SCC File No.: 39133

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

BETWEEN:

HER MAJESTY THE QUEEN

APPLICANT
(APPELLANT)

AND:

J.J.

RESPONDENT
(RESPONDENT)

RESPONDENT'S RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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RESPONDENT'S MEMORANDUM OF ARGUMENT

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Crown seeks leave to bring an interlocutory appeal of two rulings made by a trial judge on a pre-trial *Charter* motion brought by the accused respondent. These rulings relate to the constitutionality of the records scheme established by ss. 278.92 to 278.94 of the *Criminal Code*. The trial judge dismissed a number of arguments made by the respondent, but found part of the scheme – the seven-day notice period for applications under s. 278.92(2) of the *Code* – unconstitutional.[1] As a remedy, the judge read down the legislation to reduce the notice period.[2]

2. This Court should dismiss the Crown's application for leave to appeal. First, the Crown has failed to meet the requirements for leave to be granted under s. 40(1) of the *Supreme Court Act*, as the trial judge's constitutional rulings are not judgments of the highest court of final resort in a province. The respondent's trial is ongoing, and its outcome is unknown. The trial judge has not even heard the application to which her rulings relate. In these circumstances, the Court cannot be satisfied that the Crown would be foreclosed from raising the correctness of the constitutional rulings on a Crown or defence appeal to the B.C. Court of Appeal after the completion of the respondent's trial.

3. Second, granting the Crown leave would violate the common law principle against interlocutory appeals in criminal matters. Nothing in the "dual proceedings" line of authority overrides this long-standing principle.

4. In addition, while the constitutionality of a piece of legislation is typically a matter of public importance, it would be premature to grant leave in this case at this time. The proposed appeal relates only to a narrow provision in a broader legislative scheme. There has been no appellate consideration of any aspect of the constitutionality of the scheme and, as such, there is no conflicting appellate controversy to resolve. The public, and this Court, will benefit from the Court

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[1] *R. v. J.J.*, 2020 BCSC 29 ("Breach Ruling").
[2] *R. v. J.J.*, 2020 BCSC 349 ("Section 1 and Remedy Ruling").

considering the constitutionality of the scheme as a whole, with the advantage of appellate analysis and a record which includes the application of the constitutional rulings to the facts of the case.

5. In these circumstances, it is respectfully submitted that this Court should dismiss the Crown's application. This would not preclude the Crown from bringing another application once a judgment from the highest court of final resort in the province exists.

B. Relevant Facts

6. The respondent agrees with the Crown's description of the legislative scheme in ss. 278.92 to 278.94 of the *Criminal Code* as set out in the Applicant's Memorandum of Argument at paras. 9-11. The respondent also agrees with the facts respecting his case as set out in the Applicant's Memorandum of Argument at paras. 12-19.

7. At para. 16 of its Memorandum of Argument, the Crown sets out the "key findings" of the trial judge's ruling on whether the impugned provisions of the *Code* breached the respondent's s. 7 *Charter* rights. The respondent submits that the following paragraphs, omitted by the Crown, are also important to understanding the trial judge's analysis:[3]

> [72] The majority of sexual assault cases involve individuals who are known to each other. Many prosecutions solely rely on the evidence of a complainant. The danger that the complainant's evidence may be tailored, consciously or unconsciously, is not illusory. This is why witnesses are almost invariably excluded from the courtroom until they have given their evidence.
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> [73] I acknowledge Ms. Ruzicka's point that in reality a complainant may learn about the defence strategy in a variety of other ways, such as after a mistrial in which a complainant has completed her evidence or at a re-trial following an appeal. But this is a separate considerations, outside the challenge to the provisions before me which requires *de facto* disclosure of detailed particulars of the defence case and its strategy. Legislation must be *Charter* compliant.
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> …
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> [82] At its heart, a strict reading of the timing provisions in the legislation substantially alters the traditional paradigm of confronting a witness with contradictory evidence to defend oneself by replacing it with a relevance hearing in advance of a witness's testimony. Civil trial procedures concerning mutual

[3] Breach Ruling at paras. 72-73, 82-85, emphasis added.

document disclosure appear to have been grafted onto a criminal trial where the interests of the Crown, the complainant and the accused are not concerned with financial compensation but with the potential of a criminal conviction.

