of s. 15.

[379] *Mills* concerned the third party records regime, which engaged the complainant’s s. 8 right against unreasonable search and seizure because the *Criminal Code* provisions at issue authorized the seizure of the complainant’s records. The Court noted, at para. 62, that both the complainant’s s. 8 rights and the accused’s s. 7 right to make full answer and defence were engaged and that “both of these rights are instances of the ‘principles of fundamental justice’ enshrined in s. 7”.

[380] The Court in *Mills* relied on *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, despite the fact that *Dagenais* did not involve s. 7. Instead, in that case, the Court relied on the *Charter* values of a fair trial and freedom of expression to interpret the common law rule governing publication bans. *Mills* interpreted *Dagenais* to suggest that *Charter* rights considered under s. 7 “must be examined in a contextual manner to resolve conflicts between them [and] must be defined so that they do not conflict with each other” (para. 21).

[381] However, subsequent decisions of the Court confirm that *Dagenais* did not concern balancing under s. 7, and in fact “incorporates the essence of s. 1 of the *Charter* and the *Oakes* test” (*R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at para. 27; see also *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 35). These pronouncements are consistent with this Court’s decision in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 123 and 125, and *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at paras. 79-80, which confirm that s. 7 should focus on those who allege that they have been deprived of life, liberty or security of the person in a manner that does not accord with the principles of fundamental justice.

[382] In fact, this Court has asserted on multiple occasions that competing rights should be balanced under s. 1 of the *Charter* — a framework “especially well suited to the task of balancing” (*R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 733-34, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, per Wilson J., concurring; see also *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at pp. 383-84; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at paras. 73-75; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at para. 30; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 26; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 154; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 154, per L’Heureux-Dubé, Gonthier and Bastarache JJ., concurring; *Trinity Western University v. British Columbia College of Teachers*, 2001

SCC 31, [2001] 1 S.C.R. 772, at para. 94, per L’Heureux-Dubé J., dissenting; *Law Society of British Columbia*, at para. 188, per Rowe J., concurring). As these precedents demonstrate, the *Mills* approach is a clear outlier in prescribing that *Charter* rights be “defined so that they do not conflict with each other” (para. 21).

[383] In any event, the majority does not explain why *Mills* is relevant in this case. *Mills* did not find that balancing was required merely because the records in that case engaged the complainant’s privacy interest. In that case the privacy interest was a *Charter*-protected right that was *also* an instance of the principles of fundamental justice. As the majority acknowledges (at para. 119), the complainants’ *Charter* rights are not engaged in this case. It is therefore not clear why or how the framework for “analyzing multiple *Charter* breaches” applies (para. 121; see also para. 115).

(b) *Charter Rights vs. Charter Values*

[384] The Crown argues that even if it cannot be found that complainants’ *Charter* rights are engaged, courts can balance “*Charter* values” because they are relevant to the scope of the principles of fundamental justice under s. 7.

[385] The concept of “*Charter* values” originated in civil and administrative law cases, where *Charter* rights are not engaged, but the subject matter is similar to cases to which the *Charter* applies, for example defamation and free speech (see *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 675; *Dagenais*, at p. 876; *Hill v. Church of Scientology of Toronto*, [1995] 2

S.C.R. 1130, at paras. 91-98; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at paras. 22-23; *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at paras. 2 and 16; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at paras. 44 and 46; *Law Society of British Columbia*, at para. 41). Since then, *Charter* values have been applied to develop the common law, as a tool of statutory interpretation, and as a constraint on administrative discretion (see M. Horner, “Charter Values: The Uncanny Valley of Canadian Constitutionalism” (2014), 67 *S.C.L.R.* (2d) 361, at pp. 364, 367 and 371).

[386] As noted, *Charter* values were first used in *RWDSU* to interpret the common law, rather than to affect internal balancing under s. 7. However, in *Darrach*, at para. 25, the Court appeared to introduce *Charter* values into the internal “balancing” in s. 7 when it relied on the notion of “rights or values” articulated in *Mills*, at paras. 61, 72 and 89, to limit the accused’s fair trial rights. The majority follows this approach while also adding into the mix other amorphous values like dignity and equality. How these should be considered is unclear.

[387] When introduced into the principles of fundamental justice, *Charter* values are used to limit the accused’s *Charter* rights without a clear basis being set out for doing so. As the Ontario Court of Appeal recently commented in *McKitty v. Hayani*, 2019 ONCA 805, 439 D.L.R. (4th) 504, at para. 90: “*Charter* values, unlike *Charter* rights, are not taken from a canonical text. There is no methodology to guide the degree of abstraction at which they are formulated, or to resolve claims of priority when they conflict.” *Charter* rights are constrained by their text and purposes. Values are

potentially boundless, with few indications of their parameters. As I have noted in *Law Society of British Columbia*, at paras. 171-72, weighing values against rights is a subjective exercise that lends itself to conclusory reasoning. This lack of clarity is an impediment to applying a structured and consistent approach to adjudicating *Charter* claims.

[388] A finding that values supersede rights risks arbitrarily undermining those rights and poses serious risks to the rule of law. That is the case here. The majority advances somewhat abstract justifications for serious procedural limitations on fair trial rights. The majority states that “highly private” records implicate complainants’ “privacy and dignity” and “have the potential to engage truth-distorting myths” (paras. 162-63). These concerns are formulated at a very high level of generality. The majority does not specify the weight these considerations should be given in the s. 7 balancing, and why.

[389] It is beyond the scope of this case to consider what role *Charter* values should be accorded in civil and administrative proceedings. However, a proper and careful reading of this Court’s jurisprudence leads to the conclusion that *Charter* values have no place in the analysis of constitutional issues under s. 7. *Charter* values are the kinds of “moral claims” referred to in *Carter*, at paras. 79-81 (see also *Bedford*, at para. 125), that should properly be considered under s. 1. In saying this, I do not say that the result in *Darrach* is incorrect. Rather, I make the simple point that the

methodology employed under the analysis in s. 7 should be clear, transparent and consistent with the structure of the *Charter*.

(c) *Charter Rights vs. Societal Interests*

[390] Another concept the Court has referred to in delineating the principles of fundamental justice under s. 7 is that of “societal interests”.

[391] The place of “societal interests” in the s. 7 balancing analysis has been a controversial subject since the earliest days of the *Charter*. The Court has been inconsistent as to how societal interests are weighed within s. 7 (see, in particular, *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *R. v. Swain*, [1991] 1 S.C.R. 933; *Rodriguez*), attracting criticism for analytical instability and a lack of coherence. Different approaches have been taken by the Court and described in the literature (see T. J. Singleton, “The Principles of Fundamental Justice, Societal Interests and Section 1 of the Charter” (1995), 74 *Can. Bar Rev.* 446, at pp. 449 and 473; Lipton, at pp. 452-53).

[392] One approach holds that “societal interests” should not be considered at all when determining whether there has been a rights violation under s. 7. This was the Court’s view in *Re B.C. Motor Vehicle Act*, at p. 517. However, if a violation of s. 7 is found, “societal interests” may be considered in the subsequent balancing exercise

under s. 1 (*R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Carter*, at paras. 79-80 and 95; *R. v. Brown*, 2022 SCC 18, at para. 70; Singleton, at p. 448; Lipton, at pp. 452-53 and 479).

[393] A second approach holds that, when considering whether there is a deprivation of “life, liberty and security of the person” in accordance with the principles of fundamental justice, those principles should only be balanced against other principles of fundamental justice. Any “other interests” should be considered under s. 1. *Mills* is widely considered to be an example of this approach, assuming, as discussed above, the benefits of the legislation referenced there legitimately qualified as principles of fundamental justice (see also *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757, at para. 68; Lipton, at p. 478).

