

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)**

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**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 NOVA SCOTIA  
(Pursuant to the Order of Justice Côté of July 30, 2021)**

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## **PART I – OVERVIEW AND STATEMENT OF FACTS**

### **A. Overview**

1. The Crown does not win or lose. Instead, the Crown “is charged with representing the community’s interest in seeing that justice is done”.<sup>1</sup> As a result, the Crown occupies a unique position in litigation: it advocates for the public interest, not the interests of an individual client. In its role, the Crown owes a duty of fairness to all participants in the criminal justice system – the accused, victims and witnesses, the court, media and advocacy groups, police services, the public at large – and to the administration of justice itself.
2. Trial fairness is enhanced, not undermined, when the Crown is able to fulfill its duty of fairness to all and is seen to be fulfilling that duty. Every criminal proceeding has at least two parties – the Crown and an accused. However, a criminal court is not limited to hearing from only those two voices. Third party participants can supply valuable information and perspective to assist the court in deciding on specific issues. The advocacy provided by third party participants permits the Crown to remain in its independent and quasi-judicial role.
3. In this appeal, this Court must examine the constitutionality of ss. [278.92](#), [278.94\(2\)](#), and [278.94\(3\)](#) of the *Criminal Code*. The Intervener, Attorney General of Nova Scotia (“AGNS”), submits that these provisions do not infringe an accused’s rights under [ss. 7](#) or [11\(d\)](#) of the *Charter*. To the contrary, these provisions promote fair trials by ensuring the unique perspective of the complainant is heard, while also enabling the Crown to fulfill its duty of fairness to all criminal justice system participants.
4. In this Addendum, the AGNS will focus on the impact of ss. [278.94\(2\)](#) and [\(3\)](#) on the role of the Crown and how these provisions promote trial fairness. Specifically, the AGNS will make three main points: (1) hearing from the complainant directly will enhance, not undermine, prosecutorial independence, (2) the role of the Crown is in no way altered or

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<sup>1</sup> [R. v. Anthony-Cook, 2016 SCC 43](#) at para. 44.

diminished by the presence of third party participants; and (3) the criminal justice system already hears from third party participants in appropriate circumstances.

**B. Statement of Facts**

5. The AGNS takes no position on the facts in this appeal.

**PART II – RESPONSE TO QUESTIONS IN ISSUE**

6. The AGNS intervenes, as of right, to address the following constitutional questions:

- (a) That the application judge erred by finding that ss. [278.92](#), [278.94\(2\)](#) and [278.94\(3\)](#) of the *Criminal Code* infringe [ss. 7](#) and [11\(d\)](#) of the *Charter of Rights and Freedoms*.
- (b) That the application judge erred by finding that any infringements of [ss. 7](#) or [11\(d\)](#) of the Charter did not constitute reasonable limits prescribed by law and demonstrably justified in a free and democratic society and therefore were not saved pursuant to [s. 1](#) of the *Charter*.

7. The AGNS submits that ss. [278.92](#), [278.94\(2\)](#), and [278.94\(3\)](#) are constitutional and do not violate an accused's ss. [7](#) or [11\(d\)](#) rights.

**PART III – ARGUMENT**

**A. Hearing From The Complainant Directly Will Enhance, Not Undermine, Prosecutorial Independence**

8. The Crown owes a duty of fairness to all participants in the criminal justice system and to the administration of justice itself. It has been argued by some that the Crown's role means it can, and should, provide the court with the complainant's views and advocate for the complainant's rights during a s. [278.94](#) hearing. However, the role of the Crown should not extend to advancing individual *Charter* rights for multiple reasons, including that: (1) it is unfair to an accused for the Crown to be advocating the *Charter* interests of a complainant instead of the broader interests of the public; (2) it is unfair to the complainant for her advocate not to owe an undivided loyalty to her; and (3) it is unfair to the

administration of justice to require the Crown to advance the complainant's interests in the context of sexual violence but not the interests of third party participants in other contexts.

