SCC File No. 39516

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

B E T W E E N:

A.S.

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

-and-

SHANE REDDICK

Respondent

-and-

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Interveners

MOTION RECORD FOR LEAVE TO INTERVENE BY WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION and WOMAN AGAINST VIOLENCE AGAINST WOMEN RAPE CRISIS CENTRE

(Pursuant to Rules 47(1)(a) and 55-59 of the Rules of the Supreme Court of Canada)

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Interveners

NOTICE OF MOTION FOR LEAVE TO INTERVENE
OF WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION and WOMAN AGAINST VIOLENCE AGAINST WOMEN RAPE CRISIS CENTRE
(Pursuant to Rules 47(1)(a) and 55-59 of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE THAT the Moving Parties, West Coast Legal Education and Action Fund Association ("West Coast LEAF") and Women Against Violence Against Women Rape Crisis Centre ("WAVAW"), hereby apply to a Judge of this Honourable Court, pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, for an Order:

1. Granting West Coast LEAF and WAVAW leave to intervene in this appeal;

2. Permitting West Coast LEAF and WAVAW to file an addendum to their factum in *Her Majesty the Queen v J.J.* (39133) (*R. v. J.J.*) of not more than five (5) pages, or such other length as this Court deems appropriate;

3. Permitting West Coast LEAF and WAVAW to present oral argument of not more than ten (10) minutes, or such other duration as this Court deems appropriate, to jointly address this appeal and *R. v. J.J.*;

4. Providing that no order of costs of this motion and this appeal may be made for or against West Coast LEAF and WAVAW; and

5. Any such further or other Order that this Court deems appropriate.

AND FURTHER TAKE NOTICE that the motion shall be made on the following grounds:

1. As described in the affidavits of Rajwant Mangat and Dalya Israel, West Coast LEAF and WAVAW are non-profit organizations that have a genuine and substantial interest in this appeal;

2. West Coast LEAF was created as a branch of the Women's Legal Education and Action Fund ("LEAF") in 1985, when s.15 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*") came into force. It became an affiliate of LEAF in 2009 and has operated independently of LEAF since 2014. Its mandate is to use the law to create a just and equal society for all women and people who experience gender-based discrimination. It carries out its mandate through litigation, law reform, and public legal education activities;

3. West Coast LEAF has a history of providing assistance to this Court, as well as the British Columbia Court of Appeal and the Supreme Court of British Columbia, on a variety of issues affecting women and people who experience gender-based discrimination, including issues related to sexual violence and the rights and interests of survivors of sexual violence;

4. WAVAW is British Columbia's largest rape crisis centre. Founded in 1982, its mandate is to work towards a future free from sexualized violence. It carries out its mandate by providing direct support services to survivors of sexualized violence, as well as by engaging in educational outreach and systemic advocacy;

5. West Coast LEAF and WAVAW have a history of collaborating on issues related to sexual violence, including as part of a coalition of organizations from British Columbia which

intervened in *Bent v. Platnick*, 2020 SCC 23, and *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22;

6. West Coast LEAF and WAVAW already have intervener status in *Her Majesty the Queen v. J.J.* (39133) ("*R. v. J.J.*"), which will be heard together with this appeal. West Coast LEAF and WAVAW focused their factum in *R. v. J.J.* on the relevance and significance of meaningful complainant participation to realizing the purposes of the "accused in possession" regime under ss. 278.92 to 278.94, particularly for marginalized complainants;

7. West Coast LEAF and WAVAW have a different and useful perspective on the issues on appeal;

8. If granted leave to intervene, and drawing on their expertise and experience with respect to the rights and interests of survivors of sexual violence, West Coast LEAF and WAVAW propose to file an addendum to their factum in *R. v. J.J.* to argue that:

a. There is a long legal history of the unfair use of sexual history evidence to discredit and revictimize complainants, particularly complainants who experience overlapping inequalities. A detailed review of the case law on s. 276 only underscores the problem identified by West Coast LEAF and WAVAW in its factum in *R. v. J.J.*: the ongoing permeability of the rules of evidence in criminal sexual assault trials which perpetuate the disadvantage of complainants in the criminal justice system. Even recent case law shows that, contrary to idealistic notions, complainants cannot rely on crown counsel, the trial judge, or defence counsel to prevent the unfair use of sexual history evidence. Complainants' rights—and especially marginalized complainants' rights— are thus falling through the gap between law-as-legislation and law-as-practice.

b. A particular issue in the case law on s. 276 has been its judicial interpretation in the absence of the complainant's direct participation. Section 276 calls for judges to engage in a systemic and contextual analysis of the competing constitutional interests at play in admissibility applications. The case law on s. 276, however, has largely not followed suit. We propose to argue that the courts' insufficient contextualization of the complainant's privacy rights has resulted in an

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overstatement in the law of the accused's fair trial rights at the expense of fairness to the complainant and societal objectives.

c. As evidenced by this appeal, complainants can and should play a direct role in the jurisprudential development of rules of evidence which affect their constitutionally protected interests. For the same reasons stated in West Coast LEAF and WAVAW's factum in *R. v. J.J.*, complainants are uniquely situated to ensure that judges are acutely sensitive to context as required by s. 276 demands, including through consideration of the heightened concerns of marginalized complainants. Pre-screening applications, which take different names across the country (including motions for directions in Ontario), must not be used to silence or curtail the complainant's distinct and relevant perspective in the jurisprudence.

d. The case law on s. 276 also underscores West Coast LEAF and WAVAW's submission that most complainants will require independent legal representation to effectively assist the courts. Section 276 has revealed itself to be a complex and ever-evolving area of law which is rife with both systemic practice issues and technical challenges. Complainant's counsel are equipped to confront these challenges and, where necessary, seek appellate intervention so as to contribute to the jurisprudential development of the rules of evidence on behalf of the complainant.

10. If granted leave to intervene, West Coast LEAF and WAVAW will be able to holistically address the overlapping issues in *R. v. J.J.* and this appeal, rather than artificially silo their submissions in *R. v. J.J.*

11. If granted leave to intervene, West Coast LEAF and WAVAW will work collaboratively with the other parties and other interveners to avoid duplicative submissions;

12. Granting leave to intervene to West Coast LEAF and WAVAW will not prejudice any of the parties, but West Coast LEAF, WAVAW, and their constituents will suffer prejudice if leave to intervene in this appeal is denied;

13. West Coast LEAF and WAVAW will take the record as they find it and will not seek to supplement it; and

14. West Coast LEAF and WAVAW will abide by the schedule set by the Registrar for filing materials.

AND FURTHER TAKE NOTICE that the following documents will be referred to in support of such motion:

1. Affidavit #2 of Rajwant Mangat, affirmed July 13, 2021;

2. Affidavit of Rajwant Mangat, affirmed February 2, 2021;

3. Affidavit of Dalya Israel, affirmed February 3, 2021;

4. The factum of West Coast LEAF and WAVAW in *Her Majesty the Queen v. J.J.* (39133), filed April 16, 2021; and

5. Such further and other material as counsel for West Coast LEAF and WAVAW may advise and this Honourable Court may permit.

DATED at Vancouver, British Columbia, this 16th day of July, 2021.

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NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

SCC File No: 39516

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

BETWEEN:

A.S.

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

AND:

SHANE REDDICK

RESPONDENT

AND:

ATTORNEY GENERAL OF CANADA,
ATTORNEY GENERAL OF QUEBEC,
ATTORNEY GENERAL OF NOVA SCOTIA,
ATTORNEY GENERAL OF MANITOBA,
ATTORNEY GENERAL OF BRITISH COLUMBIA,
ATTORNEY GENERAL OF SASKATCHEWAN, and
ATTORNEY GENERAL OF ALBERTA

INTERVENERS

AFFIDAVIT OF RAJWANT MANGAT
(In support of a Motion for Leave to Intervene)
(Pursuant to Rules 47(1)(b) and 57(1) of the *Rules of the Supreme Court of Canada*)

I, RAJWANT MANGAT, lawyer, of the City of Vancouver, in the Province of British Columbia, AFFIRM AS FOLLOWS:

1. I am the Executive Director of the West Coast Legal Education and Action Fund Association ("West Coast LEAF") and as such have personal knowledge of the matters hereinafter deposed to, except where stated to be based on information and belief in which case I verily believe them to be true.

