SCC File No: 39133

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

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT/
RESPONDENT ON CROSS-APPEAL
(Respondent)

-and-

J.J.

RESPONDENT/
APPELLANT ON CROSS-APPEAL
(Applicant/Defendant)

-and-

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUÉBEC, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ALBERTA, WEST COAST LEGAL EDUCATION AND ACTION FUND AND WOMEN AGAINST VIOLENCE AGAINST WOMEN RAPE CRISIS CENTRE, BARBRA SCHLIFER COMMERMORATIVE CLINIC, CRIMINAL TRIAL LAWYERS' ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), CANADIAN COUNCIL OF CRIMINAL DEFENCE LAWYERS and INDEPENDENT CRIMINAL DEFENSE ADVOCACY SOCIETY

INTERVENERS

-AND-

SCC File No: 39516

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE SUPERIOR COURT OF JUSTICE FOR ONTARIO)

BETWEEN:

A.S.

APPELLANT

-and-

HER MAJESTY THE QUEEN

RESPONDENT

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ADDENDUM to the FACTUM of the INTERVENER,
ATTORNEY GENERAL OF ALBERTA
(Pursuant to the Order of Justice Côté of July 30, 2021)

Style of cause continued from previous page

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SHANE REDDICK

RESPONDENT

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A. Overview

1. As intervener in *R v JJ*, Alberta filed two factums dealing first with the seven day notice requirement, and a second factum dealing with the broader question of constitutionality of ss. 278.92 to 278.94 of the *Criminal Code*. In light of that, Alberta will endeavour to avoid unnecessary duplication of argument.

2. However, there are certain aspects of the argument presented on behalf of Mr. Reddick that must be responded to. First, commencing at paragraph 17 of his factum, the Respondent asserts a novel role for Crown prosecutors as investigator and amateur psychologist on behalf of the defence. This is a role that Alberta must respectfully decline. It remains Alberta's position that ss. 7, 15 and 28 *Charter* rights belong to victims, and are personal in nature, necessitating that their defence requires independent representation.

3. The second concern Alberta has arises at paragraph 32 to 34 of the Respondent's factum which asserts an interpretation of *R v Darrach*,[1] which flies in the face of the express language of the statutory provisions. Moreover, it fails to reflect basic statutory interpretation principles, ignoring that ss. 278.92 to 278.94 was clearly reform legislation. [2]

4. The third concern is with respect to a proposed additional interlocutory motion. Not only are these motions for directions not contemplated by the express language of s. 278.92, but can serve only to fragment and exacerbate delay in sexual violence trials. As Alberta has previously submitted,[3] fragmentation leads to delay which only lends itself to exacerbating the problem of under-reporting of sexual violence crimes.

B. Argument

(1) Prosecutors should not be in an adversarial position in relation to victims

5. Paragraphs 29 to 37 of Alberta's factum in *R v JJ* present argument in relation to the participatory rights of victims.[4] The Respondent's factum argues that independent representation

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[1] *R v Darrach*, 2000 SCC 46

[2] Sections 278.92, 278.94(2), 278.94(3) of the *Criminal Code* are at issue in the Appellant's Notice of Constitutional Question and are specific portions of this reform legislation.

[3] Factum of the Intervener, Alberta, filed on January 27, 2021, in *R v JJ* at paras 4, 7, 8, 16, 19

[4] Factum of the Intervener, Alberta, filed on April 23, 2021 in *R v JJ* at paras 29-37

would foreclose the potential for the defence garnering evidence from trial prosecutors interviewing victims of sexual violence. In particular, they assert that prosecutors must note inconsistencies, but must also assess reactions, verbal or otherwise, to information or evidence presented by a trial prosecutor in a pre-trial interview with the victim. There are several problems with that proposition.

