SCC File No.: _____

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

BETWEEN:

HER MAJESTY THE QUEEN

APPLICANT
(Respondent)

AND:

J.J.

RESPONDENT
(Defendant)

MEMORANDUM OF ARGUMENT ON LEAVE TO APPEAL
(Pursuant to Section 40 of the *Supreme Court Act* and
Rule 25(1)(c) of the *Rules of the Supreme Court of Canada*)

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PART I – STATEMENT OF FACTS

A. Overview

1. On December 13, 2018, Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, S.C. 2018, c. 29, s. 25 came into force. It introduced a new scheme in ss. 278.92 to 278.94 of the *Criminal Code* which governs the admissibility and use of third party records in the possession of the accused for certain enumerated sexual offences.

2. The Crown applicant applies for leave to appeal to this Court pursuant to s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 from an interlocutory constitutional ruling that "read down" the seven-day notice requirement in s. 278.93(4) of the *Code*. The constitutional remedy significantly altered the notice requirement, and thus operation, of the new scheme.

3. The applicant submits that the trial judge erred in concluding that s. 278.93(4) was constitutionally flawed. In her s. 7 analysis, she failed to recognize that the notice provision in s. 278.93(4) achieved a reasonable constitutional compromise because it expressly gave the trial judge the discretion to determine the timing of the application: "at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice" (emphasis added). The trial judge also failed to acknowledge that the scheme does not specify or require that the application has to be made pre-trial, or that there is built-in flexibility to consider all relevant factors (including the accused's fair trial rights) through incorporation of the well-established "interests of justice" test.

4. It is indisputable that it is in the national and public interest for this Court to determine the constitutionality of s. 278.93(4), both for British Columbia and the other Canadian provinces and territories. At the present time, there are conflicting constitutional decisions across the country. As will be reviewed in greater detail below, while courts in Ontario and Nova Scotia have concluded that the scheme is constitutional, the provisions have either been found to violate the *Charter*, or struck down/read down in B.C., Alberta,

Saskatchewan and the Yukon.[1] There is currently a patchwork of different procedures across the country and guidance is required from this Court.

5. The Crown is precluded from immediately appealing the constitutional ruling to the B.C. Court of Appeal because it is interlocutory. However, this is immaterial, because the constitutional ruling could not be raised as a ground of appeal on an appeal from conviction or acquittal since it relates to the "timing" component of a procedural issue. The only realistic avenue of appeal lies to this Court pursuant to s. 40 of the *Supreme Court Act* and the "dual proceeding" principles in *R. v. Laba*, [1994] 3 S.C.R. 965.

B. Overview of legislative scheme

6. The Bill C-51 amendments flowed from the December 2012 Senate Standing Committee on Legal and Constitutional Affairs report on the statutory review of Bill C-46 (third party records) entitled, "Statutory Review on the Provisions and Operation of the *Act to amend the Criminal Code (production of records in sexual offence proceedings*)" (the "*Report*").

7. Bill C-51 was intended to "fill a gap in the law by introducing a specific procedure for determining the admissibility of private records relating to the complainant, such as private journals or therapeutic records, which are in the possession of the accused. Specifically, if those accused seek to adduce complainants' private records, they must bring an application under the new provisions": *House of Commons Debates*, 42nd Parl., 1st Sess., Hansard Vol. 148, No. 195 (15 June 2017), at 12806 (1640). See also Department of Justice Backgrounder, "Cleaning up the *Criminal Code*, Clarifying and Strengthening Sexual Assault Law, and Respecting the *Charter*". According to the Department of Justice *Charter Statement,* clauses 22 to 25 of the Bill "would complement the existing regime by establishing a similar process [to what was contained in ss. 278.2 to 278.9 of the *Code*] to determine whether such records can be admitted by the accused

[1] *R. v. F.A.*, 2019 ONCJ 391; *R. v. A.C.*, 2019 ONSC 4270; *R. v. R.S.*, 2019 ONCJ 645; *R. v. C.C.*, 2019 ONSC 6449; *R. v. J.S.,* [2019] A.J. No. 1639 (A.B.Q.B.) (breach ruling), *R. v. J.S.* (16 March 2020), Edmonton Action No. 170876635Q1 (A.B.Q.B.) (s. 1 ruling); *R. v. Anderson*, 2019 SKQB 304 (breach ruling), 2020 SKQB 11 (s. 1 ruling), Crown appeal to SKCA pending; *R. v. A.M.*, 2019 SKPC 46, application for prerogative relief pending; *R. v. Whitehouse*, 2020 NSSC 87; *R. v. D.L.B.,* 2020 YKTC 8.

as evidence in the trial": Department of Justice, "*Charter* Statement – Bill C-51: *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*", Tabled in the House of Commons, June 6, 2017 (emphasis added).

