

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

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA

Appellant/Respondent on Cross-Appeal
(Respondent)

- and -

J.J.

Respondent/Appellant on Cross-Appeal
(Appellant)

- 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

**FACTUM OF THE INTERVENER,
ATTORNEY GENERAL OF ALBERTA
PURSUANT TO RULE 42 OF THE RULES OF THE SUPREME COURT OF CANADA**

DEBORAH J. ALFORD

Justice and Solicitor General
Appeals, Education & Prosecution Policy Branch
3rd Floor, Bowker Building
9833-109 Street
Edmonton, AB T5K 2E8
Phone: (780) 422-5402
Fax: (780) 422-1106
Email: deborah.alford@gov.ab.ca

Counsel for the Intervener,
Attorney General of Alberta

D. LYNNE WATT

Gowling WLG (Canada) LLP
Barristers & Solicitors
2600, 160 Elgin Street
Ottawa, ON K1P 1C3
Phone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener,
Attorney General of Alberta

ATTORNEY GENERAL OF BRITISH COLUMBIA

3rd Floor, 940 Blanshard Street
Victoria, BC V8W 3E6

LESLEY RUZICKA

Tel: (778) 974-5156
Fax: (250) 387-4262
Email: lesley.ruzicka@gov.bc.ca

Counsel for the Appellant / Respondent
On Cross-Appeal

PECK AND COMPANY

Barristers & Solicitors
#610-744 West Hastings Street
Vancouver, BC V6C 1A5

REBECCA A. MCCONCHIE

Tel: (604) 669-0208

Counsel for the Respondent / Appellant
On Cross-Appeal

DEPARTMENT OF JUSTICE CANADA

Guy-Favreau Complex, East Tower,
9th - 200 René-Lévesque Boulevard West
Montréal, QC H2Z 1X4

Marc Ribeiro

Tel: (514) 283-6386
Fax: (514) 496-7876
Email: marc.ribeiro@justice.gc.ca

Counsel for the Intervener, Attorney
General of Canada

ATTORNEY GENERAL OF ONTARIO

Crown Law Office-Criminal
720 Bay Street, 10th Floor
Toronto, ON M5G 1J5

GOWLING WLG (CANADA) LLP

Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

Matthew Estabrooks

Tel: (613) 786-0211
Fax: (613) 788-3573
Email:
mathew.estabrooks@gowlingwlg.com

Ottawa Agent for Counsel for the
Appellant / Respondent on Cross-Appeal

GOWLING WLG (CANADA) LLP

Barristers and Solicitors
1600 Elgin Street, Suite 2600
Ottawa ON K1P 2C3

JEFF BEEDELL

Tel: (613) 786-0171
Fax: (613) 788-3587
Email: jeff.beedell@gowlingwlg.com

Ottawa Agent for Counsel for the
Respondent / Appellant on Cross-Appeal

DEPARTMENT OF JUSTICE CANADA

50 O'Connor Street, Suite 500, Room 556
Ottawa, ON K1P 6L2

Robert J. Frater, Q.C.

Tel: (613) 954-1920
Fax: (613) 954-1920
Email: robert.frater@justice.gc.ca

Ottawa Agent for Counsel for the Intervener,
Attorney General of Canada

BORDEN LADNER GERVAIS LLP

100 Queen Street, suite 1300
Ottawa, ON K1P 1J9

Jill Witkin

Tel: (416) 314-0610
Fax: (416) 326-4600
Email: jill.witkin@ontario.ca

Counsel for the Intervener, Attorney
General of Ontario

**NOVA SCOTIA PUBLIC
PROSECUTION SERVICE**

700-1625 Grafton Street
Halifax, NS B3J 3K5

Erica Koresawa

Tel: (902) 424-8734
Fax: (902) 424-8840
Email: erica.koresawa@novascotia.ca

Counsel for the Intervener, Attorney
General of Nova Scotia

JUSTICE MANITOBA - Public

Prosecution
510 - 405 Broadway
Winnipeg, MB R3C 3L6

Jennifer Mann

Charles Murray
Telephone: (204) 918-0459
FAX: (204) 945-1260
Email: jennifer.mann@gov.mb.ca
charles.murray@gov.mb.ca

Counsel for the Intervener,
Attorney General of Manitoba

**ATTORNEY GENERAL OF
SASKATCHEWAN**

820-1874 Scarth Street
Regina, SK S4P 4B3

Sharon H. Pratchler, Q.C.

