SCC File No.:_____

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

BETWEEN:

A.S.

Applicant

– and –

HER MAJESTY THE QUEEN

Respondent

– and –

SHANE REDDICK

Respondent

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)*

Dawne Way and David Butt
130 Spadina Avenue, Suite 606
Toronto, Ontario
M5V 2L4
T: 416-361-9609
F: 416-361-9443
dawne@waylaw.ca
dbutt@barristersatlaw.ca
Counsel for the Applicant

Terri Semanyk
Shanbaum Semanyk Professional Corp.
150 Isabella Street, Suite 305
Ottawa, Ontario K1S 1V7
T: 613-238-6969
F: 613-238-9916

Agent for Counsel for the Applicant

Carlos F. Rippell
Edward H. Royle & Partners LLP
493 University Ave, Suite 1200
Toronto, Ontario
M5G 1Y8
T: 416-738-7839
F: 416-340-1672
carlos.rippell@roylelaw.ca
Counsel for the Respondent Shane Reddick

Tracey L. Vogel
Assistant Crown Attorney
1000 Finch Ave. West
North York, Ontario
M3J 2V5
T: 416-314-4222
F: 416-314-4234
tracey.vogel@ontario.ca
Counsel for the Respondent Her Majesty

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PART I – STATEMENT OF FACTS

A. Overview

1. For decades, sexual assault complainants had no right to participate in proceedings to determine how details of their private sexual lives would be used in a public courtroom. Parliament fixed this problem by amending the Criminal Code in late 2018; but a few weeks ago an Ontario Superior Court judge struck down the amendments, departing from two decisions of his colleagues upholding it. Not only is this a regressive step, but trial courts now have nowhere authoritative to turn on an issue that affects many sexual assault cases, and is often evasive of intermediate appellate review because it is dealt with entirely in a pre-trial ruling, from which complainants have no right of appeal to intermediate appellate courts. A flurry of new constitutional litigation and confusion in lower courts is the result. This is a matter of national importance.
2. The Applicant, who is the complainant in the sexual assault prosecution wherein the legislation was struck down, therefore seeks leave to appeal to this Court directly from a final determination of her rights pursuant to section 40 of the *Supreme Court Act*, R.S.C. 1985, C. S-26.
3. This is an excellent companion case to *R v J.J.*, 2020 CanLII 48929 (SCC) which was recently granted leave to appeal to this Court. This case deals with different provisions of the legislative scheme than are in issue in J.J. It can broaden the scope of review beyond what is on the table in *J.J., and* allow this Court to comprehensively settle the constitutionality of this important legislation. And perhaps most significantly, this case allows a complainant's voice to be heard as a party in settling issues that matter deeply to complainants across the country.

B. The legislative scheme

4. 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 legislative scheme in ss. 278.92 to 278.97 of the *Criminal Code* governing the admissibility and use of records (as defined in section 278.1) and evidence of "sexual activity other than the sexual activity that forms the subject matter of the charge" (as defined in section 276(2)). The goal was to ensure fair participation by complainants in proceedings that affect their Charter protected rights to privacy, equality, and security of the person.

5. Parliament chose to achieve this goal by enacting a legislative scheme similar to the procedure upheld by this Court in *R v Mills,* [1999] 3 SCR 668 and *R v Darrach,* 2000 SCC 46, [2000] 2 SCR 443.
6. At a hearing under s.278.94, the complainant is not compellable but may appear and make submissions. The complainant must also be notified of their right to be represented by counsel.
7. It is clear from these provisions that Parliament intended to provide complainants with active participatory rights on questions of admissibility of their own private records and evidence of their "sexual activity other than the sexual activity that forms the subject matter of the charge".

C. The ruling on constitutional application

8. On November 23, 2020, in *R v Reddick,* 2020 ONSC 7156, Justice Suhail Akhtar of the Ontario Superior Court of Justice struck down sections 278.92, 278.94(2), and 278.94(3) of the *Criminal Code*, holding that they infringe sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*, and that they are not saved under section 1 of the *Charter*.
9. This ruling prohibits complainant participation to determine admissibility of their own private records in the hands of the defence, and evidence of their own other sexual activity.