8. The amendments codified the common law procedure outlined by this Court in *R. v. Osolin,* [1993] 4 S.C.R. 595 and *R. v. Shearing,* 2002 SCC 58, using a substantially similar procedural scheme to that upheld in *R. v. Mills,* [1999] 3 S.C.R. 668 and *R. v. Darrach,* 2000 SCC 46.

9. The new scheme requires that, where the defence intends to tender or use third party "records" (as defined in s. 278.1 of the *Code*) that are in the possession of the accused, the defence must make an application. The new s. 278.92(1) prohibits the admission into evidence of any "record relating to a complainant that is in the possession or control of the accused – and which the accused intends to adduce" in proceedings in relation to one of the enumerated sexual offences unless the accused makes an application pursuant to ss. 278.93 and 278.94.

10. Pursuant to s. 278.93(4), the application must be made "at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice". If the judge is satisfied that the application has been properly served and "that the evidence sought to be adduced is capable of being admissible under s. 276(2)", the judge shall grant the application and hold a hearing to determine whether the evidence is admissible under ss. 276(2) or 278.92(2).

11. The hearing itself is held *in camera* (s. 278.94(1)). The complainant is not a compellable witness at the hearing but may appear, with or without counsel, and make submissions (s. 278.94(2)). The judge must inform the complainant of his or her right to be represented by counsel (s. 278.94(3)).

C. Proceedings at trial and ruling on constitutional application

12. The respondent is charged with sexual assault contrary to s. 271 of the *Code*. He has elected trial by judge and jury.

13. Prior to trial, he advanced a ss. 7, 11(c) and 11(d) *Charter* challenge, asserting that the new scheme violated his right to make full answer and defence, right against self-incrimination, and right to a fair trial. He submitted that the impugned provisions force the defence to disclose "all" of its potential evidence in advance of the trial and impacts the accused's ability to contemporaneously cross-examine the complainant contrary to s. 7 of the *Charter*.

14. The respondent advised the Crown and the court that he is in possession of records that fall within the definition of s. 278.1 of the *Code* but declined to identify the nature of the records in advance of the application. Further, he has not yet filed a substantive application. As a result, neither the Court nor the Crown have reviewed the "records" nor has there been a determination as to whether they meet the definition of "record" in s. 278.1. However, as McLachlin and Iacobucci JJ. held in *Mills*, the absence of a substantive application is not a bar to a constitutional challenge (paras. 19, 35-42).

15. The respondent's constitutional challenge was heard on October 7 and December 9 and 10, 2019.

16. In the *Breach Ruling*, dated January 6, 2020, Duncan J. found a very narrow s. 7 breach related to the seven-day notice requirement in s. 278.93(4) of the *Code*, but dismissed all other aspects of the challenge: *R. v. J.J.*, 2020 BCSC 29 (the "*Breach Ruling*"). Her key findings are set out below:

> [70] The accused is entitled to a fair trial, not a perfect trial or the fairest trial possible. Society has an interest in the trial process, and the complainant's privacy and equality rights must also be weighed in the balance. In my view, if the provisions are read to require an application be made on seven days' notice and held before the complainant testifies in chief, the proper balance of those competing rights cannot be achieved.
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> …
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> [87] I am mindful of Chapman J.'s concerns that Breen J.'s approach would result in the bifurcation of a sexual assault trial. The other decisions from Ontario in which these provisions were upheld express similar concerns. I acknowledge that permitting the accused to wait to make an application for admissibility until after the complainant has completed examination-in-chief may well lead to some scheduling difficulties. At the same time, the relevance of the proposed cross-examination may become clearer for the trial judge after hearing the complainant's evidence-in-chief,

facilitating an expedited and more informed ruling, or the defence may determine not to make the application at all.

[88] The process envisioned is not substantially different from the procedure in *Shearing*, albeit with legislated rather than common law considerations. 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.