Tel: (306) 787-5584

Nadia Effendi

Tel: (613) 787-3562
Fax : (613) 230-8842
Email: neffendi@blg.com

Ottawa Agent for Counsel for the Intervener,
Attorney General of Ontario

GOWLING WLG (CANADA) LLP

Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

D. Lynne Watt

Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener,
Attorney General of Nova Scotia

GOWLING WLG (CANADA) LLP

Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

D. Lynne Watt

Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener,
Attorney General of Manitoba

GOWLING WLG (CANADA) LLP

Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

D. Lynne Watt

Tel: (613) 786-8695

Fax: (306) 787-9111
Email: sharon.pratchler2@gov.sk.ca

Counsel for the Intervener, Attorney
General of Saskatchewan

Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener,
Attorney General of Saskatchewan

TABLE OF CONTENTS

	<u>Page No.</u>
PART I – OVERVIEW AND FACTS	1
OVERVIEW	1
FACTS	1
PART II – ISSUES	2
PART III – STATEMENT OF ARGUMENT	2
CONCLUSION	6
PART IV – SUBMISSIONS ON COSTS	6
PART V – ORDER SOUGHT	6
PART VII – TABLE OF AUTHORITIES	7

FACTUM OF THE INTERVENER

PART I – OVERVIEW AND FACTS

Overview

1. The Attorney General of Alberta (AG Alberta) intervenes on the following constitutional question:

Did the trial judge err in concluding that the seven day notice requirement in s. 278.93(4) of the Criminal Code, R.S.C. 1985, c. C-46 infringes s. 7 of the 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 and does not constitute a reasonable limit pursuant to s. 1?

2. AG Alberta has reviewed the thorough factum filed on behalf of the appellant. AG Alberta expressly adopts the arguments advanced on behalf of the appellant in their entirety. AG Alberta simply wishes to supplement the section 1 *Charter* argument.

3. For far too long, sexual assault victims, primarily women and children, have been ambushed at trial with material that is often collateral and deeply personal, adding trauma to the existing trauma of having been sexually assaulted.

4. The notice period is essential to ensuring that women and children are not improperly assailed at trial by providing a process which permits their privacy and security rights to be protected. The reading down of that provision leads to potential delay through bifurcation of the proceedings. The potential for being ambushed with personal information, that may be entirely collateral to the issues, plus consequent delay, relates directly to reasons for the underreporting of sexual assaults and the unwillingness of complainants to continue with proceedings. This can serve only to undermine confidence in the administration of justice.

Facts

5. AG Alberta accepts the facts as stated by the appellant.

PART II – ISSUES

6. The submissions below relate directly to the very specific constitutional question filed by the appellant. Hence, the following submissions relate only to the seven-day notice period. A second constitutional question has just been filed by the cross-appellant. It is likely that AG Alberta will intervene on that constitutional question. That constitutional question puts into issue the entirety of the legislative scheme enacted in sections 278.92 to 278.94 of the *Criminal Code*. AG Alberta anticipates filing fuller argument in its response to that constitutional question.

PART III – STATEMENT OF ARGUMENT

7. The appellant at paragraph 157 asserts that the notice provision is essential to avoid the bifurcation of sexual assault trials which can contribute to the further traumatization of sexual assault victims. AG Alberta agrees.

