Striking the right balance? Complainant privacy and full answer and defence in the new first-party records regime[*]

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Introduction

Bill C-51, passed in 2018, made a series of amendments to the sexual offence provisions of Canada's *Criminal Code*.[1] Among them is a new set of provisions governing the admissibility at trial of records in the possession of the accused that engage a complainant's privacy interests.[2] By inviting judges to weigh these interests against the fair trial rights of the accused, Parliament has brought to bear in this context the holdings in a body of case law on section 8 of the *Charter*,[3] from *Morelli* to *Marakah*, that finds a high privacy interest in digital communications.[4] The government also sought to address public concerns, brought to the fore in the wake of the

[*] This article also appear in R. Diab and C. Hunt, eds. *The Last Frontier: Digital Privacy and the Charter* (Thompson Reuters, 2021).

[1] Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act,* 1st Session, 42nd Parl, 2018 (royal assent on 13 December 2018) [Bill C-51].

[2] *Criminal Code*, RSC 1985 c C-46, ss 278.92-278.97 [*Criminal Code*]. For an overview of amendments in the bill, see Canada, Legal and Social Affairs Division, Parliamentary Information and Research Service, "*Legislative Summary of Bill C-51: An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, (legislative summary), No 42-1-C51-E (Ottawa: Library of Parliament, 1 October 2018), online: <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/42-1/c51-e.pdf> [Legislative Summary].

[3] *Canadian Charter of Rights and* Freedoms, s 8, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[4] *R v Morelli*, 2010 SCC 8; *R v Marakah*, 2017 SCC 59 [*Marakah*].

trial of Jian Ghomeshi, that sexual assault trials be made less daunting, surprising, or humiliating for complainants — as a means of encouraging more victims to trust and partake in the process.[5]

The amendments raise many questions, including the constitutionality of requiring the accused to make early disclosure of key elements of his or her defence. Our concern in this article is with the discrete question of the practical effect of the first-party records regime in sections 278.92 to 278.94 of the *Criminal Code*,[6] which applies to a host of sex-related offences.[7] At the time of this writing, the number of cases is relatively small, but there are enough to offer a preliminary assessment of important questions about the amendments – including whether they strike a fair balance between rights of the complainant and the accused in terms of what they require of parties and evidence they permit to be used at trial.

In Part 1, we provide a brief overview of the state of the law on first-party records prior to Bill C-51, and the role that the trial of Jian Ghomeshi – specifically, defence counsel's unexpected use of complainants' emails – played in catalyzing the amendments at issue. We discuss Parliament's rationale for the provisions and briefly sketch how the new first-party regime operates. In Part 2, we look at the early cases under three headings: what constitutes a record, admission, and timing. The regime is triggered only if a document is found to be a 'record' under section 278.1, which turns on whether it engages a 'reasonable expectation of privacy.' Courts place a high bar on what constitutes a record, applying a different test for privacy from the one used under section 8 of the *Charter*. Yet courts also tend to admit the documents they do find to be records — suggesting that the new first-party records regime does not at this stage pose an undue hindrance to the accused's right to make full answer and defence. The timing at which applications must be brought remains a contentious issue. We briefly trace the contours of this debate and point to implications of a forthcoming Supreme Court ruling. In Part 3, we engage in a broader discussion of whether the first-party records regime is effective in advancing the government's aims. We argue that the early cases cast doubt on whether the

[5] We canvas official pronouncements of purpose in more detail below.

[6] *Criminal Code*, *supra* note 2, ss 278.92-278.94.

[7] Section 278.92(1)(a) sets out the offences to which the regime applies and they include sexual assault, sexual interference, invitation to sexual touching and sexual exploitation. See *Criminal Code*, *supra* note 2, s 278.92(1)(a).

amendments effectively protect complainant privacy, foster greater trust and reliance on the criminal justice system, or adequately protect fair trial rights.

Part 1: Context, scope, and nature of the first-party records regime

Prior to 2018, the *Code* contained two sets of provisions relating to the use of evidence in sexual assault trials. The 'rape shield' provisions in section 276 prohibit the admission of evidence relating to the complainant's "sexual activity other than the sexual activity that forms the subject-matter of the charge" to support the inference that by reason of the sexual nature of that activity, the complainant is more likely to have consented to the activity at issue or less worthy of belief.[8] An accused could make an application under section 276.1 to admit past (or other) sexual activity where it would address a relevant issue and not advance one of the 'twin myths.'[9] The *Code* also contained provisions for an accused to apply to the court for an order requiring disclosure of a record pertaining to the complainant in the hands of a third party, such as a therapist.[10] These provisions required the court to balance the potential evidentiary value of the record with the complainant's privacy interest.[11] There were, however, no provisions in the *Code* governing the admissibility of a document in which the complainant has a privacy interest that happened to be in the possession of the accused. Documents of this nature were admissible in *R v Osolin*,[12] where the probative value of the evidence was "not substantially outweighed by the danger of unfair prejudice that might flow from it."[13]

Thus, before Bill C-51, if the accused provided his or her counsel with a document from a complainant – an email, photo, text – that contained inuendo or flirtatious communication, it was unclear whether the *communication* constituted past sexual activity that triggered the more

[8] *Criminal Code*, *supra* note 2, s 276(1).

[9] *R v Goldfinch,* 2019 SCC 38 at para 46.

[10] See *Criminal Code*, *supra* note 2, ss 278.1-278.91.

[11] *Criminal Code*, *supra* note 2, s 278.5(2).

[12] *R v Osolin*, [1993] 4 SCR 595, SCJ No 135 [*Osolin*].

[13] *Ibid* at para 37, Justice Cory [for the majority] held that "[c]ross examination for the purposes of showing consent or impugning credibility which relies upon 'rape myths' will always be more prejudicial than probative." See also, Legislative Summary*, supra* note 2 at 23.

formal admissibility test in section 276.[14] And while the evidence might engage the 'substantial prejudice' test in *Osolin*, the complainant was often ambushed by the document in cross-examination. If the evidence contained content that was *not* sexual in nature, but clearly private, it would be held admissible unless the prejudice it caused, in a *general* sense, "substantially outweighed" its probative value.[15]

All of these issues came to the fore in *R v Ghomeshi*.[16] Jian Ghomeshi, a popular host of a national radio program, was charged with multiple counts of sexual assault against three complainants. Each woman had withheld from Crown or police evidence contained in emails or pictures of romantic or flirtatious communication that ran contrary to their evidence at trial (in the case of two complainants) or to police (in the case of a third complainant) that after Ghomeshi had assaulted them, they sought to avoid further contact. The first two complainants were surprised in cross-examination when presented with the emails and photos, and offered explanations for their failure to disclose which, in the view of the trial judge, undermined their credibility. Only after the first two complainants were "seriously embarrassed when confronted with their own dramatic non-disclosures" did the third complainant disclose to Crown a similar email indicating a post-offence romantic invitation.[17] The trial judge found the credibility of all three complainants insufficiently trustworthy to "displac[e] the presumption of innocence."[18]

As Janine Benedet has noted, the *Ghomeshi* verdict provoked much public debate about whether "sexual assault trials, as currently constructed, are fair to victims of sexual assault."[19]

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[14] Some courts did support this reading. In *R v I(J)*, 2015 ONCJ 61, Murray J held that social media posts constitute 'sexual activity' under section 276, noting at para 20 that "'sexual activity' can be comprised of any activity which the evidence establishes was done for a sexual purpose". See also *R v Drakes*, [1998] BCJ No 127, CanLII 14968 (BCCA), holding, at para 16, that "communicating for the purposes of prostitution constitutes 'sexual activity' on the part of the communicator" because "[i]t is an activity which takes place for a sexual purpose. 'Sexual activity' is not limited to overtly sexual acts".