[89] While I have some concerns about the complainant's right to be present and represented at the admissibility hearing, this is consistent with both third party record and prior sexual history applications. I am not satisfied, on the basis of the argument before me, that this constitutes a breach of the accused *Charter* rights if the admissibility application comes after the complainant's direct examination.

Conclusion

[90] In all the circumstances, I find that the accused's fair trial rights under s. 7 of the *Charter* are violated by the requirement to apply on seven days' notice for a hearing concerning the admissibility of records that may meet the definition of a record in s. 278.1 of the *Criminal Code*. The requirement compels disclosure of defence evidence and unduly truncates the right to make full answer and defence by providing the complainant and the Crown with an advance preview of defence evidence and tactics before examination-in-chief is completed and a case to meet has been established.

[Emphasis added.]

17. On February 18, 2020, in a very brief oral ruling, Duncan J. advised counsel that the s. 7 breach was not saved under s. 1, but she did not address the question of remedy.

18. In written reasons released on March 11, 2020, Duncan J. held that the s. 7 violation could not be saved under s. 1: *R. v. J.J.,* 2020 BCSC 349 ("*Section 1 and Remedy Ruling*"). However, because s. 278.93(4) applies to both ss. 276 and 278.92 applications, she "read down" the provision to: (1) remove the seven day notice requirement in s. 278.93(4) only as it applies to s. 278.92 applications; and (2) provide that s. 278.92 applications should be made "at the conclusion of the complainant's examination in chief, or as otherwise required by the judge, provincial court judge or justice in the interests of justice". As Duncan J. explained:

> [19] ….I am persuaded that [reading down] is the appropriate remedy for the violation of s. 7 in this case, because striking down the seven day notice requirement in s. 278.93(4) in its entirety would have the unintended consequence of upending the s. 276 application regime.
> …
>
> [21] While the Crown's formulation is helpful, I find that the fairest way to read down the legislation is to add that applications pursuant to s. 278.92 should be made "at the conclusion of the complainant's examination in chief, or as otherwise required by the judge, provincial court judge or justice in the interests of justice".
>
> [22] This formulation does not preclude trial judges, in the exercise of their trial management powers, from inquiring of defence counsel at a pre-trial conference or at the commencement of a trial whether such an application might be made. Such an inquiry would have the benefit of putting the Crown and the complainant on notice that counsel might be required to assist the complainant and reduce mid-trial delay if such an application proceeds without requiring the defence to disclose any particulars.
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> [Emphasis added.]

19. On February 18, 2020, the applicant discharged his counsel. As a result, the jury trial scheduled for the week of February 24, 2020 was adjourned. The applicant has retained new counsel, and his jury trial is currently scheduled for October 5-9, 2020, with jury selection scheduled for October 1, 2020.

PART II – STATEMENT OF QUESTIONS IN ISSUE

20. The principal question raised on this application is whether this Court should grant the Crown applicant leave to appeal the constitutional ruling pursuant to s. 40 of the *Supreme Court Act*.

21. In order to answer this question, the following two issues arise:

a. Do the principles in *R. v. Laba*, [1994] 3 S.C.R. 965 apply to the constitutional ruling such that s. 40 of the *Supreme Court Act* is the only appellate avenue available to the Crown?

b. Is the constitutionality of s. 278.93(4) of the *Criminal Code* a matter of sufficient public importance or other significance that leave to appeal should be granted?

PART III – STATEMENT OF ARGUMENT

A. Crown appeal of constitutional ruling

22. The constitutional ruling in this case was an interlocutory ruling with respect to a pre-trial application. As the ruling was made by a superior court judge, it is not possible to pursue an application for prerogative relief (and there is some question as to whether it could be characterized as jurisdictional error in any event).

23. Further, as this is an interlocutory ruling, the Crown has no avenue to appeal it to the Court of Appeal for British Columbia. However, this is immaterial, because the constitutional ruling could not be raised a ground of appeal on an appeal from conviction or acquittal since it relates only to the "timing" component of a procedural issue. As Willcock J.A., writing for the Court, recently observed in *R. v. Picard*, 2020 BCCA 107, "[a]n appeal, even where it is cast as an appeal from conviction, is not properly constituted if the appellant seeks only to set aside a ruling on a *voir dire* that has no impact on the verdict" (para. 23). The same reasoning would apply to an appeal from acquittal.