[83] With all due respect to Senator Sinclair's comments about the apparent undesirability of the Crown being surprised by some of the cross-examination in the Ghomeshi trial on texts which had not been disclosed to the prosecutor, either by the complainant or the accused, this is not an unusual occurrence in a criminal trial. The defence has never been required to hand over its brief to the Crown in advance of the trial.

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

[85] Fundamentally, the provisions give the complainant's privacy rights primacy over the accused's fair trial rights when the notice requirements are strictly applied. As observed by the majority in *Mills* at para. 94, where the information contained in a record directly bears on the right to make full answer and defence, privacy rights must yield to the need to avoid convicting the innocent.

PART II – QUESTIONS IN ISSUE

8. The issue to be decided is whether the Court should grant the Crown's application for leave to appeal the trial judge's ruling that the seven-day notice period in s. 278.93(4) of the *Criminal Code* violates s. 7 of the *Charter* in a manner that cannot be justified under s. 1 when applied to applications under s. 278.92 of the *Criminal Code*.

PART III – STATEMENT OF ARGUMENT

A. The Constitutional Rulings Are Not Judgments of the Highest Court of Final Resort in the Province

i. There has been no judgment from the highest court of final resort in the province

9. Section 40(1) of the *Supreme Court Act* ("the *Act*") gives the Court jurisdiction to grant leave to appeal from a final or other judgment of the highest court of final resort in a province where the issue raised by the appeal is of such public importance, or is otherwise of such a nature or significance, as to warrant determination by the Supreme Court of Canada.[4]

10. The requirements in s. 40(1) of the *Act* are not met in this case. There has been no final or other judgment from the highest court of final resort in the province on the question of the constitutionality of the notice period in s. 278.93(4) of the *Code*. Nor has there been any final or other judgment from any provincial court on the question of the respondent's culpability. The respondent's trial before a judge and jury is scheduled to begin in October. The trial judge has not yet heard or decided the respondent's application under s. 278.92(2) of the *Code* respecting the admissibility of records in his possession – the application to which the judge's constitutional rulings relate, and where the trial judge will apply the remedy granted by her s. 1 ruling.

11. As a result, if the Court granted the Crown leave to appeal at this point in time, the record before this Court would not include any examples of a trial court applying the remedy ordered by the trial judge. It is not open to the Crown to suggest that the trial judge's application of the rulings at trial should be part of the appeal record, given its position that the trial judge's constitutional rulings are a stand-alone "constitutionality" proceeding such that whatever happens at the respondent's trial – the "culpability" proceeding – is irrelevant to the constitutional question.[5]

12. The "dual proceedings" line of authority from *R. v. Laba*, [1994] 3 S.C.R. 965 does not support the granting of leave to appeal in this case. That authority establishes that the Crown may seek leave to appeal a constitutional ruling under s. 40(1) of the *Act* <u>where there is no other avenue through which the Crown could appeal the ruling.</u> That is not the situation here: the Crown could

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[4] *R. v. Shea*, 2010 SCC 26 at para. 12.
[5] Applicant's Memorandum of Argument at paras. 24-25, 27.

raise the correctness of the constitutional rulings on either a Crown or defence appeal to the B.C. Court of Appeal after the conclusion of the appellant's trial.

13. The Crown's submission that it is "impossible to conceive of any realistic situation" in which the constitutional rulings would come before the B.C. Court of Appeal is inaccurate and speculative.[6] It also highlights the prematurity of the Crown's application. At this stage of the proceedings, there is no way to be sure that the constitutional rulings will *not* be the subject of an appeal to the B.C. Court of Appeal. They may be, they may not be. Because the trial has not happened yet, there is no factual basis upon which to conclude that the rulings will necessarily be irrelevant to issues that could be raised on appeal.