[15] *Osolin*, *supra*, note 12. See also *R v Shearing*, 2002 SCC 58, where the Court held that the "complainant's privacy interest did not substantially outweigh the accused's right to test the complainant's memory by cross-examination on the absence of entries in the diary recording abuse." [from headnote].

[16] *R v Ghomeshi*, 2016 ONCJ 155.

[17] *Ibid* at para 117.

[18] *Ibid* at para 141.

[19] Janine Benedet, "R v Ghomeshi: Telling the Whole Truth Might Not Have Changed the Result" (2016) 27 CR (7th) 47-48.

Commenting on the case soon after it was decided, Benedet raised an important concern. If the complainants had told police and Crown about the emails and photos, would this have been "held against them anyway, not as going to their credibility generally but instead as making it less likely that the earlier encounters were non-consensual or violent?"[20] Could the *sexual nature* of communications made before or after an alleged assault serve to support either of the twin myth inferences prohibited by section 276 (that a complainant was more likely to have consented or less worthy of belief)? That is to say, the Ghomeshi case made clear one way in which sexual activity evidence *could* be introduced to support twin myth reasoning without requiring a 276 application. This gap in the law could be rectified (as Bill C-51 would do) by amending section 276 to make clear that evidence of "sexual activity other than the sexual activity that forms the subject-matter of the charge" includes *communications* of a sexual nature.

Would the Ghomeshi case have resulted in a conviction had the accused been required to disclose – before cross-examining the complainants – the fact of being in possession of the documents at issue? Would the court have refused to admit some or all of this evidence as either too prejudicial to the complainant's privacy interests or not probative of issues aside from the twin myths? Pursuing these questions in detail is beyond the scope of this article, but we suggest that the accused might still have been acquitted – even if he were required to disclose the documents at issue prior to the outset of cross-examination and to establish their admissibility under section 276. The complainants might have had more time to provide a reasonable explanation for the failure to be forthcoming with the evidence, but the court might still have had doubts about their credibility in *general* for not disclosing the documents sooner.

Justification for the bill and its scope

The *Ghomeshi* decision served as a catalyst for Parliament to codify a regime for the admission of first-party records impinging upon complainant privacy and to remove the element of surprise in their use. But the impetus to include these elements in the *Code* extends further back. In 2012, the Senate's Statutory Review of the sexual assault provisions of the *Code* recommended that a

[20] *Ibid*.

first-party records regime be added.[21] In tabling Bill C-51 in June of 2017, Parliament made these and a host of other changes to the sexual assault provisions of the *Code*, including sections that narrow the scope of the mistaken belief in consent defence and amendments to the process for third-party records applications.

At third reading of the bill in the House of Commons, the government suggested the new first-party records regime respects "fair trial rights of the accused in that it does not prevent relevant evidence from being used in court."[22] It also "seeks to acknowledge that victims of sexual assault and other related crime, even when participating in a trial, have a right to have their privacy considered and respected to the greatest extent possible."[23] The regime also attempts to "facilitate the truth-seeking function of the courts by ensuring that evidence that is clearly irrelevant to an issue at trial is not put before the courts."[24] Submitting first-party records to a more formal process before deciding on admission – as is the case under the rape shield provisions – and providing complainants a right to "participate" at both hearings would strike a better balance between the interests at issue.[25]

Among the bill's many amendments to the law of sexual assault, we highlight the few relevant to this inquiry. The 'rape shield' provisions in section 276 of the *Code* prohibiting the use of prior sexual activity evidence to support twin myth inferences were amended to include section 276(4), which states that "For the purpose of this section, *sexual activity* includes any communication made for a sexual purpose or whose content is of a sexual nature." This codified common law authority in some jurisdictions (noted above),[26] holding that a flirtatious text or

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[21] Senate, *Statutory Review on the Provisions and Operation of the Act to amend the Criminal Code (production of records in sexual offence proceedings)*, (December 2012) (Chair: The Honourable Robert W Runciman) at 20.

[22] Official Report of Debates of the House of Commons (Hansard), 42nd Parl, Sess 1, Vol 148, No 249 (December 11, 2017), at 16218-16219 [Hansard, third reading]. [credit to Solomon Friedman & Vanessa Garcia, "For the Record" (31st Annual Criminal Law Conference 19-20 October 2019),(2019) CanLIIDocs 3867].

[23] *Ibid* at 16219.

[24] *Ibid* at 16219.

[25] Official Report of Debates of the House of Commons (Hansard), 42nd Parl, Sess 1, Vol 148, No 195 (15 June 2017), at 12789. The right to "participate" is set out in sections 278.93(2) and (3). See *Criminal Code, supra* note 2, ss 278.92 and (3).

[26] *I(J), supra* note 14; *Drakes, supra* note 14.

photo meant to be used as evidence of sexual activity other than the activity at issue in the charge would trigger the test in section 276.[27] Parliament also amended the process for applying to admit any evidence under section 276 to give complainants a right to "appear and make submissions" in the hearing and be represented by counsel, and to do the same for an accused applying to admit records in his or her possession impinging upon complainant privacy.[28]

Bill C-51 also added to the *Code* section 278.92, which sets out a more elaborate test than the one in *Osolin* for deciding whether to admit documents in the accused's possession over which the complainant has a privacy interest. To trigger the application of section 278.92, a document must fall within the definition of a 'record' in section 278.1, which prior to 2018 pertained only to applications for third-party records. It now extends to any record in the accused's possession which "contains personal information for which there is a reasonable expectation of privacy."[29] This would clearly capture sexual activity communications in the new 276(4) intended to be confidential, but not necessarily every private email or photo a complainant may have sent to the accused (for reasons to be explored below).