2. I am authorized by West Coast LEAF and the Women Against Violence Against Women Rape Crisis Centre ("WAVAW") to provide this affidavit in support of their motion for leave to jointly intervene in the within appeal.

Procedural Background

3. On March 5, 2021, West Coast LEAF and WAVAW (jointly) were among six organizations or groups of organizations granted leave to intervene in *Her Majesty the Queen v J.J.* (39133) ("*R. v. J.J.*"). The interveners or groups of interveners were to file and serve their factums on or before April 16, 2021.

4. On March 25, 2021, an order signed by Chief Justice Wagner adjourned the appeal and cross-appeal of *R. v. J.J.* to the 2021 Fall session to be heard together with this appeal.

5. On April 9, 2021, an order signed by Justice Côté adjourned the factum deadline for the six interveners or groups of interveners on the basis that it was "desirable that the parties coordinate their filings in the two appeals." The order also clarified that "should any of the six (6) interveners or groups of interveners who were granted leave to intervene in *R. v. J.J.* intend to also intervene in the appeal in *A.S. v. R. et al.*, they must apply separately, by way of motion, for leave to intervene in that appeal. In their motion for leave to intervene, they may request to file a joint factum for the two appeals."

6. West Coast LEAF and WAVAW did not receive or become aware of the order dated April 9, 2021 until April 22, 2021, after we had filed our factum in *R. v. J.J.* on April 16, 2021. The Registry Branch of the Supreme Court of Canada emailed the order to our Ottawa agent on April 22, 2021.

7. West Coast LEAF and WAVAW now seek leave to intervene in this appeal. Since we have already filed our factum in *R. v. J.J.*, we propose to file an addendum of no more than five

(5) pages to that factum which would address the specific issues in this appeal. We also seek leave to make oral submissions of no more than ten (10) minutes to jointly address this appeal and *R. v. J.J.*

The Shared Interest and Expertise of West Coast LEAF and WAVAW

8. The affidavits in support of West Coast LEAF and WAVAW's motion for leave to jointly intervene in *R. v. J.J.*—namely, my affidavit of February 2, 2021 and Dalya Israel's affidavit of February 3, 2021—describe each organization's interest and expertise in issues related to sexual and gender-based violence, including the rights and interests of survivors of such violence. Those affidavits are contained at Tabs 3 and 4 of this motion record.

9. Since filing our application for leave to jointly intervene in *R v. J.J.*, West Coast LEAF and WAVAW have continued their work on issues related to sexual and gender-based violence.

10. On June 30, 2021, West Coast LEAF was granted leave to intervene in *R. v. Kirkpatrick* (SCC File No. 39287), which addresses the question of whether a person can make condom use a condition of their consent to a sexual activity. West Coast LEAF will be making submissions about the effects of the Court's consent analysis in *R. v. Hutchinson*, 2014 SCC 19, on the experiences and substantive equality of victims of violative condom practices within the criminal justice system. In April 2021, West Coast LEAF provided written submissions to British Columbia's Special Committee on Reforming the Police Act, which included submissions on improving police interactions with survivors of sexual and gender-based violence. In July 2021, West Coast LEAF provided written submissions to the Immigration and Refugee Board on *Chairperson's Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution*, which applies to the adjudication of refugee claims engaging all forms of gender-based violence.

11. In addition to its work on sexual and gender-based violence, West Coast LEAF has also continued to grow its intervention experience in other areas. In June 2021, it intervened in a constitutional challenge before the BC Supreme Court to s. 96 of the *Child, Family, and Community Services Act*, which governs child welfare agencies' access to private third-party records.

The issues at play in *R. v. J.J.* and in *A.S. v. R. et al.*

12. *R. v. J.J.* concerns the constitutionality of ss. 278.92 to 278.94 of the *Criminal Code*, R.S.C. 1985, c. C-46 ("the *Code*"), which uniquely apply to the prosecution of sexual offences and control the admissibility of records that are in the accused's possession and in which the complainant has a reasonable expectation of privacy (the "accused in possession" regime). The accused in possession regime requires that, where the defence wishes to tender or use such records, they must bring an admissibility application. The application must be made on seven days' notice to the Crown unless the trial judge permits a shorter notice period (s. 278.93(4)). If the application meets certain threshold requirements, the trial judge must hold an admissibility hearing (s.278.93(4)). While the admissibility hearing is in camera (s. 278.94(1)), the complainant is permitted to attend the hearing, make submissions, and be represented by counsel (ss. 278.94(2) to 278.94(3)).

13. As in *R. v. J.J.*, this appeal concerns the constitutionality of s. 278.92 of the *Code*. However, this appeal additionally concerns the constitutionality of ss. 278.94(2) and 278.94(3) as applied to sexual history applications under s. 276 of the *Code*. Specifically, this Court is called upon to determine whether the complainant's participatory rights in sexual history applications, (as set out in ss. 278.94(2) and 278.94(3)), unjustifiably infringe the accused's fair trial rights under ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*.

14. West Coast LEAF and WAVAW's Proposed Submissions

15. In our factum in *R v. J.J.*, West Coast LEAF and WAVAW summarized our submissions as follows:

> West Coast LEAF and WAVAW jointly submit that, in determining the constitutionality of the regime, this Court must consider how meaningful complainant participation in admissibility applications promotes the overarching goal of a fact-finding process that is free from all forms of bias and prejudicial reasoning, an interest shared by the complainant and the accused alike. In particular, complainants can play a key role in refuting discredited myths and stereotypes about sexual assault which may nevertheless underlie these applications, especially in cases involving complainants who experience

multiple and intersecting indicia of inequality. The scope of the complainant's participation, their access to independent legal counsel, and the timing of these applications are all essential factors in assessing the regime's constitutionality. On balance, permitting complainants to bring their distinct and relevant perspective to admissibility applications is not at odds with the accused's rights to a fair trial.

16. If granted leave to intervene in this appeal, West Coast LEAF and WAVAW propose to provide an addendum to their factum for *R. v. J.J.* to include the following submissions:

a. There is a long legal history of the unfair use of sexual history evidence to discredit and revictimize complainants, particularly complainants who experience overlapping inequalities. A detailed review of the case law on s. 276 only underscores the problem identified by West Coast LEAF and WAVAW in its factum in *R. v. J.J.*: the ongoing permeability of the rules of evidence in criminal sexual assault trials which perpetuate the disadvantage of complainants in the criminal justice system. Even recent case law shows that, contrary to idealistic notions, complainants cannot rely on crown counsel, the trial judge, or defence counsel to prevent the unfair use of sexual history evidence. Complainants' rights—and especially marginalized complainants' rights— are thus falling through the gap between law-as-legislation and law-as-practice.

b. A particular issue in the case law on s. 276 has been its judicial interpretation in the absence of the complainant's direct participation. Section 276 calls for judges to engage in a systemic and contextual analysis of the competing constitutional interests at play in admissibility applications. The case law on s. 276, however, has largely not followed suit. We propose to argue that the courts' insufficient contextualization of the complainant's privacy rights has resulted in an overstatement in the law of the accused's fair trial rights at the expense of fairness to the complainant and societal objectives.

c. As evidenced by this appeal, complainants can and should play a direct role in the jurisprudential development of rules of evidence which affect their constitutionally protected interests. For the same reasons stated in West Coast LEAF and WAVAW's factum in *R. v. J.J.*, complainants are uniquely situated to ensure that judges are

acutely sensitive to context as required by s. 276 demands, including through consideration of the heightened concerns of marginalized complainants. Pre-screening applications, which take different names across the country (including motions for directions in Ontario), must not be used to silence or curtail the complainant's distinct and relevant perspective in the jurisprudence.

d. The case law on s. 276 also underscores West Coast LEAF and WAVAW's submission that most complainants will require independent legal representation to effectively assist the courts. Section 276 has revealed itself to be a complex and ever-evolving area of law which is rife with both systemic practice issues and technical challenges. Complainant's counsel are equipped to confront these challenges and, where necessary, seek appellate intervention so as to contribute to the jurisprudential development of the rules of evidence on behalf of the complainant.