24. It is virtually impossible to conceive of a situation in which the notice requirement could form a ground of appeal on an appeal from conviction or acquittal. For example, if the accused is acquitted or convicted based on the application of the principles in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, the Crown could not advance an appeal of the constitutional ruling (a procedural question) on an appeal. As a result, this constitutional ruling is effectively a decision of the court of last resort in the province. The only avenue of appeal lies to this Court pursuant to s. 40 of the *Supreme Court Act* and the "dual proceeding" principles in *Laba*.

25. This is precisely the type of situation that was contemplated in *Laba*:

> XX. For an appeal under s. 40(1), the judgment appealed against must be the final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case. An appeal against a ruling on the constitutionality of a law that cannot be piggybacked onto proceedings set out in the *Criminal Code* is a judgment of the highest court of final resort in a province in which judgment can be had in the particular case for the purposes of s. 40(1). Therefore, this Court has jurisdiction under s. 40(1) to grant leave

to appeal against a ruling on the constitutionality of a law that cannot be piggybacked onto proceedings set out in the *Criminal Code*.

XXI. To find otherwise would be to accept an absurd consequence. Consider the following example. In a trial on a charge of operating a motor vehicle while impaired, a Superior Court judge in Ontario declares s. 256 of the *Criminal Code* (warrants to obtain blood samples) unconstitutional and inoperative and rules that the evidence obtained as a result of a warrant under this section is inadmissible. Despite this declaration, the accused is convicted on the remaining evidence. The accused chooses not to appeal this conviction. The Crown cannot appeal against the conviction through the *Criminal Code* (because no such appeal is provided for by Parts XXI and XXVI of the *Code*). Unless the analysis I propose is accepted, s. 256 will remain inoperative in Ontario unless and until one of the following four scenarios transpires. First, a case involving s. 256 of the *Criminal Code* comes before another Superior Court judge in Ontario, this second judge disagrees with the first judge and declares the section constitutional, the accused is convicted, the accused appeals the conviction to the Court of Appeal, and the Court of Appeal affirms the conviction. Second, a case involving s. 256 comes before another Superior Court judge in Ontario, this second judge agrees with the first judge on the constitutionality issue and acquits the accused, the Crown appeals the acquittal to the Court of Appeal, and the Court of Appeal declares the section constitutional. Third, a case involving s. 256 comes before a Superior Court judge of another province or territory, this judge declares the section unconstitutional, the accused is acquitted, the Crown appeals the acquittal to the Court of Appeal, the Court of Appeal affirms the acquittal, and the Crown successfully appeals against the Court of Appeal decision at the Supreme Court of Canada. Fourth, a case involving s. 256 comes before a Superior Court judge in another province or territory, this second judge disagrees with the first judge and declares the section constitutional, the accused is convicted, the accused appeals the conviction to the Court of Appeal, and the Court of Appeal affirms the conviction, and the accused successfully appeals against the Court of Appeal decision to the Supreme Court of Canada. If ever a finding of unconstitutionality coincides with a conviction, no appeal against the finding of unconstitutionality will be available if the accused chooses not to appeal.

XXII. To me, such a consequence is absurd. First, the constitutionality of a law is left dependent upon the resolution of an issue completely unrelated to constitutionality, i.e., the guilt or innocence of the accused and upon his or her decision to appeal a conviction. Second, a law can be struck down by a Provincial or Superior Court judge and then left to hang there inoperative until some time in the future when another case on point happens to come before another judge and happens to result in a verdict that provides for an avenue of appeal through the *Criminal Code*. Just as an accused is entitled to his or her day in court, so too is the legislature. The legislature does not properly get this day in court if its ability to get to court on the issue of the constitutionality of a law is dependent upon the contingency of a particular finding of guilt or innocence coinciding with a *Criminal Code* avenue of appeal.

> XXIII. In order to avoid such absurdities and to indicate the direction in which I believe the analysis of the proper procedures for s. 52 challenges should go, I adopt my "dual proceedings, s. 40" analytical approach to appeals against successful s. 52 challenges to the constitutionality of laws.
>
> [Emphasis added.]