To be clear, by including first-party record provisions and the new section 276(4) of the *Code*, Parliament has created three possible routes that an accused person must travel if they seek to admit private complainant documents in their possession in sexual assault cases. If the document only engages the complainant's privacy, it is a 'record' (under 278.1) and the accused must satisfy the first party test in 278.92(2)(b). If the document constitutes 'sexual activity communication' under section 276(4), the accused must satisfy the rape shield test in section 276(2). And if the document is both private (and thus a 'record' under 278.1) *and* a 'sexual

[27] The requirement to submit a 276 application regardless of one's intended purpose for past sexual activity evidence is set out in section 276(2). See *Criminal Code, supra* note 2, s 276(2).

[28] This was done by repealing sections 276.1 to 276.5 and adding sections 278.93 to 278.97 of the *Code*. See *Bill C-51 supra* note 1, ss 22 and 25. These latter provisions govern both 'rape shield' applications under section 276 and applications to admit first-party records under section 278.92. The right to participate and be represented is found in section 278.93(2) and (3). See *Criminal Code, supra* note 2, ss 278.93(2) and (3). The complainant thus has a right to participate at these hearing but does not thereby acquire standing as a *party* to the prosecution.

[29] Section 278.1 as amended extends its definition of 'records' to first-party records by virtue of making reference section 278.92 at the outset of the provision. See *Criminal Code, supra* note 2, s 278.1.

activity communication (under 276(4)), the accused would need to satisfy *both* the first party (278.92(2)(a)) and rape shield tests (276(2)).[30]

The test for admitting a complainant's private record in the accused's possession is set out in 278.92(2) and codifies the holding in *Osolin*,[31] requiring that the evidence be relevant and that its probative value not be substantially outweighed by its prejudicial effect. To decide this question, the court must consider a list of factors in 278.92(3), which are the same as those found in the existing section 276(3), with the addition of a new factor, subsection (c).[32] The full list in 278.92(3) asks the court to consider:

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

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[30] The requirement to satisfy both tests in a case of this nature is made explicit in section 278.92(2)(a). See *Criminal Code, supra* note 2, s 278.92(2)(a).

[31] *Osolin, supra* note 12 at para 37.

[32] Subsection (c) reflects concerns raised in the Supreme Court's holding in *M(A) v* Ryan, [1997] 1 SCR 157, SCJ No 13 at para 29, per McLachlin J [for the majority], "the effect that a finding of no privilege would have on the ability of other persons suffering from similar trauma to obtain needed treatment and of psychiatrists to provide it".

If the 'record' at issue also happens to contain 'sexual activity' evidence as contemplated in section 276(4), the court must consider the conditions in 276(2) along with the factors set out in the list in 278.92(3) cited above.[33]

The process for making an application under section 276 or the new 278.92 is set out in section 278.93 to 278.97. These provisions require the accused to set out "detailed particulars" of the evidence at issue at least 7 days in advance or "any shorter interval [the court] may allow in the interests of justice."[34] The hearing is held *in camera*; the complainant is not compellable, but must be notified by the court of their right to represented by counsel.[35]

As Bill C-51 made its way through Parliament, many concerns were raised about the amendments at issue in this article. We highlight three of them to lend context to what follows.

The most frequently raised concern was that requiring the accused to disclose a record in their possession in advance of cross-examination hinders the right to make full answer and defence (protected in section 11(d) of the *Charter*) by removing the element of surprise. Without this, some argue, the accused cannot adequately challenge a witness's credibility.[36] The requirement to disclose detailed particulars of defence evidence is also said to violate the right to silence (by involving the accused in building the Crown's case).[37] Both arguments were made in relation to the regime in section 276 in *R v Darrach*,[38] and both were rejected. Justice Gonthier,

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[33] The requirement to do so is set out in section 278.92(2)(a). See *Criminal Code, supra* note 2, s 278.92(2)(a).

[34] *Criminal Code*, *supra* note 2, ss 278.93(2) - 278.93(4).

[35] *Criminal Code*, *supra* note 2, ss 278.94(1) - 278.94(3); *Legislative Summary, supra* note 2 at 26.

[36] Canadian Civil Liberties Association, "Submission to the House of Commons Standing Committee on Justice and Human Rights" (2017), online (pdf): *Our Commons* <www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR9225428/br-external/CanadianCivilLibertiesAssociation-e.pdf> [CCLA]; Criminal Lawyers Association, "Submissions on Bill C-51: An Act to amend the Criminal Code and the Department of Justice to make consequential amendments to another act", (2017), online (pdf): *Our Commons* <www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR9167275/br-external/CriminalLawyersAssociation-e.pdf> [CLA]; The Canadian Bar Association, "Bill C-51, Criminal Code and Department of Justice Act amendments", (2017), online (pdf): *Our Commons* <www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR9200786/br-external/CanadianBarAssociation-e.pdf>.

[37] Ibid CCLA at 6; CLA at 5-6.

[38] *R v Darrach*, 2000 SCC 46 at para 54.

for the Court, held that an accused is "not forced to embark upon the process under s. 276 at all."[39] He also held that "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."[40] Courts at present are divided on how to apply the reasoning in *Darrach* to the first-party regime – and we briefly canvas this debate in Part 3 below.

Further concerns were raised about whether giving complainants a right to make submissions at rape shield and first-party hearings, and to be represented, would be an effective means of balancing their interests with those of the accused if complainants did not receive state funding for counsel.[41] Also at issue was whether the additional steps involved in making a first-party application under section 278.92 would cause significant delays in the trial process.[42] How these issues are playing out in practice is difficult to measure. In what follows, we assess the effect of the first-party regime on three other, more readily measurable, fronts: deciding whether a document is a record; whether to admit it; and when an application should be made.

Part 2: A survey of the early case law

a. Is the document a 'record' under 278.1?

The new framework in section 278.92 for admitting complainant-related documents in the accused's possession applies only if the document falls within the definition of a 'record' in section 278.1. That section defines a 'record' as "any form of record that contains personal information for which there is a reasonable expectation of privacy" and may include any document aside from one "made by persons responsible for the investigation or prosecution of the offence".[43] The combined effect of sections 278.1 and 278.92 results in a two-stage process for accused persons in sexual offence cases who seek to admit (or pose questions about) a

[39] *Ibid* at para 55.

[40] *Ibid* at para 55.

[41] Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs in consideration of Bill C-51, 42nd Parl, Sess 1, Issue No 47 (20 June 2018) at 4-5.

[42] Hansard, third reading*, supra* note 22 at 16254-16255.

[43] *Criminal Code, supra* note 2, s 278.1.

document in their possession that potentially engages the complainant's privacy interest. The accused must first ask the court for a ruling as to whether the document constitutes a 'record' under 278.1 (unless this is conceded), before moving on, in a second phase, to a ruling on whether the record should be admitted under the more elaborate test in section 278.92. A body of decisions has emerged relating to the question at the first stage: is the document a 'record'?