[394] A third approach holds that “societal interests”, whether principles of fundamental justice or not, may be considered when delineating the scope of the principles of fundamental justice under s. 7. Examples of “societal interests” may include administrative efficiency or the effectiveness of law enforcement. Often there is no further balancing under s. 1 (see *R. v. Beare*, [1988] 2 S.C.R. 387, at pp. 402-3; *R. v. Hebert*, [1990] 2 S.C.R. 151, at p. 180; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at pp. 833 and 852-54; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at p. 733; *Malmo-Levine*, at paras. 98-99; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, at para. 45; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at

paras. 20 and 63; *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405, at paras. 45-47; Singleton, at p. 448; Lipton, at p. 477).

[395] A fourth approach holds that “societal interests” should be balanced against *the s. 7 right itself* (that is liberty, life, or personal security) and not just the principle of fundamental justice that sets boundaries on the application of the right (see *Cunningham v. Canada*, [1993] 2 S.C.R. 143, at pp. 151-52; Lipton, at pp. 452-53 and 476).

[396] Finally, the Court adopted a fifth approach in *Bedford*. When considering whether there has been a violation under s. 7 and the principles of overbreadth, arbitrariness or gross disproportionality are at issue, it should be determined whether the effect on an *individual’s* life, liberty or personal security is in accordance with the principles of fundamental justice in a particular case. Whether such a deprivation is justified in light of the “overarching public goal” of the legislation may be considered under s. 1 (*Bedford*, at paras. 124-29; *R. v. Smith*, 2015 SCC 34, [2015] 2 S.C.R. 602, at para. 29).

[397] In *Carter*, at paras. 79-80, the Court responded to longstanding and continuing criticism of its various approaches to “societal interests” in s. 7 by affirming that societal interests should only be considered under s. 1. The Court explicitly stated that when “determining whether the deprivation of life, liberty and security of the person is in accordance with the principles of fundamental justice under s. 7, courts are not concerned with competing social interests or public benefits conferred by the

impugned law” (para. 79 (emphasis added)). Similarly, in *Brown*, our Court held that “[t]he equality and dignity interests of women and children . . . are appropriately understood as justification for the infringement by the state. . . . [T]he equality, dignity and security interests of vulnerable groups informed the overarching social policy goals of Parliament; they are best considered under s. 1” (para. 70 (emphasis added)).

[398] In their reasons, the majority seeks to distinguish *Carter* on the basis that they are not “balancing ‘competing moral claims’ but rather assessing the fairness of trial procedures” (para. 122, citing *Carter*, at para. 79). With respect, the majority is balancing the s. 11(d) rights of accused persons with “the privacy, dignity, and equality interests of complainants” (para. 119 (emphasis added)) to define the parameters of the accused’s entitlement to trial fairness under s. 7.

[399] In sum, in the present case, the Court is being asked to return to the method adopted in the specific context arising in *Darrach* and *Mills*, which does not otherwise conform to the Court’s recent pronouncements and, as explained below, is inconsistent with the structure of the *Charter*. These cases cannot support the propositions for which they are advanced by the Crown.

(2) Conclusions on Section 7

[400] The ambiguities and lack of consistent structure in the Court’s s. 7 jurisprudence make it a grab-bag of “rights, values, and societal interests” — unclear and amorphous concepts of uncertain legal origin and status that can be chosen, *à la*

*carte*, by a decision maker to arrive at a given result. The outcomes provide little certainty about the law for citizens and little predictability for litigants. This opens the door widely to conclusory decision-making.

D. *The Principles of Fundamental Justice Under Section 7 Are Being Relied Upon to Limit Section 11*

(1) How Permissible Internal Limits on Section 7 Rights Are Being Relied on to Introduce Limitations Into Section 11

[401] Not only are there difficulties in the Court's s. 7 jurisprudence, the Court is now being invited to rely on the content of s. 7 to limit the rights protected by s. 11.

[402] Protections under s. 7 have been held to overlap with protections under ss. 11(c) and (d). For example, s. 7 rights that are also protected under s. 11 include:

- The right of the accused to make full answer and defence (*Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505, at p. 1514; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, at p. 336; *R. v. Carosella*, [1997] 1 S.C.R. 80, at para. 29; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at para. 3; *Seaboyer*);
- The right of the accused to be presumed innocent until proven guilty (*R. v. Pearson*, [1992] 3 S.C.R. 665, at p. 682);
- The right of the accused to cross-examine Crown witnesses without significant and unwarranted restraint (*Lyttle*, at para. 43);

- The right of the accused to call evidence in their own defence (*Seaboyer*; *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 2);
- The right of the accused to fair procedures (*R. v. Levogiannis*, [1993] 4 S.C.R. 475; *Rose*, at para. 99; *Dersch*, at pp. 1514-17);
- The right of the accused to take a completely adversarial stance to the prosecution (*Stinchcombe*, at p. 333).

[403] There are three ways through which limits in s. 7 are introduced into s. 11, all of which rely on similar theoretical underpinnings and all three of which the majority relies on here.

[404] The first approach finds that ss. 11(c) and 11(d) protect rights that illustrate principles of fundamental justice (*Re B.C. Motor Vehicle Act*, at p. 502), and therefore these may be balanced against other considerations under s. 7. When s. 7 is given priority in the analysis, it subsumes ss. 11(c) and 11(d) and the latter can be limited without a s. 1 analysis. This was the approach adopted in *Mills* and subsequently, in *Darrach*.

[405] The second approach is somewhat similar to the first. However, ss. 11(c) and 11(d) are not balanced against other principles of fundamental justice under s. 7, but are themselves *defined* following consideration of other interests because they are “inextricably intertwined” with s. 7 (*Seaboyer*, at p. 603). This analysis can be seen in *Seaboyer*, where McLachlin J. stated for the majority, at pp. 603-4, that “[t]he

principles of fundamental justice reflect a spectrum of interests, from the rights of the accused to broader societal concerns”, and implied that the content of ss. 7 and 11(d) is equivalent and ascertained by looking to the scope of s. 7.

[406] The third approach holds that, because it is so closely related to s. 7, the definition of “fairness” in the s. 11(d) right to a fair trial includes considerations of the interests of the state and other parties. This methodology is exemplified by the reasons of Chief Justice McLachlin in *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, where she stated, at para. 28:

The ultimate requirement of a system of jury selection is that it results in a fair trial. A fair trial, however, should not be confused with a perfect trial, or the most advantageous trial possible from the accused’s perspective. As I stated in *R. v. O’Connor*, [1995] 4 S.C.R. 411, at para. 193, “[w]hat constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process. . . . What the law demands is not perfect justice, but fundamentally fair justice”. See also *R. v. Carosella*, [1997] 1 S.C.R. 80, at para. 72; *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 362; *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 14. At the same time, occasional injustice cannot be accepted as the price of efficiency: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at para. 32; *R. v. Leipert*, [1997] 1 S.C.R. 281.

[407] All of the above approaches have common features, which have at their core the conflation of s. 7 with the other “Legal Rights” in ss. 8 to 14 and the tendency to channel the entire constitutional analysis through s. 7. Such an analysis operates almost entirely outside the constitutional text, structure, and purposes of the various provisions.