PART II – STATEMENT OF QUESTION IN ISSUE

10. Should this Court should grant the complainant/applicant leave to appeal the constitutional ruling pursuant to s. 40 of the *Supreme Court Act*?
11. In order to answer this question, two issues arise:

a. Does section 40 of the *Supreme Court Act* provide an avenue of appeal for the applicant?

b. Is the constitutionality of sections 278.92, 278.94(2) and 278.94(3) 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. Third-party appeals under section 40

12. Sections 278.92 to 278.97 of the *Criminal Code* provide complainants in sexual assault trials with meaningful rights of participation around admissibility of evidence of "sexual activity other than the sexual activity that forms the subject matter of the charge" as described in s.276 of the *Criminal Code*, and around admissibility of records in the possession of the accused.

13. Section 40(1) of the *Supreme Court Act* states in part that this Court may grant leave to appeal "from any final or other judgment … of the highest court of final resort in a province … in which judgment can be had in the particular case sought to be appealed".

14. This Court has long favoured a liberal interpretation of s.40 of the *Supreme Court Act* to fulfill its role as a "general court of appeal for Canada". A liberal interpretation of s.40 allows the Court to take jurisdiction over matters where no other appellate court can do so and where it is not barred from doing so under s.40(3) of the *Act.* See, *R v Shea*, 2010 SCC 26, [2010] 2 SCR 17 at para. 10, and *R v Mentuck,* 2001 SCC 76, [2001] 3 SCR 442 at para. 20.

15. While interlocutory appeals in criminal matters are generally undesirable, there is an important exception. In *Dagenais v C.B.C.,* [1994] 3 SCR 835, this Court identified an application under s.40 of the *Supreme Court Act* as the appropriate procedural pathway for third parties, with no other statutory appeal rights, to appeal a decision which impacted their rights.

16. *Dagenais* was a media to challenge a publication ban. But this Court has extended *Dagenais* to other issues involving third parties, see, e.g., *R v Primeau*, [1995] 2 SCR 60, at para. 14.
17. In both *L.L.A. v A.B.*, [1995] 4 SCR 536 at para. 24 and *R v Mills*, [1999] 3 SCR 668 at para. 31, this Court held that complainant third parties in sexual assault cases may appeal pursuant to s. 40 of the *Supreme Court Act* an interlocutory ruling of the trial judge on disclosure of records.
18. More recently, in *R v Awashish*, 2018 SCC 45, [2018] 3 SCR 87, this Court reaffirmed the expanded rights of third parties to seek interlocutory remedies, such as *certiorari* on either jurisdictional or legal error. However *certiorari* is unavailable from a ruling of a Superior Court, so there the third party appeal route is through s. 40. See, *Primeau*, at para. 14.
19. Without resort to s.40, the issue of complainant participation in section 276 applications about their own other sexual activity is highly vulnerable to insulation from appeal: because third parties have no appellate rights after a trial; because the final trial verdict itself may be unappealable; because a party with appeal rights may choose not to appeal an appealable verdict; or because an appeal may be launched without raising the s.276 ruling.
20. Sections 278.92 to 278.97 bestow participatory rights to complainants in sexual assault trials but provide no avenue of appeal for complainants. The complainant also lacks rights of appeal post verdict. The ruling here is final and conclusive on the applicant's right to participate in the proceedings, and the appeal in this case is not barred by section 40(3) of the *Supreme Court Act*.
21. For all these reasons an application under s.40 is the avenue of appeal for the applicant in this case. It is sanctioned by this Court's jurisprudence, and is the only appeal route available.

B. The constitutionality of sections 278.92, 278.94(2) and 278.94(3) of the *Criminal Code* is a matter of sufficient public and national importance to justify granting leave to appeal

Indicia of Public Importance

22. This case has a number of indicia of national importance, as follows:

    a. The ruling strikes down national legislation of high legal and social importance in the ongoing efforts of the justice system to improve fairness for sexual assault complainants.

    b. The decision involves important *Charter* rights.

    c. This case presents an opportunity for this Court to consider the legislation comprehensively, and provide detailed guidance.

    d. The ruling is demonstrably inconsistent with principled trends in this Court's jurisprudence. It denies the complainant meaningful participation in determining admissibility of deeply personal, potentially prejudicial evidence. It is regressive at a time when this Court has pointedly called for progress. As stated by Moldaver J. in *R v Barton*, 2019 SCC 33, [2019] SCJ No 33, at para. 1, "Put simply, we can – and *must* – do better".

    e. Multiple decisions across the country have reached differing conclusions about the constitutionality of these salutary provisions. The time is ripe to settle the debate.

    f. The ruling creates confusion and uncertainty across Ontario because two other Superior Court of Ontario rulings hold the opposite: *R v A.C.*, 2019 ONSC 4270 at para. 72 and *R v C.C.*, 2019 ONSC 6449 at para. 82. Justice Akhtar failed to adequately explain why his colleagues are plainly wrong as required by principles of *stare decisis* and judicial comity. Now the Superior Court of Ontario is divided against itself. This is untenable and the Superior Court itself is powerless to authoritatively resolve its internal conflict.

