SCC File No: 39133

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

AND:

J.J.

RESPONDENT
(Applicant/ Defendant)

AND:

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF QUEBEC, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), WEST COAST LEGAL EDUCATION AND ACTION FUND AND WOMEN AGAINST VIOLENCE AGAINST WOMEN RAPE CRISIS CENTRE, BARBRA SCHLIFER COMMEMORATIVE CLINIC, CRIMINAL TRIAL LAWYERS' ASSOCIATION, CANADIAN COUNCIL OF CRIMINAL DEFENCE LAWYERS/ CONSEIL CANADIEN DES AVOCATS DE LA DÉFENSE AND INDEPENDENT CRIMINAL DEFENSE ADVOCACY SOCIETY

INTERVENERS

FACTUM OF THE INTERVENER,
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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

1. Despite over three decades of reform to the rules of evidence in criminal sexual assault cases, myths and stereotypes about sexual assault persist in the criminal justice system. In 2018, Parliament enacted ss. 278.92 to 278.94 of the *Criminal Code* as part of its latest effort to minimize the risk that such myths and stereotypes will undermine the integrity of the trial process. By enacting these provisions which control the admissibility of the complainant's private records in the hands of the accused ("the regime"), Parliament recognized that the accused's use of such records is not only invasive to the complainant, but also linked to discriminatory attitudes and practices which have been resistant to change at the trial level. Parliament sought to realize the purposes of the regime in part by providing complainants with participatory rights in applications under the regime ("admissibility applications").

2. West Coast LEAF and WAVAW jointly submit that, in determining the constitutionality of the regime, this Court must consider how meaningful complainant participation in admissibility applications promotes the overarching goal of a fact-finding process that is free of all forms of bias and prejudicial reasoning, an interest shared by the complainant and the accused alike. In particular, complainants can play a key role in refuting discredited myths and stereotypes about sexual assault which may nevertheless underlie these applications, especially in cases involving complainants who experience multiple and intersecting indicia of inequality. The scope of the complainant's participation, their access to independent legal counsel, and the timing of these applications are all essential factors in assessing the regime's constitutionality. On balance, permitting complainants to bring their distinct and relevant perspective to admissibility applications is not at odds with the accused's rights to a fair trial.

3. West Coast LEAF and WAVAW accept the facts as set out in the Appellant's factum.

PART II – POSITION WITH RESPECT TO QUESTIONS IN ISSUE

4. Meaningful participatory rights for complainants under ss. 278.92 to 278.94 are constitutional and support trial fairness through the proper enforcement of the regime.

PART III - ARGUMENT

A. Myths and stereotypes persist in the criminal justice system

5. Sexual assault is an overwhelmingly gendered crime perpetuating the disadvantage of women and gender-diverse people.[1] It disproportionately affects women and gender-diverse people who experience multiple and intersecting indicia of inequality, including on the basis of Indigeneity, race, age, gender-identity, immigration status, sexual orientation, class, and sex worker status.[2] Indigenous women, for instance, self-report sexual assault at more than triple the rate of non-Indigenous women.[3]

6. Despite the evolution of Canadian sexual assault law, myths and stereotypes about sexual assault continue to plague the criminal justice system.[4] Reflecting social conditions outside the courtroom, myths and stereotypes are most common in relation to complainants who experience multiple and intersecting indicia of inequality.[5] A notorious example is *R v. Barton*, in which discriminatory and prejudicial attitudes toward Cindy Gladue, an Indigenous woman and a sex worker, permeated the trial process.[6]

7. Myths and stereotypes in criminal sexual assault trials have two significant consequences for trial fairness. First, by distorting the fact-finding process, they undermine the trial's truth-seeking function. Second, they contribute to a trial process which is harmful and traumatizing to sexual assault complainants, including by reinforcing the relationship between sexual