[408] Although the majority states that they are not importing the limits of s. 7 into s. 11 in this case, that is how their analysis proceeds. Notably, the majority defines the right to a fair trial by reference to the perspectives of the accused, the complainant, the community and the criminal justice system at large (paras. 121 and 125). However, the right to a fair trial under s. 11(d) is one that appertains to the accused only. I do not see how this right of the accused can be limited by consideration of societal interests unless it is through the vehicle of the principles of fundamental justice under s. 7. I note again that, having regard to the architecture of the *Charter*, the proper methodology by which to have regard to such societal considerations is under s. 1 and not by using s. 7 as a mechanism to limit rights under s. 11.

(2) Confusion Whether to Proceed First Under the Specific (Section 11) or the General (Section 7)

[409] Because of the lack of coherence in the approach to defining ss. 7 and 11, when courts are presented with a specific case, there is no clear methodology for choosing to deal with the general (s. 7) or the specific (s. 11) right first, or to deal with one but not the other.

[410] The Court's approach to this issue has been inconsistent. In *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, at para. 76, the Court favoured proceeding with the specific right first, yet some cases continue to proceed *ad hoc*. Sometimes cases proceed under the general right — s. 7 — first (see, for example, *R. v. Cawthorne*, 2016 SCC 32, [2016] 1 S.C.R. 983, at para. 35).

Sometimes, the Court’s approach varies within the same case. For example, in *R. v. St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 S.C.R. 187, the Court dealt with some claims under s. 7 and some claims under s. 11 on the basis that some rights “most directly engage[d]” one section or the other (para. 125). This also appears to have been the approach followed in *R. v. Boutilier*, 2017 SCC 64, [2017] 2 S.C.R. 936, and *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3.

[411] The lack of a settled approach is problematic, because by choosing to proceed under one or the other section, one may arrive at inconsistent results, or, as seen above, import irrelevant considerations from one section into another. For example, here the majority asserts (without explanation) that s. 7 and s. 11(d) are “co-extensive” (paras. 113-14), while giving primacy to s. 7 and avoiding s. 1 altogether.

(3) The Specific Example of Evidence in Which a Complainant Has a Reasonable Expectation of Privacy

[412] The Court has a line of jurisprudence addressing situations that arise when an accused wishes to obtain or use evidence in which a complainant has a reasonable expectation of privacy and where restrictions on the use of this evidence are alleged to affect the accused’s fair trial rights. Due to their particular difficulty, these cases tend to demonstrate all of the above methodological problems, often at the same time. They illustrate the gradual blending of *Charter* rights, *Charter* values and societal interests within the principles of fundamental justice and how they have come to influence the

interpretation of s. 11 and impose limits on its scope that are not found in its text and are not justified under the rigorous *Oakes* analysis of s. 1.

[413] In *Seaboyer*, the Court addressed Parliament's first effort to regulate the use of evidence of complainants' prior sexual history under s. 276 of the *Criminal Code*. Complainants' privacy and security rights were not directly engaged by the legislation, but the arguments made in favour of the legislation contended that these goals needed to be considered when determining whether the legislation violated s. 7. As described above, McLachlin J. imported consideration of societal interests into s. 7 when she stated on behalf of the majority, at pp. 603-4:

A final point must be made on the ambit of s. 7 of the *Charter*. It has been suggested that s. 7 should be viewed as concerned with the interest of complainants as a class to security of person and to equal benefit of the law as guaranteed by ss. 15 and 28 of the *Charter*: Yola Althea Grant, "The Penetration of the Rape Shield: *R. v. Seaboyer* and *R. v. Gayme* in the Ontario Court of Appeal" (1989-1990), 3 *C.J.W.L.* 592, at p. 600. Such an approach is consistent with the view that s. 7 reflects a variety of societal and individual interests.

Crucially, McLachlin J. finished that statement by writing: "However, all proponents in this case concede that a measure which denies the accused the right to present a full and fair defence would violate s. 7 in any event" (p. 604).

[414] In *R. v. O'Connor*, [1995] 4 S.C.R. 411, the Court considered the common law rules governing production of third party records in sexual assault trials. In dissent on this issue, L'Heureux-Dubé J. opined that "values that are fundamental to our

common law” are the basis for the “principles of fundamental justice” and that complainants’ privacy and security of the person are such principles (paras. 61 and 113). She would have found that these *Charter* values should have been balanced against the accused’s right to a fair trial within s. 7.

[415] I note, parenthetically, that even L’Heureux-Dubé J.’s *O’Connor* dissent, while finding that complainants’ privacy and security may be weighed against the accused’s right to a fair trial, recognized that some documents are exempt from this weighing because they are necessary for the accused to defend against the subject matter of the charge. L’Heureux-Dubé J. commented that “witnesses have a right to privacy in relation to private documents and records (i.e. documents and records in which they hold a reasonable expectation of privacy) which are not a part of the Crown’s ‘case to meet’ against the accused” (para. 130 (emphasis added)). This crucial point has been eliminated in ss. 278.92 to 278.94. In this case the majority appears to suggest that introducing information relating to the subject matter of the charge is merely a tactical burden, rather than crucial to determining the truth of the matters in issue (paras. 66-67, 79 and 151-63).

[416] In *Mills*, the privacy and security interests of complainants were elevated to the status of principles of fundamental justice to be balanced against the right to a fair trial within s. 7 (para. 62). However, it should not be overlooked that the Court in *Mills* also considered that the legislation directly engaged complainants’ *Charter* rights

because there was a seizure of records under s. 8. The privacy and security of complainants in that case were not merely *Charter* values or societal interests.

[417] In *Darrach*, the Court blended consideration of *Charter* rights and *Charter* values under the principles of fundamental justice. In that case, the legislation did not directly engage any of the complainant's *Charter* rights. Nonetheless, the Court concluded, at para. 25, that "[i]n *Seaboyer*, the Court found that the principles of fundamental justice include the three purposes of s. 276 identified above: protecting the integrity of the trial by excluding evidence that is misleading, protecting the rights of the accused, as well as encouraging the reporting of sexual violence and protecting 'the security and privacy of the witnesses' (p. 606). This was affirmed in *Mills*, *supra*, at para. 72." The Court reached this finding despite the distinctions between the status of complainants' rights and interests in those prior cases. The holding in *Darrach* that *Charter* values are relevant to internal balancing under s. 7 finds no support in *Mills* or *Seaboyer*, on a careful reading of those cases.

[418] As well, *Darrach* blended s. 7 and ss. 11(c) and 11(d). At para. 23, the Court explained:

In *R. v. Mills*, [1999] 3 S.C.R. 668, the Court dealt with a claim that s. 11(d) was violated in combination with s. 7, and the Court analysed the issues under the rubric of s. 7 on the grounds that the fair trial specifically protected by s. 11(d) was itself a principle of fundamental justice under s. 7. In *R. v. White*, [1999] 2 S.C.R. 417, at paras. 40 and 44, Iacobucci J. described s. 11(c) as a procedural protection that underlies the principle against self-incrimination, which is also a principle of fundamental justice under s. 7. In both cases, the Court analysed the rights involved in the context of s. 7. [Emphasis added.]

[419] The Court in *Darrach* then proceeded to import the limits of s. 7 into ss. 11(c) and 11(d) so as to find no constitutional violation. An analysis under s. 1 was therefore not required (see para. 30).

[420] The majority states they are applying the current approach to the analysis. However, they reference *Mills* and *Darrach* and adopt the “blended” methodology I have described above, thereby defining s. 11 through s. 7. This is problematic for two reasons. First, the approach as to the order in which ss. 7 and 11 should be addressed was settled in *Whaling*, at para. 76. Second, the Court confirmed in *Carter*, at paras. 79-80, and even more recently in *Brown*, at para. 70, that consideration of “societal interests” should not be factored into the s. 7 balancing, but rather should be dealt with under s. 1. I do not see how the methodology adopted in *Mills* and *Darrach* can be reconciled with these subsequent authorities.