While the number of these cases may be small at present, patterns are emerging.[44] One is that most cases do not involve communications of a sexual nature but pertain instead to a variety of casual texts, photos, or social-media posts – reflecting the wide *potential* ambit of the first party records regime. Second, because section 278.1 involves only a consideration of privacy, courts conduct the privacy analysis in isolation; other words, without weighing privacy against the potential relevance of the evidence. Third, with the potential scope of the regime being quite broad, courts tend to apply the 'records' test narrowly: in most cases declining to find a document to be private. And finally, courts decide the question of privacy using a form of 'risk analysis,' as contemplated (and rejected in the section 8 context) in *R v Duarte*.[45] Documents are not private if the complainant shared them knowing they *might* be disclosed. Put another way: the emblematic private document in this context appears to be something like a therapeutic record or a diary, rather than a casual text, a non-sexual photo, or a Facebook posting: *i.e.*, documents meant to be shared only with the recipient.

To expand upon a few of these points briefly, the cases make clear thus far the broad scope of what *might* constitute a 'record' and some of the challenges that arise in deciding expectations of privacy in relation to them. In *R v MS*,[46] the accused sought direction about a series of documents ranging from photos and videos to social media posts and text messages. The court declined to find some of the documents to be private due to uncertainty about Facebook and Snapchat privacy settings, and questions about who had posted the messages at

[44] At the time of this writing, the cases that contain substantive analysis of whether a document is a record in relation to section 278.92 include: *R v RMR*, 2019 BCSC 1093 [*RMR*]; R *v MS*, 2019 ONCJ 670 [*MS*]*; R v McKnight*, 2019 ABQB 755 [*McKnight*]*; R v WM*, 2019 ONS 6535 [*WM*]*; R v Mai,* 2019 ONSC 6691 [*Mai*]; *R v Navia*, 2020 ABPC 20 [*Navia*]*; Her Majesty the Queen v TA*, 2020 ONSC 2613 [*TA*]*; R v AM*, 2020 ONSC 1846 [*AM*]*; R v White*, 2020 ONSC 1808 [*White*]*; R v BH,* ONSC 4533.

[45] *R v Sanelli*, [1990] 1 SCR 30, SCJ No 2 at para 33 [*Duarte*].

[46] *MS, supra* note 44.

issue. In *R v Mai*,[47] the court distinguished between private and not-private parts of a single stream of messages, suggesting the possible fluidity in the boundaries of what might constitute a record within a single document (in this case, portions of a Whatsapp message thread that contained a sexual component the accused did not seek to adduce and a non-intimate portion he did seek to adduce). Other cases suggest that courts do not place much weight on common assumptions about the private nature of the *medium* in which a message is communicated.[48] Assessing email, phone voicemail, and a Google Hangout conversation in the larger context in which the messages were sent, courts have decided against finding a reasonable privacy interest.[49]

Looking at the kinds of messages and documents found to be private, in contrast to those found not to be private, helps to make the pattern of reasoning in these cases clearer. Documents or messages found to be private tend to be those that are intimate or sexual and sent exclusively to the accused.[50] Those found not to be private may contain private information – about lifestyle (*e.g.*, drug use)[51] or personal plans and associations[52] – but nothing that would significantly

[47] *Mai, supra* note 44.

[48] Judge Stirling in *Navia* is explicit on this point, "It is apparent from the recent caselaw that it is not the *type* of document but rather the *content* that will determine whether a document is a record under section 287.1." See *Navia*, *supra* note 44 at para 69. The Supreme Court's holding in *Marakah, supra* note 4, applies similar reasoning in the context of section 8 and a state search of text messages found on a recipient's cellphone. Whether a message engages a reasonable expectation of privacy depends in large part on the content of the message read in light of its context; the medium alone does not decide the question. However, at para 33, McLachlin CJC opined that: "Individuals may even have an acute privacy interest in the *fact* of their electronic communications. As Marshall McLuhan observed at the dawn of the technological era, 'the medium is the message' [citation omitted…] The medium of text messaging broadcasts a wealth of personal information capable of revealing personal and core biographical information about the participants in the conversation". The cases on section 278.1, by contrast, tend to look past the question of medium altogether.

[49] See e.g., *AM* and *White*, *supra* note 44.

[50] See, e.g., *McKnight, supra* note 44 (text messages between the accused and the complainant and between the complainant and a third party); *MS, supra* note 44 (photos, videos, social media posts and text messages); *Mai, supra* note 44 (Whatsapp messages between the accused and the complainant); *TA, supra* note 44 (Facebook messages between the accused and the complainant).

[51] *Mai, supra* note 44 at para 31.

[52] *WM*, *supra* note 44 (Facebook posts), *Navia*, *supra* note 44 (emails with photos of complainant's children and friends).

impinge upon dignity or security of the person.[53] Communications or documents in this context might be of the sort that would engage a reasonable expectation of privacy in a section 8 analysis under the *Charter*, by virtue of touching upon "a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state."[54] But merely including "information which tends to reveal intimate details of the lifestyle and personal choices of the individual",[55] does not, in this context, constitute a reasonable expectation of privacy.[56] The threshold or meaning of 'reasonable' under 278.1 is different.

Superior courts in three cases have tried to fashion more a specific test for what constitutes a reasonable expectation of privacy under 278.1. In the first of these, *R v WM*,[57] Davis J held that courts should consider four factors:

> (a) the content of the messages;
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> (b) the manner in which the messages were sent and who has control over them;
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> (c) the nature of the relationship between the accused and the complainant; and
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> (d) the policy implications of finding that the complainant does have a reasonable expectation of privacy.[58]

Applying these factors, Davis J found the non-intimate Facebook messages sent to the accused were not private, due in part to the fact that the complainant would have been aware of the

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[53] This language comes from Justice Christie in *AM*, *supra* note 44 at para 113.

[54] *R v Plant*, [1993] 3 SCR 281, SCJ No 97 at para 27.

[55] *Ibid* at para 27.

[56] One notable exception is *RMR*, *supra* note 44, at para 38, finding to be private messages containing personal information, including thoughts, feelings, details about daily activities, preferences, friendships and social interactions – thus applying a test closer in nature to that under section 8 jurisprudence. In *TA*, the court also found a reasonable expectation of privacy in some of the messages on the basis that they conveyed the complainant's personal feelings about the accused. See also *WM, supra* note 44 at para 43.

[57] *WM*, *supra* note 44.