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[1] Jennifer Koshan, "Disclosure and Production in Sexual Violence Cases: Situating Stinchcombe," (2002) 40-3 *Alberta Law Review* 6559 ("*Koshan*"), at 657; Caroline White, Joshua Goldberg, "Expanding our Understanding of Gendered Violence: Violence against Trans People and their Loved Ones" (2006) 25.1-2 Canadian Women's Studies at 125.
[2] *Koshan, supra* note 1, at 657.
[3] Samuel Perrault, "Criminal Victimization in Canada, 2014," Juristat Statistics Canada Catalogue 85-002-X, at 17.
[4] *R v. Barton*, 2019 SCC 33 at para 52("*Barton*"), at para. 1; *R v. Goldfinch*, 2019 SCC 38 ("*Goldfinch*") at para. 2.
[5] *Barton, supra* note 4, at para. 1.
[6] *Ibid*, at paras. 5, 205, and 223.

assault, gender hierarchy, and shame.[7] This Court has recognized that sexual assault survivors experience a constellation of physical and psychological harms from both sexual assault and society's biased reactions to sexual assault.[8] While criminal trials are not designed to heal complainants, myths and stereotypes within the trial process unnecessarily increase complainants' risk of revictimization.[9]

8. The rules of evidence in criminal sexual assault trials, which have evolved through extensive dialogue between Parliament and the courts, aim to remove myths and stereotypes from the trial process through restrictions on the use of sexual history evidence and the complainant's private records. However, there is a well-documented gap between their aims and their substantive results.[10] This gap can be at least partially explained by the pernicious influence of myths and stereotypes on the very interpretation and application of these rules.[11] In other words, the gap lies in the discrepancy between law-as-legislation and law-as-practice.[12]

9. Without proper oversight, the accused's use of the complainant's private records exposes what is often deeply personal information on the basis of what are often discriminatory assumptions about who the "ideal victim" should be and how they should behave. The risks are greatest to complainants who experience multiple and intersecting indicia of inequality, as they are more likely to diverge from notions of the "ideal victim." Further, they are more likely to have had records made about them by virtue of increased (and often involuntary) interactions with the state and health care systems.[13]

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[7] Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal, QUE & Kingston, ON: McGill-Queen's University Press, 2018) ("*Craig 1*"), at 9.
[8] *Goldfinch*, *supra* note 4, at para. 37.
[9] *Craig 1*, *supra* note 7, at 11.
[10] Elaine Craig, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions," (2016) 94 Canadian Bar Review 1 ("*Craig 2*"); Lise Gotell, "Tracking Decisions on Access to Sexual Assault Complainants' Confidential Records: The Continued Permeability of Subsections 278.1–278.9 of the Criminal Code," (2008) Canadian Journal of Women and the Law, vol. 20 no. 1 ("*Gotell*").
[11] *Craig 2*, *supra* note 10, at 46; *Gotell*, *supra* note 10, at 114.
[12] Susan Ehrlich, "Perpetuating - and Resisting - Rape Myths in Trial Discourse." In *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*, edited by Elizabeth A. Sheehy, (Ottawa, ON: University of Ottawa Press, 2012), at 390.
[13] *Gotell*, *supra* note 10, at 123.

10. All legal actors within the trial process—Crown counsel, defence counsel, and trial judges—are implicated in the patterns of practice which underlie the ongoing permeability of the rules of evidence.[14] Unless these patterns of practice change, myths and stereotypes will continue to undermine the trial's integrity and complainants' equality, privacy, and security rights.

B. Complainant participation is essential and fair

11. Complainants can play a critical role in changing the patterns of practice which allow myths and stereotypes to seep into the trial process. Parliament has recognized the distinct, relevant perspective of complainant by providing them with participatory rights in admissibility applications.[15] Where their participation is meaningful, complainants are best positioned to refute the influence of myths and stereotypes on the adjudication of these applications.

12. The ongoing permeability of the rules of evidence demonstrates that complainants cannot depend on other trial actors to avoid or refute myths and stereotypes in admissibility applications. First, the respective roles of Crown counsel, defence counsel, and trial judges often result in a subordination of the complainant's rights and interests to other duties or concerns. Crown counsel's duty is to the public interest. While this duty includes protecting vulnerable witnesses, Crown counsel do not represent complainants and must weigh the interests of the complainant with those of the accused and the wider community.[16] Defence counsel, on the other hand, owe a duty of loyalty to their accused clients. While many defence counsel strive to avoid myths and stereotypes about sexual assault as a matter of law, professional ethics, and strategy, there is a clear tension between realizing this ideal and providing their clients with a vigorous defence. Trial judges have a duty to ensure a fair trial on the merits, including through intervening in the trial process and properly enforcing legal

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[14] *Craig 1*, *supra* note 7.
[15] *R. v. A.C.*, 2019 ONSC 4270, at 64.
[16] In *Craig 1*, *supra* note 7, at 137-139, there is a discussion of the variation in how individual Crown counsel perceive their responsibilities toward protecting complainants and combatting discriminatory attitudes within trials.

protections for complainants.[17] However, the scope of this protection is constrained by the trial judge's ultimate role as an impartial trier-of-fact within an adversarial system of justice.