[421] I emphasize that, regardless of the methodology used, *no* case from this Court has held that protecting a complainant’s privacy interests always justifies limiting the accused’s right not to respond before the Crown has established the case to meet. Nor has any case from this Court found that access to, or the use of, evidence in which a complainant has a reasonable expectation of privacy never engages the accused’s fair trial rights (see *Seaboyer*; *O’Connor*; *Mills*; *Darrach*; *Osolin*; *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33). To do so, the majority asserts that leading information to defend oneself is merely a tactical burden (see paras. 151-63 and 173-74) and appears

to authorize compelled defence disclosure (see paras. 162-69). No judgment of this Court has undercut the accused's right to a fair trial in so serious a way.

E. *Section 7 Cannot Operate to Limit Section 11 Rights as This Is Inconsistent With the Architecture of the Charter*

[422] There is no basis in the Constitution for the approach whereby s. 7 can limit rights in ss. 8 to 14. This becomes evident when one examines the structure of the *Charter* and the places of ss. 7 and 11 within it.

(1) The Relationship Between Section 7 and Section 11 of the *Charter*

[423] Both ss. 7 and 11 appear under the heading “Legal Rights”. As explained by E. Colvin in his article “Section Seven of the Canadian Charter of Rights and Freedoms” (1989), 68 *Can. Bar Rev.* 560, at p. 574:

... “legal rights” cannot simply mean rights which are recognized in law. All Charter rights would be legal rights in this sense. The use of the term to describe a sub-category of Charter rights suggests that the included rights are of a special kind, different from the rights respecting the substantive content of law which are conferred in some other parts of the Charter.

[424] The grouping of ss. 7 and 11 into one subsection of the *Charter* suggests a relationship between their purposes and the purposes of other rights within that same grouping. Usually, “Legal Rights” are associated with the administration of justice

(Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123, at pp. 1172-73, citing Colvin, at pp. 573-74).

[425] In *Re B.C. Motor Vehicle Act*, the Court concluded that ss. 8 to 14 “are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice” (p. 502). However, they are not exhaustive of s. 7, which is broader (p. 502; *Malmo-Levine*, at para. 169, referring to *Hebert*, and *Thomson Newspapers Ltd.*; see also *R. v. Généreux*, [1992] 1 S.C.R. 259, at p. 311). Section 7 provides residual rights protections, where the specific rights in ss. 8 to 14 do not apply. However, the analysis cannot work in reverse to rely on any internal limits under s. 7 to limit the scope of the rights in s. 11. There is simply no basis in the Constitution for doing so.

(2) Limiting Section 11 on the Basis of Section 7 Is Inconsistent With the Structure of the Charter, the Purposes of Both Provisions and Section 1

[426] Limiting s. 11 on the basis of s. 7 is inconsistent with the text and structure of the “Legal Rights” section of the *Charter*, the purposes of both provisions and s. 1.

[427] Textually, there is an internal balancing using the principles of fundamental justice in s. 7, but there are no corresponding textual limits in ss. 11(c) and 11(d). The text of the sections is not the same.

[428] Structurally, s. 11 rights can only be limited if the outcome is justified following a proportionality assessment under s. 1.

[429] As a practical matter, balancing s. 7 internally and using the outcome to limit s. 11 leads to a reversal of the burden of proof and a dilution of *Charter* protections. Under s. 11, an accused alleging a violation must prove it; if proven, the onus shifts to the state to justify the violation under s. 1 (*Oakes*, at pp. 136-37). By contrast, when there is a balancing of *Charter* rights, *Charter* values and societal interests under the principles of fundamental justice in s. 7, the burden is on the accused throughout. Accused persons must establish not only the content of the principle of fundamental justice that they allege is violated, but also that it is not outweighed by other considerations. Such an approach undermines the purpose of the broad protection of the right to a fair trial under s. 11 and the purpose of s. 1 to hold the state to the burden of proof to show that any limit is demonstrably justified in a free and democratic society.

[430] A further potentially anomalous result is that s. 11 may first be limited by s. 7 and then, when the usual s. 1 analysis is undertaken, s. 11 rights may be further limited. This implies that s. 11 rights may be limited once, importing limits from s. 7, and then again under s. 1. Yet does this result not follow logically from the majority's approach?

[431] Most fundamentally, limiting s. 11 protections through s. 7 is contrary to the purposes of both ss. 7 and 11. Sections 11(c) and 11(d) are cast broadly in order to

provide strong protections for fair trial rights. Section 7 is meant to be a broad, rights-conferring provision that provides residual protection to fair trial rights that may not be captured by s. 11. Yet in these appeals, the Crown and various interveners urge on the Court an approach whereby s. 7 operates to limit the broad rights in s. 11. This is not the proper function of s. 7. It undermines the *Charter's* purpose as a counter-majoritarian instrument intended to protect accused persons from the excesses of state power. Rather than protecting the rights of accused persons, s. 7 is being used as the instrument to imperil that protection.

#### IV. Suggested Interpretive Approach

[432] In order to bring coherence to the application of s. 7 and ss. 8 to 14 when constitutional claims allege violations of s. 7 as well as other sections of the *Charter*, the Court should adopt and consistently apply an interpretive approach that is in line with the structure and purpose of the *Charter*. Doing so is a matter of constitutional imperative.

[433] Where a specific *Charter* guarantee is pleaded along with the broader guarantee in s. 7, the specific guarantee should be addressed first. Unless a right is not captured under the specific *Charter* guarantee, there is no reason to proceed to s. 7. There is nothing new to this proposition. The Court has previously set out this approach in *Whaling*, at para. 76, citing *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 13, and *Généreux*, at p. 310 (see also *Pearson*).

[434] In the present case, specific *Charter* guarantees — ss. 11(c) and 11(d) — are pleaded along with the broader guarantee in s. 7. The first step is therefore to determine whether there is a violation of ss. 11(c) and 11(d), and, if so, whether it is justified under s. 1. If there *is* a violation that is not justified under s. 1, then the analysis stops there.

[435] If, however, there is no violation of the specific provisions, or there is a violation but it is found to be justified, the courts *then* look to s. 7. As noted at para. 425 above, violations of ss. 8 to 14 are illustrative of deprivations of s. 7 rights, but s. 7 is broader. In these circumstances, the courts must examine whether the rights protected under s. 7 are *more extensive or different* from those protected under the specific provision. If the answer is *no*, then no analysis is required under s. 7, since the result under s. 7 remains the same as the result under the specific provision. If the answer is *yes*, however, courts need to explain in what way it is more extensive or different. This analysis will define the scope of the right protected under s. 7 and the analysis that is required in order to find an infringement.

[436] When determining the scope of s. 7, courts should focus on the rights alleged by the rights claimant. For the reasons set out above, there is no place for values and societal interests in the internal balancing in s. 7. Such moral considerations should be weighed using the transparent proportionality analysis in s. 1 (*Carter*, at para. 79; *Brown*, at para. 70).

[437] This construction of s. 7, s. 11 and s. 1 conforms to the architecture of the *Charter*, provides for interpretation of the relevant provisions by reference to their own text and purposes, and offers clarity as to which party has the onus of proof at each stage of the analysis.