[58] *Ibid* at para 41. The test was applied in *Mai*, supra note 44, to find the Whatsapp messages at issue were not private, and also in *TA,* supra note 44 to find Facebook messages not private.

possibility that she was creating a record that he might share with others.[59] In *R v White*,[60] Cavanagh J, of the same court, adopted the first three of Davis J's factors to hold that the complainant did not have a reasonable expectation of privacy in Google Hangout messages, due in part to the fact that they arose out of a group chat but also that the complainant had knowledge that she was creating a record the accused could share.[61]

A thread running through these decisions is the court's explicit embrace of the risk analysis as an important, if not decisive factor in deciding whether a document is private. In *R v WM*, Davis J suggested that the "risk of further dissemination is not determinative" and distinguished the risk at issue in this kind of a case from the risk that "the state might intercept or make a permanent record of the communication."[62] Yet he also held that it was "nonetheless relevant that Ms. M.-A. chose to give W.M. the information he now wishes to use and she did so in a manner that she knew would create a permanent record that he could save."[63] Justice Roberts, in *R v Mai*, was more explicit, holding: "I believe that a 'risk analysis' forms an important part of assessing whether there is a reasonable expectation of privacy in the totality of circumstances."[64] Her Ladyship conceded that the Supreme Court in *Duarte* "emphatically rejected a risk analysis as a legitimate consideration in the context of s. 8," on the basis that the threat of state surveillance presents a risk of "a different order of magnitude" from that of having one's secrets disclosed by a recipient. But she also noted that "in *Duarte* itself, the Supreme Court recognized that the risk analysis was compelling, outside the s. 8 context".[65]

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[59] *WM, supra* note 44 at para 46.

[60] *White*, *supra* note 44.

[61] *Ibid* at para 15.

[62] *WM, supra* note 44 at para 47.

[63] *Ibid* at para 47.

[64] *Mai, supra* note 44 at para 23.

[65] *Ibid* at para 23, Roberts J held "the risk that the listener will "tattle" on the speaker, is of a different order of magnitude than the risk that the state is listening in *and* making a permanent recording. While the speaker may contemplate the risk of the former, it cannot reasonably be concluded that he contemplated the risk of the latter. However, outside the s.8 context, that is, where it is not the state that obtained the record, I believe that the risk analysis has an important role to play in assessing whether or not a complainant has a reasonable expectation of privacy in a record".

The attempt in *Mai*, *WM*, and *AM* to distinguish the meaning of 'reasonable expectation of privacy' in section 278.1 from its meaning in the jurisprudence on section 8 of the *Charter* is consistent

In *R v AM*,[66] Christie J sought to consolidate the factors applied in *R v WM* along with many others formulated in recent cases on the revised version 278.1. Her expanded test includes considerations such as the time at which the message was created, the time period it covers, and whether the parties had knowledge the material was being shared and with whom.[67] But perhaps the most crucial consideration – one that encapsulates the decisive consideration in most of the early decisions on the revised provision – is "whether there is any indication in the material that the information is meant to remain private or with whom it is meant to be shared".[68]

Justice Christie also explored at some length the rationale behind extending section 278.1 to first-party records and urging a cautious approach that is likely to shape later case law. Prior to Bill C-51, the concern was to avoid "finishing expeditions" in relation to "things that would be expected to reside in the hands of third parties, such as therapeutic or counselling records, or things that are only to be seen by the person creating it, such as a diary."[69] The concern now is not with the accused possessing the complainant's information but with how it might be used. As a result, the "reasonable expectation of privacy analysis must be assessed differently, and not in the same manner as one would assess a reasonable expectation of privacy with respect to state

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with the Supreme Court's reasoning in *R v Jarvis*, 2019 SCC 10. In that case, the Court addressed the meaning of the phrase in the context of the voyeurism offence in what is now section 162.2 of the *Criminal Code* (formerly 162(1)). Chief Justice Wagner, for the majority, held, at para 56, that "Parliament must be understood as having chosen the words 'reasonable expectation of privacy' in s. 162(1) purposefully and with the intention that the existing jurisprudence on this concept would inform the content and meaning of these words in this section." However, he added: "the relevant differences between the context of s. 8 of the *Charter* and the context of the offence in s. 162(1) must be kept in mind. While one purpose of s. 162(1) of the *Criminal Code* is to protect individuals' privacy interests from intrusions by other individuals, the purpose of s. 8 of the *Charter* is to protect individuals' privacy interests from state intrusion." General principles from section 8 case law should be carried over into new provisions that invoke the concept of a 'reasonable expectation,' including the need assess privacy in context and to consider the totality of the circumstances. But, as Wagner CJ also noted, the principles developed under section 8 need to be modified to suit the purpose of the legislation. Courts have done so under section 278.1 by shifting the emphasis from potential state intrusion to possible violations by other individuals. Whether they have struck the right balance of interests here remains to be decided.

[66] *AM, supra* note 44.

[67] *Ibid* at para 102.

[68] *Ibid* at para 102.

[69] *Ibid* at para 115.

intrusion or with respect to records held by third parties."[70] Concerns about misuse during trial can be addressed with the "already existing rules of evidence"; otherwise, her Ladyship held:

> …the labelling of material in the hands of the accused as a "record" must be undertaken very cautiously so as to only capture those things that truly are included in the list contained in s. 278.1, such as therapeutic records or a diary in the hands of the accused, or those over which a clear reasonable expectation of privacy can be demonstrated. It is the view of this court that the material captured by this second category should not be overly broad.[71]

The model for a 'clear expectation' here – a diary or therapeutic record in the accused's hands – entails an intimate communication *not meant to be shared* with anyone aside from the accused. The danger of defining the expectation otherwise is the "absurd result" that 278.1 would apply to any conceivable written communication, such as a "birthday card, a photograph, a voice mail message,"[72] requiring a formal application for permission to use evidence that would be automatically permissible if it were strictly oral.

b. Case law on admissibility under 278.92

If a document in the accused's possession that he seeks to admit constitutes a 'record' under section 278.1, the court decides whether to admit it by applying the test in section 278.92(2). For records not containing 'sexual activity,' as contemplated in section 276(4), the court should admit the evidence 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."[73] To decide this question, the court must consider the factors in section 278.92(3)(canvassed above), which include the accused's right to make full answer and defence; society's interest in encouraging the reporting of sexual assault offences; the need to remove discriminatory bias; and perhaps most crucially, the potential prejudice to the complainant's personal dignity and right of

[70] *Ibid* at para 116.

[71] *Ibid* at para 116.

[72] *Ibid* at para 117.

[73] *Criminal Code, supra* note 2, s 278.92(2)(b).

privacy. If the record does contain 'sexual activity,' as contemplated in 276(4), the court must apply the test for admission in section 276(2) while also considering the factors in 278.92(3).[74]

As with the cases on what constitutes a 'record' in the accused's possession under 278.1, the body of case law on the admissibility of first-party records in 278.92(2) is also relatively small, but patterns are discernable.[75] Most records are admitted. The preference to admit is so clear and consistent in these early cases as to suggest almost a presumption of admissibility. Courts exclude records in two instances: where they contain *physically* sexual content or are clearly irrelevant. Yet, the cases also suggest that the evidence must be relevant and probative, and both to a *significant* degree. This qualification may be due, in part, to the requirement in section 278.94(4) that the court to provide reasons for its decision under 278.92(2), and specifically, where the court admits a record, to "state the manner in which that evidence is expected to be relevant to an issue at trial."[76]

To expand on these points briefly in turn, we note first the range of documents that courts have chosen to admit – including many that engage a moderate to high privacy interest. Once again, courts do not reach the test in 278.92(2) without first having found a document to engage a meaningful privacy interest, but at the admission stage, the private nature of a record becomes only one of many considerations. In *R v RMR*,[77] for example, the court admitted a series of text messages, despite acknowledging that they included "the parties' thoughts, feelings, details of their daily activities, preferences, friendships, and social interactions" and were "not intended to be shared with the public" or with a jury.[78] In *R v FA*,[79] the court admitted surreptitiously recorded phone calls between the complainant and her son, and a video recording that the accused made of the complainant at a doctor's appointment discussing her sexual activity.[80] In *R*

[74] *Criminal Code, supra* note 2, s 278.92(2)(a).