6. First, this is not a proper role for the prosecutor. The proposed role potentially places a prosecutor in an adversarial relationship vis-á-vis victims of sexual violence. It is also to be remembered that many victims of sexual violence are children and some of a very young age. The notion that we are to "spring" material in order to invoke a reaction to the defence would be an anathema to Crown prosecutors. Particularly given that defence apparently seeks out impressions of psychological reactions, there is a potential that trial prosecutors on the eve of trial, may find themselves in the position of having to be a witness. This can only serve to fragment and delay trials. From a policy standpoint this Court and others have consistently held that delay and fragmentation is to be avoided.[5]

7. A second critical problem is that the Respondent's proposed role for prosecutors ignores the personal nature of ss. 7 and 15 *Charter* rights. Alberta has explored that more fully in its *R v JJ* factums,[6] but it must be stressed that this Court and others have recognized that not only are *Charter* rights in general personal in nature,[7] but s. 15 rights in particular have an accentuated personal nature.

8. This Court and others have recognized that Parliament made a deliberate choice in its wording of s. 15 to stress the individual nature of the right.[8] As stated in *Stinson Estate v British*

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[5] *R v Awashish,* 2018 SCC 45 at para 10; *R v Johnson*, (1991) OJ No 481; *R v Blackwoods Beverages,* 1984 CanLII 41, leave ref'd leave ref'd [1985] 1 SCR vi; *R v Kendall*, 1982 ABCA 332 at para 11

[6] Factum, *supra* note 3 and Factum, *supra* note 4 at paras 34-36

[7] *Irwin Toy Ltd v Quebec*, [1989] 1 SCR 927 at p 1004

[8] *Canada (Attorney General) v Hislop,* 2007 SCC 10 at para 72-77; *Ermineskin Indian Band & Nation v Canada,* 2006 FCA 415; *Grant v Winnipeg Regional Health Authority et al,* 2015 MBCA 44 at para 65; *Giacomelli Estate v Canada (Attorney General),* 2008 ONCA 346; Hogg, P.W, *Constitutional Law of Canada* (5th ed), (Toronto: Thomson Reuters Canada, 2016) Vol 1 at 37.4-37.5

Columbia, s.15 rights are "personal, and ***the power to enforce the guarantee resides in the person whose rights have been infringed***."[9] [emphasis added]

9. As referenced in paragraphs 29 to 33 of Alberta's factum,[10] participatory rights have long been recognized. In a real sense ss. 278.92 to 278.94 recognize that the potential for jeopardizing the ss. 7, 15 and 28 rights of a victim is inherent in sexual violence trials. It is recognized that the direct interest that a victim has in protecting those rights would normally give rise to a participatory role.[11] That participatory role in turn reinforces the accepted position that privacy rights are intended to protect the individual and not a place.[12]

10. A third critical problem is that, when one considers the type of material the prosecutor is apparently to gather on behalf of the defence, it leads directly to the realm of collateral issues and mythology surrounding sexual violence crimes and victims. As found at paragraphs 21-23 of Alberta's factum in *R v JJ* the twin myths are but two of the myths that have plagued sexual violence trials. [13]

11. McWilliams canvasses the numerous problems with respect to the treatment of women and children in sexual violence crimes. He observes that "*these myths and stereotypes about child and adult complainants are particularly invidious because they comprise part of the fabric of social "common sense" in which we are daily immersed.*"[14] Examples include assumptions about inherent unreliability and assumptions about how victims of trauma will behave. As McWilliams posits "*complainants should be able to rely on a system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions*."[15]

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[9] *Stinson (Estate of) v British Columbia*, 1999 BCCA 761 at para 11

[10] Factum *supra* note 4 at paras 29-33

[11] *Canadian Civil Liberties Association (Corporation of) v Canada (Attorney General)*, [1998] OJ No 2856 (CA), leave ref'd [1998] SCCA No 487; *Canadian Council of Churches v R*, [1992] 1 SCR 236; *R v Marakah*, [2017] 2 SCR 608 at para 21

[12] *R v Reeves*, 2018 SCC 56 at paras 11-18

[13] Factum *supra* note 4 at paras 21-23

[14] S. Casey Hill, David M. Tanovich, Louis P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed) (Toronto: Thomson Reuters Canada, 2013), The Evidence of Women and Children at 30:30.20.10

[15] *Ibid*

12. As stated by this Court in *R v AG*, and has been repeatedly stated, myths and stereotypes have no place in a rational system of law as they jeopardize the court's truth finding function. [16] In *R v ARJD*[17] the majority of the Court of Appeal observed that the right to make full answer and defence and the criminal standard of proof do not allow reliance on generalizations about sexual assault victims. The special vulnerability of children was recognized.