8. As has been recognized, sexual violence crimes are significantly underreported.¹ Most surveys and studies indicate that very low percentages of sexual assaults are reported to police,² which makes sexual assault crime least likely amongst all other crimes to be reported to the police³ and one of the most underreported criminal offences in Canada.⁴

9. Despite indications that there has been some increase in the reporting of sexual assault in

¹ Cecilia Benoit et al, “Issue Brief: Sexual Violence Against Women in Canada”, December 2015, p 5 [Tab 6].

² A. Cotter & L. Savage, “Gender-based violence and unwanted sexual behaviour in Canada, 2018: Initial Findings from the Survey of Safety in Public and Private Spaces” (Statistics Canada, December 5, 2019) [Tab 2]; S. Perreault, “Criminal Victimization in Canada, 2014,” (Statistics Canada, 2015) p 3 says reports of sexual assaults to police is as little as 5 percent [Tab 12]

³ C. Rottenberg, “Police-Reported Sexual Assaults in Canada, 2009-2014: A Statistical Profile” (Statistics Canada, October 3, 2017) p 4 [Tab 5]

⁴ Alana Prochuk, “We are Here: Women’s Experiences of the Barriers to Reporting Sexual Assault” (West Coast Leaf November 2018) [Tab 4]; A. Cotter & S. Conroy, “Self-reported sexual assault in Canada, 2014,” (Statistics Canada, July 11, 2017) p 4 [Tab 3]

the last three to five years, it remains one of the most underreported crimes.⁵ Although the reasons for underreporting is multi-faceted, a critical reason is the traumatization of the victims at trial.

10. As the chairwoman of the 1982 Presidential Task Force on Victims of Crime stated, speaking of the criminal justice system, “[w]hen victims come forward...they find little protection. They discover instead that they will be treated as appendages of a system appallingly out of balance...Somewhere along the way, the system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest”.⁶

11. Studies indicate that cross-examination remains the most distressing part of the trial experience despite numerous reforms.⁷ One study compared transcripts from older cases to cases that were subsequent to legislative reform, including rape-shield legislation. While there were some differences in emphasis, the comparison showed that across both time periods the focus remained on targeting personal traits or inferring ulterior motives by questioning the complainant’s manner of dress, dramatization of things, prior relationships, kissing other men, giving out their telephone numbers and/or intoxication. Indeed, it was found that this was more likely in the contemporary cases.

12. The study concluded that little has changed despite legislative reform, with the defence merely pursuing the same goals in slightly different ways. Tactics are used that leverage rape myths invoking stereotypes about typical behavior. These tactics are successful because the complainant is often the only witness to the event. Far from encouraging treatment, the trial process can turn the seeking of help into a source of undermining credibility.⁸

⁵ Just in the last two reported years, the increase of police reported sexual assaults was 13% in 2017 and 15% in 2018; G. Moreau, Police-reported crime statistics in Canada, 2018, (Statistics Canada, July 22, 2019) [Tab 9]; and G. Moreau, B. Jaffray and A. Armstrong, “Police Reported Crime Statistics in Canada 2019” (Statistics Canada, October 29, 2020) [Tab 8]

⁶ Lois Haight Herrington, “President’s Task Force on Victims of Crime” December 20 1982 p vi [Tab 10]

⁷ Sarah Zydervelt et al, “Lawyers’ Strategies for Cross-examining Rape Complainants: Have We Moved Beyond the 1950s?” (2017), 57 Brit. J. Criminal., 57, pp 551-569 [Tab 13]

⁸ Sarah Zydervelt, *ibid.*, pp. 12-16. See also Shaffer, Martha. “The Impact of the Charter on the Law of Sexual Assault: Plus ca Change, Plus C’est La Meme Chose.” The Supreme Court

13. Multiple studies establish that shame, guilt, stigma, a perception that they will be blamed, re-victimized, dismissed, not believed, or treated disrespectfully, or a broader sense of societal normalization of inappropriate or unwanted sexual behaviour, are key contributors to complainants' under-reporting of sexual assault to police. The reluctance of complainants to report sexual assault to police is often reinforced by the negative, and sometimes traumatizing experiences, described by other complainants who have spoken with police or have participated in the criminal justice system.⁹