14. The correctness of the constitutional ruling could very well be an issue on appeal to the B.C. Court of Appeal. For example, if the respondent is convicted, he could challenge the correctness of the constitutional rulings on the basis that the judge should have found more of the records regime unconstitutional or granted a different remedy. This would also allow the Crown to challenge the correctness of the rulings, either through a cross-appeal or as a way of arguing that the conviction should be sustained.[7] To use the language from *Laba*, this is one way the Crown could "piggyback" an appeal against the constitutional rulings onto proceedings at the B.C. Court of Appeal.[8]

15. It is also possible that the Crown could raise the constitutional ruling as an issue on appeal should the respondent be acquitted. The fact that the remedy imposed has an effect on the timing of an application under s. 278.92(2) of the *Code* does not relegate the constitutional rulings to an ancillary question of procedure that will have no bearing on the outcome of the case. Indeed, the

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[6] Applicant's Memorandum of Argument at para. 27.

[7] As a general rule, a respondent in a criminal appeal is entitled to raise any argument which supports the order of the courts below: *R. v. Keegstra*, [1995] 2 S.C.R. 381 at 396-397. As such, if the accused appealed his conviction on the basis that the trial judge erred by not striking down the entirety of the records scheme in ss. 278.92-278.94 of the *Code*, the Crown could argue that the conviction should be sustained because the judge should have dismissed the accused's constitutional challenge in its entirety.

[8] *Laba* at 982.

Crown asserts that the trial judge's ruling "significantly altered" the operation of the records scheme in ss. 278.92 to 278.94 of the *Code*, and that the notice period is important to preserving the privacy and dignity rights of complainants in sexual assault cases.[9] It is difficult to understand how the ruling eliminating the seven-day notice period is both a significant change to the operation of a new legislative scheme yet also so irrelevant to the proceedings that it would be unappealable should the respondent be acquitted.

16. Similarly, the trial judge viewed the notice period in s. 278.93(4) as being relevant to considerations respecting the credibility and reliability of the complainant in a sexual assault case.[10] These considerations are obviously integral to the outcome of a sexual assault trial.

17. If this Court grants the Crown leave to appeal now and the respondent later seeks to challenge the constitutional rulings on a conviction appeal, it would put the justice system in the awkward and undesirable position of having two different courts at two different levels deciding the same issue in the same case at the same time.

ii. The prohibition on interlocutory appeals in criminal matters applies here

18. Nothing in *Laba* or the jurisprudence respecting appeals on issues ancillary to the outcome of the trial overturns the Court's jurisprudence respecting interlocutory appeals in criminal matters. This Court has repeatedly held that parties in a criminal matter are not permitted to bring interlocutory appeals, even for rulings respecting the constitutionality of criminal legislation. Rather, the parties should "follow the normal, established procedure. When the trial is completed the appeal may be taken against the decision or verdict reached and the alleged error in respect of the claim for *Charter* relief will be a ground of appeal".[11]

19. The prohibition on interlocutory appeals in criminal matters applies to constitutional rulings. In *R. v. Mills*, [1986] 1 S.C.R. 863, the majority held that parties in criminal matters should

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[9] Applicant's Memorandum of Argument at paras. 2, 30.
[10] Breach Ruling at paras. 71-72.
[11] *R. v. Mills*, [1986] 1 S.C.R. 863 at 959, emphasis added. See also *R. v. Morgentaler* (1984), 48 O.R. (2d) 519, 1984 CanLII 55 (Ont. C.A.).

wait until the end of the trial to bring an appeal of rulings respecting remedies under s. 24(1) of the *Charter*:[12]