13. Juries and the judiciary may not even realize that they are relying upon prejudicial generalizations leading to the drawing of inferences that may be unfair and inaccurate. The majority added that this form of reasoning is opaque and therefore more difficult to identify and correct on appellate review. They concluded that on the facts of that case it stood as an example of how deeply engrained the myths and stereotypes concerning victims can be.[18] In that particular case the evidence concerned expected conduct of a 17 year old victim who had been sexually violated between the ages of 11 and 16.

14. The court emphatically said that evidence about the lack of expected avoidant behaviour of a victim lends nothing to a sexual assault trial.[19] The majority reasoning of the Court of Appeal was accepted by this Court which stated that to judge a complainant's credibility solely on correspondence between her behaviour and expected behaviour is an error of law.[20]

15. In *R v ABA*, the Ontario Court of Appeal reiterated that stereotypical views about victim behaviour is an error of law and that common sense cannot and should not be used to mask reliance on stereotypical assumptions.[21] Yet this is precisely the type of improper information that is urged upon the Crown to gather by the Respondent. Throughout his argument there floats this notion that one can garner relevance from how a victim, including a child, reacts.

16. The essence of this appeal is made clear by the Respondent's very first sentence that this case is not about conflicting constitutional rights.[22] This Court has consistently recognized that

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[16] *R v AG*, 2000 SCC 17 at para 2
[17] *R v ARJD*, 2017 ABCA 237
[18] *Ibid* at paras 6-7
[19] *Ibid* at para 39
[20] *R v ARJD*, 2018 SCC 6 at para 2
[21] *R v ABA*, 2019 ONCA 124 at paras 8-12
[22] Factum of the Respondent Reddick, filed August 13, 2021, at para 1

ss. 7, 15 and 28 *Charter* rights of complainants ***are*** engaged in sexual violence cases and that there must be a balancing of rights. Without reference to any legislative framework a victim would have the right at common-law to consult with a lawyer. She would be able to discuss, in confidence, potentially very personal and intimate details of her life. Without that, the phenomenon of "whacking the victim" is going to be fostered and maintained. Indeed, to give full effect to the Respondent's position one would have to restrict the victim's right to her own legal counsel and compel her to speak only to a trial prosecutor.

17. It is not at all clear why any victim should be put in that position. It is not at all clear why she would then wish to speak to a trial prosecutor. A trial prosecutor would have to tell her that even a blush or lifted eyebrow or expression of anger is to be relayed to the defence notwithstanding that the trial prosecutor knows nothing about her and what may actually prompt those reactions.

18. The Respondent's position actually emphasizes the necessity of having independent representation.

(2) The ruling in R v Darrach should not be diluted

19. Paragraphs 32-34 of the Respondent's factum essentially asks this Court to revisit its decision in *R v Darrach*. Alberta has previously argued in its factum that *Darrach* is completely correct.[23] As indicated in paragraphs 46-47 of Alberta's prior factum, *Darrach* fully recognizes the mythology surrounding female complainants and the dignity, privacy and equality rights that necessarily preclude the kind of wide ranging questioning that is suggested by the Respondent.

20. Alberta would add only two additional points. First, the Respondent's proposed reinterpretation of *Darrach* flies in the face of the express language of the statutory provisions in question. As stated by this Court in *Rizzo*: *[t]oday, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament*.[24]

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[23] Factum *supra* note 4 at paras 12, 46, 47, 51

[24] *Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at para 41; see also *R v Myers*, 2019 SCC 18 at paras 19, 21-24 and *R v Jarvis*, 2019 SCC 10 at para 24

21. A historical review of Canadian legislative and jurisprudence reform over a period of many years fairly demonstrates a progressive response to the many legal errors arising from assessing the credibility of sexual assault complainants based upon stereotypical assumptions. A non-exhaustive list includes the following:

- Abolition of common law rules permitting unfettered evidence of the complainant's sexual history.[25]
- The removal of the requirements for corroboration.[26]
- The abrogation of the rules relating to the evidence of recent complaint in sexual offences.[27]
- Removal of the requirement for the corroboration of a child's evidence.[28]
- Judicial recognition of the harms caused by the twin myths in sexual violence trials.[29]
- Removal of the requirement of recent complaint and stereotypical assumptions of how people (particularly children) react to acts of sexual abuse.[30]
- Rejection of the assumption that a child's evidence is inherently unreliable.[31]
- Parliament's recognition that all children are in need of protection from unlawful sexual activity with an adult, and not only girls of previously chaste character.[32]

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[25] *Criminal Law Amendment Act, 1975,* SC 1974-75-76, c 93, s 8

[26] *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof,* SC 1980-81-82-83, c 125; s.274 of the *Criminal Code*

[27] S. 275 of the *Criminal Code*

[28] *An Act to amend the Criminal Code and the Canada Evidence Act,* SC 1987, c 24, s 15, in force January 1, 1988

[29] *R v Seaboyer; R v Gayme,* [1991] 2 SCR 577

[30] *R v DD,* 2000 SCC 43 at para 63; see also, *R v W (R),* [1992] 2 SCR 122 at pp 132-133; *R v TEM,* 1996 ABCA 312 at paras 9, 11 and 15; *R v ADG,* 2015 ABCA 149 at paras 31-32

[31] *R v W (R), ibid*

[32] *R v Hajar,* 2016 ABCA 222 at paras 30-44

- Parliament's introduction of a positive definition of consent found in s. 273.1 of the *Criminal Code*[33]combined with a fulsome judicial consideration of many of the propagated myths of consent found in some sexual assault cases.[34]

22. The legislative reforms and significant judicial pronouncements have been consistently directed at ameliorating the harms.[35] Those harms include the significant underreporting of sexual violence crimes, traumatization of victims at trial, the continued usage of rape myths invoking stereotypes about typical behaviour; instilling shame, guilt and stigma in the victim and the threat to the mental health of victims.

23. There are competing rights and as firmly stated in *Dagenais*: "*[w]hen two protected rights come into conflict, Charter principles require a balance to be achieved that fully respects the importance of both rights. A hierarchical approach to rights must be avoided, both when interpreting the Charter and when developing the common-law."*[36] In *Mills* this Court again stated: "*[n]o single principle is absolute and capable of trumping the others, all must be defined in light of competing claims."*[37]

24. There is simply no legitimate policy reasons to retreat from the views that a victim's ss. 7, 15 and 28 *Charter* rights are to be protected. They are not to be whittled away by using the office of the Crown prosecutor to extract evidence that feeds only into stereotypical reasoning. Sections 278.92 to 278.94 must be recognized as part of the progression of reform that Parliament initiated in recognition of the continuing and serious problems in relation to sexual violence trials. This Court in *Shearing*[38] delineated a gap which was addressed in the legislative history of the impugned sections.[39] The legislative history clearly indicates that Parliament was not trying to undermine *Darrach* but rather to reinforce it.

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[33] *An Act to amend the Criminal Code (sexual assault),* SC 1992, c 38, s.1 in force August 15, 1992

[34] *R v Ewanchuk,* 1998 ABCA 52 at paras 52-61; *R v Ewanchuk,* [1999] 1 SCR 330 at paras 82, 87 and 95

[35] Factum *supra* note 4 at paras 15-17

[36] *Dagenais v Canadian Broadcasting Corp,* [1994] 3 SCR 835 at p 839

[37] *R v Mills,* [1999] 3 SCR 668 at para 61; see also, *R v Crawford,* [1995] 1 SCR 858 at para 26

[38] *R v Shearing,* [2002] 3 SCR 33

[39] Factum, *supra* note 3 at para 17; Factum *supra* note 4 at paras 1, 14, 17, 28, 49 and 53

25. If there is relevance and probative value, that will be properly determined at the hearing as required by s. 278.94. But what must first be determined is whether or not there is a reasonable expectation of privacy that must be protected and weighed against the necessity of having that evidence used at trial. Without that determination, the recognition of a victim's *Charter* protected rights becomes illusory.