9. As this Court recently observed, “[t]he public interest is undermined when prosecutorial decision-making is influenced by considerations extraneous to the Crown’s role as a quasi-judicial officer”.<sup>2</sup> One of those extraneous considerations is the requirement to advance the rights of sexual violence complainants. Although the Crown has been required to fulfill this role of advocating for the rights of sexual violence complainants in the past, that is no longer appropriate given:
- (a) Society’s increasing recognition of the rights of complainants generally;<sup>3</sup>
  - (b) Society’s increasing recognition of the harms caused to complainants of sexual violence by both the act(s) of sexual violence and the trial process, which requires specific attention to the historically-underrepresented rights of the complainant;<sup>4</sup> and
  - (c) The increasing use of, and rapid changes in, technology, through which “records” are being generated and which can have varying degrees of privacy implications for an individual complainant.<sup>5</sup>
10. As Parliament, society, and the courts continue to evolve in their appreciation for the rights of complainants of sexual violence, more consideration must be given to how those rights can be fairly represented. Sections [278.94\(2\)](#) and [\(3\)](#) recognize that such advocacy should no longer be the responsibility of the Crown: it is unfair to everyone.
11. Hearing from the complainant directly, rather than through the Crown, ensures the Crown is able to carry out its duties in a fair, impartial manner. Perhaps more importantly in this

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<sup>2</sup> [Ontario \(Attorney General\) v. Clark, 2021 SCC 18](#) at para. 30.

<sup>3</sup> See ex. [Canadian Victims Bill of Rights](#), S.C. 2015, c. 13.

<sup>4</sup> See factum of the Intervenor Attorney General of Nova Scotia on the appeal in the companion case of *R. v. J.J.* (39133), paras. 11, 12, 79.

<sup>5</sup> See factum of the Intervenor Attorney General of Alberta on the cross-appeal in the companion case of *R. v. J.J.* (39133), para. 27.

context, the Crown is also *seen* to be carrying out its duties in a fair, impartial manner, rather than being seen as an advocate for an individual. This appearance of fairness is best illustrated in those situations where the Crown and the complainant's counsel take different positions at the s. [278.94](#) hearing. In those cases, the Crown's independence is clear; it is not aligned in purpose with the complainant. Instead, the Crown is free to advocate a position in accordance with its duty of fairness to all participants and to the administration of justice.

12. Trial fairness is enhanced when the Crown can, and is seen to, remain independent and impartial. The role of the Crown excludes any notion of winning or losing.<sup>6</sup> Where all other counsel advocate for the rights and advance the position of their clients, the Crown does not act as counsel for any particular person or party.<sup>7</sup> Trial fairness requires this impartiality and such impartiality is fostered by ss. s [278.94\(2\)](#) and [\(3\)](#).

#### **B. The Role of the Crown is Not Altered or Diminished by the Presence of the Complainant**

13. In all situations where other voices – third party participants – are heard by a criminal court, there are limits on the scope of their submissions. Intervenors must not raise new issues. Victims must not request a certain sentence. These limits exist to ensure the third party participant is heard on the narrow issue in which they have an interest. Third party participants are not given *carte blanche* to make submissions on trial issues. Third party participants are not parties to the prosecution.
14. Similarly, ss. [278.94\(2\)](#) and [\(3\)](#) do not empower a complainant of sexual violence to raise new issues or make submissions on any issue other than the narrow question of the admissibility of her records. Nor does a strict reading of the provisions give the complainant the right to adduce evidence or cross-examine witnesses at the hearing. These provisions do not make the complainant a party at the trial, but a participant on an application.

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<sup>6</sup> [Boucher v. The Queen, \[1955\] S.C.R. 16](#) at 24, per Rand J., concurring.

<sup>7</sup> [Boucher](#) at 25, per Locke J., concurring.

15. The complainant's ability to appear and make submissions does not displace the fundamental tenets of the criminal trial – the onus of proof always remains on the Crown, the accused is always presumed innocent, and the burden is always proof beyond a reasonable doubt.
16. Further, the *addition* of a voice to the criminal process does not *diminish* the role or responsibilities of the Crown. The Crown is still solely responsible for carriage or discontinuation of the prosecution, establishing the “case to meet” at trial, and making submissions on the trial proper. When the court hears from the complainant, it does not limit the Crown's decision-making or ability to make submissions, either at the s. [278.94](#) hearing or in the trial proper. A trial is not a finite space with limited capacity to receive submissions or viewpoints. To the contrary, ss. [278.94\(2\)](#) and [\(3\)](#) free the Crown to make decisions and submissions in accordance with its wider duty to the public and ensures the Crown is not hampered by partisan considerations.
17. It has been suggested that ss. [278.94\(2\)](#) and [\(3\)](#) will negatively impact the Crown's *Stinchcombe* responsibilities because the complainant's “reaction” to the application will be privileged as a result of her solicitor-client relationship with counsel. This may leave the Crown “bereft of information that might be critical to the prosecution”<sup>8</sup> and so too will the defence be deprived of this disclosure, which negatively impacts trial fairness. However, this argument makes several tenuous assumptions, including that:
  - (a) The complainant was not previously entitled to retain and speak with her own counsel about any part of the trial process. However, every complainant – indeed, any person – is entitled to retain counsel and have consultations protected by solicitor-client privilege.
  - (b) The Crown was previously obliged to consult with the complainant about the application (and would then disclose the complainant's reaction). While it was always good practice to consult with the complainant – particularly when the Crown was burdened with trying to assert the complainant's rights – the Crown was never obliged to do so. Even before ss. [278.94\(2\)](#) and [\(3\)](#), the defence could have been left without knowing the complainant's reaction to the application.