[75] *RMR*, *supra* note 44; *R v EM*, 2019 ONSC 6120 [*EM*]; *R v FA*, 2019 ONCJ 848 [*FA*]; *R v AC*, 2020 ONSC 184 [*AC*]; *R v RS,* 2020 ONSC 1509; *R v CC*, 2020 CarswellNfld 176, NJ No 150 [*CC*], *R v GE*, 2020 ONCJ 453 [*GE*].

[76] *Criminal Code, supra* note 2, s 278.94(4)(c).

[77] *RMR, supra* note 44.

[78] *Ibid* at para 38.

[79] *FA, supra* note 75.

[80] *Ibid* at paras 17-18, 25.

v EM,[81] the court excluded video and photos of the alleged sexual assault before the court, but admitted the audio recording. The court in *R v AC*,[82] admitted a series of emails between the accused and the complainant chronicling, in some detail, the breakdown of their marriage. In *R v CC*,[83] the court admitted records of a conversation between the complainant and her youth social worker expressing positive feelings toward the accused. In all of these cases, a significant degree of privacy was ultimately considered less pressing than the probative value of the evidence and the accused's right to make use of it.

To arrive at this conclusion, courts have had to make two related findings: the potential probative value of the record was *significant* and admitting it would not have a *serious* impact on the complainant's privacy and dignity. The requirement in section 278.92(2)(b) that the probative value of the evidence be "significant" mirrors the use of the term in the rape shield provisions, under section 276(2)(d). In relation to that provision, the Supreme Court in *Darrach* held: "The requirement of 'significant probative value' serves 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."[84] This suggests a relatively low bar for establishing significance, but the cases on 278.92(2) indicate otherwise. In each of the cases canvased in the paragraph above, the court articulates the specific potential relevance of each piece of evidence admitted, and it tends to be high. For example, *R v RMR*, the texts at issue were relevant to testing the complainant's credibility by establishing the accuracy of her memory about times and places, and to explain critical memory lapses on the evening in question.[85] The recorded calls and video of a doctor's visit in *R v FA* were important to assessing discrepancies in the evidence about the timing of the assault or the nature of the relationship between the complainant and the accused.[86] The audio of the assault in *R v EM* contained evidence that the complainant uttered words of consent but in a context in which she might have been too impaired to have given valid

[81] *EM, supra* note 75.

[82] *AC, supra* note 75.

[83] *CC*, *supra* note 75.

[84] *Darrach*, *supra* note 38 at para 41; cited in *RMR*, supra note 44 at para 51.

[85] *Ibid* at paras 62-63.

[86] *FA, supra* note 75 at paras 17-18, 25.

consent.[87] Conversely, where the court excluded evidence as irrelevant or insufficiently probative, it did so finding *no* potential relevance or the *likelihood* that the evidence would mislead.[88]

A similar pattern emerges in assessments of the potential impact of admission on the complainant's privacy and dignity. Here too, the bar for exclusion is high. In contrast to the private records canvassed above that courts did chose to admit, consider the degree of privacy engaged by the records that courts chose to exclude. In *R v GE*, the court excluded a large number of text messages expressing the complainant's positive feelings about recent sexual activity with the accused (without deciding whether section 276(4) also applied) on the basis that the probative value (in relation to credibility) was low and that prejudice to the complainant privacy and dignity would be "very high".[89] In *R v EM*, the video of the assault at issue depicted the complainant performing oral sex on a co-accused and the photo showed her naked from below the waist.[90] In short, the cases suggest that only private records that are highly invasive in a physical or sexual sense tend to be excluded, and even then, only when they also lack a significant probative value.

c. Cases on the timing of an application

We turn now to an especially fluid aspect of the case law on the first-party records regime: the question of when an accused person must apply to admit a record. More specifically: how late can they bring an application? We intend here only to trace the contours of the debate currently unfolding in the courts. At the time of this writing, the Supreme of Canada has granted leave on the issue and will likely settle it.[91] Whatever the court may decide, the concerns we trace in this

[87] *EM, supra* note 75 at paras 13-14.

[88] See e.g., *FA*, *supra* note 75 on the exclusion of the Turkish passport as altogether irrelevant and a doctor's letter, created more than a year after the appointment, lacking circumstantial guarantees of trustworthiness. See also the decision to exclude references to past sexual activity in Snapchat messages in *GE*, *supra* note 75 at paras 71 to 78, as having no relevance to an issue at trial.

[89] *GE, supra* note 75 at para 93.

[90] *EM, supra* note 75 at paras 15-17.

[91] See *Her Majesty the Queen v JJ*, 2020 Carswell BC 1922 (SCC July 23, 2020) (Docket: 39133) [*JJ,* SCC July 23, 2020]; see also *Her Majesty the Queen v JJ,* 2020 CarswellBC 3431 (SCC December 23,

section are likely to remain valid in relation to the impact that the timing of an application will have on a person's defence.

Briefly, section 278.93(4) requires that an application to adduce first-party records under section 278.92(2) be given to the Crown and filed with the court "at least seven days previously, or any shorter interval that [the court…] may allow in the interests of justice." How short that interval may be – and whether it may fall in the middle of trial, possibly as late as the middle of the complainant's cross-examination by the accused – is, at the time of this writing, unclear, with the case law divided on the question. It engages the larger issue of whether Parliament intended the first-party records regime (and 278.93(4) in particular) to deprive the accused of the chance to commit the complainant to one version of events before revealing an intention to admit a record in the accused's possession – or whether the scheme was meant to eliminate precisely this possibility. This in turn engages broader questions about the constitutional validity of requiring the accused to make disclosure of defence evidence in this context.

One body of cases suggests that section 278.93(4) should be read to permit the accused to bring their application as late as the middle of the accused's cross-examination of the complainant, on the basis that hindering him from doing so would violate the right to a fair trial and the ability to make full answer and defence protected in sections 7 and 11(d) of the *Charter*.[92] This reading of 278.93(4) is premised on the view that the first-party regime entails a fundamentally different dynamic from what was contemplated in *R v Darrach*, where the Supreme Court upheld the constitutional validity of the regime for seeking disclosure of third-party records and rejected a right to "trial by ambush."[93] Justice Breen in *R v A(RS)* distinguished the holding in *Darrach* from the first-party context by noting:

> The statutory scheme under consideration in *Darrach* made no provision for notice to the complainant and the Court made no reference to the notice provisions governing applications for production of third party records. In my view, the Court's recognition of

2020) (Docket 39133) [*JJ*, SCC December 23, 2020].

