SCC File No. 39133

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

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant (Respondent on Cross-Appeal)

- and –

J.J.

Respondent (Appellant on Cross-Appeal)

- and -

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF 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,
INDEPENDENT CRIMINAL DEFENSE ADVOCACY SOCIETY
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

GREG DELBIGIO, Q.C.
27th Floor, 595 Burrard Street
Vancouver, BC V7X 1J2

Telephone: (604) 351-2590
FAX: (604) 688-4711
Email: greg@gregdelbigio.com

Counsel for the Intervener, Independent Criminal Defense Advocacy Society

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, Ontario K2P 0R3

Marie-France Major
Telephone: (613) 695-8855 Ext: 102
FAX: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Intervener, Independent Criminal Defense Advocacy Society

ATTORNEY GENERAL OF BRITISH COLUMBIA
940 Blanshard Street
3rd floor
Victoria, BC V8W 3E6

Lesley A. Ruzicka
Telephone: (778) 974-5156
FAX: (250) 387-4262
Email: lesley.ruzicka@gov.bc.ca

Counsel for the Appellant, Her Majesty the Queen

GOWLING WLG (CANADA) LLP
2600 - 160 Elgin Street
P.O. Box 466, Stn. A
Ottawa, Ontario K1P 1C3

Matthew Estabrooks
Telephone: (613) 786-0211
FAX: (613) 788-3573
Email: matthew.estabrooks@gowlingwlg.com

Ottawa Agent for Counsel for the Appellant, Her Majesty the Queen

PECK AND COMPANY
610-744 West Hastings Street
Vancouver, BC V6C 1A5

Rebecca A. McConchie
Megan Savard
Telephone: (604) 669-0208
FAX: (604) 669-0616
Email: rmcconchie@peckandcompany.ca

Counsel for the Respondent, J.J.

GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3

Jeffrey W. Beedell
Telephone: (613) 786-0171
FAX: (613) 788-3587
Email: jeff.beedell@gowlingwlg.com

Ottawa Agent for the Respondent, J.J.

ATTORNEY GENERAL OF ALBERTA
Alberta Crown Prosecution Service, Appeals Branch
3rd Floor, 9833-109 Street
Edmonton, Alberta T5K 2E8

Deborah J. Alford
Telephone: (780) 427-5181
FAX: (780) 422-1106
Email: deborah.alford@gov.ab.ca

Counsel for the Intervener, Attorney General of Alberta

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario K1P 1C3

D. Lynne Watt
Telephone: (613) 786-8695
FAX: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Attorney General of Alberta

DEPARTMENT OF JUSTICE CANADA
Guy-Favreau Complex, East Tower, 9th Floor
200 René-Lévesque Boulevard West
Montréal, Quebec H2Z 1X4

Marc Ribeiro
Lauren Whyte
Telephone: (514) 283-6386
FAX: (514) 496-7876
Email: marc.ribeiro@justice.gc.ca

Counsel for the Intervener, Attorney General of Canada

ATTORNEY GENERAL OF CANADA
Civil Litigation Section
50 O'Connor Street, Suite 500
Ottawa, Ontario K1P 6L2

Robert J. Frater Q.C.
Telephone: (613) 670-6289
FAX: (613) 954-1920
Email: robert.frater@justice.gc.ca

Ottawa Agent for Counsel for the Intervener, Attorney General of Canada

ATTORNEY GENERAL OF ONTARIO
Crown Law Office-Criminal
720 Bay Street, 10th Floor
Toronto, Ontario M5G 1J5

Jill Witkin
Jennifer Trehearne
Telephone: (416) 314-0610
FAX: (416) 326-4600
Email: jill.witkin@ontario.ca

Counsel for the Intervener, Attorney General of Ontario

ATTORNEY GENERAL FOR SASKATCHEWAN
820-1874 Scarth Street
Regina, Saskatchewan S4P 4B3

Sharon H. Pratchler, Q.C.
Telephone: (306) 787-5584
FAX: (306) 787-9111
Email: sharon.pratchler2@gov.sk.ca