26. This requires a trial judge to determine if there is a reasonable expectation of privacy in the record. What is protected is a person's privacy interest, not a place where the personal information is located.[40] The establishment of a reasonable expectation of privacy has of course both a subjective and objective component. These components are to be judicially determined based upon the totality of circumstances.[41]

27. The wide variety and number of factors that must be considered fall within four main groups: (a) subject matter of the alleged search, (b) the claimant's interest in the subject matter, (c) the claimant's subjective expectation of privacy in the subject matter, and (d) whether this subjective expectation of privacy was objectively reasonable.[42]

28. Where a person is a participant in the information then that person has a direct interest in the information, whatever form it takes.[43] Control, ownership, or possession over the material or information are factors to be considered, but not determinative of the issue of the existence of a protected *Charter* privacy right.[44]

29. There is a wide variety of information that may come into play with information into the hands of an accused, whether surreptitiously or by legitimate means. It can be electronic messaging, videos [taken surreptitiously or otherwise], hospital and other medical records, therapeutic records (whether for a child or an adult), or computer records. Simply because the accused may have possession does not defeat a *Charter* protected privacy right.

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[40] *R v Marakah, supra* note 11 at paras 26-30

[41] *R v Spencer*, 2014 SCC 43 at para 17

[42] *Ibid* at para 18

[43] *R v Marakah, supra* note 11 at para 10; see also, *R v Spencer, supra* note 41 at para 17 and *R v Patrick*, 2009 SCC 17 at para 14

[44] *R v Marakah, supra* note 11 at paras 11, 21, 26-30, 38; *R v Jones*, 2017 SCC 60 at paras 9, 42; *R v Reeves, supra* note 12 at para 37; *R v Yu*, 2019 ONCA 942, aff'g *R v Brewster*, 2016 ONSC 8038

30. As with all *Charter* rights, there must be a factual foundation for the right, which cannot be negated simply by a facial look at the document, or by presuming that the accused's possession eliminates any privacy interest that the victim may have. The person in the best position to establish the necessary foundation is the victim, whose subjective and objective expectations of privacy will have been put into issue. The victim should have the same access to a confidential relationship with legal counsel as the accused enjoys.

(3) Motions for directions should not be countenanced

31. The Respondent's position is that there should be a motion for directions from which the person whose rights are potentially to be violated is to be excluded. This is an end run around the process set out in ss. 278.92 to 278.94 and introduces yet another interlocutory step that will fragment and delay trials. In the post *Jordan*[45]era that is a significant policy concern.

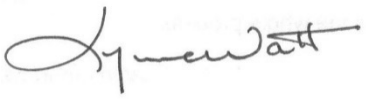
32. As stated in *R v DeSousa*, as a matter of principle, criminal proceedings are not to be fragmented by interlocutory proceedings which take on a life of their own, and which may lead to additional interlocutory appeals.[46]

33. When one considers the additional *voir dires* and delays emanating from the proposition that prosecutors should be investigators and the argument in favour of motions for directions, this will only add to the nightmarish quality of sexual violence trials that too many victims are asked to endure.

C. Conclusion

34. Alberta submits that the constitutionality of the provisions at issue be confirmed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of September, 2021.



for:

Deborah J. Alford
Counsel for the Intervener
Attorney General of Alberta

[45] *R v Jordan*, 2016 SCC 27

[46] *R v DeSousa*, [1992] 2 SCR 944 at para 17; *R v OY*, [2021] ONSC 1105 (OSC) at para 37

TABLE OF AUTHORITIES & LEGISLATION

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Criminal Code, RSC 1985, c C-46, s 273.1 *Code criminal*, LRC (1985), ch C-46, s 273.1	21	
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Criminal Code, RSC 1985, c C-46, ss 278.92-278.94 *Code criminal*, LRC (1985), ch C-46, ss 278.92-278.94	1, 4, 9, 25, 31	
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