> The question has been raised as to whether there can be something in the nature of an interlocutory appeal in which a claimant for relief under s. 24(1) of the *Charter* may appeal immediately upon a refusal of his claim and before the trial is completed. It has long been a settled principle that all criminal appeals are statutory and that there should be no interlocutory appeals in criminal matters. This principle has been reinforced in our *Criminal Code* (s. 602, *supra*) prohibiting procedures on appeal beyond those authorized in the *Code*. It will be observed that interlocutory appeals are not authorized in the *Code*. The question was the subject of the judgment of the Ontario Court of Appeal in *R. v. Morgentaler* (1984), 41 C.R. (3d) 262. Brooke J.A. wrote the judgment of the court (Brooke, Lacourcière and Tarnopolsky JJ.A.) and concluded that interlocutory appeals in respect of refusals of *Charter* remedies under s. 24(1) were not open. In that case the accused, who were charged with conspiracy to procure an illegal abortion, before trial brought a motion to quash or stay the indictment, in the form of a claim that the proceedings were an abuse of process, alleging that s. 251 of the *Code* was contrary to the *Charter* and the *Canadian Bill of Rights* and other non-*Charter* relief. The motion was refused by the trial judge and the accused appealed before the trial was completed. The Court of Appeal quashed the appeal. Brooke J.A. reviewed the authorities on the question and concluded that neither s. 24(1) of the *Charter* nor s. 52(1) of the *Constitution Act, 1982* conferred any right of appeal nor any jurisdiction in the Court of Appeal to hear one.

20. The Court came to the same conclusion respecting constitutional challenges under s. 52(1) of the *Constitution Act, 1982*.[13]

21. The Court's findings from *Mills* respecting the common law principle against interlocutory appeals in criminal matters were recently confirmed in *R. v. Awashish*, 2018 SCC 45 at para. 10.

22. There are strong policy reasons against interrupting the trial process with appeals. These reasons include the potential for fragmentation or disruption of the trial process and the risk of having issues decided without the benefit of a full evidentiary record.[14] Another reason against

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[12] *Mills* at 959-962, emphasis added.
[13] *Mills* at 960-962.
[14] *Mills* at 961, 963-964; *Awashish* at para. 10; *Re Bird and Peebles and The Queen* (1984), 12 C.C.C. (3d) 523 (Man. C.A.) at 530. In *Bird*, the Crown took the position that strong policy considerations militated against interlocutory appeals in criminal matters, even if the appellate

interlocutory appeals is apparent on the facts of this case: because the Crown has sought to appeal the trial judge's ruling before the respondent's trial is complete, the Crown has forced the respondent and his counsel to defend the respondent at trial and on appeal simultaneously. This runs the risk of creating the appearance of unfairness, if not actual unfairness.

23. The law respecting interlocutory appeals applies equally to the Crown and the accused.[15] Just as an accused person is prohibited from appealing their unsuccessful constitutional challenge before their trial is complete, so too is the Crown prohibited from launching an interlocutory appeal where the accused's constitutional challenge was successful.

24. The dismissal of the Crown's application now would not preclude the Crown from bringing another application for leave to appeal under s. 40(1) of the *Act* once there is a judgment from the highest court of final resort in the province on the constitutional issue. For example, if the respondent is convicted but does not appeal his conviction, the Crown could seek leave to appeal the constitutional ruling under s. 40(1) of the *Act* at that time. Similarly, if the respondent is acquitted and there is no legal basis upon which the Crown could appeal the constitutional rulings to the provincial court of appeal, the Crown could then seek leave to the Supreme Court under s. 40(1) of the *Act*.

25. Requiring the Crown to wait to bring its application for leave to appeal until there is a judgment by the highest court of final resort in the province would permit this Court to decide the application for leave to appeal on the basis of facts instead of speculation.

B. The Application is Otherwise Premature

26. The broad question of the constitutionality of the records scheme established by ss. 278.92 to 278.94 of the *Criminal Code* is an issue of public importance. However, the Crown's application is still premature – in terms of s. 40(1) of the *Act*, as outlined above, but also in terms of any national controversy over the constitutionality of these provisions.