Counsel for the Intervener, Attorney General of Saskatchewan

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario K1P 1C3

D. Lynne Watt
Telephone: (613) 786-8695
FAX: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Attorney General of Saskatchewan

NOVA SCOTIA PUBLIC PROSECUTION SERVICE
700 – 1625 Grafton Street
Halifax, Nova Scotia B3J 0E8

Erica Koresawa
Telephone: (902) 424-6794
FAX: (902) 424-8440
Email: erica.koresawa@novascotia.ca

Counsel for the Intervener, Attorney General of Nova Scotia

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario K1P 1C3

D. Lynne Watt
Telephone: (613) 786-8695
FAX: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Attorney General of Nova Scotia

JUSTICE MANITOBA - PUBLIC PROSECUTION
510 - 405 Broadway
Winnipeg, Manitoba R3C 3L6

Jennifer Mann
Charles Murray
Telephone: (204) 918-0459
FAX: (204) 945-1260
Email: jennifer.mann@gov.mb.ca

Counsel for the Intervener, Attorney General of Manitoba

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario K1P 1C3

D. Lynne Watt
Telephone: (613) 786-8695
FAX: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Attorney General of Manitoba

GLORIA NG LAW
1111 Melville St. Suite 1200
Vancouver, BC V6E 3V6

Gloria Ng
Kate Feeney
Telephone: (604) 559-2529
FAX: (604) 559-2530
Email: gloria@gloriang.ca

Counsel for the Intervener, West Coast Legal Education and Action Fund and Women Against Violence Against Women Rape Crisis Centre

POWER LAW
130 Albert Street, Suite 1103
Ottawa, OntarioK1P 5G4

Maxine Vincelette
Telephone: (613) 702-5573
FAX: (613) 702-5573
Email: mvincelette@ju ristespower.ca

Ottawa Agent for Counsel for the Intervener, West Coast Legal Education and Action Fund and Women Against Violence Against Women Rape Crisis Centre

BIRENBAUM LAW
555 Richmond St. W., Suite 1200
Toronto, Ontario M5V 3B1

Joanna Birenbaum
Telephone: (647) 500-3005
FAX: (416) 968-0325
Email: joanna@birenbaumlaw.ca

Counsel for the Intervener, Barbra Schlifer Commemorative Clinic

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1300
Ottawa, Ontario K1P 1J9

Nadia Effendi
Telephone: (613) 787-3562
FAX: (613) 230-8842
Email: neffendi@blg.com

Ottawa Agent for Counsel for the Intervener, Barbra Schlifer Commemorative Clinic

BOTTOS LAW GROUP
10226 104 St., 4th floor
Edmonton, Alberta T5J 1B8

Peter Sankoff
William J. Van Engen
Telephone: (780) 421-7001
FAX: (780) 421-7031
Email: psankoff@bottoslaw.ca

Counsel for the Intervener, Criminal Trial Lawyers' Association

DANIEL BROWN LAW LLP
36 Lombard Street, Suite 100
Toronto, ON M5C 2X3

Daniel Brown
Lindsay Board
Tel: (416) 297-7200
Email: brown@danielbrownlaw.ca
board@danielbrownlaw.ca

STOCKWOODS LLP
TD North Tower
77 King Street West, Suite 4130
Toronto, ON M5K 1H1

Gerald Chan
Tel: (416) 593-7200
Fax: (416) 593-9345
Email: geraldc@stockwoods.ca

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, Ontario K2P 0R3

Marie-France Major
Telephone: (613) 695-8855 Ext: 102
FAX: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Intervener, Criminal Lawyers' Association

Counsel for the Intervener, Criminal Lawyers' Association

GERRAND RATH JOHNSON
700 - 1914 Hamilton St
Regina, SK S4P 3N6

John M. Williams
Thomas P. Hynes
Telephone: (306) 522-3030
FAX: (306) 522-3555
Email: jwilliams@grj.ca

SULLIVAN BREEN DEFENCE
Suite 300, Haymarket Square,
223-233 Duckworth Street
St. John's, NL A1C 1G8

Rosellen Sullivan
Telephone: (709) 739-4141
FAX: (709) 739-4145
Email: rsullivan@sbdefence.ca