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<sup>8</sup> [R. v. Reddick, 2020 ONSC 7156](#) at para. 100.

- (c) The complainant will have a disclosable “reaction” to the application. However, it is unrealistic to expect every complainant to display an observable reaction. Further, it is dangerous to assume any particular reaction (or failure to react) carries any specific meaning. Finally, it is likewise dangerous to assume that it is the application stimulating any observed reaction, rather than any number of influences, stressors, or thoughts known only to the complainant.
  - (d) The Crown will now not prepare, or speak with, the complainant about the application and then disclose anything that is disclosable that arises from those meetings. However, nothing displaces the Crown’s ongoing obligation to provide disclosure nor the expectation that the Crown prepare the complainant.
  - (e) The complainant’s “reaction” to the application, if there is one, is somehow critical to the prosecution. However, it is difficult to ascertain how the “reaction” could be critical to the prosecution given the dangers, noted above, in assuming any reaction is being caused by the application or carries some particular significance.<sup>9</sup>
18. The argument that some critical, disclosable “reaction” by the complainant has been wrenched out of the reach of defence by ss. [278.94\(2\)](#) and [\(3\)](#) assumes a state of affairs that did not exist prior to the enactment of those provisions.
19. The Crown’s role is not altered or diminished by ss. [278.94\(2\)](#) and [\(3\)](#). These provisions allow the court to hear directly from the complainant on the narrow issue being determined at a s. [278.94](#) hearing. Such participation does not make the complainant a party to the prosecution. The Crown is still responsible for effectively preparing for, and prosecuting, the criminal charge. All of the Crown’s duties, including the duty to disclose, remain unchanged by these provisions.

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<sup>9</sup> The AGNS acknowledges that the records, alone or in conjunction with the complainant’s responses to questions during meetings in preparation for the application, could be critical to the prosecution in that they cause the prosecution to re-evaluate the strength of its case. Where the complainant provides new or different information in preparation meetings, such information is still disclosable.



### C. The Criminal Justice System Hears From Third Party Participants in Appropriate Circumstances

#### *i. Complainants Should be Heard Because They Have an Interest in the Proceedings*

20. Complainants of sexual violence should be heard at a s. [278.94](#) hearing *because* they have an interest in the records at issue. While some advocates argue that this interest is a reason the complainant should not be permitted to participate, it is precisely this interest that makes a third party participant's submissions relevant to a criminal court. Hearing these other voices ensures that all parties are permitted to make submissions on the narrow issue in which they have an interest.<sup>10</sup>
21. Any assumption that a complainant will derail the fair adjudication of the process because of her interest in the hearing also assumes that:
  - (a) The complainant is only interested in persecuting the accused and will, therefore, attempt to exclude any evidence that reflects poorly on themselves or otherwise to manipulate proceedings to see that a conviction results. However, there are complainants who do not wish to see the accused convicted, hurt, or otherwise suffer negative consequences from the criminal process. Further, it is a stereotype to assume that complainants are spiteful and seek revenge on the accused.<sup>11</sup>
  - (b) The complainant's counsel will not abide by their professional obligations to the court to ensure their participation: is of assistance to the court, is narrowed to the live issue, and does not mislead, unnecessarily complicate, cause delay, or otherwise compromise the fairness of the hearing. However, all counsel are expected to conduct themselves in accordance with their regulatory codes of conduct and any parameters set out by the courts for all lawyers.<sup>12</sup>
  - (c) The court will not or cannot control the conduct of the hearing. However, trial judges are frequently tasked with managing challenging courtroom situations, including where questions are irrelevant, repetitive, or argumentative; witnesses are hostile or argumentative; and prejudicial or presumptively inadmissible evidence is inadvertently adduced. Trial judges are well-equipped to address any of those issues should they arise as a result of the complainant's participation in the s. [278.94](#) hearing.

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<sup>10</sup> [O'Connor](#) at para. 137.

<sup>11</sup> [R. v. Seaboyer, \[1991\] 2 S.C.R. 577](#) at 653, 665-666, L'Heureux-Dubé J., dissenting in part.