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court had jurisdiction (at 528). There, the accused was attempting to appeal the trial judge's decision dismissing their constitutional challenge before the end of their trial.

[15] *R. v. Tingley*, 2015 NBCA 51, leave to appeal to SCC ref'd, at para. 6.

27. The constitutionality of some or all of the records scheme has not yet been considered by any provincial appellate court. As such, there is no appellate controversy that this Court needs to address. While there have been differing opinions at the trial level, this is an inevitable part of the process of testing the constitutional validity of new legislation through the criminal courts.

28. There is no doubt that this Court will have the opportunity to consider the constitutionality of the entirety of the scheme, with the benefit of appellate consideration of the issues, in due course. In fact, the Saskatchewan Court of Appeal is scheduled to hear the Crown's appeal of rulings from the Saskatchewan Court of Queen's Bench striking down ss. 278.92(1), 278.92(2)(b) and 278.94(2) of the *Code* on the basis that these provisions violate ss. 7 and 11(d) of the *Charter* in a manner that cannot be saved by s. 1.[16]

29. Finally, to the extent that the Crown's submissions suggest that leave should be granted in order to avoid the "likely" event of mid-trial adjournments due to the constitutional ruling, those submissions are without merit.[17] The trial judge was aware of the potential for delay caused by her ruling. To mitigate this concern, she held that defence counsel should notify the Crown and court of the potential of a s. 278.92(2) application at the pre-trial stage wherever possible, so that the parties can plan accordingly.[18] The Crown points to no evidence suggesting that this common sense approach will be ineffective. Moreover, an unsubstantiated concern about delay is not a basis upon which to grant leave to appeal.

PART IV – SUBMISSIONS ON COSTS

30. The respondent seeks costs on a solicitor-client basis.

31. Costs are appropriate given the nature of the Crown's application for leave to appeal in this case. The Crown's application is not about the case against the respondent – indeed, the Crown does not seek to prevent the constitutional rulings from being applied in the respondent's trial.[19] Rather, the Crown seeks to appeal on the stated basis that clarifying the constitutionality of the

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[16] *R. v. Anderson*, 2019 SKQB 304 and 2020 SKQB 11.
[17] Applicant's Memorandum of Argument at para. 45.
[18] Breach Ruling at para. 88; Section 1 and Remedy Ruling at para. 22.
[19] Applicant's Memorandum of Argument at paras. 23, 29.

impugned provision of the *Criminal Code* would benefit the public and legal system as a whole.[20] Yet despite the fact that the Crown's application is meant to benefit the legal system generally rather than anyone involved in the respondent's case, the respondent has had to expend his own personal resources to respond to the Crown's application.

32. In addition, the Crown chose to file its application before the respondent's trial was complete. As a result, the respondent has been forced to divert resources that would otherwise be devoted to trial preparation to responding to this application.

33. This Court has found that where the public is meant to be the main beneficiary of a legal challenge in a criminal case, the individual accused should not be put to substantial expense – particularly where the Crown initiates the appeal.[21]

34. That is the situation here. In these circumstances, the Court should exercise its discretion to award the respondent costs under s. 47 of the *Act*.

PART V – ORDERS SOUGHT

35. The respondent respectfully requests that the application for leave to appeal be dismissed and the respondent be awarded costs.

All of which is respectfully submitted this 3rd day of June, 2020.

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[20] Applicant's Memorandum of Argument at para. 30.
[21] *R. v. Trask*, [1987] 2 S.C.R. 304 at 307-308; *R. v. Banting*, 2020 CMAC 2 at para. 21, citing *Trask*, *R. v. Osborn*, [1971] S.C.R. 184, and *Caron v. Alberta*, 2015 SCC 56.

PART VI – TABLE OF AUTHORITIES

Case Law	**At Para.**
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