Counsel for the Intervener, Canadian Council of Criminal Defence Lawyers/Conseil Canadien des Avocats de la Défense

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, Ontario K2P 0R3

Marie-France Major
Telephone: (613) 695-8855 Ext: 102
FAX: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Intervener, Canadian Council of Criminal Defence Lawyers/Conseil Canadien des Avocats de la Défense

ATTORNEY GENERAL OF QUEBEC
1200, Route de l'Église, 2ième étage
Québec, Quebec G1V 4M1

Abdou Thiaw
Telephone: (418) 643-1477 Ext: 21369
FAX: (418) 644-7030
Email: abdou.thiaw@justice.gouv.qc.ca

Counsel for the Intervener, Attorney General of Quebec

NOËL ET ASSOCIÉS, S.E.N.C.R.L.
111, rue Champlain
Gatineau, Quebec J8X 3R1

Pierre Landry
Telephone: (819) 503-2178
FAX: (819) 771-5397
Email: p.landry@noelassocies.com

Ottawa Agent for Counsel for the Intervener, Attorney General of Quebec

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The Criminal Defence Advocacy Society (CDAS) is a British Columbia non-profit society engaged in advocacy, law reform and education relating to criminal defence work and the administration of justice. It currently has approximately 300 members.

2. CDAS makes no submissions upon the facts.

3. In overview, CDAS's position is:

    a. The requirement to give 7 days notice, combined with the fact that the complainant has the statutory right to participate, through counsel, in the application to determine the admissibility of evidence the defence applies to rely upon, improperly interferes with the accused person's right to conduct a full and effective cross-examination and, through that, interferes with the right to a fair trial and the right to make full answer and defence.

    b. The process and procedure defined by statute for determining the admissibility of evidence proposed for use by an accused provides greater protection to a complainant, as compared to an accused person, against the use of evidence and argument that is irrelevant, prejudicial, or based on myths, stereotypes and prejudice.

PART II – POSITION WITH RESPECT TO QUESTIONS IN ISSUE

4. The CDAS submits that the legislation interferes with the ability of an accused person to fully and effectively conduct cross-examination of a complainant and is contrary to s.7 of the *Charter*. This limitation upon the right to fair trial and the right to make full answer and defence is made more serious by the greater protection that the law provides to a complainant, as compared to an accused person, for ensuring that credibility and testimony are challenged and measured in accordance with the law.

PART III – ARGUMENT

(a) An Overview of the Statutory Scheme

5. The statutory scheme governing the admissibility of evidence in proceedings in respect of offences set out in s.276(1)[1] must be read in its entirety but, in overview:

    a. An accused person who wishes to introduce evidence must apply, in writing, and set out "detailed particulars of the evidence" and "the relevance of that evidence to an issue at trial".[2]

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[1] *Criminal Code*, R.S., c. C-34, s.1
[2] s. 278.93(2)

b. That application must be given to the prosecutor and clerk of the court and, if a judge is satisfied that the application was provided "at least seven days previously, or any shorter interval that the judge …may allow in the interests of justice", and that the evidence is "capable of being admissible under subsection 276(2)", the application to hold a hearing shall be granted.[3]

c. The complainant may appear at the hearing and make submissions[4] and has the right to be represented by counsel.[5]

d. At the conclusion of the hearing the judge shall determine whether the evidence is admissible pursuant to subsection 276(2) or 278.92(2).[6]

e. Pursuant to s.276(2), in determining the admissibility of evidence a judge "shall take into account" factors that include[7]:

i. The need to remove from the fact-finding process any discriminatory belief or bias.[8]

ii. The risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury.[9]

iii. The potential prejudice to the complainant's personal dignity and right of privacy.[10]

iv. The right of the complainant and of every individual to personal security and to the full protection and benefit of the law.[11]

6. The trial judge held that the 7 day notice requirement violated the s.7 *Charter* rights of the accused person[12] In granting remedy, the trial judge agreed with the Crown submission that that the appropriate remedy is to read down the legislation.[13] On that basis, the trial judge "added" to the statutory wording that a 278.(94) hearing must not be made until the end of the complainant's evidence in chief.[14]