## V. Conclusion

[438] The limitation on the fair trial right is unjustified in this case. I agree with Justice Brown on the merits and would therefore hold that ss. 278.92 to 278.94 of the *Criminal Code* are unconstitutional and, therefore, of no force or effect, except as they apply to the existing s. 276 regime.

The following are the reasons delivered by

CÔTÉ J. —

### I. Overview

[439] I have had the benefit of reading the majority's reasons as well as the dissenting reasons of Brown J. and Rowe J. I endorse the constitutional analyses of Brown J. and Rowe J. I agree with Brown J. that the record screening regime does not come close to passing constitutional muster. I am also in agreement with Rowe J.'s analytical approach in respect of s. 7 of the *Canadian Charter of Rights and Freedoms*.

However, I disagree with the analyses and the conclusions of both the majority and Brown J. on the interpretation of “record” and “adduce”.

[440] I readily concede that there are issues with any interpretation of both of these words. Unfortunately, this is an inevitable consequence of the “ham-fisted” nature of the record screening regime (Brown J.’s reasons, at paras. 204 and 311). But in my view there are strong reasons to prefer narrow interpretations of both words. Even with narrow interpretations, however, I am of the view that the record screening regime remains unconstitutional. It is simply *more* constitutionally defective if either the majority’s interpretations or Brown J.’s interpretations are adopted.

[441] My reasons proceed in two parts. First, I explain why narrow interpretations of “record” and “adduce” should be adopted. Second, I briefly explain why, even if my narrower interpretations were adopted, Brown J.’s constitutional analysis remains overwhelmingly applicable.

## II. Statutory Interpretation

### A. *The Definition of “Record” Excludes Communications Between the Complainant and the Accused*

[442] In my view, a proper interpretation of “record” as defined in s. 278.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, excludes any communications — electronic or otherwise — between the accused and the complainant other than communications

made in the context of a professional relationship in which there was an expectation of some degree of confidentiality. Such an interpretation is preferable because: (1) it better accords with the text of s. 278.1; (2) it better reflects the intention of Parliament; (3) it better aligns with the jurisprudence on the interpretation of the phrase “reasonable expectation of privacy”; and (4) it avoids many of the absurd results that inevitably follow from a broad interpretation.

(1) Text of Section 278.1

[443] I begin my analysis with the text. Section 278.1 does not refer to communications — electronic or otherwise — in defining “record”. Communications between the complainant and the accused are not specifically enumerated as records in that section. There is no dispute that communications between the complainant and the accused may be captured by the enumerated categories (e.g. communications between a physician and a patient). The main interpretive question at issue, however, is whether communications between the complainant and the accused are included among the types of records that are not enumerated in the definition. That is, are they covered by the definition of “record” because they nonetheless contain personal information for which there is a reasonable expectation of privacy? In my view, any communications between the accused and the complainant that were not exchanged in the context of a professional relationship in which there was an expectation of some degree of confidentiality would not constitute a record.

[444] I agree with the majority that the interpretive principle of *ejusdem generis* (“of the same kind”) applies (para. 55). However, and with respect, I believe that the majority does not apply this principle properly. The majority relies on it to conclude that “[t]he common thread weaving through the enumerated records is that they contain information of an intimate and highly personal nature that is integral to the complainant’s overall physical, psychological or emotional well-being”, explaining that this “could include, but is not limited to, discussions regarding mental health diagnoses, suicidal ideation, prior physical or sexual abuse, substance abuse or involvement in the child welfare system” (para. 55). With respect, the majority conflates the concept of “personal information” with that of a “reasonable expectation of privacy”. As Brown J. correctly notes at para. 233 of his reasons, although the diary in question in *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33, contained only “mundane” entries, that did not eliminate the complainant’s privacy interest.

[445] In my view, a proper application of the *ejusdem generis* principle leads to the conclusion that communications between the complainant and the accused would not be included in the definition of “record”. All the enumerated records fall into one of two distinct categories: (1) records created in a professional context for which there is an expectation of some degree of confidentiality (i.e. medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption, and social services records); or (2) records that are intended for the complainant’s exclusive personal use and review (i.e. personal journals and diaries). The phrase “reasonable expectation of privacy” must be interpreted in this context.

[446] The common thread weaving through the enumerated records, therefore, is the complainant's reasonable expectation that such records will not be publicly disclosed. In short, the defining feature of the enumerated records is not the "highly personal nature" of the information; rather it is the complainant's reasonable expectation that the information will remain private. Accordingly, unenumerated records will be documents containing personal information (broadly defined) that the complainant expects not to be disclosed. These could be either (1) records created in a professional context for which there is an expectation of some degree of confidentiality, even if the relationship is not strictly confidential, or (2) records that are intended for the complainant's exclusive personal use and review.

[447] This interpretation of "record" is consistent with *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, in which this Court held that the Court of Appeal had erred "in concluding that the complainant could not have a reasonable expectation of privacy because the information was disclosed outside the context of a 'trust-like, confidential or therapeutic relationship'" (para. 38). Karakatsanis J., writing for the Court, emphasized the principle that a person may reveal information to an individual or an organization on the understanding that it will be used only for a specific purpose, commenting that "[w]hether a person is entitled to expect that their information will be kept private is a contextual inquiry" (para. 38).

[448] The relationship between the police and individuals reporting information to the police cannot be strictly classified as a "trust-like, confidential or therapeutic

relationship”. Nevertheless, Karakatsanis J. rightly stressed that, given the context in which the information had been divulged in that case, there was in effect an expectation of some degree of confidentiality. She stated the following:

People provide information to police in order to protect themselves and others. They are entitled to do so with confidence that the police will only disclose it for good reason. The fact that the information is in the hands of the police should not nullify their interest in keeping that information private from other individuals. [Emphasis added; para. 43.]

Ultimately, a strictly confidential relationship is not required; however, in *Quesnelle*, it was the relationship between the complainant and the police that grounded the expectation of some degree of confidentiality. That relationship formed the basis of a reasonable expectation that the police would only disclose the information for a good reason, and the complainant retained an interest in keeping the information private from others.

(2) Legislative Context

[449] In addition to being consistent with the text of s. 278.1, a narrower interpretation of “record” is more consistent with other contextual factors — such as the section’s legislative evolution and legislative history. Legislative evolution “consists of the successive enacted versions of [a] provision from its inception to the version in place when the relevant facts occur” (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at § 23.18). Legislative history, on the other hand, can be more narrowly construed as “the range of extrinsic materials relating to

the conception, preparation and passage of a provision, from the earliest proposals for legislative change to royal assent” (Sullivan, at § 23.19).

[450] With respect to the section’s legislative evolution, the definition of “record” remains largely unchanged from the original definition that applied to the regime for the production of records by third parties.<sup>2</sup> This weighs heavily in favour of an interpretation that would exclude communications — electronic or otherwise — between a complainant and an accused. Given the absence of an explicit modification, the record screening regime introduced by the *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”), cannot have changed the meaning of “record” as defined in s. 278.1. Prior to the enactment of Bill C-51, communications between the accused and the complainant were not contemplated as falling within the meaning of “record” under the regime for third party records. Such communications were already in the possession of the accused. In my view, by importing a definition of “record” from the regime for the production of third party records, which did not contemplate or include communications between the accused and the complainant, Parliament signaled an intention that such communications do not constitute records for the purposes of the record screening regime.

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<sup>2</sup> With the enactment of Bill C-51, there were some minor, non-substantive changes to the text of s. 278.1. The statutory definition of “record” was modified to the extent that the phrase “without limiting the generality of the foregoing” was removed. As was noted in *R. v. M.S.*, 2019 ONCJ 670, at paras. 33-36 (CanLII), this was not a substantive change.