17. If granted leave to intervene, West Coast LEAF and WAVAW will be able to holistically address the overlapping issues in *R. v. J.J.* and *A.S. v. R. et al*, rather than artificially silo their submissions in *R. v. J.J.*

18. If granted leave to intervene, West Coast LEAF and WAVAW will work in cooperation with the parties and any other interveners to ensure that we offer a perspective that is non-duplicative, unique, and useful to the Court's determination of this appeal.

19. I make this affidavit in support of West Coast LEAF's application for leave to intervene and for no other or improper purpose.

AFFIRMED BEFORE ME at the City of Vancouver, in the Province of British Columbia, this 13th day of July, 2021.

Commissioner for Taking Affidavits in British Columbia

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RAJWANT MANGAT

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)

AND:

J.J.

RESPONDENT
(Applicant/ Defendant)

AND:

ATTORNEY GENERAL OF CANADA,
ATTORNEY GENERAL OF ONTARIO,
ATTORNEY GENERAL OF NOVA SCOTIA,
ATTORNEY GENERAL OF MANITOBA,
ATTORNEY GENERAL OF SASKATCHEWAN, and
ATTORNEY GENERAL OF ALBERTA

INTERVENERS

AFFIDAVIT OF RAJWANT MANGAT
(In support of a Motion for Leave to Intervene)
(Pursuant to Rules 47(1)(b) and 57(1) of the *Rules of the Supreme Court of Canada*)

I, RAJWANT MANGAT, lawyer, of the City of Vancouver, in the Province of British Columbia, AFFIRM AS FOLLOWS:

1. I am the Executive Director of the West Coast Legal Education and Action Fund Association ("West Coast LEAF") and as such have personal knowledge of the matters hereinafter deposed to, except where stated to be based on information and belief in which case I verily believe them to be true.

2. I was called to the Bar of Ontario in 2004 and to the Bar of British Columbia in 2011. I joined West Coast LEAF as the Director of Litigation in March 2016. I became the Executive Director on September 3, 2019.

3. I am authorized to provide this affidavit in support of West Coast LEAF's motion for leave to intervene jointly with the Women Against Violence Against Women Rape Crisis Centre ("WAVAW") in the within appeal.

4. This appeal concerns the constitutionality of ss. 278.92 to 278.94 of the *Criminal Code*, which uniquely apply to the prosecution of sexual offences and govern the admissibility of records that are in the accused's possession and in which the complainant has a privacy interest (the "accused in possession" regime). The regime aims to balance the rights of the accused with the privacy interests of the complainant, while ensuring the truth-seeking function of the courts by preventing the admission of irrelevant and prejudicial evidence.

5. As described in further detail herein, West Coast LEAF has a demonstrable and ongoing interest in ending gender-based violence, including sexual assault, against all women and gender diverse people. West Coast LEAF's work on gender-based violence includes advocating for the elimination of myths and stereotypes about sexual violence from the criminal justice system, other non-criminal legal and quasi-legal processes, and wider society.

6. West Coast LEAF seeks leave to intervene in this appeal on the basis of this long-standing interest and expertise and its ability to provide a unique and useful perspective to aid the Court in its consideration of the issues on appeal.

A. Background of West Coast LEAF

7. West Coast LEAF is a non-profit society incorporated in British Columbia and registered federally as a charity. West Coast LEAF's mandate is to use the law to create an equal and just society for all women and people who experience gender-based discrimination in British Columbia. Working in collaboration with community, West Coast LEAF uses litigation, law reform, and public legal education to seek systemic change. West Coast LEAF's areas of focus are freedom from gender-based violence, access to healthcare, access to justice, economic security, justice for those who are criminalized, and the right to parent.

8. West Coast LEAF was created in April 1985 when the equality provisions of the *Charter* came into force. Before 2009, West Coast LEAF was a branch of a national organization, Women's Legal Education and Action Fund ("LEAF"). In 2009, West Coast LEAF became an

affiliate of LEAF. Since then, West Coast LEAF has involved itself in litigation in its own name. As of 2014, West Coast LEAF is no longer an affiliate of LEAF, but continues to collaborate with it from time to time.

9. During the last fiscal year, West Coast LEAF had approximately 460 members. As of February 3, 2021, West Coast LEAF employs 10 permanent staff members. It relies on the annual support of approximately 200 volunteers to carry out its work.

B. West Coast LEAF's Experience

10. West Coast LEAF acts to promote the equality interests of all women and gender diverse people in British Columbia, including where gender intersects with other indicia of inequality such as race, national origin, immigration status, Indigeneity, sexual orientation, gender identity, gender expression, family or marital status, disability or ability, age, and class. West Coast LEAF is committed to working in consultation and collaboration with other equality-seeking groups to ensure that West Coast LEAF's legal positions, law reform activities, and educational programming are informed by, and inclusive of, the diversity of human experience.

11. Litigation is one of West Coast LEAF's three program areas. Through litigation, West Coast LEAF has contributed to the development of equality rights jurisprudence and the meaning of substantive equality in Canada, both in specific challenges to discriminatory or unconstitutional laws and government actions, as well as in matters where statutory interpretation compromises the realization of substantive equality through the adverse effects of such interpretation. West Coast LEAF works to ensure that the law incorporates an intersectional analysis of discrimination and disadvantage.

i. Experience before the Supreme Court of Canada

12. West Coast LEAF has considerable intervention experience before the Supreme Court of Canada, both in its own name and, in earlier years, through its participation in interventions brought by LEAF while West Coast LEAF was operating under LEAF's auspices.

13. West Coast LEAF has intervened in its own name in the following cases:

a. *Colucci v Colucci*, SCC File No. 38498 (jointly with LEAF) (appeal heard November 4, 2020; judgment reserved);

b. *Michel v Graydon*, 2020 SCC 24;

c. *Bent v. Platnick, 2020 SCC 23, and 1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22* (jointly with Atira Women's Resource Society, B.W.S.S. Battered Women's Support Services Association, and Women Against Violence Against Women Rape Crisis Centre);

d. *Law Society of British Columbia v. Trinity Western University and Volkenant,* 2018 SCC 32;

e. *Schrenk v British Columbia Human Rights Tribunal,* 2017 SCC 62;

f. *R v Lloyd,* 2016 SCC 13;

g. *British Columbia Teachers' Federation v British Columbia Public School Employers' Association,* 2014 SCC 70;

h. *Trial Lawyers Association of British Columbia v British Columbia (Attorney General),* 2014 SCC 59;

i. *British Columbia (Ministry of Education) v Moore,* 2012 SCC 61; and

j. *Downtown Eastside Sex Workers United Against Violence v Canada,* 2012 SCC 45 (jointly *with Justice for Children and Youth and ARCH Disability Law Centre).*

14. Interventions brought by LEAF, originating in British Columbia, in which West Coast LEAF was involved, include:

a. *Rick v. Brandsema*, 2009 SCC 10 ("Rick");

b. *Blackwater v. Plint*, 2005 SCC 58 (as part of a coalition with the Native Women's Association of Canada and the DisAbled Women's Network of Canada);

c. *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 (co-intervening with the DisAbled Women's Network of Canada);

d. *R. v. Shearing*, 2002 SCC 58 ("*Shearing*");

e. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 ("*Little Sisters*");

f. *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44;

g. *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3 (S.C.C.) (as part of a coalition with the DisAbled Women's Network of Canada and the Canadian Labour Congress);

h. *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624 (S.C.C.) ("*Eldridge*") (co-intervening with the DisAbled Women's Network of Canada);

i. *R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.) (as part of a coalition with the Aboriginal Women's Council, the Canadian Association of Sexual Assault Centres, and the DisAbled Women's Network of Canada);

j. *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 (S.C.C.);

k. *R. v. Sullivan*, [1991] 1 S.C.R. 489 (S.C.C.); and

l. *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143 (S.C.C.).