(b) The Right to and Importance of Cross-Examination

7. There can be no doubt that the following propositions will be widely agreed upon: (a) a

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[3] s. 278.93(4)
[4] s. 278.94(2)
[5] s. 278.94(3)
[6] s. 278.94(4)
[7] These same factors are set out in s. 278.92(3).
[8] s. 276(3)(d)
[9] s. 276(3)(e)
[10] s. 276(3) (f)
[11] s. 276(3)(g)
[12] 2020 BCSC 29, para.90
[13] 2020 BCSC 349, para.19
[14] 2020 BCSC 349, para.21

criminal trial is not a contest between the Crown and an accused person; (b) the evidentiary requirement of relevance should apply to all evidence regardless of the party that is proposing to tender the evidence; (c) a trial judge must always act as a gatekeeper to ensure that evidence is admissible and witnesses are fairly treated; (d) neither an accused person nor a complainant, in any sort of a criminal trial, should be believed or disbelieved or have their credibility measured against myths, stereotypes or prejudices; (e) the application or development of rules that would apply to a criminal trial must always be done with regard to protecting against the risk of a wrongful conviction; (f) the risk of a wrongful conviction is highest where a trier of fact is faced with a complainant's version of events, an accused person's version of events, and there is no independent evidence to substantially corroborate either; (g) an accused person's ability to conduct full cross-examination of a complainant upon relevant matters is fundamental to a fair trial and to the right to make full answer and defence.

8. Some complainants are truthful, others are not. Some will answer questions in cross examination readily and some will be less willing to be forthcoming. The importance of cross-examination as a tool for getting at the truth, or for eliciting evidence from a reluctant witness, cannot be in dispute.

9. For this reason, as a general matter, "a key element of the right to make full answer and defence is the right to cross-examine the Crown's witnesses without significant and unwarranted restraint…The right to cross-examine is protected by both ss. 7 and 11(*d*) of the *Charter*. In certain circumstances, cross-examination may be the only way to get at the truth."[15]

10. Effective cross-examination is a strategic and tactical process based on the character and characteristics of the witness and the goals of the cross-examination. A cross-examiner must decide what to put to a witness, when and in what order.

11. Cross-examination will sometimes be a matter of getting a witness to provide evidence in relation to something that was not testified to in examination in chief, it will sometimes be a matter of showing that a witness has exaggerated, that a witness's memory is incomplete or that a witness's testimony is inconsistent with other evidence. However,

[15] *R. v. R.V.,* 2019 SCC 41

cross-examination will also sometimes involve confronting a witness with the assertion that the witness has intentionally not told the truth.

12. Experience shows that "the *rhythm* of cross-examination [is] an essential aspect of an accused's fair trial rights, and not just the *fact* of cross-examination… cross-examination is not so much a *series of questions* as a *process of questioning*."[16] Further:

> …cross-examination is an organic process that cannot be considered in isolated pieces. It consists of more than a single question or series of questions. Indeed, it typically consists of a process of questioning in which skilled counsel seek to elicit things that are not immediately apparent that, within strict bounds, tests the credibility of a witness. The *rhythm* of cross-examination involves putting careful questions to a witness that are designed to explore bit by bit the nature and extent of that witness's knowledge. Cross-examination is effective only where it is permitted to proceed step by step towards the ultimate point, where the cross-examiner can pose the final question (or questions), knowing by that time what the answer(s) will be, having regard to the earlier evidence elicited (see G.D.E. Adair, *On Trial: Advocacy Skills and Practice* (2nd ed. 2004), at p. 333). This means that, when cross-examination is unduly constrained, the effects on the fairness of the trial will often reverberate beyond, and cannot be fully appreciated by parsing, the particular words in a transcript.[17]

13. Denying the right to conduct cross-examination at all, unduly limiting the time in which to conduct cross-examination, or undue interference with cross-examination are all obvious ways in which the right may be improperly restricted and ways in which the right to a fair trial, or the right to make full answer and defence might be compromised.