26. In *R. v. Adams*, [1995] 4 S.C.R. 707, this Court confirmed that s. 40(3) of the *Supreme Court Act* prohibits an appeal from a judgment where there is an express right of appeal pursuant to the *Code* provisions (i.e. an appeal from a judgment of any court acquitting, convicting, setting aside a conviction, affirming a conviction, setting aside an acquittal or affirming an acquittal) (para. 14). An appeal is also precluded with respect to any order “that is integrally related to one of those categories” and to “the vast array of interlocutory orders and rulings made at trial with respect to the conduct of the proceedings” (para. 17). However, this Court has jurisdiction under s. 40 where an order is “not integrally related to”, or has “no bearing whatsoever” on, the conviction or acquittal (para. 18). See also, *R. v. Mentuck*, [2001] 3 S.C.R 442, at para. 21, and *R. v. Shea*, [2010] 2 S.C.R. 17, at paras. 6-11.

27. The applicant submits that this is the precisely the situation in the present case - the constitutional ruling could not be raised as a ground of appeal on an appeal from conviction or acquittal as it relates to the “timing” component of a procedural issue. It is impossible to conceive of any realistic situation where it would be “integrally related” to a conviction or acquittal. As a result, s. 40 of the *Supreme Court Act* and the reasoning behind the dual proceedings approach in *Laba* are directly applicable to the case at bar. Resort to this Court through s. 40 is the only available appellate avenue open to the Crown. Section 40 was also the route by which this Court heard the appeal of the constitutional ruling in *R. v. Mills,* [1999] 3 S.C.R. 668, although in that case the appeal was advanced by a third party (para. 31).

28. The applicant acknowledges that there has been some suggestion that there is an independent right to appeal a constitutional ruling to an appellate court (*R. v. Boutilier*, 2016 BCCA 24 and *R. v. Ndhlovu*, 2018 ABCA 260). However, these cases either rely on a specific statutory provision that does not apply in this case or, alternatively, the

reasoning is likely overtaken by this Court's recent decision in *R. v. Brassington*, 2018 SCC 37, at paras. 18-23. See also *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 958-964 (*per* McIntyre J., writing for the majority on this point).

29. The Crown applicant is not seeking to adjourn the trial pending this Court's decision on the application for leave to appeal or appeal, if leave is granted. The filing of a s. 40 application for leave to appeal does not necessarily foreclose the continuation of the proceedings: see, for example, *R. v. Ahmad*, 2009 CanLII 84778 (Ont. S.C.J.), at para. 14; *R. v. Archer*, 1989 ABCA 38, at para. 14. If this Court grants leave, the applicant submits that the s. 278.92 application, if it is ultimately filed, could proceed on the notice requirement established by Duncan J.

B. The constitutionality of s. 278.93(4) of the *Criminal Code* is of sufficient public and national importance to justify granting leave to appeal

30. It is incontrovertible that the constitutionality of s. 278.93(4) of the *Code* is of sufficient public and national importance to justify granting leave to appeal due to: (1) the importance of the amendments in preserving the privacy and dignity rights of sexual assault complainants; and (2) the conflicting body of jurisprudence that has developed across the country on the constitutionality of the scheme.

31. If leave to appeal is granted, it is anticipated that the following constitutional issue will arise:

> Did the trial judge err in concluding that the seven day notice requirement in s. 278.93(4) infringes s. 7 of the *Charter* and does not constitute a reasonable limit pursuant to s. 1?

32. Duncan J. correctly concluded that the scheme has a pressing and substantial objective: *Section 1 and Remedy Ruling,* at paras. 8-9. The amendments, as a whole:

- ensure that a complainant's right to privacy, dignity, security of the person, and equality under ss. 7, 15 and 28 of the *Charter* are fully considered, appreciated, and respected in circumstances where the admissibility of private records of the complainants are involved;
- improve victim and community confidence in the criminal justice system, thereby increasing the likelihood that victims of offences of sexual violence will report these crimes and participate in criminal prosecutions; and

- protect the integrity of the trial process by ensuring that evidence that is misleading or rooted in dangerous myths and stereotypes is not admitted into evidence such as to distort the truth-seeking function.

  See, for example, *House of Commons Debates*, 42nd Parl., 1st Sess., Vol. No. 148, No. 249 (11 December 2017) at 16218-16219 (Mr. Marco Mendicino, Parliamentary Secretary to the Minister of Justice and Attorney General of Canada); *R. v. C.C.*, 2019 ONSC 6449, at para. 83.