13. Second, trial actors are not themselves immune from myths and stereotypes about sexual assault and other forms of bias. Trial actors may find it especially difficult to ensure fairness for complainants who experience multiple and intersecting indicia of inequality. In *Barton*, for instance, the prosecutor allowed defence counsel to introduce sexual history evidence which should have been subject to a s. 276 application, while the trial judge did not give the jury any limiting instruction about the purposes for which sexual history evidence could and could not be used.[18] The prosecutor also participated in the use of prejudicial and dehumanizing language to describe Ms. Barton.[19]

14. Complainants are in the best position to vigorously refute myths and stereotypes about sexual assault in admissibility applications. First, they have a direct and compelling interest in eliminating such myths and stereotypes, which is not in tension with other obligations or concerns. In some cases, it may fall to the complainant to raise issues that other trial actors have either failed to or feel no obligation to consider. Second, the court benefits from hearing the complainant's distinct perspective directly, rather than through the prism of Crown counsel's submissions. In particular, it is helpful to hear directly from the complainant about the impacts of the proposed evidence on their privacy *in relation to* their lived experiences, which often differ greatly from those of the other trial actors. Finally, the additional presence of the complainant adds needed scrutiny to the adjudication of admissibility applications, which tend to receive little oversight because most decisions are not written or monitored.[20]

15. Additionally, the complainant's participatory rights may in and of themselves mitigate the harmful and traumatizing effects of the trial process on complainants. Asking complainants to rely on other trial actors to speak to their rights and interests is paternalistic and replicates

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[17] *Craig 1*, *supra* note 7, at 14.
[18] *Barton*, *supra* note 4, at para. 5. See also *Goldfinch*, *supra* note X, in which this Court held that the trial judge erred in allowing evidence of an ongoing sexual relationship (para. 45).
[19] *Barton*, *supra* note 4, at para. 205.
[20] *Gotell*, *supra* note 10, at. 113.

the gendered, social, and colonial hierarchies which underlie sexual assault itself.[21] The vulnerability of the complainant vis-à-vis other trial actors is especially acute where, as is often the case, there is a significant gap between their respective socio-economic statuses.[22]

16. As with prior efforts to reform the law of evidence in sexual assault trials, an unnecessary and unhelpful dichotomy is created between the complainant's participatory rights and the trial's ultimate truth-seeking function. A meaningful role for complainants in admissibility applications does not erode the accused's right to a fair trial. On the contrary, permitting complainant participation supports the trier of fact in reaching a decision with more confidence that bias and prejudice have not taken root in the reasoning. The concern that complainant participation is fundamentally at odds with an accused's fair trial rights overstates the scope of what is at issue in the application and the novelty of the application procedure, while also mischaracterizing the complainant's interest in participating.

17. The regime is narrow in scope: it is only those documents that engage the complainant's reasonable expectation of privacy that trigger the application process. The accused is also not required to produce the records in question as part of the application.[23] At this stage, the accused is required only to provide the trier of fact with sufficient information such that an analysis can be conducted about whether the proposed evidence is admissible based on the statutory framework and goals. The balancing between an accused's fair trial rights and the complainant's privacy rights has long been affirmed as constitutional by this Court.[24]

18. Moreover, "disclosing" to the complainant what they may be confronted with in cross-examination is neither novel nor unconstitutional. Notice and the complainant's right to be represented by independent counsel is already provided for under the third-party record regime in s. 278.3. Third parties are regularly afforded standing in such applications as well. While it is true that a complainant may gain some advance knowledge through their participation in the application process of what records may be put to them in cross-examination, their participation does not eliminate all probative value of cross-examination

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[21] *Craig 1*, *supra* note 7, at 10.
[22] *Craig 1*, *supra* note 7, at 10.
[23] *Criminal Code*, RSC 1985, c C-46 ("Code"), s. 278.92
[24] *R v. Mills*, [1999] 3 SCR 668 at paras. 61-68.

on any inconsistencies that may exist between their evidence in a police statement or in direct examination and the records in question.