14. However, the required notice to a complainant is an interference with the process of cross-examination through permitting the complainant to object to the proposed evidence and cross-examination, and to prepare for any cross-examination that is allowed, with the assistance of counsel,

15. CDAS submits that the operation of this statutory scheme improperly interferes with an accused person's right to conduct a full and effective cross-examination through the requirement of advance notice to the complainant and through the involvement of the complainant, through counsel, in the determination of the admissibility of evidence.

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[16] 2019 SCC 41, para. 120 (dissenting reasons)
[17] 2019 SCC 41, para.121 (dissenting reasons)

16. Further, the operation of the 7 day notice rule, in advance of the completion of a complainant's examination in chief imposes an unfair and unreasonable burden upon an accused person. Until a complainant's evidence in chief is complete, an accused person or their counsel cannot know what the method, process or strategy of cross-examination will be or what records might be proposed for use in cross-examination.

(c) Crown Counsel vs. Counsel to a Complainant

17. The role of Crown counsel as compared to the role of counsel to a complainant are fundamentally different.

18. A criminal trial is not a "contest" between the Crown and an accused person. The Crown does not win or lose. As emphasized by Locke J. in the leading case of *Boucher v. The Queen*[18], the Crown is not counsel "for any particular side or party", Crown is to be an "assistant to the Court in the furtherance of justice, and not to act as counsel for any particular person or party" and, the Crown are to "regard themselves as ministers of justice, and not to struggle for a conviction".

19. These important principles are captured in this often-cited passage:

> It cannot be made too clear, that in our law, a criminal prosecution is not a contest between individuals, nor is it a contest between the Crown endeavouring to convict and the accused endeavouring to be acquitted; but it is an investigation that should be conducted without feeling or animus on the part of the prosecution, with the single view of determining the truth.[19]

20. Trial fairness, which is achieved through the rigorous application of these principles, is undermined when a complainant participates in evidentiary applications in criminal trial proceedings as a party and through counsel.

21. Drawing from the Federation of Law Societies of Canada Model Code of Professional Conduct, a lawyer who acts as an advocate for a complainant owes a professional duty of loyalty to that complainant.

22. As stated in Commentary 3 to Chapter 5.1, The Lawyer as Advocate,

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[18] *Boucher v. The Queen*,1954 CanLII 3 (SCC)
[19] *Boucher*, supra, at p. 26

> The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case. (Emphasis added)

23. The Model Code also addresses Conduct During Witness Preparation and Testimony. A lawyer "must not influence a witness or potential witness to give evidence that is false, misleading or evasive"[20]. However, the commentary is clear that a lawyer "may prepare a witness, for discovery and for appearances before tribunals, by discussing courtroom and questioning procedures and the issues in the case, reviewing facts, refreshing memory, and by discussing admissions, choice of words and demeanour. It is, however, improper to direct or encourage a witness to misstate or misrepresent the facts or to give evidence that is intentionally evasive or vague." (Emphasis added)

24. The operation of a rule which requires that an accused person provide notice to a complainant of the proposed path and strategy of cross-examination, interferes with the accused's persons ability to fully and effectively conduct a cross-examination of the complainant. This, in turn, undermines the ability of the accused person to make full answer and defence and the fairness of the trial itself.

25. The ability to confront a complainant, without advance notice, is not an issue of an improper cross-examination technique based upon an irrelevant subject matter. Assuming a proper cross-examination, the force of the cross-examination is lost if the complainant has received the playbook in advance.

26. A complainant who receives advance notice with respect to the admissibility of evidence, as it might arise through a proposed cross-examination can oppose that application and, if unsuccessful, can through counsel prepare for that cross-examination. As the Model Code spells out, it would not be unethical for counsel to even prepare the complainant's "choice of words and demeanour".

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[20] *Model Code*, 5.4-2

(d) Balancing the Rights and Interests at Stake

27. In *R. v. R.V.*[21] the majority observed that the an accused person's right to make full answer and defence must be "balanced with the danger to the other interests protected by s. 276(3), including the dignity and privacy interests of the complainant."[22]

28. The operation of the statutory provisions as set out above create admissibility barriers for an accused person which are more restrictive than those which rest upon the Crown in presenting evidence in support of the prosecution. For example, an accused person who testifies on their own behalf will be subject to cross-examination by the Crown and credibility and reliability may be attacked, including through the use of documents, without the requirement of advance notice to the accused person and a prior evidentiary hearing.