33. However, Duncan J. erred in concluding that s. 278.93(4) was constitutionally flawed. In her s. 7 analysis, she failed to recognize that the notice provision in s. 278.93(4) achieved a reasonable constitutional compromise because it expressly gave the trial judge the discretion to determine the timing of the application: "at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice" (emphasis added). Duncan J. also failed to address the fact that s. 278.93(4) does not specify that the application must be made pre-trial. The notice provision is flexible and involves the balancing of a number of factors under the "interests of justice" test.

34. The "interests of justice" test is a well-known standard in criminal law, that is used widely throughout the *Code*, and provides for the broadest possible consideration of factors. The phrase "interests of justice" is "a broad and flexible concept": *R. v. Smith*, 2004 SCC 14, at para. 41. As Watt J. (as he then was) observed in *R. v. Blakeman*, 1988 CarswellOnt 848 (Ont. S.C.J.), "the compendious expression 'the interests of justice' is not statutorily confined.... The 'interests of justice' are amenable to neither precise nor exhaustive definition. Indeed, it would seem antithetical to the breadth of the phrase and wholly inimical to the interests there described to essay its definition" (para. 108).

35. "Interests of justice" takes its meaning from the context in which it is sought to be applied. As Doherty J.A, writing for the court, explained in *R. v. Bernardo* (1997), 121 C.C.C. (3d) 123 (Ont. C.A.):

> [16] The phrase "the interests of justice" is used throughout the *Criminal Code*. It takes its meaning from the context in which it is used and signals the existence of a judicial discretion to be exercised on a case-by-case basis. The interests of justice encompass broad based societal concerns and the more specific interests of a particular accused. [Emphasis added.]

36. More recently, in *R. v. Last,* 2009 SCC 45, this Court considered the "interests of justice" test in the context of an application for severance. Deschamps J. held that the interests of justice "encompass the accused's right to be tried on the evidence admissible against him, as well as society's interest in seeing that justice is done in a reasonably efficient and cost-effective manner" (para.16). Courts "have given shape to the broad criteria established in s. 591(3) and identified factors that can be weighed in the decision to grant severance or not. The weighing exercise ensures that a reasonable balance is struck between the risk of prejudice to the accused and the public interest in a single trial" (para. 17). The factors identified by courts "are not exhaustive. They simply help capture how the interests of justice may be served in a particular case, avoiding an injustice" (para. 18).

37. The Crown submits that the inclusion of the "interests of justice" test in s. 278.93(4) allows for the widest possible balancing of factors with respect to the timing of notice, including the accused's right to make full answer and defence. Further, the seven-day notice requirement is entirely consistent with the continued emphasis post-*Jordan* on the flexible exercise of the trial management power and on all actors in the criminal justice system acting proactively and taking steps to minimize delay.

38. As noted above, at the present time there are conflicting constitutional decisions in B.C., Alberta, Saskatchewan, Nova Scotia, Ontario and the Yukon.

39. In Alberta, Sanderman J. concluded that s. 278.92 violated ss. 7 and 11(d) of the *Charter*, and that the violations could not be saved under s. 1. He declared s. 278.92 to be of no force or effect: *R. v. J.S.,* [2019] A.J. No. 1639 (A.B.Q.B.) (breach ruling); *R. v. J.S.* (16 March 2020), Edmonton Action No. 170876635Q1 (A.B.Q.B.) (s. 1 ruling). Writing at paras. 27-28 of the breach ruling, he observed:

> 27 This legislation from my perspective goes too far. Section 278.9(2) is of no force and effect as it violates J.S.'s rights under section 11 -- pardon me section 7 and 11(d) of the *Charter*. It violates his right to silence, and right to make full answer and defence in requiring him to reveal evidence in his possession and how it will be used at trial beforehand. This is a clear section 7 violation. It violates his right make full answer and defence and his right to be tried fairly by impeding his ability to cross-examine as he chooses to do so. This is a section 7 and 11(d) violation.