15. West Coast LEAF provided background information and support to several LEAF interventions originating in other jurisdictions, including:

a. *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees (N.A.P.E.)*, 2004 SCC 66;

b. *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627 (S.C.C.) ("*Thibaudeau*") (as part of a coalition with the Charter Committee on Poverty Issues, Federated Anti-Poverty

Groups of British Columbia, and the National Action Committee on the Status of Women); and

c. *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 (S.C.C.).

ii. Experience before lower courts, administrative decision-makers, and inquiries

16. West Coast LEAF has intervened before the British Columbia Court of Appeal and the Supreme Court of British Columbia in the following cases:

a. *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241;

b. *A.B. v. C.D.*, 2020 BCCA 11;

c. *British Columbia Civil Liberties Association and John Howard Society of Canada v. Canada (Attorney General)*, 2019 BCCA 228 (jointly with the Native Women's Association of Canada);

d. *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*, 2018 BCCA 132 (jointly with the Community Legal Assistance Society) (leave to appeal to the SCC refused, SCC File No. 38157);

e. *British Columbia Civil Liberties Association and John Howard Society of Canada v Canada (Attorney General)*, 2018 BCSC 62;

f. *Denton v Workers Compensation Board*, 2017 BCCA 403 (jointly with the Community Legal Assistance Society);

g. *Law Society of British Columbia v. Trinity Western University and Volkenant*, 2016 BCCA 423;

h. *Scott v College of Massage Therapists of British Columbia*, 2016 BCCA 180;

i. *Trinity Western University and Volkenant v. Law Society of British Columbia*, 2015 BCSC 2326;

j. *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*, 2015 BCSC 534 (jointly with the Community Legal Assistance Society);

k. *Vilardell v Dunham*, 2013 BCCA 65;

l. *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309;

m. *Friedmann v MacGarvie*, 2012 BCCA 445;

n. *Reference re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (the *Polygamy Reference*); and

o. *Downtown Eastside Sex Workers United Against Violence v Canada*, 2010 BCCA 439.

17. Additionally, West Coast LEAF has intervened or had interested party status before an administrative decision-maker or a commission of inquiry in the following cases:

a. *RR v. Vancouver Aboriginal Child and Family Services Society*, BCHRT File No. 16765 (hearing ongoing);

b. *Oger v Whatcott*, 2019 BCHRT 58;

c. *National Inquiry into Missing and Murdered Indigenous Women and Girls* (Order dated August 17, 2017 granting participant status in Part II and Part III hearings) (final report released June 2019) and the *BC Missing Women Commission of Inquiry* headed by Hon. Wally Oppal, Q.C. (report released November 2012); and

d. *In the Matter of an Inquiry Pursuant to Section 63(1) of the Judges Act Regarding the Hon. Justice Robin Camp* (Canadian Judicial Council) (report released November 29, 2016) (as part of a national coalition of six organizations).

18. Apart from its intervention work, West Coast LEAF is currently litigating a constitutional challenge to British Columbia's family law legal aid regime before the Supreme Court of

British Columbia: *Single Mothers' Alliance of BC and Nicolina Bell v. British Columbia*, (File No. S-1733843) (Notice of Civil Claim filed April 26, 2017).

iii. Law reform and public legal education activities

19. West Coast LEAF's second program area is law reform. West Coast LEAF's law reform initiatives seek to ensure that all legislation and policies comply with guarantees of sex and gender-based equality found in the *Charter*, human rights legislation, and relevant international instruments to which Canada is a signatory. West Coast LEAF's law reform work consists of conducting comprehensive community-based research and analysis, drafting best practices and policy recommendations, and making submissions to governmental and other decision-makers on a range of issues impacting equality-seeking groups.

20. Public legal education rounds out West Coast LEAF's major program areas. West Coast LEAF's educational programming aims to help residents of British Columbia understand and access their equality rights, and to think critically about the law as it affects them. The program aims to transform public legal education, collaborate with diverse equality-seeking groups, present workshops and talks to diverse audiences, and distribute public legal education materials. West Coast LEAF's public legal education projects complement and support its litigation and law reform activities, based on the premise that the first step toward asserting rights is understanding them.

C. West Coast LEAF's Interest in this Appeal

21. West Coast LEAF's work on gender-based violence, including sexual violence, forms a significant part of its litigation, law reform, and public legal education programs. A selection of relevant work includes the following:

    a. Commencing in 2016, West Coast LEAF has been engaged in a law reform project, *Dismantling the Barriers to Reporting Sexual Assault*, which is aimed at identifying strategies to reduce barriers in the justice system for sexual assault survivors through dialogue among key stakeholders, including front-line anti-violence activists and service providers, law enforcement, former Crown prosecutors, retired judges, defence counsel and academics. In November 2018, as part of this project, West

Coast LEAF published a report titled, "We are Here: Women's Experiences of the Barriers to Reporting Sexual Assault". This report centred the voices of 18 female survivors of sexual assault who shared with us their experiences of navigating the criminal justice system. Following this report, in March 2020, West Coast LEAF published a toolkit for complainant's counsel in criminal proceedings who are dealing with applications under sections 276 and 278 of the *Criminal Code*.

b. In November 2019, West Coast LEAF was part of a coalition of anti-violence organizations from British Columbia which intervened in two appeals heard together by the Supreme Court of Canada: *Bent v. Platnick*, 2020 SCC 23, and *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22. The coalition made submissions on the barriers to the reporting and disclosure of gender-based violence, including the use and threat of SLAPP suits. It argued for an interpretation of Ontario's *Protection of Public Participation Act* (upon which BC's *PPPA* is modelled) which would empower survivors to report, disclose, and/or seek basic supports related to gender-based violence without the fear of being sued.

c. In June 2019, West Coast LEAF wrote to the government of British Columbia to urge the province to invest in a rights-based framework for survivors of sexual assault by committing to providing dedicated, sustained funding for community-based sexual assault crisis response teams and integrated sexual assault clinics across British Columbia. We were joined in this request by several BC-based umbrella and direct-service provider organizations who work to support survivors of sexual assault.

d. In July 2017, West Coast LEAF was granted standing to participate in Part II (institutional hearings) and Part III (expert hearings) of the *National Inquiry into Missing and Murdered Indigenous Women and Girls* (final report released June 2019). West Coast LEAF participated at several of the National Inquiry's hearings held over the course of 2018 and prepared final oral and written submissions in late 2018. West Coast LEAF's participation in the National Inquiry focused on how governments could be held accountable for action in resolving the root causes of violence against Indigenous women, girls and Two Spirit persons, including violence

of a sexual nature. Earlier, West Coast LEAF had also been granted leave to participate in the provincial Missing Women Commission of Inquiry headed by Hon. Wally Oppal, Q.C., which completed its work in November 2012. After withdrawing from the provincial inquiry, West Coast LEAF joined, and continues to participate in, a coalition of Indigenous, women's and grassroots anti-poverty organizations in the Downtown Eastside of Vancouver pushing for action in addressing violence against Indigenous women, girls and Two Spirit people.

e. In April 2017, West Coast LEAF filed a notice of civil claim in the Supreme Court of British Columbia representing the Single Mothers' Alliance of British Columbia and two individual plaintiffs (once of whom has since discontinued her involvement in the litigation.) The case, *Single Mothers Alliance of British Columbia et al v. British Columbia*, Vancouver Registry, File No. S1733843, is a challenge under ss. 7 and 15(1) of the *Charter* and under s. 96 of the *Constitution Act, 1867* on the basis that BC's family law legal aid scheme deprives women litigants of limited or moderate means whose family law proceeding involves protection from violence (including sexual violence), histories of family violence, or the disruption of the parent-child bond of their security of the person and equality rights. The pleadings also allege that the impugned scheme undermines the jurisdiction of superior courts to resolve disputes and decide questions of law.

f. In June 2016, West Coast LEAF was granted intervener status (as part of a coalition of six women's organizations from across Canada) in proceedings concerning a judge's conduct of a sexual assault trial: In the matter of an Inquiry Pursuant to s. 63(1) of the *Judges Act* regarding the Honourable Justice Robin Camp. The Coalition made submissions on, among other things, low reporting rates of sexual assault, the lack of confidence among survivors of sexual assault in the criminal justice system, and the chilling effect that the perpetuation of rape myths and stereotypes has on reporting.

g. In May 2016, Rise Women's Legal Centre opened in Vancouver to provide legal services to self-identified women of low or moderate means. Many of the clients

served by Rise are impacted by family violence, including sexual assault and other violence of a sexual nature. Rise was developed by West Coast LEAF to respond to women's increasingly unmet family justice needs, after decades of advocacy for increased funding to family law legal aid. In partnership with the Peter A. Allard School of Law at UBC, Rise runs a student legal clinic where clients are represented by upper-year law students under close supervision by Rise staff.