19. The oft-sounded concern about providing notice to the complainant of records in possession of the accused is that there exists a risk that the complainant will then find a way to "explain away" any inconsistencies. The same risk exists in the third-party records regime. The same risk exists when the accused reviews the Crown's disclosure and prepares to testify. Inherent in this concern is the stereotype that complainants are less worthy of trust and more likely to lie about being sexually assaulted. However, once the stereotypic belief is removed from the equation, the regime enhances the truth-seeking process as trial judges ensure that only those records that meet the statutory requirements are used at trial.

20. Finally, concerns that the complainant will become a second prosecutor or otherwise interfere with prosecutorial independence can largely be addressed through recognition of the complainant's limited and focused role within these applications.[25] The purpose of the complainant's participation is to provide submissions on whether the proposed evidence is admissible based on the statutory framework and goals, not to provide submissions on other trial matters or the guilt or innocence of the accused.[26] Trial judges can ensure that the complainant's participation is fair through their control of the trial process.[27]

C. Complainant participation must be meaningful

21. The purpose and potential of the regime will only be realized if complainants have meaningful participatory rights. The Court has an opportunity to provide guidance to courts below on what constitutes meaningful complainant participation in the regime, as well as to interpret the regime to remove barriers to meaningful participation.

a. Scope of the complainant's participation

22. The complainant's rights to attend and make submissions at a second-stage hearing include the rights to review the application materials, lead evidence, and cross-examine the accused

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[25] *A.C.*, *supra* note 15, at para. 71.
[26] *Ibid*, at para. 69.
[27] *Ibid*, at para. 71.

on the affidavit sworn in support of the application.[28] In support of this proposition, West Coast LEAF and WAVAW adopt the reasoning of Justice Doody in *R v. Boyle*:

a. A complainant cannot make meaningful submissions without learning what evidence is proposed to be admitted, the purported relevance of that evidence, and the evidence relied upon to support its admissibility;[29]

b. A complainant may require evidence to support their submissions about the relevance and/or prejudicial effects of the proposed evidence;[30] and

c. A complainant may require cross-examination to address the accused's evidence in support of the relevance of the proposed evidence.[31]

23. The complainant's participatory rights must also extend to any application which affects their rights and interests under the regime. The increasing use of pre-screening applications, which take place outside of the two-stage process prescribed by the regime and largely exclude the complainant, risk undermining the spirit, intent, and effectiveness of the regime. For example, pre-screening applications about whether a complainant has a reasonable expectation of privacy in a "record" implicate both the rights of the complainants and the scope of the regime's protections against the invalid or discriminatory use of the complainant's private information.

b. Access to independent legal representation

24. Access to legal representation supports complainants in making informed decisions and effectively communicating their perspectives. Where complainants are represented, they benefit from the unique advantages of the lawyer-client relationship, including their lawyer's duty of loyalty, confidential communications, and independent legal advice (none of which can be provided by the other trial actors). Further, they benefit from their lawyer's specialized expertise and experience in identifying and preventing the admission of irrelevant

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[28] *R v Boyle*, 2019 ONCJ 253 ("Boyle"); A.C., *supra* note 23, at para. 67.
[29] *Boyle*, *supra* note 26, at para. 3.
[30] *Ibid*, at para. 6.
[31] *Ibid*.

and prejudicial evidence. For complainants who experience multiple and intersecting indicia of inequality, their counsel's responsibilities would include understanding and responding to their particular needs and interests. Counsel choice also allows a complainant to choose a lawyer who has a gendered analysis of the law and/or shares some of their lived experiences.