> 28 Now even though the legislation - legislation is of no force and effect the complainant in this matter still has the full protection guaranteed by *Mills* and *Darrach*. And the protection of the adopt -- and the protection of the approach adopted in R v Shearing decided in 2002, 3 SCR 33. In *Shearing* the Supreme Court of Canada had to decide the limits of the cross-examination that would be allowed in relation to the diary of the complainant in the possession of the accused. Once again something that the accused had and the accused had come into possession, in a legitimate fashion, had been given the diary by the mother of the complainant.

40. In Saskatchewan, two courts have also concluded that the amendments violate the *Charter*: *R. v. A.M.,* 2019 SKPC 46, application for prerogative relief pending; and *R. v. Anderson*, 2019 SKQB 304 (breach ruling), 2020 SKQB 11 (s. 1 ruling), appeal to the Saskatchewan Court of Appeal pending. In the breach ruling in *Anderson,* Rothery J. held that ss. 278.92(1), 278.92(2)(b) and 278.94(3) violated ss. 7 and 11(d) of the *Charter*:

> [22] The nature of this offence is one that usually occurs in private, without any witnesses other than the complainant and the accused. Often, it is a case of “she said, he said” (or in this trial, “he said, he said”). The defence must be permitted to test the veracity of a complainant, within the constraints of cross-examination as articulated in *Lyttle* and *R.V*. That is, the complainant’s questions must be relevant, and their prejudicial effect must not outweigh their probative value. The complainant’s privacy rights associated with records in the accused’s possession must give way to the accused’s rights under ss. 7 and 11(d) of the *Charter*, that is, an unencumbered cross-examination. The balance is incontrovertibly in the accused’s favour.
>
> [23] Therefore, I must conclude that the effect of ss. 278.92(1), 278.92(2)(b) and 278.94(2) of the *Criminal Code* infringes the accused’s right to make full answer and defence as guaranteed by s. 7 of the *Charter* and infringes the accused’s right to a fair trial guaranteed by s. 11(d) of the *Charter*.
>
> [24] A complainant is not left without a remedy if these impugned sections of the *Criminal Code* are rendered unconstitutional. Any records that hold a high degree of privacy that somehow make their way into the accused’s possession, as was the situation in *Shearing*, can be addressed in the same manner as outlined in *Shearing*. That is, the trial judge holds a *voir dire*, with the complainant and counsel present, to determine the admissibility of that record.

41. In the s. 1 ruling in *Anderson*, Rothery J. concluded that the ss. 7 and 11(d) violations could not be saved under s.1 but did not expressly address the question of remedy. While addressing the minimal impairment prong of the *Oakes* test, he observed:

> [10] …. [w]hile Parliament may have intended to enact legislation that addressed the problem of a complainant's private records as dealt with in *Shearing*, the combination of the definition of "record" and these impugned provisions squarely infringes the accused's ss. 7 and 11(d) rights. This legislation tramples on the truth-seeking objective of cross-examination.

The Saskatchewan Crown has filed a Notice of Appeal of the *Anderson* interlocutory constitutional ruling to the Saskatchewan Court of Appeal.[2]

42. In Ontario, there have been three decisions dismissing constitutional challenges to the scheme: *R. v. F.A.*, 2019 ONCJ 391; *R. v. A.C.*, 2019 ONSC 4270 and *R. v. C.C.*, 2019 ONSC 6449. In a fourth case, *R. v. R.S.*, 2019 ONCJ 645, Breen J. concluded that a statutory provision which "compels disclosure of material to a complainant, *in advance of cross-examination*, compromises the fairness of the trial contrary to s. 7 of the *Charter* (para. 78, emphasis in original). However, he concluded that the standing of the complainant on the admissibility *voir dire* does not offend the fair trial rights of the accused (para. 81). Ultimately, Breen J. determined that the provisions can be interpreted in such a way as to maintain their constitutionality:

> [85] The notice required for an application to adduce evidence of private records [s.278.92] is addressed in s.278.93(4) which provides for service on the prosecution and filing with the court "at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice". This provision is sufficiently flexible to permit an admissibility *voir dire* to be heard **during the cross-examination of the complainant**. The fact that in trial applications may lead to an abridgement of the seven day notice period does not preclude the application being routinely brought at this point in the trial. Resort to a statutory exception need not be exceptional.
>
> [86] The stark contrast between the seven days notice required for an admissibility *voir dire* and the sixty days required for a production application [s.278.3(5)] further suggests that Parliament contemplated admissibility being determined in trial.