h. In November 2015, West Coast LEAF intervened at the Court of Appeal for British Columbia in *Scott v. College of Massage Therapists of British Columbia*, 2016 BCCA 180. This case concerned the ability of the College to place interim conditions on the registrant's practice to protect the public while investigating a complaint of sexual misconduct. West Coast LEAF intervened to make submissions that the evidence required to establish a risk to the public must not result in the complainant's evidence being assessed on the basis of gendered myths and stereotypes about sexual violence.

i. Since 2009, West Coast LEAF has reported annually on British Columbia's overall action to remedy gender-based discrimination by issuing a report card assessing the province's performance against the United Nations' *Convention on the Elimination of Discrimination against Women* in a number of areas. As in past years, West Coast LEAF's Gender Equality Report Card 2019/2020 gives low grades to BC's overall action to remedy gender-based discrimination. In the area of addressing gender-based violence, the report card identifies the lack of a provincial policy on addressing sexual assault.

j. West Coast LEAF offers a range of public legal education resources and workshops aimed at educating the public about gender-based discrimination and forms of gender-based violence. In 2017, in part as a response to the requirement that all post-secondary institutions in British Columbia have in place sexual misconduct policies, West Coast LEAF developed a legal education project called "Only Yes Means Yes" about sexual assault and consent designed by and for post-secondary students. Along with the workshop, through which we have reached approximately 800 students,

faculty and staff, West Coast LEAF produced a social media-friendly video called "The Unfinished Story of Yes" about the development of sexual assault and consent law in Canada.

k. Since 1999, West Coast LEAF has delivered its "No Means No" workshop to thousands of BC students aged 10-15 to empower youth to understand sexual assault and consent law. The workshop, developed in response to the Supreme Court of Canada's decision in *R. v. Ewanchuk*, [1999] 1 SCR 330, delves into gendered myths and stereotypes about sexual assault.

D. West Coast LEAF's and WAVAW'S Proposed Submissions

22. If granted leave to intervene in this appeal, West Coast LEAF and LEAF will advance the arguments set out in the Memorandum of Argument in support of their Application for Leave to Intervene. These are briefly outlined below:

a. Despite the evolution of the rules of evidence, myths and stereotypes about sexual assault continue to infuse criminal sexual assault trials, particularly in relation to complainants who experience multiple and intersecting indicia of inequality.

b. Meaningful complainant participation in applications under the accused in possession regime is key to refuting discredited myths and stereotypes about sexual assault which may nevertheless underlie these applications, especially in cases involving complainants who experience multiple and intersecting indicia of inequality; and

c. Factors including (a) the scope of the complainant's participation; (b) the complainant's access to independent legal representation; and (c) the timing of these applications during the course of criminal proceedings is essential to a consideration of the constitutionality of the regime and whether it affords meaningful participatory rights to complainants, as intended by Parliament.

23. If granted leave to intervene, West Coast LEAF and WAVAW will jointly offer a gendered and intersectional perspective, from the standpoint of sexual assault survivors and complainants. Further, they offer an analytical approach which, by reconciling complainant

participation with the truth-seeking function of the criminal justice system, shows that the rights of the accused and those of the complainant are not mutually exclusive. This perspective is not otherwise before the Court.

24. I have reviewed the Memorandum of Argument included in this Motion Record, and confirm that it is an accurate reflection of West Coast LEAF's and WAVAW's proposed submissions should leave to intervene in this appeal be granted.

25. If granted leave to intervene, West Coast LEAF and WAVAW will work in cooperation with the parties and any other interveners to ensure that we offer a perspective that is non-duplicative, unique, and useful to the Court's determination of this appeal.

26. I make this affidavit in support of West Coast LEAF's application for leave to intervene and for no other or improper purpose.

AFFIRMED BEFORE ME at the City of Vancouver, in the Province of British Columbia, this 2nd day of February, 2021.

Commissioner for Taking Affidavits in British Columbia

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RAJWANT MANGAT

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)

AND:

J.J.

RESPONDENT
(Applicant/ Defendant)

AND:

ATTORNEY GENERAL OF CANADA,
ATTORNEY GENERAL OF ONTARIO,
ATTORNEY GENERAL OF NOVA SCOTIA,
ATTORNEY GENERAL OF MANITOBA,
ATTORNEY GENERAL OF SASKATCHEWAN, and
ATTORNEY GENERAL OF ALBERTA

INTERVENERS

AFFIDAVIT OF DALYA ISRAEL
(In support of a Motion for Leave to Intervene)
(Pursuant to Rules 47(1)(b) and 57(1) of the *Rules of the Supreme Court of Canada*)

I, DALYA ISRAEL, executive director, of the City of Vancouver, in the Province of British Columbia, AFFIRM AS FOLLOWS:

1. I am the Executive Director of Women Against Violence Against Women Rape Crisis Centre ("WAVAW") and as such have personal knowledge of the matters hereinafter deposed to, except where stated to be based on information and belief in which case I verily believe them to be true.

2. I have worked at WAVAW since 2005 and I became its Executive Director in February 2019.

3. I am authorized to provide this affidavit in support of WAVAW's motion for leave to intervene jointly with the West Coast Legal Education and Action Fund Association ("West Coast LEAF") in the within appeal.

4. This appeal concerns the constitutionality of ss. 278.92 to 278.94 of the *Criminal Code*, which uniquely apply to the prosecution of sexual offences and govern the admissibility of records that are in the accused's possession and in which the complainant has a privacy interest (the "accused in possession" regime). The regime aims to balance the rights of the accused with the privacy interests of the complainant, while ensuring the truth-seeking function of the courts by preventing the admission of irrelevant and prejudicial evidence.

5. As described in further detail herein, WAVAW has a demonstrable and ongoing interest in ending sexualized violence, including sexual assault, against all people of marginalized genders, including women, transgender people who are not women, gender-diverse, and Two-Spirit people. WAVAW's work includes advocating for the elimination of myths and stereotypes about sexualized violence from the criminal justice system, other non-criminal legal and quasi-legal processes, and wider society.

6. WAVAW seeks leave to intervene in this appeal on the basis of this long-standing interest and expertise and its ability to provide a unique and useful perspective to aid the Court in its consideration of the issues on appeal.

A. Background of WAVAW

7. WAVAW is a non-profit organization incorporated in British Columbia and registered federally as a charity. WAVAW's mandate is to work toward a future free from sexualized violence. In order to do so, WAVAW provides direct support services to survivors of sexualized violence, as well as engages in educational outreach and systemic advocacy. It works from a feminist, anti-oppressive, and decolonizing framework.

8. WAVAW was established in 1982 in response to the increasing recognition that sexual assault offences were dramatically under-reported, the criminal justice system was not responding appropriately to sexual assault offences, and sexual assault survivors were lacking in support services. Nearly forty years later, WAVAW is British Columbia's largest rape crisis centre.

Throughout its existence, it has observed the pernicious effects of myths and stereotypes about sexualized violence on survivors' pursuits of justice and healing.

9. WAVAW initially worked with and on behalf of survivors who were ciswomen. Since the early 1990s, WAVAW has provided services to all women (both cis- and trans- women). In 2018, WAVAW changed its mandate to expressly include survivors of all marginalized genders. This change was groundbreaking and has influenced other anti-violence organizations in Canada and abroad to consider the ways in which they are inclusive of transgender, gender-diverse and Two-Spirit people.

B. WAVAW's Experience and Interest in the Appeal

10. WAVAW's direct support services include immediate support after an experience of sexualized violence (in the form of a 24-hour crisis-line and accompaniment to the hospital), as well as longer term support over the course of a survivor's pursuit of justice and healing. WAVAW is committed to ensuring survivors' autonomy in responding to sexualized violence. Depending on the survivor's chosen path, WAVAW's support services include communicating with the perpetrator, assisting the survivor to make a police report, assisting the survivor to share their story with the media, and supporting the survivor in the criminal justice system and/or other non-criminal legal processes.

11. WAVAW also provides free individual and group counselling services to survivors. WAVAW's counselling services include specialized services to meet the needs of survivors who are disproportionately affected by sexualized violence and other forms of marginalization, such as Indigenous survivors and transgender, gender-diverse, and Two-Spirit survivors. WAVAW also provides counselling services to the families of missing and murdered Indigenous women, Two-Spirit people, and girls.