<sup>12</sup> See ex. [R. v. Cody, 2017 SCC 31](#) at paras. 33-36.

(d) The court will not give a considered decision based on all the submissions and evidence, but will instead be swayed by the complainant's submission or conduct. Again, trial judges frequently determine pre- or mid-trial applications, including those heard with the input of third party participants; there is no reason to believe such impartial adjudication will not occur because of the complainant's presence.

22. Sections [278.94\(2\)](#) and [\(3\)](#) merely codify what has been accepted in criminal law in other contexts: in appropriate circumstances, the court should hear from third party participants. In this unique context, ss. [278.94\(2\)](#) and [\(3\)](#) achieve two purposes: hearing from the complainant directly ensures that a party whose interest is affected (the complainant) is heard and it ensures that the trial judge is fully informed before making a decision because the trial judge will have the benefit of the complainant's unique perspective and position.

*ii. The Criminal Justice System Hears from Interested Third Party Participants in Other Contexts*

23. A criminal trial is (usually) a bipartite legal proceeding between the Crown and the accused.<sup>13</sup> Yet many other participants have an interest in the criminal trial as well. The bipartite proceeding is not derailed when these other voices are heard in the courtroom on specific issues. To the contrary, trial fairness is enhanced when third party participants are heard on narrow issues in which they have an interest or on which they can contribute a unique perspective.

24. The law already allows for criminal courts to hear from third party participants. The purpose of this is twofold: (1) it ensures that the court is as fully informed as possible when making decisions, and (2) it ensures those whose rights are affected by court decisions are heard.

25. Courts will hear from third party participants where their unique perspective adds information which can assist the court in making a fully informed decision. Examples of this are:

(a) Intervenors on appeal,<sup>14</sup>

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<sup>13</sup> The trial arguably becomes tri- or multi-partite when multiple co-accused are charged together.

<sup>14</sup> [R. v. Barton, 2019 SCC 33](#) at paras. 52-53.

- (b) Intervenors at trial,<sup>15</sup>
  - (c) Victim or community impact statements at sentencing,<sup>16</sup>
  - (d) Requests for restitution at sentencing,<sup>17</sup> and
  - (e) *Amicus curiae* or special counsel.<sup>18</sup>
26. Courts will also hear from third party participants where their rights will be affected, or they will be otherwise affected by the court's decision. Examples of this are:
- (a) Recordholders in an *O'Connor* application for production,<sup>19</sup>
  - (b) Persons with a privacy interest in the records sought in an *O'Connor* application for production,<sup>20</sup>
  - (c) Recordholders in a *Mills* application for production,<sup>21</sup>
  - (d) Persons with a privacy interest in the records sought in a *Mills* application for production,<sup>22</sup>
  - (e) Media outlets and other individuals or groups in an application for a publication ban,<sup>23</sup>
  - (f) Witnesses or interested groups asserting privilege,<sup>24</sup>
  - (g) Witnesses seeking a publication ban, testimonial accommodation, exclusion of the public, or any other order to protect their security,<sup>25</sup>

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<sup>15</sup> See ex. [R. v. Clarke, 2012 NSSC 243](#).

<sup>16</sup> *Criminal Code*, ss. 722; 722.2.

<sup>17</sup> *Criminal Code*, ss. 737.1(4); 739.4(1).

<sup>18</sup> [Ontario v. Criminal Lawyers' Association of Ontario, 2013 SCC 43](#) at paras. 44-48; [R. v. Johnston, 2021 BCCA 34](#) at paras. 61-63.

<sup>19</sup> [R. v. Jackson, 2015 ONCA 832](#) at para. 35.

<sup>20</sup> [R. v. O'Connor, \[1995\] 4 S.C.R. 411](#) at para. 134.

<sup>21</sup> *Criminal Code*, s. 278.4(2).

<sup>22</sup> *Criminal Code*, s. 278.4(2).

<sup>23</sup> See ex. [R. v. Minassian, 2019 ONSC 4455](#), leave to appeal to S.C.C. refused, 38866 (Aug 5, 2021).

<sup>24</sup> See ex. [R. v. Basi, 2009 SCC 52](#) at para. 38; [R. v. Durham Regional Crime Stoppers Inc., 2017 SCC 45](#).

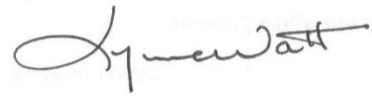
<sup>25</sup> *Criminal Code*, ss. 486(1); 486.1(1), (2); 486.2(1), (2); 486.3(1), (2), (3); 486.31(1); 486.4(2)(b), (2.2)(b); 486.5(1), (2); 486.7(1).