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[2] To the best of the applicant's knowledge, the Saskatchewan Crown is relying on the following as sources for the right to appeal and the Court's jurisdiction to entertain the appeal: *The Constitutional Questions Act*, S.S. 2012, c. C-29.01, s. 15(6); *The Court of Appeal Act*, S.S. 2000, c. C-42.1, s. 10; and *R. v. Daniels* (1991), 65 C.C.C. (3d) 366 (Sask. C.A.), at para. 11. A similar route is not available to the Crown in British Columbia – see also paragraph 28 above.

> [87] Finally, s. 278.93(3), which requires that an application under s.278.93(1) be heard in the absence of the jury, necessarily envisions the application being brought at trial.
>
> [88] This is the approach taken in this Court, as s.2.5(2)(ii)(b) of the *Criminal Rules of the Ontario Court of Justice* contemplates applications pursuant to s.278.93(1) being brought during trial.
>
> [89] More importantly, pursuant to s. 278.92(2)(b), private records are only admissible at trial where the defence establishes that the proposed evidence has significant probative value. Where the defence anticipates utilizing a record to impeach the complainant through contradiction, relevance is dependent upon the existence of an inconsistency between the record and the complainant's *testimony.* In these circumstances the application *can only be brought during cross-examination* after the foundation for contradiction is established.
>
> [Emphasis in original.]

43. In Nova Scotia, there has been one constitutional challenge, which was dismissed: *R. v. Whitehouse*, 2020 NSSC 87.

44. Finally, in *R. v. D.L.B.*, 2020 YKTC 8, Ruddy T.C.J. held that ss. 278.92 to 278.94 infringed the accused's right to silence and his right to make full answer and defence contrary to ss. 7 and 11(d) (paras. 45-80). However, she concluded that the amendments are not arbitrary or overbroad (paras. 27-44); that the complainant's standing to make submissions does not violate the accused's right to a fair trial (paras. 81-83); and, that the scheme does not violate the accused's s. 11(b) rights (paras. 21-26). Ruddy T.C.J. held that the violations could not be saved under s. 1 (paras. 84-87).

45. As the above review illustrates, there is currently a patchwork of different procedures across the country. Absent timely guidance from this Court, the provision will be applied inconsistently across the country. Further, Duncan J.'s constitutional remedy will likely lead to mid-trial adjournments after the complainant has testified in chief and associated s. 11(b) delay, which will have a significant impact on sexual assault complainants and accused persons alike. Clarity and consistency is required. The applicant is not in a position to pursue an appeal of the constitutional ruling to the B.C. Court of Appeal and therefore the only reasonable avenue of appeal lies to this Court.

PART IV – SUBMISSIONS ON COSTS

46. The applicant does not seek costs and submits that no costs should be awarded.

PART V – ORDER SOUGHT

47. The applicant applies for leave to appeal the constitutional ruling pursuant to s. 40 of the *Supreme Court Act*.

48. Such other and ancillary relief that may be necessary in the consideration of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Victoria, British Columbia, this 16th day of April, 2020.

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NOTICE TO THE RESPONDENT: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the *Supreme Court Act*

PART VI - TABLE OF AUTHORITIES AND LEGISLATION

Para No.

Legislative Materials

PART VII – STATUTORY PROVISIONS

An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act, S.C. 2018, c. 29 s. 25	Loi modifiant le Code criminel et la Loi sur le ministère de la Justice et apportant des modifications correlatives à une autre loi, S.C. 2018, c. 29 s. 25
Criminal Code, R.S.C., 1985, c. C-46. ss. 271, 276(2), 278.1, 278.2, 278.9, 278.92, 278.93(4), 278.94	*Code Criminel,* L.R.C. (1985), ch. C-46. ss. 271, 276(2), 278.1, 278.2, 278.9, 278.92, 278.93(4), 278.94
Supreme Court Act, R.S.C. 1985, c. S-26. s. 40	*Loi sur la Cour suprême*, L.R.C. 1985, ch. S-26. s. 40
Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. ss. 1, 7, 11(b), 11(c), 11(d)	*Charte canadienne des droits et libertés, partie 1 de la Loi constitutionnelle de 1982*, constituant l'annexe B de la loi canadienne de 1982 (UK), 1982, c 11. ss. 1, 7, 11(b), 11(c), 11(d)