[451] With respect to legislative history, it is important to consider the mischief Bill C-51 was intended to remedy. The majority mentions that Bill C-51 was “Parliament’s response” to a 2012 report of the Standing Senate Committee on Legal and Constitutional Affairs (para. 9). The report acknowledged the existence of a legislative gap apparent after this Court’s decision in *Shearing*. The report included the following recommendation: “That the Government of Canada consider amending the *Criminal Code* to set out a procedure governing the admissibility and use during trial of a complainant’s private records, as defined in section 278.1 of the *Criminal Code*, which are not wrongfully in the hands of the accused” (*Statutory Review on the Provisions and Operation of the Act to amend the Criminal Code (production of records in sexual offence proceedings): Final Report*, at p. 20 (emphasis added)).

[452] Ultimately, Bill C-51 was enacted to address a gap in the law that arose where an accused legally came into possession of a record such as a diary or a counselling record. This was the mischief Parliament sought to address. The mischief to be remedied was *not* the admission at trial of voluntary communications — such as text messages or emails — between the complainant and the accused. This again weighs heavily in favour of an interpretation of “record” that excludes electronic communications between an accused and a complainant.

[453] I acknowledge that there is other evidence regarding the legislative history, from the legislative proceedings, for example, that “suggest[s] that Parliament did indeed intend to capture digital conversations between the accused and [the]

complainant” (Brown J.’s reasons, at para. 237). This includes references in the Parliamentary debate to the trial in *R. v. Ghomeshi*, 2016 ONCJ 155, 27 C.R. (7th) 17, and a proposal from defence lawyers to *explicitly* exclude electronic communications between the complainant and the accused from the record screening regime.

[454] Although this other evidence of Parliament’s intent is relevant, I would not give much weight to it. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 35, this Court stated: “Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation.” In my view, the frailties of this evidence of Parliament’s intent are apparent in the case at bar. Notwithstanding the stray and marginal remarks about the *Ghomeshi* trial and submissions made to Parliament by defence lawyers on the *potential* implications of language in a draft bill and how it *could* be improved, I am unconvinced that Parliament intended the record screening regime to apply to communications — electronic or otherwise — between the complainant and the accused. The countervailing evidence of Parliament’s intent that I have discussed — such as the section’s legislative evolution and the 2012 Senate Report — is quite simply more conclusive.

(3) Jurisprudence on the Phrase “Reasonable Expectation of Privacy”

[455] The definition of “record” must also be interpreted in light of this Court’s jurisprudence on the meaning of “reasonable expectation of privacy”, a phrase that has been of particular significance in the jurisprudence relating to s. 8 of the *Charter*. In *R. v. Jarvis*, 2019 SCC 10, [2019] 1 S.C.R. 488, the Court concluded that the s. 8

jurisprudence may be instructive when it comes to interpreting privacy interests in non-*Charter* contexts (paras. 58-59). In my view, the interpretations of “record” by both the majority and Brown J. are less consistent with this Court’s jurisprudence and with the common law meaning of the phrase “reasonable expectation of privacy”. The balance of this Court’s jurisprudence favours a narrow interpretation.

[456] To be clear, I do not dispute that “[e]xpectations of privacy are contextual and must be assessed in light of the ‘totality of the circumstances’” (majority reasons, at para. 57, citing *R. v. Patrick*, 2009 SCC 17, [2009] 1 S.C.R. 579, at para. 26, and *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 45). However, the key contextual factor is this: An individual does not have an objectively reasonable expectation of privacy in communications *vis-à-vis* the recipient of the message. In the context of a trial in which the accused’s liberty is at stake, a complainant therefore does not have an objectively reasonable expectation of privacy in their communications with the accused. As a result, communications between the accused and the complainant — including communications relating to the subject matter of the charge — do not constitute records for the purposes of the record screening regime. The only exception to this category-based approach relates to messages exchanged in the context of a professional relationship in which there is an expectation of some degree of confidentiality.

(a) *Meaning of “Reasonable Expectation of Privacy”*

[457] In *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, a majority of this Court held that individuals can retain a reasonable expectation of privacy over the

contents of their electronic communications. However, McLachlin C.J. distinguished the risk of dissemination to a private citizen from the risk of dissemination to the state (paras. 40-41). As she mentioned, “[t]he issue is not who owns the device through which the electronic conversation is accessed, but rather whether the claimant exercised control over the *information* reflected therein” (para. 43 (emphasis in original)). McLachlin C.J. acknowledged that by sharing information, Mr. Marakah had accepted the risk that the information might then be shared with third parties, but she concluded that, “by accepting this risk, Mr. Marakah did not give up control over the information or his right to protection under s. 8” (para. 41).

[458] In my view, this Court’s decision in *Marakah* must be read in light of s. 8 of the *Charter*. As McLachlin C.J. explicitly stated: “The risk that the recipient could have disclosed it, if he chose to, does not negate the reasonableness of Mr. Marakah’s expectation of privacy against state intrusion” (para. 45 (emphasis added)). Moreover, by acknowledging that the recipient *could* have disclosed the information, McLachlin C.J. implicitly recognized that *some* control over the information had effectively been ceded to the recipient. This is a natural consequence of sharing information with others.

[459] This Court’s decision in *R. v. Mills*, 2019 SCC 22, [2019] 2 S.C.R. 320, likewise supports my narrower interpretation of “record”. The issue in *Mills* was whether the police had breached the accused’s right under s. 8 of the *Charter* by posing online as a 14-year-old girl and capturing the accused’s messages to the fictional child.

Brown J. concluded that the accused's expectation of privacy was objectively unreasonable, noting that the police were "simply responding to messages sent directly to them" (para. 29). In concurring reasons, Karakatsanis J. wrote: ". . . an individual cannot reasonably expect their words to be kept private from the person with whom they are communicating" (para. 42; see also para. 51). Moldaver J. concurred with the reasons of both Brown J. and Karakatsanis J., stating that they were both "sound in law" (para. 66). Martin J., in separate concurring reasons, did not dispute the general proposition that an individual cannot reasonably expect their words to be kept private from the person with whom they are communicating, but she instead held: "That general proposition does not and cannot apply when the state has secretly set itself up as the intended recipient" (para. 101).

[460] Both *Marakah* and *Mills* support my narrower interpretation of "record". Although my interpretation is more category-based, it nonetheless remains consistent with the fundamental premise in the jurisprudence that expectations of privacy are contextual. To reiterate, the key contextual factor is that an individual does not have an objectively reasonable expectation of privacy in communications *vis-à-vis* the recipient of the message.

[461] The only exception to this category-based approach relates to messages exchanged in the context of a professional relationship in which there is an expectation of some degree of confidentiality. It is reasonable to conclude that a complainant has a reasonable expectation of privacy — *vis-à-vis* an accused psychologist or doctor, for

example — in communications exchanged in the context of such a relationship. In such circumstances, the professional relationship and the corresponding expectation of some degree of confidentiality ground a reasonable expectation of privacy. This approach is therefore consistent with the principle that privacy interests include a “reasonable expectation that private information will remain confidential to the persons to whom and restricted to the purposes for which it was divulged” (*R. v. Mills*, [1999] 3 S.C.R. 668, at para. 108).

[462] In any event, I note that communications exchanged in the context of a professional relationship (e.g. emails with a psychologist) are clearly included in s. 278.1 as enumerated records. They would therefore automatically be subject to the record screening regime.