This Court has recently acknowledged the public importance of the legislative scheme

23. On July 23, 2020, this Court granted leave to appeal in *R v J.J.* where the Crown challenges a Supreme Court of British Columbia ruling "reading down" the seven day notice requirement in

section 278.93(4). If that small subsection is worthy of leave, as the granting of leave makes plain, then the much broader issues in *Reddick* are even more worthy of leave.

This case is an excellent companion case to R v J.J.

i. Scope of Review

24. *R v J.J.* raises the narrow issue of the seven day notice period in the legislation. *Reddick* squarely engages much broader issues of complainant participation. *Reddick* strikes at the heart of the legislative scheme as a whole, whereas J.J. deals only with an ancillary procedural detail.
25. Additionally, *Reddick* raises the issue of the definition of "records" in s. 278.1. This issue has been the subject of much litigation since the enactment of these amendments. See, for example: *R v W.M.*, 2019 ONSC 6535, *R v A.M.*, 2020 ONSC 1846, *R v White*, 2020 ONSC 1808, *R v M.S.*, 2019 ONCJ 670. The practice in Ontario is for the accused to bring a motion for directions to determine the applicability of the legislative scheme to records in their possession before embarking on the applications described above. This has added to the complexity, length, and cost of sexual assault cases and has denied the complainant participation in a determination of whether she has a reasonable expectation of privacy in the subject records. Leave in this case would allow this Court to address this issue and provide guidance on the interpretation of section 278.1 for other courts to follow.
26. This case significantly expands the permissible scope of review for this Court when considering the legislative scheme detailed above. If heard as a companion to *J.J.* it provides this Court with an opportunity to comprehensively review the constitutionality of the scheme as a whole and address several jurisprudential issues that have revealed themselves in the lower courts.
27. These issues are too important to be decided in piecemeal fashion. The rights of the accused and complainants in sexual assault cases are critically important and this Court ought to address them in a comprehensive manner when given the opportunity to do so.

28. And incidentally, the decision in the present case reaches a conclusion on the notice requirement in section 278.93(4) which is directly contrary to *J.J.* Therefore, this case will inevitably be considered while deciding *J.J.* See, *R v Reddick*, at paras. 67 to 74.

ii. Competing Authorities

29. There is currently a patchwork of different approaches to ss. 278.92 to 278.97 across the country. Courts in B.C., Alberta, Saskatchewan, Nova Scotia, Ontario, and the Yukon have weighed in on the constitutionality of the legislative scheme, reaching differing and conflicting decisions.

30. Alberta and Saskatchewan courts have found various provisions in the legislative scheme unconstitutional. In the Yukon, a court found the disclosure requirements unconstitutional, but not the provisions for complainant participation. In Nova Scotia the legislation was upheld. See, *R v J.S.,* [2019] AJ No 1639 at para. 27, *R v A.M.,* 2019 SKPC 46, *R v Anderson*, 2019 SKQB 304 at para. 22 to 24, *R v D.L.B.,* 2020 YKTC 8 at paras. 78 to 83, *R v Whitehouse*, 2020 NSSC 87.

31. The impact of competing judgments is keenly felt in Ontario where the *Reddick* decision now conflicts with the earlier Superior Court rulings in *R v A.C.* and *R v C.C.* This has led in short order to a flurry of litigation and confusion. In *R v Bickford*, 2020 ONSC 7510, Justice Quigley held that *Reddick* does not settle the constitutional questions it addresses, and that litigants seeking to rely on *Reddick* to exclude the complainant from the proceedings must serve a notice of constitutional question (NCQ) and provide notice to the complainant third-party, See also *R v A.M.*, 2020 ONSC 7674 where Justice Christie held NCQ was required but not notice to the complainant. Nor is this issue settled in the Ontario Court of Justice. See, *R v A.T.*, 2020 ONCJ 576 at para. 16.