- (h) Legal counsel for the province in an application for the appointment of legal counsel on an appeal,<sup>26</sup> and
  - (i) Sureties applying to render an accused, responding to an application for forfeiture, or showing cause why a warrant of committal should not be issued.<sup>27</sup>
27. While it is only in narrow circumstances that a court will hear from third party participants, it is not novel.

#### **D. Conclusion**

28. The role and responsibilities of the Crown – including its duty to disclose – are not diminished, hindered, or in any other way fettered by ss. [278.94\(2\)](#) and [\(3\)](#). To the contrary, these provisions allow the Crown to fulfill its broader duty to the public and the administration of justice. Where the complainant’s rights will be advanced by her own advocate at a s. [278.94](#) hearing, the Crown is better able to – and will be seen to – remain an impartial party seeking only that justice be done. In this way, these provisions support, rather than detract from, the Crown’s prosecutorial independence.
29. As the Crown’s quasi-judicial role is enhanced by these provisions, so too is trial fairness enhanced.
30. Trial fairness is likewise promoted because the court is able to hear directly from the complainant: a trial is seen to be fair when the complainant is heard on an issue that affects her rights and a trial is fair when the trial judge is equipped to make fully-informed decisions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of September, 2021.

  
for:

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**Erica Koresawa**  
Counsel for the Intervener, Attorney  
General of Nova Scotia

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<sup>26</sup> *Criminal Code*, s. 684; *R. v. Publicover*, 2020 NSCA 67 at para. 13; *R. v. McPherson*, 2019 NSCA 70 at para. 2.

<sup>27</sup> *Criminal Code*, ss. [766\(1\)](#); [771\(2\)](#); [773\(1\)](#).

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<p><i>Canadian Charter of Rights and Freedoms</i>, Part 1 of the <i>Constitution Act</i>, 1982, being Schedule B to the <i>Canada Act</i>, 1982 (U.K.), 1982, c. 11, <a href="#">ss. 1, 7, 11(d)</a>.</p> <p><i>Charte canadienne des droits et libertés</i>, partie 1 de la <i>Loi constitutionnelle de 1982</i>, constituant l'annexe B de la <i>loi canadienne de 1982</i> (U.K.), 1982, c. 11, <a href="#">ss. 1, 7, 11(d)</a>.</p>	

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<p><i>Criminal Code</i>, R.S.C., 1985, c. C-46, <a href="#">ss. 278.4(2)</a>, <a href="#">278.92</a>, <a href="#">278.94(2)</a>, <a href="#">(3)</a>, <a href="#">486(1)</a>, <a href="#">486.1(1)</a>, <a href="#">(2)</a>, <a href="#">486.2(1)</a>, <a href="#">(2)</a>, <a href="#">486.3(1)</a>, <a href="#">(2)</a>, <a href="#">(3)</a>, <a href="#">486.31(1)</a>, <a href="#">486.4(2)(b)</a>, <a href="#">(2.2)(b)</a>, <a href="#">486.5(1)</a>, <a href="#">(2)</a>, <a href="#">486.7(1)</a>, <a href="#">684</a>, <a href="#">722</a>, <a href="#">722.2</a>, <a href="#">737.1(4)</a>, <a href="#">739.4(1)</a>, <a href="#">766(1)</a>, <a href="#">771(2)</a>, <a href="#">773(1)</a>.</p> <p><i>Code Criminelle</i>, L.R.C. (1985), ch. C-46, <a href="#">ss. 278.4(2)</a>, <a href="#">278.92</a>, <a href="#">278.94(2)</a>, <a href="#">(3)</a>, <a href="#">486(1)</a>, <a href="#">486.1(1)</a>, <a href="#">(2)</a>, <a href="#">486.2(1)</a>, <a href="#">(2)</a>, <a href="#">486.3(1)</a>, <a href="#">(2)</a>, <a href="#">(3)</a>, <a href="#">486.31(1)</a>, <a href="#">486.4(2)(b)</a>, <a href="#">(2.2)(b)</a>, <a href="#">486.5(1)</a>, <a href="#">(2)</a>, <a href="#">486.7(1)</a>, <a href="#">684</a>, <a href="#">722</a>, <a href="#">722.2</a>, <a href="#">737.1(4)</a>, <a href="#">739.4(1)</a>, <a href="#">766(1)</a>, <a href="#">771(2)</a>, <a href="#">773(1)</a>.</p>	
<p><a href="#">Canadian Victims Bill of Rights</a>, S.C. 2015, c. 13.</p>	