[463] I recognize that a distinction can be made between a complainant sharing private information with an accused and the accused disseminating that information in the context of a public trial. However, in the context of a trial for a sexual offence, it is difficult to see how — based on an objective assessment — a complainant can reasonably expect the accused not to rely on information the complainant had freely shared with the accused if the information is relevant to an issue at trial. Context matters. Where the accused’s liberty is at stake, a complainant’s expectation of privacy in communications with the accused is objectively unreasonable unless the information was disclosed in the context of a professional relationship in which there was an expectation of some degree of confidentiality.

[464] It is helpful, in my view, to highlight the implications of the majority's approach to the complainant's privacy interests, specifically as it relates to communications with the accused that pertain to the subject matter of the charge. According to the majority, a complainant "will often", but not always, have a reasonable expectation of privacy in records of an explicit sexual nature, including communications with the accused relating to the subject matter of the charge (para. 65). The majority's "content and context framework" (para. 67) is equivocal and indeterminate, as "evidence of an explicit sexual nature that relates to the subject matter of the charge may be caught by the record screening regime even if it is not s. 276 evidence" (para. 66 (emphasis added)).

[465] With respect, the majority's approach fails fundamentally to assess whether the complainant's expectation of privacy is *objectively* reasonable in the circumstances. It gives undue weight to the content of the communications, while simultaneously disregarding or minimizing other significant contextual factors, such as the fact that the accused is a party to the communications, the fact that the communications in question may relate to the subject matter of the charge and the fact that the accused's liberty is at stake. In this way, the majority conflates the assessment of the complainant's (possible) subjective expectation of privacy with the assessment of whether that expectation of privacy is objectively reasonable in the circumstances. The result of the majority's confounding approach is twofold.

[466] First, no meaningful guidance is provided to counsel or to trial judges. Counsel for the accused must simply discern — with reference to the majority’s ill-defined “type of content” (para. 55) and other “non-exhaustive” contextual factors (para. 57) — whether a message relating to the subject matter of the charge may or may not be subject to the record screening regime. Contrary to the majority’s statement, the test they have articulated for interpreting s. 278.1 will not “reduc[e] the need for motions for directions” (para. 104).

[467] Second, the majority’s conception of and approach to privacy is inconsistent with the idea that a reasonable expectation of privacy standard is normative rather than simply descriptive (*R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 42; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 18; *Jarvis*, at para. 68). Subject to the single exception I have discussed above, I fail to see how a complainant can have an *objectively* reasonable expectation of privacy in *any* messages exchanged with the accused that include information — whether explicit or inexplicit — pertaining to the subject matter of the charge. The trial context is determinative: the complainant has stepped forward with an accusation against the accused; the accused is being prosecuted in open court; the accused faces a loss of liberty; the accused has the right to make full answer and defence; the communications at issue were between the complainant and the accused; and the communications at issue contain information that directly pertains to the criminal accusation (i.e. the subject matter of the charge) against the accused. In these circumstances, the complainant does not have an *objectively* reasonable expectation of privacy in the

communications. The mere statement by the majority that its approach “take[s] into account the trial context” does not make it so (para. 62).

(b) *Content-Neutral Analysis*

[468] With respect, I am of the view that the majority is wrong to abandon the content-neutral approach from the s. 8 jurisprudence. I say this for five reasons.

[469] First, there is nothing in the text of s. 278.1 that suggests that doing so is necessary. There is quite simply no reason to depart from the common law meaning of the phrase “reasonable expectation of privacy” and the content-neutral approach that has been developed in relation to it.

[470] Second, a content-neutral approach facilitates the operation of the record screening regime: it allows lawyers and judges to more easily assess whether a document is a “record” on its face. This would render the majority’s convoluted approach to records unnecessary and would have the significant benefit of largely averting the need for motions for directions.

[471] Third, the majority’s justification for jettisoning the content-neutral approach is unpersuasive. The majority states that “it would be difficult to meaningfully assess or protect” (para. 49) a complainant’s privacy interests using a content-neutral approach. However, as I explained above, the common thread weaving through the records enumerated in s. 278.1 is not the sensitivity of their content, but the expectation

that they will not be publicly disclosed. All of the enumerated records are either (1) records created in a professional context for which there is an expectation of some degree of confidentiality or (2) records that are intended for the complainant's exclusive personal use and review. The content of such records can vary dramatically — from information that is mundane to information that is deeply personal. Yet all of them are included in the record screening regime because the complainant's expectation that they will not be disclosed is reasonable. The focus should therefore be on the expectation of privacy rather than on the content of the information.

[472] Fourth, the majority's justification for jettisoning the content-neutral approach is internally inconsistent with their own reasons as well as being inconsistent with *Shearing*. The majority states: "Records do not attract a reasonable expectation of privacy simply because of the medium used to convey them" (para. 49). The majority also notes, however, that "mundane information such as general emotional states, everyday occurrences or general biographical information would typically not give rise to a reasonable expectation of privacy" (para. 56). This is clearly inconsistent with *Shearing*. The diary in *Shearing* contained only "very mundane" entries, yet this did not extinguish the complainant's privacy interest (*Shearing*, at paras. 87 and 112). As well, the majority in the case at bar later emphasizes that "courts may consider where the record was shared and how it was created or obtained", juxtaposing mediums like text messages that "may attract an enhanced reasonable expectation of privacy" with other mediums like social media that would attract a lower expectation of privacy

(para. 60 (emphasis added)). Clearly, records *can* attract a reasonable expectation of privacy — regardless of their content — based on the medium used to convey the information.

[473] Fifth, the majority’s justification for abandoning the content-neutral approach is inconsistent with the fundamental premise of the record screening regime. This regime specifically concerns records. It does not, contrary to the majority’s conclusion, concern “information of an intimate and highly personal nature that is integral to the complainant’s overall physical, psychological or emotional well-being” (para. 54). If, for example, the accused learns that the complainant is dealing with “suicidal ideation” or “substance abuse” (para. 55) in the course of an oral conversation in which no record was created, the record screening regime would not apply. This entirely undermines the majority’s rationale for abandoning the content-neutral approach to assessing whether there is a reasonable expectation of privacy. In the record screening regime, the medium — and the expectation of privacy that exists in the context of that medium — is determinative.

#### (4) Absurd Results

[474] As this Court observed in *Rizzo & Rizzo Shoes*, “[i]t is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences” (para. 27). There are three absurd results that would be averted by adopting a narrow category-based approach to the interpretation of “record”.

[475] First, a category-based approach would have significant practical benefits in terms of trial efficiency. If electronic communications between an accused and a complainant fall within the ambit of the record screening regime, an accused seeking to adduce hundreds of electronic communications into evidence will be required to contextually assess each message in order to determine whether it constitutes a “record”. Some of these messages may meet the majority’s threshold for “record” and some may not. The status of many messages, however, will remain ambiguous. Continual recourse to motions for directions — not contemplated in the regime — will be necessary. This added procedure will inevitably have an adverse impact on trial efficiency, thereby making trials for sexual offences even more unwieldy and complicated.

[476] Second, the majority’s interpretation of “record” will result in an absurd two-tiered system of admissibility that favours the Crown: the Crown can adduce any communications provided to it by the complainant, while the accused cannot adduce communications in its possession that were freely exchanged with the complainant. The majority purports to draw on the common law meaning of the phrase “reasonable expectation of privacy”. However, the majority interprets the phrase in a manner that affords the complainant greater protection than the accused in their electronic communications with each other, despite the fact that the accused’s communications will have been disclosed to the state. This is an absurd, and needless, consequence of the majority’s interpretation.