25. It will not be the rare case where a complainant requires independent legal representation to give effect to their participatory rights. Evidentiary questions are among the most difficult problems in criminal sexual assault cases, and complainants are uniquely disadvantaged within the trial process. Many complainants, and especially complainants who experience multiple and intersecting indicia of inequality, will struggle to effectively communicate their perspectives—let alone review the application materials, lead evidence, cross-examine the accused, and interpret and apply the law—on a self-represented basis. In *R. v T.P.S.*, the Nova Scotia Supreme Court ordered state-funded counsel for a complainant with respect to an application to admit sexual history evidence, stating:[32]

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

26. Where complainants are better able to make informed decisions and effectively communicate their perspectives, this ultimately assists the court. First, it improves trial efficiency. In some cases, upon receipt of legal advice, the complainant will choose to consent to the admission of the proposed evidence and/or not participate in the admissibility hearing. Where complainants do participate in the admissibility hearing, their counsel can ensure that their submissions are relevant, focused and clear. Second, it ensures that the trial judge has the benefit of the entire legal, factual and contextual matrix within which to make a decision.[33]

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[32] *R. v T.P.S.*, 2019 NSSC 48, at para. 25.

[33] In *R v. T.A.H.*, 2019 BCSC 1614, Justice Blok noted: "I found it particularly helpful that there was counsel representing the complainant. It is not the Crown's role to advocate on behalf of a

a. Timing of the application

27. The timing and notice period of an application under the regime have significant implications for complainant participation. An application which takes place during the trial will often result in a trial adjournment so that the complainant can retain counsel. Retaining counsel can be difficult and time consuming, especially through provincial legal aid programs. Even after the complainant has retained counsel, securing continuation dates may add to trial delays. There is a real risk that some complainants will forego their rights to participate in the application and/or be represented by counsel to avoid adverse impacts from trial interruptions and delays. These adverse impacts are especially acute when trial interruptions and delays take place during the complainant's cross examination, as the complainant risks weeks or months of being unable to talk about their evidence or trial experiences with others.

28. An application which takes place during the complainant's cross examination also affects the nature and quality of the complainant's legal representation. The rules of cross examination constrain the ability of complainant's counsel to candidly discuss the application within the context of the case and provide legal advice. These limits thus strike at the heart of the lawyer-client relationship and render the complainant's right to legal representation hollow**.**

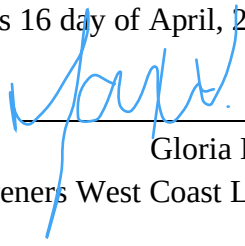
PART IV – SUBMISSION ON COSTS

29. West Coast LEAF and WAVAW seek no costs and ask that none be awarded against them.

PART V – ORDER SOUGHT

30. West Coast LEAF and WAVAW do not request any orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16 day of April, 2021



for Gloria Ng and Kate Feeney
Counsel for the Interveners West Coast LEAF and WAVAW

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complainant and the additional perspective added much to the Court's understanding of the issues" (para. 67).

PART VI – TABLE OF AUTHORITIES

JURISPRUDENCE	**PARA(S)**
R. v. A.C., 2019 ONSC 4270	11, 20, 22
R. v. Barton, 2019 SCC 33	4, 13
R. v. Boyle, 2019 ONCJ 253	22
R. v. Goldfinch, 2019 SCC 38	4, 7
R v. Mills, [1999] 3 SCR 668	17
R v. T.A.H., 2019 BCSC 1614	26
R. v T.P.S., 2019 NSSC 48	25
SECONDARY SOURCES	**PARA(S)**
Caroline White, Joshua Goldberg, "Expanding our Understanding of Gendered Violence: Violence against Trans People and their Loved Ones," (2006) 25.1-2 Canadian Women's Studies. < https://cws.journals.yorku.ca/index.php/cws/article/viewFile/5968/5157 >	5
Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal, QUE & Kingston, ON: McGill-Queen's University Press, 2018)	7, 10, 12, 15
Elaine Craig, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions," (2016) 94 Canadian Bar Review 1. < https://cbr.cba.org/index.php/cbr/article/view/4370/4363 >	8
Lise Gotell, "Tracking Decisions on Access to Sexual Assault Complainants' Confidential Records: The Continued Permeability of Subsections 278.1–278.9 of the Criminal Code," (2008) Canadian Journal of Women and the Law, vol. 20 no. 1.	8, 9, 14
Jennifer Koshan, "Disclosure and Production in Sexual Violence Cases: Situating Stinchcombe," (2002) 40-3 *Alberta Law Review* 6559.	5