[92] See *R v A(RS)* 2019 ONCJ 645 [*A(RS)*]; *R v FA*, 2019 ONCJ 391 *(FA* June 2019*); R v JJ,* 2020 BCSC 29 [*JJ*]; *R v Reddick*, 2020 ONSC 7156 [*Reddick*]; *R v AM*, 2020 ONSC 8061 [*AM* December 23, 2020]; *R v AM*, 2019 SKPC 46 [*AM* 2019]; *R v DLB*, 2020 YKSC 8 [*DLB*].

[93] *Darrach*, *supra* note 38, at para 55.

> a prosecutorial discretion to "consult" with a complainant cannot reasonably be interpreted as an approval of a statutory requirement that a complainant be granted access to the complete application record in advance of trial.[94]

Expanding upon the reasoning in *R v A(RS)*, Duncan J held in *R v JJ* (the case currently on appeal to the Supreme Court of Canada):

> The ability to impeach a witness is a fundamental tool in any barrister's toolbox. It has been effectively removed by a strict application of this legislation, particularly in cases where the parties are known to each other and have been in communication, before or after the alleged sexual assault. The legislation does not prevent an unfair ambush of a sexual assault complainant by defence counsel seeking to advance an affirmative defence of consent or honest but mistaken belief in consent, as was the case in *Darrach*, or with therapeutic records, as in *Mills*; rather, it hobbles the development and execution of trial strategy on core issues of credibility and reliability.[95]

But other courts see no meaningful distinction between the early disclosure a complainant receives under the new first-party record regime and the early disclosure that occurs as a consequence of the application regime under the rape-shield provisions and for third-party records.[96]

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[94] *A(RS)*, *supra* note 92 at para 75.

[95] *JJ*, *supra* note 92, at para 84. See also *AM* 2019, *supra* note 92; Henning J, at para 40: "…the combined effect of sections 278.92(1), 278.92(2)(b) and 278.94(2) is to seriously limit an accused person's ability to effectively challenge the veracity of a complainant in cases where the accused is in possession of potentially significant material that would be utilized in cross-examination to counter evidence already given in court. This constitutes a serious infringement of an accused person's ability to challenge a complainant in seeking truth in a trial. As a result, the Applicant's right to a full answer and defence and to a fair trial that are guaranteed under sections 7 and 11(d) of the *Charter* is infringed."

[96] See for example the *Charter* challenge of section 278.92 on trial fairness grounds in *FA* June 2019, *supra* note 92, where Justice Caponecchia notes, at para 67: "No compelling reason was submitted to me as to why defence disclosure of private records being adduced in evidence should be treated any differently than disclosure of someone's private sexual activity. Both pertain to sensitive information over which a complainant has a privacy interest. Both potentially lend themselves to impermissible inferences based on myths and stereotypes." In *CC* 2019, *supra* note 92, Raikes J asked, at para 73: "From the perspective of a victim of a sexual offence, why should the use of a document in which a complainant has an otherwise constitutionally recognized privacy interest be treated differently where the defendant has that record? How is it fair to the victim to be taken by surprise and possibly embarrassed by the disclosure of personal information?" See also, *DLB, supra* note 92 at para 69.

Finally, other courts have expressed concerns that bringing an application under sections 278.92 and 278.93 in the middle of trial would "bifurcate" proceedings, rendering them "unmanageable and not at all what Parliament intended."[97] Once again, the Supreme Court is likely to settle these concerns, along with the larger dispute about timing and fair trial rights, in its pending decision in *R v JJ*.[98] The weight of authority supports the view that precluding mid-trial applications would violate fair trial rights. The Supreme Court may well adopt this reasoning and also hold that mid-trial applications do not cause undue delay. We anticipate that a decision to this effect will likely render first-party applications mid-trial – during cross-examination of the complainant – a common feature of sexual assault trials.[99]

Part 3: Are the amendments effective?

In this part of the article, we address the larger question of whether the first-party record regime in Bill C-51 is effective in advancing the government's stated goals. The government had what might be framed as four broad goals for the regime, as gleaned from the Hansard passages cited earlier and the factors in 278.92(3). On behalf of the complainant, the first-party regime was intended to "consider and respect" complainant privacy rights "to the greatest extent possible"[100] and to "encourag[e] the reporting of sexual assault offences"[101] – or more broadly, to foster greater trust and participation in the justice system as an effective means of deterring sexual assault and thus protecting the security, dignity, and equality rights of complainants, the vast majority of whom are women. The government also aimed to protect the accused's right to a fair trial or to full answer and defence – more specifically, by not hindering relevant evidence from

[97] *MS*, *supra* note 44 at para 97; see also *DLB*, *supra* note 92 and *Reddick*, *supra* note 92.

[98] *JJ*, SCC July 23, 2020, *supra* note 91.

[99] This would not necessarily entail complete surprise on the part of the Crown or the complainant. Justice Duncan in *R v JJ*, supra note 92, suggests, in para 88, that "To reduce the disruption of the trial, defence counsel should advise the trial judge, or the judge at a pre-trial conference, that an application to admit records in possession of the accused may or will be made at trial so that the complainant is aware of the possibility of such an application and of the right to retain counsel."

[100] Hansard, third reading, *supra* note 22 at 16219.

[101] *Criminal Code, supra* note 2, s 278.92(3)(b).

being excluded.[102] The patterns emerging from the early case law cast doubt on whether the first-party regime has advanced *any* of these goals. The cases also point to a host of new concerns. Appellate decisions on point might address some of these concerns, but many will likely remain.

Consider what the regime has done for complainants. As we noted in Part 2, most of the documents that engage a *significant* privacy interest on the part of complainants are admitted. This happens either because courts do not find the privacy interest to be high enough to deem the document a 'record' under section 278.1, or if it is deemed a 'record,' it does not warrant exclusion under section 278.92(2). As a result, complainants in the early cases have not been spared the exposure in court of intimate emails about marital breakdown;[103] texts divulging intimate expressions of emotion in the course of a romantic relationship;[104] and even parts of a video recording of a visit with a doctor to discuss sexual activity.[105] The cases make clear that, at this point, only records with a highly invasive and usually sexual component *in a physical sense* are excluded under 278.92(2) – raising the question of whether they would have been captured under section 276 had Bill C-51 not been passed. Conversely, what does get excluded through the new provisions (aside from sexual activity of a physical nature) tends to be evidence that is clearly irrelevant and would have been excluded under long-standing common law rules of evidence.