[477] Third, a broad interpretation of “record” will lead to the absurd consequence of having the record screening regime — needlessly and without a principled justification — create a distinction between information exchanged orally and information exchanged through electronic means. In *Marakah*, McLachlin C.J. characterized text messages as “part of an electronic conversation”, which, she observed, “reflects the technological reality of text messaging” (para. 17). The majority’s broad interpretation of “record” will now result in the record screening regime treating electronic communications differently than oral conversations merely because the electronic conversations were recorded. This is absurd. It is unclear how an individual retains *more* control (or why they should do so) over information shared *with an accused individual* via electronic means than they would over information shared orally.

(5) Conclusion on the Interpretation of “Record”

[478] For the foregoing reasons, a narrow interpretation of “record” should be adopted. With respect, the majority’s approach to the interpretation of “record” is needlessly ambiguous, complicated and confusing. It is neither principled nor pragmatic.

B. *Plain Meaning of “Adduce” Should Be Adopted*

[479] Sections 278.92 and 278.93 of the *Criminal Code* together are clear: they require an application only where an accused intends to introduce a copy of the actual

record into evidence — “adduce” simply means adduce. An application is not required where an accused intends only to ask questions about the information contained in the record, and not to adduce the record in evidence. There are three reasons to prefer a narrow interpretation of “adduce”.

[480] First, the record screening regime is ultimately about the admissibility of “records”, in contrast to other statutory or common law schemes that govern the admissibility of a category of evidence (such as evidence under s. 276 of the *Criminal Code* or *Scopelliti* character evidence). Given that the record screening regime is focused on physical records rather than on a category of evidence, the plain meaning of “adduce” should be adopted, as it relates directly to the physical record. It is incongruous for the record screening regime to make all personal information presumptively inadmissible merely because the information happens to be documented in a record, and regardless of whether there was ever an intention to introduce — that is, adduce — that record in evidence.

[481] Second, interpreting “adduce” more broadly to include using the information contained in the record means that an accused who kept a record will be subject to the regime, whereas an accused who forgot about the existence of a record, lost the record, destroyed the record or learned about the information contained in it through an oral conversation will not be subject to the regime. There is an inherent incongruity in an interpretation of “adduce” that prevents one accused from using relevant information contained in a record merely because this accused possesses the

best evidence of the information in question, whereas another accused will be permitted to use the same information (e.g. by asking questions during cross-examination of the complainant) because the second accused does not possess a record containing the information.

[482] Third, the majority's interpretation of "adduce" is, in my respectful view, highly problematic given their broad interpretation of "record". Witnesses are generally permitted to give evidence about things said to them in conversations, provided the evidence is relevant and otherwise admissible. Given McLachlin C.J.'s description of text messaging as an "electronic conversation" (*Marakah*, at para. 17), it follows that an accused should be permitted to ask the complainant questions about any electronic conversations between them that are relevant to an issue at trial. Barring an evidentiary rule (like the one in s. 276) that prohibits the accused from producing certain types of evidence, an accused should also be permitted to testify about electronic conversations with the complainant. In *R. v. Fliss*, 2002 SCC 16, [2002] 1 S.C.R. 535, this Court held that the jury was entitled to hear from a police officer about a conversation with the accused, and that the officer was entitled to refresh his memory by any means, including a stimulus that would constitute inadmissible evidence (para. 8, per Arbour J.; paras. 43-45, per Binnie J.). Similarly, in *Mills* (2019), Karakatsanis J. explained that, even if screenshots of messages between an accused and an undercover police officer could not be tendered as evidence, "the Crown could still call the officer to testify about what the accused said and the written record could be used to refresh

the officer's memory" (para. 54). In my view, the same approach must be taken with the record screening regime.

### III. Record Screening Regime Remains Unconstitutional

[483] Brown J. concludes that the record screening regime limits the accused's rights under ss. 11(c), 11(d) and 7 of the *Charter* in four ways: (1) it forces accused persons to reveal their defence before the Crown has made out a case to meet, contrary to the principle against self-incrimination, the right to silence, and the presumption of innocence; (2) it restricts the accused's ability to cross-examine Crown witnesses by giving the complainant a role in pre-trial admissibility determinations; (3) it makes private records presumptively inadmissible when tendered *by the defence*, but presumptively admissible when tendered *by the Crown*; and (4) it sets a stricter test for admitting defence evidence than is warranted or constitutionally permissible (para. 203).

[484] Even with my narrower interpretations, Brown J.'s constitutional analysis remains overwhelmingly applicable. The record screening regime is simply *more* constitutionally defective based on the broader interpretations adopted by the majority. I briefly explain why Brown J.'s analysis remains applicable.

[485] First, the record screening regime continues to force accused persons to reveal their defence before the Crown has made out a case to meet even if my narrow interpretations of "record" and "adduce" were adopted. Thus, the regime continues to

require pre-trial disclosure — before the Crown has made out a case to meet — for various records and it continues to apply to “a broad swathe of evidence that is not inherently prejudicial or irrelevant” (Brown J.’s reasons, at para. 254).

[486] Second, it remains the case that the record screening regime restricts the accused’s ability to cross-examine Crown witnesses by giving the complainant a role in pre-trial admissibility determinations. Once again, Brown J.’s analysis applies even if my narrower interpretations were adopted. The record screening regime operates to give advance notice to the complainant and the Crown, providing them with detailed particulars of the evidence the accused wishes to adduce. Accordingly, the record screening regime limits “the accused’s ability to effectively cross-examine the complainant, contrary to the presumption of innocence, the right to make full answer and defence and the right to a fair trial” (Brown J.’s reasons, at para. 263).

[487] Third, the record screening regime still makes private records presumptively inadmissible when tendered *by the defence*, but presumptively admissible when tendered *by the Crown*. My narrower interpretations of “record” and “adduce” do not affect this glaring issue with the regime. The record screening regime therefore continues to limit “the accused’s right to a fair trial under ss. 7 and 11(d)” (Brown J.’s reasons, at para. 290).

[488] Fourth, nothing in my interpretations of “record” and “adduce” affects how the record screening regime sets a stricter test for admitting defence evidence than is warranted or constitutionally permissible. Brown J.’s constitutional analysis on the

heightened standard of “significant probative value” continues to apply (Brown J.’s reasons, at paras. 291-97).

[489] None of these limits on the accused’s *Charter* rights can be justified under s. 1 of the *Charter*. I agree that the objective of the record screening regime is pressing and substantial. However, even with my narrower interpretations of “record” and “adduce”, the regime is not rationally connected to its objective, it is not minimally impairing, and its salutary effects do not outweigh its deleterious effects. I acknowledge that Brown J.’s analysis under s. 1 is not entirely applicable, as my narrower interpretations render the regime less broad and mitigate some of its deleterious consequences. Nevertheless, the bulk of Brown J.’s s. 1 analysis continues to apply.

[490] In conclusion, I concur with Brown J.’s constitutional analysis. I also concur with Brown J.’s analysis on the features a record screening regime might include in order to minimally impair the rights of accused persons and, therefore, be constitutional (Brown J.’s reasons, at para. 311).

#### IV. Disposition

[491] In light of the foregoing reasons, I agree with the disposition of the appeals proposed by Brown J. and by Rowe J. (Brown J.’s reasons, at para. 320; Rowe J.’s reasons, at para. 438).

*Appeal of Her Majesty The Queen allowed, cross-appeal of J.J. dismissed and appeal of A.S. allowed, CÔTÉ, BROWN and ROWE JJ. dissenting in part.*

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