12. In addition to its direct support services, WAVAW engages in educational outreach and systemic advocacy. WAVAW's educational outreach programs work with high schools, post-secondary institutions, workplaces, courts, and other organizations to teach people about the root causes of sexualized violence, as well as how to challenge rape culture and support survivors.

13. WAVAW's systemic advocacy has resulted in numerous changes to the criminal justice system and other institutions to make them more responsive to the needs of survivors. Briefly, some relevant examples of WAVAW's systemic advocacy include:

(a) In 1982, WAVAW collaborated with healthcare providers and the Vancouver Police Department's Sex Crimes Unit to establish the Sexual Assault Service ("SAS"). The SAS gives survivors the option to have forensic evidence collected by trained and sensitive medical practitioners.

(b) In 1983, WAVAW's advocacy contributed to the enactment of Bill C-127, which made fundamental amendments to the *Criminal Code* with respect to the substantive, procedural and evidentiary aspects of Canada's sexual assault laws.

(c) In 1989, WAVAW's lobbying assisted to bring about increased legal protections for sexual assault survivors under British Columbia's *Victims of Crime Act*.

(d) In 1992, WAVAW's advocacy contributed to the enactment of the *Criminal Code*'s "rape shield" provisions (R.S.C., 1985, c. C-46, ss. 276 and 277).

(e) In 1995-2010, WAVAW supported Kimberley Nixon, a trans woman who brought a human rights complaint against Vancouver Rape Relief for discrimination on the basis of her gender identity.

(f) In 2008 and after years of advocacy by WAVAW, British Columbia adopted a Third Party Reporting Protocol for sexual offences, which allows adult survivors to access support and report details of a sexual offence to police anonymously, through a Community Based Victim Services Program.

(g) In 2012, WAVAW published *Challenges of Women's Equality In the Courts,* a research project which examined the impacts of rape culture myths on criminal justice proceedings.

(h) In 2016, WAVAW was granted intervenor status in the Canadian Judicial Council's inquiry into the conduct of Judge Robin Camp. WAVAW submitted documentation

to the inquiry which highlighted the negative impacts of Judge Camp's prejudicial reasoning on survivors' confidence in the criminal justice system.

(i) In 2017, WAVAW started a three-year project called the Justice Project that supports justice system personnel to learn from survivors' lived experiences with the criminal justice system. The project aimed at answering the question, "How can we increase confidence in the criminal justice system for survivors of sexual assault?" Twenty-one survivors and ten justice system personnel were interviewed. A report from the Justice Project will be available in Spring 2021.

(j) In November 2019, WAVAW was part of a coalition of anti-violence organizations from British Columbia which intervened in two appeals heard together by the Supreme Court of Canada: *Bent v. Platnick*, 2020 SCC 23, and *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22. The coalition made submissions on the barriers to the reporting and disclosure of gender-based violence, including the use and threat of SLAPP suits. It argued for an interpretation of Ontario's *Protection of Public Participation Act* (upon which BC's *PPPA* is modelled) which would empower survivors to report, disclose, and/or seek basic supports related to gender-based violence without the fear of being sued.

14. West Coast LEAF's and WAVAW'S Proposed Submissions

15. If granted leave to intervene in this appeal, West Coast LEAF and LEAF will advance the arguments set out in the Memorandum of Argument in support of their Application for Leave to Intervene. These are briefly outlined below:

a. Despite the evolution of the rules of evidence, myths and stereotypes about sexual assault continue to infuse criminal sexual assault trials, particularly in relation to complainants who experience multiple and intersecting indicia of inequality.

b. Meaningful complainant participation in applications under the accused in possession regime is key to refuting discredited myths and stereotypes about sexual assault which may nevertheless underlie these applications, especially in cases involving complainants who experience multiple and intersecting indicia of inequality; and

c. Factors including (a) the scope of the complainant's participation; (b) the complainant's access to independent legal representation; and (c) the timing of these applications during the course of criminal proceedings is essential to a consideration of the constitutionality of the regime and whether it affords meaningful participatory rights to complainants, as intended by Parliament.

16. If granted leave to intervene, West Coast LEAF and WAVAW will jointly offer a gendered and intersectional perspective, from the standpoint of sexual assault survivors and complainants. Further, they offer an analytical approach which, by reconciling complainant participation with the truth-seeking function of the criminal justice system, shows that the rights of the accused and those of the complainant are not mutually exclusive. This perspective is not otherwise before the Court.

17. I have reviewed the Memorandum of Argument included in this Motion Record, and confirm that it is an accurate reflection of West Coast LEAF's and WAVAW's proposed submissions should leave to intervene in this appeal be granted.

18. If granted leave to intervene, West Coast LEAF and WAVAW will work in cooperation with the parties and any other interveners to ensure that we offer a perspective that is non-duplicative, unique, and useful to the Court's determination of this appeal.

19. I make this affidavit in support of WAVAW's application for leave to intervene and for no other or improper purpose.

AFFIRMED BEFORE ME at the City of Vancouver, in the Province of British Columbia, this 3rd day of February, 2021.

Commissioner for Taking Affidavits in British Columbia

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IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

AND:

J.J.

RESPONDENT
(Applicant/ Defendant)

AND:

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF QUEBEC, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), WEST COAST LEGAL EDUCATION AND ACTION FUND AND WOMEN AGAINST VIOLENCE AGAINST WOMEN RAPE CRISIS CENTRE, BARBRA SCHLIFER COMMEMORATIVE CLINIC, CRIMINAL TRIAL LAWYERS' ASSOCIATION, CANADIAN COUNCIL OF CRIMINAL DEFENCE LAWYERS/ CONSEIL CANADIEN DES AVOCATS DE LA DÉFENSE AND INDEPENDENT CRIMINAL DEFENSE ADVOCACY SOCIETY

INTERVENERS

FACTUM OF THE INTERVENER,
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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

1. Despite over three decades of reform to the rules of evidence in criminal sexual assault cases, myths and stereotypes about sexual assault persist in the criminal justice system. In 2018, Parliament enacted ss. 278.92 to 278.94 of the *Criminal Code* as part of its latest effort to minimize the risk that such myths and stereotypes will undermine the integrity of the trial process. By enacting these provisions which control the admissibility of the complainant's private records in the hands of the accused ("the regime"), Parliament recognized that the accused's use of such records is not only invasive to the complainant, but also linked to discriminatory attitudes and practices which have been resistant to change at the trial level. Parliament sought to realize the purposes of the regime in part by providing complainants with participatory rights in applications under the regime ("admissibility applications").

2. West Coast LEAF and WAVAW jointly submit that, in determining the constitutionality of the regime, this Court must consider how meaningful complainant participation in admissibility applications promotes the overarching goal of a fact-finding process that is free of all forms of bias and prejudicial reasoning, an interest shared by the complainant and the accused alike. In particular, complainants can play a key role in refuting discredited myths and stereotypes about sexual assault which may nevertheless underlie these applications, especially in cases involving complainants who experience multiple and intersecting indicia of inequality. The scope of the complainant's participation, their access to independent legal counsel, and the timing of these applications are all essential factors in assessing the regime's constitutionality. On balance, permitting complainants to bring their distinct and relevant perspective to admissibility applications is not at odds with the accused's rights to a fair trial.

3. West Coast LEAF and WAVAW accept the facts as set out in the Appellant's factum.

PART II – POSITION WITH RESPECT TO QUESTIONS IN ISSUE

4. Meaningful participatory rights for complainants under ss. 278.92 to 278.94 are constitutional and support trial fairness through the proper enforcement of the regime.