Does the first-party regime make trials less daunting for victims of sexual assault? Does it make complainants more likely to report crimes? Does it foster greater participation? Concerns arise from the early cases indirectly. Giving complainant's standing at hearings under section 278.92 may be empowering for some, and it may help render a trial less daunting or unpredictable to have advance notice of invasive evidence the accused intends to call. But for other complainants, participating in a hearing under section 278.92 could be re-traumatizing. The hearing might involve exploring a private document in some detail, in a way that cannot but provoke embarrassment and the re-surfacing of painful emotions. The very prospect of such a hearing could have the oppositive of effect that Parliament intended: making trials more daunting

[102] Hansard, third reading, *supra* note 22 at 16218.

[103] *AC*, *supra* note 75.

[104] *RMR*, *supra* note 44.

[105] *FA*, *supra* note 75.

or more challenging for victims than they might have seemed otherwise. To be clear, we are not suggesting that the first-party regime should be rescinded for this reason – or that without it, trials would be less daunting for complainants across the board. Rather, we argue that it brings new problems and challenges in the process of trying to address older ones.

Another dimension to assessing the impact of the first-party regime for complainants turns on the question of representation. Whether victims will be more likely to come forward or perceive the process to be fairer in light of the addition of sections 278.92 to 278.94 depends in part on funding for counsel. What will it cost? Will it be covered by legal aid? How challenging is it for complainants to navigate the process of obtaining state-funded counsel in her particular jurisdiction? The answer to these questions will vary over time, reflecting changes under local legal aid programs, potentially resulting in a different experience for complainants across Canada.

However, the early cases indicate that complainants are being represented consistently, and that having a lawyer can make a difference. But there are qualifications to this. We note that complainants have counsel for the most part only at hearings under section 278.94, to apply the rape shield or first-party records tests in sections 276 and 278.92(2) respectively.[106] In all but two of the decisions canvassed in Part 2 of this article, relating to whether a document is a 'record' under section 278.1, the complainant lacked counsel – and in the two exceptions, counsel made submissions of behalf of the complainant only with leave of the court.[107] But in every admissibility case canvassed in Part 2, the complainant was represented. In most cases, complainant counsel took the same position on admissibility as the Crown. In three cases – *R v AC*,[108] *R v CC*,[109] *R v GE*[110] – the complainant took a different position. In *CC* and *GE* the complainant's counsel argued against the admissibility of a record based on a different

[106] Courts have declined to recognize a complainant right to standing under section 278.93 (requiring the court to confirm that an application satisfies certain formal requirements before permitting a hearing to be scheduled under 278.94): *R v Roland*, 2020 BCPC 130 at para 35; *R v Bethinger*, 2020 ABQB 253, noting at paras 9-10, the absence of standing provisions in section 278.93 and their presence in 278.94.

[107] The two exceptions were *R v Mai*, *supra* note 44, and *TA*, *supra* note 44.

[108] *AC, supra* note 75.

[109] *CC, supra* note 75.

[110] *GE, supra* note 75.

assessment of its potential relevance from that of the Crown.[111] In *AC*, the Crown submitted that the records at issue engaged section 276 and should not be admitted; but the complainant disagreed, arguing for admissibility to lend context to the complainant's prior statements.[112] In these cases, the court had the benefit of a more nuanced perspective on the interests at play, and the complainant arguably had a more meaningful voice at this stage of the process

We note one further concern in assessing the effectiveness of the first-party regime in relation to complainants' perceptions of fairness. What impact will a court's decision have on a complainant when it decides to admit a record that engages a significant privacy interest? The complainants in many of the hearings under section 278.92 canvassed in Part 2 above may have found it helpful that the hearing eliminated the element of surprise. They may have appreciated knowing what evidence will be called in their cross-examination. But some may well have been devasted by the court's decision to permit a jury to hear, read, listen, or watch a highly invasive record at some length. This decision alone could thus add further strife and anxiety to an already emotionally fraught process. Again, we note this feature not as argument for rescinding the first-party regime, but to highlight ways in which it may *exacerbate* the daunting nature of sexual assault trials for many complainants.

Does the first-party records regime as it currently operates strike an effective balance of interests from the accused's perspective? Does the regime effectively protect the right to a fair trial? One dimension of this question concerns whether the regime will hinder relevant and highly probative evidence from being admitted. The cases thus far suggest not. Few records are excluded, and they involve content that is clearly irrelevant or physically sexual *and* not probative. But another important dimension of the fair trial question is the effect of the element of surprise. The Supreme Court, in its pending appeal in *R v JJ*,[113] may well agree with a line of authority, canvassed above, suggesting that sections 7 and 11(d) of the *Charter* require that an accused be free to bring an application as late as the middle of his cross-examination of a complainant. This would allow the accused to wait until (a) the crown has established a *prima facie* case without the accused's assistance, and (b) to commit the complainant to a version of her

[111] *CC, supra* note 75 at paras 16-19; *GE, supra* note 75 at paras 53-54.

[112] *AC, supra* note 75 at paras 12-13.

[113] *JJ* July 23, 2020, *supra* note 91; see also *JJ* December 23, 2020, *supra* note 91.

evidence in cross-examination.[114] The Supreme Court may disagree and hold that a requirement to bring the application sooner than the middle of cross-examination is consistent with the *Charter*. If so, this could give rise to the possibility of an unforeseen issue arising in cross-examination and the accused being preventing from using contrary evidence in a record in his possession to impeach the witness.

Conclusion

The government sought to advance laudable and important purposes in adding a first-party records regime in Bill C-51 for trials of sex-related offences. There were widely shared and long-standing concerns that the framework for prosecuting sexual offences in Canada was daunting to victims and discouraged many from reporting crimes. Bill C-51 sought to address a lack of sensitivity to the privacy and dignity of complainants, and to give them greater voice in trials of sex offences. Adding a formal process for admitting first-party party records, and providing complainants a right to counsel does, in some respects, accomplish these purposes.

But the early cases cast into doubt how effective the first-party regime has been in achieving its broader aim of making sexual assault trials fairer for both the complainant and the accused. Many documents that clearly engage a privacy interest are not deemed 'records,' and among those found to be records, most are admitted. The regime may not hinder relevant and probative evidence from being admitted, but the question of whether it adequately protects fair trial rights hinges in large part on when applications need to be made. The law at present is unclear on this point, but even after the Supreme Court weighs in on the issue, concerns about timing and fairness are likely to remain.

Ultimately, the effect of the regime on both accused persons and complainants will vary in response to a host of issues, including whether a complainant is represented, her experience of litigating the admission of an invasive record, and the impact of a negative decision. The effects will not be uniform. Bill C-51 has not resolved concerns about the fairness of sexual assault trials. It adds a further layer of complexity that we sought to explore, with the aim of encouraging further research and reform.

[114] See the cases cited at *supra* note 92.