29. Further, there are no advance safe-guards to ensure that factors such as discriminatory beliefs or biases, or prejudice to personal dignity will not be used, advertently or inadvertently in the cross-examination. Instead, it is left for counsel on behalf of an accused person to object at the time the question is posed.

30. The law instructs a trier of fact to rely upon logic, common sense and experience when assessing the credibility or reliability of an accused person.

31. As an example, in a case where a male is charged with assaulting a female partner, and where the defence is self-defence arising from a history of assaults by the partner against the accused person, the Crown might challenge the credibility of the accused person, on whether he suffered previous assaults, on the basis of whether he contacted the police, whether he reported injuries in respect of those assaults or what he dd to stop the assaults from occurring. A jury would then be instructed to use their logic and "common sense" in deciding whether to accept his testimony.

32. The risk is that the instruction to use "common sense" in the assessment of credibility of an accused may amount to an invitation to a juror to invoke and rely upon beliefs, assumptions and paths of reasoning that s.276(2) specifically guards against.

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[21] 2019 SCC 41
[22] 2019 SCC 41, para.41 (See also para.60, 67)

33. Section 7 of the *Charter* guarantees procedural fairness. CDAS submits that the requirement that an accused person make an application regarding the admissibility of evidence in advance, but not the Crown and the statutory restrictions on admissibility in respect of a complainant, but not an accused person, violates the guarantees of procedural fairness.

34. Through the statutorily prescribed procedure and test for admissibility, the privacy and equality interests of a complainant are given greater protection than those of an accused person. This is of critical importance because, a trier of fact will often be required to examine the credibility of a complainant, and the credibility of an accused person, in relation to the allegation. A trial is not a credibility contest between a complainant and an accused.[23] However, where there is a direct contradiction between their respective testimonies, it is inevitable that a trier of fact will draw some comparison between the two.

35. At present, counsel for an accused must object to a question posed in cross-examination, or use of a document put forward by the Crown during cross-examination, after the fact. This offers less procedural protection to an accused person, as compared to a complainant, for ensuring that a question or line of questioning is not based on or does not invoke prejudice, hostility, discriminatory beliefs, bias, or prejudice to dignity and the right of privacy.

36. CDAS submits that taken alone or together, these considerations cause the provisions in question to be contrary to s.7 of the *Charter.*

37. It is for this reason that the care that is taken, in advance, for ensuring that a complainant is only cross-examined upon issues and documents that a trial judge has determined to be admissible should also be available to an accused person.

PART IV – SUBMISSION ON COSTS

38. CDAS makes no submissions on costs except for submitting that no cost award should be ordered against it.

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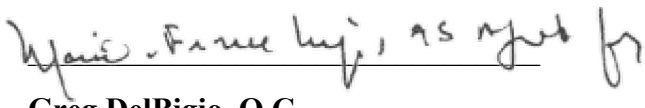
[23] *R. v. S. (W.D.),* 1994 CanLII 76 (SCC)

PART V – ORDER SOUGHT

39. CDAS does not request any order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 19th day of April 2021.



Greg DelBigio, Q.C.

Counsel for Independent Criminal Defense Advocacy Society

PART VI – TABLE OF AUHTORITIES

Cases **Para.**

STATUTORY PROVISIONS

Criminal Code, R.S.C. (1958), c. C-34, ss. 1, 276(1), 276(3)(d),(e),(f),(g), 278.92(3), 278.93(2),(4), 278.94(2),(3),(4)
Code criminel (L.R.C. (1985), ch. C-46), a. 1, 276(1), 276(3)(d),(e),(f),(g), 278.92(3), 278.93(2),(4), 278.94(2),(3),(4)

Model Code, Chapters, 5.1, commentary 3, 5.4-2, 5.4.3, commentary 2
Code type de déontologie professionnelle, c. 5.1, commentaire 3, 5.4-2, 5.4.3, commentaire 2