PART III - ARGUMENT

A. Myths and stereotypes persist in the criminal justice system

5. Sexual assault is an overwhelmingly gendered crime perpetuating the disadvantage of women and gender-diverse people.[1] It disproportionately affects women and gender-diverse people who experience multiple and intersecting indicia of inequality, including on the basis of Indigeneity, race, age, gender-identity, immigration status, sexual orientation, class, and sex worker status.[2] Indigenous women, for instance, self-report sexual assault at more than triple the rate of non-Indigenous women.[3]

6. Despite the evolution of Canadian sexual assault law, myths and stereotypes about sexual assault continue to plague the criminal justice system.[4] Reflecting social conditions outside the courtroom, myths and stereotypes are most common in relation to complainants who experience multiple and intersecting indicia of inequality.[5] A notorious example is *R v. Barton*, in which discriminatory and prejudicial attitudes toward Cindy Gladue, an Indigenous woman and a sex worker, permeated the trial process.[6]

7. Myths and stereotypes in criminal sexual assault trials have two significant consequences for trial fairness. First, by distorting the fact-finding process, they undermine the trial's truth-seeking function. Second, they contribute to a trial process which is harmful and traumatizing to sexual assault complainants, including by reinforcing the relationship between sexual

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[1] Jennifer Koshan, "Disclosure and Production in Sexual Violence Cases: Situating Stinchcombe," (2002) 40-3 *Alberta Law Review* 6559 ("*Koshan*"), at 657; Caroline White, Joshua Goldberg, "Expanding our Understanding of Gendered Violence: Violence against Trans People and their Loved Ones" (2006) 25.1-2 Canadian Women's Studies at 125.
[2] *Koshan, supra* note 1, at 657.
[3] Samuel Perrault, "Criminal Victimization in Canada, 2014," Juristat Statistics Canada Catalogue 85-002-X, at 17.
[4] *R v. Barton*, 2019 SCC 33 at para 52("*Barton*"), at para. 1; *R v. Goldfinch*, 2019 SCC 38 ("*Goldfinch*") at para. 2.
[5] *Barton, supra* note 4, at para. 1.
[6] *Ibid*, at paras. 5, 205, and 223.

assault, gender hierarchy, and shame.[7] This Court has recognized that sexual assault survivors experience a constellation of physical and psychological harms from both sexual assault and society's biased reactions to sexual assault.[8] While criminal trials are not designed to heal complainants, myths and stereotypes within the trial process unnecessarily increase complainants' risk of revictimization.[9]

8. The rules of evidence in criminal sexual assault trials, which have evolved through extensive dialogue between Parliament and the courts, aim to remove myths and stereotypes from the trial process through restrictions on the use of sexual history evidence and the complainant's private records. However, there is a well-documented gap between their aims and their substantive results.[10] This gap can be at least partially explained by the pernicious influence of myths and stereotypes on the very interpretation and application of these rules.[11] In other words, the gap lies in the discrepancy between law-as-legislation and law-as-practice.[12]

9. Without proper oversight, the accused's use of the complainant's private records exposes what is often deeply personal information on the basis of what are often discriminatory assumptions about who the "ideal victim" should be and how they should behave. The risks are greatest to complainants who experience multiple and intersecting indicia of inequality, as they are more likely to diverge from notions of the "ideal victim." Further, they are more likely to have had records made about them by virtue of increased (and often involuntary) interactions with the state and health care systems.[13]

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[7] Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal, QUE & Kingston, ON: McGill-Queen's University Press, 2018) ("*Craig 1*"), at 9.
[8] *Goldfinch*, *supra* note 4, at para. 37.
[9] *Craig 1*, *supra* note 7, at 11.
[10] Elaine Craig, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions," (2016) 94 Canadian Bar Review 1 ("*Craig 2*"); Lise Gotell, "Tracking Decisions on Access to Sexual Assault Complainants' Confidential Records: The Continued Permeability of Subsections 278.1–278.9 of the Criminal Code," (2008) Canadian Journal of Women and the Law, vol. 20 no. 1 ("*Gotell*").
[11] *Craig 2*, *supra* note 10, at 46; *Gotell*, *supra* note 10, at 114.
[12] Susan Ehrlich, "Perpetuating - and Resisting - Rape Myths in Trial Discourse." In *Sexual Assault in Canada: Law, Legal Practice and Women's Activism*, edited by Elizabeth A. Sheehy, (Ottawa, ON: University of Ottawa Press, 2012), at 390.
[13] *Gotell*, *supra* note 10, at 123.

10. All legal actors within the trial process—Crown counsel, defence counsel, and trial judges—are implicated in the patterns of practice which underlie the ongoing permeability of the rules of evidence.[14] Unless these patterns of practice change, myths and stereotypes will continue to undermine the trial's integrity and complainants' equality, privacy, and security rights.

B. Complainant participation is essential and fair

11. Complainants can play a critical role in changing the patterns of practice which allow myths and stereotypes to seep into the trial process. Parliament has recognized the distinct, relevant perspective of complainant by providing them with participatory rights in admissibility applications.[15] Where their participation is meaningful, complainants are best positioned to refute the influence of myths and stereotypes on the adjudication of these applications.

12. The ongoing permeability of the rules of evidence demonstrates that complainants cannot depend on other trial actors to avoid or refute myths and stereotypes in admissibility applications. First, the respective roles of Crown counsel, defence counsel, and trial judges often result in a subordination of the complainant's rights and interests to other duties or concerns. Crown counsel's duty is to the public interest. While this duty includes protecting vulnerable witnesses, Crown counsel do not represent complainants and must weigh the interests of the complainant with those of the accused and the wider community.[16] Defence counsel, on the other hand, owe a duty of loyalty to their accused clients. While many defence counsel strive to avoid myths and stereotypes about sexual assault as a matter of law, professional ethics, and strategy, there is a clear tension between realizing this ideal and providing their clients with a vigorous defence. Trial judges have a duty to ensure a fair trial on the merits, including through intervening in the trial process and properly enforcing legal

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[14] *Craig 1*, *supra* note 7.
[15] *R. v. A.C.*, 2019 ONSC 4270, at 64.
[16] In *Craig 1*, *supra* note 7, at 137-139, there is a discussion of the variation in how individual Crown counsel perceive their responsibilities toward protecting complainants and combatting discriminatory attitudes within trials.

protections for complainants.[17] However, the scope of this protection is constrained by the trial judge's ultimate role as an impartial trier-of-fact within an adversarial system of justice.

13. Second, trial actors are not themselves immune from myths and stereotypes about sexual assault and other forms of bias. Trial actors may find it especially difficult to ensure fairness for complainants who experience multiple and intersecting indicia of inequality. In *Barton*, for instance, the prosecutor allowed defence counsel to introduce sexual history evidence which should have been subject to a s. 276 application, while the trial judge did not give the jury any limiting instruction about the purposes for which sexual history evidence could and could not be used.[18] The prosecutor also participated in the use of prejudicial and dehumanizing language to describe Ms. Barton.[19]

14. Complainants are in the best position to vigorously refute myths and stereotypes about sexual assault in admissibility applications. First, they have a direct and compelling interest in eliminating such myths and stereotypes, which is not in tension with other obligations or concerns. In some cases, it may fall to the complainant to raise issues that other trial actors have either failed to or feel no obligation to consider. Second, the court benefits from hearing the complainant's distinct perspective directly, rather than through the prism of Crown counsel's submissions. In particular, it is helpful to hear directly from the complainant about the impacts of the proposed evidence on their privacy *in relation to* their lived experiences, which often differ greatly from those of the other trial actors. Finally, the additional presence of the complainant adds needed scrutiny to the adjudication of admissibility applications, which tend to receive little oversight because most decisions are not written or monitored.[20]

15. Additionally, the complainant's participatory rights may in and of themselves mitigate the harmful and traumatizing effects of the trial process on complainants. Asking complainants to rely on other trial actors to speak to their rights and interests is paternalistic and replicates

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[17] *Craig 1*, *supra* note 7, at 14.
[18] *Barton*, *supra* note 4, at para. 5. See also *Goldfinch*, *supra* note X, in which this Court held that the trial judge erred in allowing evidence of an ongoing sexual relationship (para. 45).
[19] *Barton*, *supra* note 4, at para. 205.
[20] *Gotell*, *supra* note 10, at. 113.

the gendered, social, and colonial hierarchies which underlie sexual assault itself.[21] The vulnerability of the complainant vis-à-vis other trial actors is especially acute where, as is often the case, there is a significant gap between their respective socio-economic statuses.[22]

16. As with prior efforts to reform the law of evidence in sexual assault trials, an unnecessary and unhelpful dichotomy is created between the complainant's participatory rights and the trial's ultimate truth-seeking function. A meaningful role for complainants in admissibility applications does not erode the accused's right to a fair trial. On the contrary, permitting complainant participation supports the trier of fact in reaching a decision with more confidence that bias and prejudice have not taken root in the reasoning. The concern that complainant participation is fundamentally at odds with an accused's fair trial rights overstates the scope of what is at issue in the application and the novelty of the application procedure, while also mischaracterizing the complainant's interest in participating.

