

**Ministry of The Attorney General**

Crown Law Office - Criminal

10<sup>th</sup> Floor  
720 Bay Street  
Toronto ON M7A 2S9  
Fax: 416-326-4656  
Tel: 416-326-4600

**Ministère du Procureur général**

Bureau des avocats  
de la Couronne – droit criminel

10<sup>e</sup> étage  
720 rue Bay  
Toronto ON M7A 2S9  
Télécopieur: 416-326-4656  
Tel: 416-326-4600



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[jill.witkin@ontario.ca](mailto:jill.witkin@ontario.ca)

Mr. David Power  
Acting Registrar  
Supreme Court of Canada  
301 Wellington Street  
Ottawa, ON K1A 0J1

BY EMAIL AND COURIER

Dear Mr. Power:

Re: **A.S. v. Her Majesty the Queen and Shane Reddick**  
**SCC File No. 39516**

This letter is Her Majesty the Queen’s response to A.S.’s application for leave to appeal the ruling of Justice Akhtar finding sections [278.92](#), [278.94\(2\)](#) and [278.94\(3\)](#) of the *Criminal Code* unconstitutional. A.S. is the complainant in that case.

The respondent does not oppose the application for leave to appeal for the reasons outlined below and agrees that this case is a natural companion case to *R. v. J.J.* ([39133](#)), which has been listed for a hearing on March 22, 2021. Granting leave will place the reasoning in the present case squarely before the Court. The correctness of that reasoning is an issue that is being debated on a regular basis in Ontario’s trial courts.

**Issue of public importance:** In *R. v. J.J.* ([SCC 39133](#)), this Court will consider the interlocutory constitutional ruling of Madam Justice Duncan that “read down” the seven-day notice requirement in s. [278.93\(4\)](#) of the *Criminal Code*. On December 23, 2020, this court further granted leave to the respondent to cross-appeal. As such, this Court will now hear full argument on the records-screening regime in s. [278.92-94](#), not just on the seven-day notice period. The scope of *J.J.* has now been expanded to include issues relating to the participatory rights of the complainant. By granting leave, this Court has signaled that the interpretation and constitutionality of the full records-screening regime is an issue of public importance that this Court ought to hear. The participatory rights of the complainant are a central plank of the legislation.

**Participation of the complainant in a hearing about her legislated rights:** A.S.'s proposed appeal is about whether the complainant in a sexual assault trial can participate in the process whereby her sexual or private records are sought to be adduced during the trial. This legislative scheme affords complainants the ability to address trial courts on the discrete issue of the admissibility of their private or sexual records. The decision in the court below to strike s. [278.94\(2\)](#) extinguished these participatory rights.

This Court would benefit from having the complainant's perspective in a debate about how complainants' private or sexual records should be used in a public courtroom. Indeed, various trial courts have found it helpful to have the complainant's input when deciding whether a particular record falls under the section and how the legislation should be interpreted.<sup>1</sup> The same debate over the constitutionality of this legislation is taking place in *J.J.*, but the complainant is not a participant in that case. The public perception of the administration of justice would be strengthened if the complainant took part in this process. The very existence of the impugned regime reflects the fact that a complainant's interests may not align entirely with those of the Crown. Indeed, it would be paradoxical not to allow her to be present for the argument.

**Companion case to J.J.:** If A.S.'s application for leave is granted, the present case should be joined with *J.J.* Both cases deal with the constitutionality of the same regime and, as stated above, participation of the complainant will be of assistance to this court in resolving that issue. Moreover, J.J.'s trial was completed on October 9, 2020, and he was acquitted. Not only is the complainant not a party in *J.J.* ([39133](#)) but there is no longer an adversarial context between the Crown and the accused J.J.

The trial in *Reddick* is scheduled to commence with the s. [276](#) application on February 8, 2021 following which the jury trial would commence. I am advised by the trial crown that the matter is being adjourned for two reasons. First, the complainant A.S. will seek an adjournment so that she can exercise her right of appeal to this court in order to preserve her participation and representation rights under s. [278.94\(2\) and \(3\)](#). Second, a jury trial cannot commence in view of new provincial restrictions suspending jury trials until May 3, 2021 at the earliest due to the Covid-19 pandemic.

For these reasons, the Respondent Her Majesty the Queen does not oppose A.S.'s leave application in the above-named case. If leave is granted, we anticipate defending the legislation.

Sincerely,



Jill Witkin  
Crown Counsel

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<sup>1</sup> *R. v. Mai* 2019 ONSC 6691; *R. v. H.A.R.*, 2019 ONSC 7145; *R. v. T.A.*, 2020 ONSC 2613; *R. v. R.M.R.* 2019 BCSC 1093; *R. v. Marrello* [2020] O.J. No. 3617