32. Justice Quigley's approach to *Reddick* in Ontario requiring an NCQ in every case where a party seeks reliance on *Reddick,* is sound. Practically, however, it opens the door for NCQs to be filed whenever the defence seeks to rely on complainant records in their possession or other sexual activity of a complainant. This inevitably adds complexity, length, uncertainty, and cost to

litigation. It is an access to justice issue for clients, and a professionalism challenge for the bar, requiring criminal lawyers across the province to become constitutional lawyers overnight.

33. There exists no mechanism for the Superior Court of Justice in Ontario to resolve this issue. Further lower court constitutional litigation may lead to a measure of judicial consensus, but binding authority will remain absent, and the constitutional questions will therefore remain open. Indeed in the absence of binding authority, defence counsel have an obligation to assert the correctness of *Reddick,* and Crown and complainants' counsel have a duty to assert the opposite.
34. The conflicting decisions have made it very difficult to schedule and litigate these issues. Without knowing which ruling will be applied in any given case, it is impossible for complainants to know whether they can participate: in short, the present state of the jurisprudence is a recipe for confusion and disarray in sexual assault cases, which are one of the most important pieces of work criminal courts undertake. The practical and jurisprudential ramifications of *Reddick* are untenable and detrimental to complainants, accused persons, and the justice system as a whole. These issues must be resolved by comprehensive guidance from this Court.
35. R. v. J.J. is further down the procedural highway than this case. However granting leave as a companion to J.J. need not cause delay. Given the urgent need in Ontario to address the current untenable state of the jurisprudence, haste in perfecting an appeal is in everyone's interests, can be expected, and indeed from the applicant's perspective would be welcomed.

The Benefits of Companion Cases

36. Companion cases enrich the debate and deliberations around jurisprudential issues of national importance. Our constitution wisely divides the administration of criminal justice, giving legislative authority to the federal government exclusively, to ensure nation-wide consistency, but leaving the administration of criminal justice to the provinces, to ensure sensitivity to local

conditions. This wise constitutional dynamic can be leveraged to enhance Charter review of federal legislation by granting leave on companion cases from different provinces. Because of the unique dynamics unfolding in Ontario courts after *Reddick* (as discussed above) this case can ably fulfill the role of enriching debate and deliberation by bringing to bear the perspective of a province three times zones removed from the province of origin of R. v. J.J. The Court can thereby benefit from an enhanced diversity of perspective by considering the practical realities of how the Charter issues to be decided play out in different jurisdictions.

Hearing from the Complainant

37. The Appeal in R. v. J.J. is by the Crown. The trial in J.J. is over, and resulted in an acquittal. The complainant in that case has no right of appeal post-trial. She cannot be a party, and at best can be an intervenor. When the constitutionality of a legislative scheme granting participatory rights to complainants is in issue, it is both optically[1] and substantively necessary, from the perspective of inclusiveness and to do justice to the issues, that an actual complainant be heard. Indeed it would be both problematic and sadly ironic if the perspective of an actual complainant, whose Charter rights stand on an equal footing with those of the accused, were not heard by this Court. This application for leave solves the problem and avoids the irony, because in this case, the complainant is the applicant.

PART IV – SUBMISSIONS ON COSTS

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

[1] After all, justice must of course not only be done, but be seen to be done.

PART V – ORDER SOUGHT

39. The applicant requests an order granting leave, pursuant to section 40 of the *Supreme Court Act*, to appeal the ruling of Justice Akhtar finding sections 278.92, 278.94(2), and 278.94(3) of the *Criminal Code* unconstitutional.

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Toronto, Ontario, this the 21st day of December, 2020.

Dawne Way
Counsel for the Applicant

David Butt
Counsel for the Applicant

PART VI – TABLE OF AUTHORITIES

Cases	Paragraph(s)
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R v M.S., 2019 ONCJ 670	25
R v Mentuck, 2001 SCC 76, [2001] 3 SCR 442	14
R v Mills, [1999] 3 SCR 668	5, 17
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R v W.M., 2019 ONSC 6535	25
R v White, 2020 ONSC 1808	25

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 criminal et la Loi sur le ministère de la Justice et apportant des modiˆcations corrélatives 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, 278.92, 278.93, 278.94	Code Criminel, L.R.C. (1985), ch. C-46. ss. 271, 276(2), 278.1, 278.92, 278.93, 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(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(d)

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T: 416-361-9609
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Counsel for the Applicant

Terri Semanyk
Shanbaum Semanyk Professional Corp.
150 Isabella Street, Suite 305
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T: 613-238-6969
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Carlos F. Rippell
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M5G 1Y8
T: 416-738-7839
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Assistant Crown Attorney
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