17. The regime is narrow in scope: it is only those documents that engage the complainant's reasonable expectation of privacy that trigger the application process. The accused is also not required to produce the records in question as part of the application.[23] At this stage, the accused is required only to provide the trier of fact with sufficient information such that an analysis can be conducted about whether the proposed evidence is admissible based on the statutory framework and goals. The balancing between an accused's fair trial rights and the complainant's privacy rights has long been affirmed as constitutional by this Court.[24]

18. Moreover, "disclosing" to the complainant what they may be confronted with in cross-examination is neither novel nor unconstitutional. Notice and the complainant's right to be represented by independent counsel is already provided for under the third-party record regime in s. 278.3. Third parties are regularly afforded standing in such applications as well. While it is true that a complainant may gain some advance knowledge through their participation in the application process of what records may be put to them in cross-examination, their participation does not eliminate all probative value of cross-examination

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[21] *Craig 1*, *supra* note 7, at 10.
[22] *Craig 1*, *supra* note 7, at 10.
[23] *Criminal Code*, RSC 1985, c C-46 ("Code"), s. 278.92
[24] *R v. Mills*, [1999] 3 SCR 668 at paras. 61-68.

on any inconsistencies that may exist between their evidence in a police statement or in direct examination and the records in question.

19. The oft-sounded concern about providing notice to the complainant of records in possession of the accused is that there exists a risk that the complainant will then find a way to "explain away" any inconsistencies. The same risk exists in the third-party records regime. The same risk exists when the accused reviews the Crown's disclosure and prepares to testify. Inherent in this concern is the stereotype that complainants are less worthy of trust and more likely to lie about being sexually assaulted. However, once the stereotypic belief is removed from the equation, the regime enhances the truth-seeking process as trial judges ensure that only those records that meet the statutory requirements are used at trial.

20. Finally, concerns that the complainant will become a second prosecutor or otherwise interfere with prosecutorial independence can largely be addressed through recognition of the complainant's limited and focused role within these applications.[25] The purpose of the complainant's participation is to provide submissions on whether the proposed evidence is admissible based on the statutory framework and goals, not to provide submissions on other trial matters or the guilt or innocence of the accused.[26] Trial judges can ensure that the complainant's participation is fair through their control of the trial process.[27]

C. Complainant participation must be meaningful

21. The purpose and potential of the regime will only be realized if complainants have meaningful participatory rights. The Court has an opportunity to provide guidance to courts below on what constitutes meaningful complainant participation in the regime, as well as to interpret the regime to remove barriers to meaningful participation.

a. Scope of the complainant's participation

22. The complainant's rights to attend and make submissions at a second-stage hearing include the rights to review the application materials, lead evidence, and cross-examine the accused

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[25] *A.C.*, *supra* note 15, at para. 71.
[26] *Ibid*, at para. 69.
[27] *Ibid*, at para. 71.

on the affidavit sworn in support of the application.[28] In support of this proposition, West Coast LEAF and WAVAW adopt the reasoning of Justice Doody in *R v. Boyle*:

a. A complainant cannot make meaningful submissions without learning what evidence is proposed to be admitted, the purported relevance of that evidence, and the evidence relied upon to support its admissibility;[29]

b. A complainant may require evidence to support their submissions about the relevance and/or prejudicial effects of the proposed evidence;[30] and

c. A complainant may require cross-examination to address the accused's evidence in support of the relevance of the proposed evidence.[31]

23. The complainant's participatory rights must also extend to any application which affects their rights and interests under the regime. The increasing use of pre-screening applications, which take place outside of the two-stage process prescribed by the regime and largely exclude the complainant, risk undermining the spirit, intent, and effectiveness of the regime. For example, pre-screening applications about whether a complainant has a reasonable expectation of privacy in a "record" implicate both the rights of the complainants and the scope of the regime's protections against the invalid or discriminatory use of the complainant's private information.

b. Access to independent legal representation

24. Access to legal representation supports complainants in making informed decisions and effectively communicating their perspectives. Where complainants are represented, they benefit from the unique advantages of the lawyer-client relationship, including their lawyer's duty of loyalty, confidential communications, and independent legal advice (none of which can be provided by the other trial actors). Further, they benefit from their lawyer's specialized expertise and experience in identifying and preventing the admission of irrelevant

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[28] *R v Boyle*, 2019 ONCJ 253 ("Boyle"); A.C., *supra* note 23, at para. 67.
[29] *Boyle*, *supra* note 26, at para. 3.
[30] *Ibid*, at para. 6.
[31] *Ibid*.

and prejudicial evidence. For complainants who experience multiple and intersecting indicia of inequality, their counsel's responsibilities would include understanding and responding to their particular needs and interests. Counsel choice also allows a complainant to choose a lawyer who has a gendered analysis of the law and/or shares some of their lived experiences.

25. It will not be the rare case where a complainant requires independent legal representation to give effect to their participatory rights. Evidentiary questions are among the most difficult problems in criminal sexual assault cases, and complainants are uniquely disadvantaged within the trial process. Many complainants, and especially complainants who experience multiple and intersecting indicia of inequality, will struggle to effectively communicate their perspectives—let alone review the application materials, lead evidence, cross-examine the accused, and interpret and apply the law—on a self-represented basis. In *R. v T.P.S.*, the Nova Scotia Supreme Court ordered state-funded counsel for a complainant with respect to an application to admit sexual history evidence, stating:[32]

> If the complainant does not have counsel, her interests will not be fully before the court. Crown counsel cannot substitute as counsel for the complainant, that is not the role of the Crown. The accused has counsel and his interests will be before the court. It would be an injustice to this complainant and to all complainants if they are unable to exercise their right to be represented by counsel to protect their privacy and personal dignity. It is fair and just that the complainant be represented by counsel to protect her privacy and equality interests and rights.

26. Where complainants are better able to make informed decisions and effectively communicate their perspectives, this ultimately assists the court. First, it improves trial efficiency. In some cases, upon receipt of legal advice, the complainant will choose to consent to the admission of the proposed evidence and/or not participate in the admissibility hearing. Where complainants do participate in the admissibility hearing, their counsel can ensure that their submissions are relevant, focused and clear. Second, it ensures that the trial judge has the benefit of the entire legal, factual and contextual matrix within which to make a decision.[33]

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[32] *R. v T.P.S.*, 2019 NSSC 48, at para. 25.

[33] In *R v. T.A.H.*, 2019 BCSC 1614, Justice Blok noted: "I found it particularly helpful that there was counsel representing the complainant. It is not the Crown's role to advocate on behalf of a

a. Timing of the application

27. The timing and notice period of an application under the regime have significant implications for complainant participation. An application which takes place during the trial will often result in a trial adjournment so that the complainant can retain counsel. Retaining counsel can be difficult and time consuming, especially through provincial legal aid programs. Even after the complainant has retained counsel, securing continuation dates may add to trial delays. There is a real risk that some complainants will forego their rights to participate in the application and/or be represented by counsel to avoid adverse impacts from trial interruptions and delays. These adverse impacts are especially acute when trial interruptions and delays take place during the complainant's cross examination, as the complainant risks weeks or months of being unable to talk about their evidence or trial experiences with others.

28. An application which takes place during the complainant's cross examination also affects the nature and quality of the complainant's legal representation. The rules of cross examination constrain the ability of complainant's counsel to candidly discuss the application within the context of the case and provide legal advice. These limits thus strike at the heart of the lawyer-client relationship and render the complainant's right to legal representation hollow**.**

PART IV – SUBMISSION ON COSTS

29. West Coast LEAF and WAVAW seek no costs and ask that none be awarded against them.

PART V – ORDER SOUGHT

30. West Coast LEAF and WAVAW do not request any orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16 day of April, 2021

for Gloria Ng and Kate Feeney
Counsel for the Interveners West Coast LEAF and WAVAW

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complainant and the additional perspective added much to the Court's understanding of the issues" (para. 67).

PART VI – TABLE OF AUTHORITIES

JURISPRUDENCE	PARA(S)
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R. v. Barton, 2019 SCC 33	4, 13
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