14. The conduct of a trial has a direct bearing on the complainant's willingness to report and participate in the proceedings. Professor Tanovich discusses the phenomenon of defence instructional material teaching how to “*whack*” the complainant through usage of prolonged cross-examinations and working in humiliating details. He details how sexual assault is the most underreported and under prosecuted offence because it is the one offence where the complainant is more vulnerable because of gender, age, race, aboriginality, physical and mental disabilities. While that might be curtailed in court, experience reveals that it is not often done, as matters are viewed through a stereotypic lens. This lends itself to the discrediting of the complainant as a central strategy. It can go so far, if done at preliminary inquiry, as to convince the complainant not to proceed further. As one lawyer advised young counsel, they must seek to “*kill*” the witness in cross-examination.¹⁰

15. Tanovich refers to an Alberta case by way of illustration. *R. v. Khaery*¹¹ is an example of a case in which an obviously fatigued and emotional complainant did not want to continue, after two days of cross-examination.

Law Review: Osgoode's Annual Constitutional Cases Conference 57, (2012), pp 338, 346-348 [Tab 15], Standing Senate Committee on Legal and Constitutional Affairs, *Statutory Review on the Provisions and Operation of the Act to amend the Criminal Code (production of records in sexual offence proceedings), Final Report*, p. 3 [Tab 16]

⁹ A. Cotter & L. Savage, “Gender-based violence and unwanted sexual behaviour in Canada, 2018: Initial Findings from the Survey of Safety in Public and Private Spaces” (Statistics Canada, December 5, 2019), *supra* n 2 Tab 2

¹⁰ David M Tanovich, “*Whack No More*”: *Infusing Equality Into the Ethics of Defence Lawyering in Sexual Assault Cases*” (2013), 45 Ottawa L. Rev. 495, at pp. 495, 498-499, 502-504, 507 [Tab 7]

¹¹ *R. v. Khaery*, 2014 ABQB 676 [Tab 1]

16. The elimination of the seven-day notice provision all but guarantees the bifurcation of trial proceedings, further prolonging the trauma imposed on sexual assault victims. Current literature continues to indicate that there are low rates of reporting, charging, prosecution and conviction rates. Annual Statistics Canada reports on police reported crime repeatedly warn:

It is important to note that the number of sexual assaults reported by police is likely an underestimation of the true extent of sexual assault in Canada, as these types of offences often go unreported to police. For instance, self-reported data from the General Social Survey on Canadians' Safety (Victimization) showed that only 5% of sexual assaults experienced by Canadians aged 15 years and older in 2014 were brought to the attention of police".¹²

17. This is also referenced in the 2012 Senate report which is the foundation for the impugned legislation. The report indicates that as traditional avenues of defence were narrowed by legislation, new defence strategies were developed. These were still directed at credibility, by routinely requesting and receiving court orders for a wide variety of records. Apprehension rose that usage of records in open court was discouraging reporting of crimes.¹³

18. To put a complainant on notice of records in which they have a reasonable expectation of privacy and which are in the possession of the accused is but the first step to an orderly procedure that enhances the truth-seeking function of the Court.

19. The appellant's factum at paragraph 135 argues that the elimination of the seven-day notice period will likely lead to the bifurcation of sexual assault trials and scheduling difficulties. AG Alberta agrees with this concern. For this very reason, Alberta has put in place a procedure for the timely appointment of counsel for the complainant. This is to ensure that there is an opportunity to consult with counsel and determine whether there are any issues with respect to her section 7 and 15 *Charter* rights and whether they need to be protected.

¹² Mary Allen, "Police-reported crime statistics in Canada, 2017" (Statistics Canada, July 23, 2018) [**Tab 11**]

¹³ Senate Standing Committee on Legal and Constitutional Affairs, "Statutory Review on the Provisions and Operation of the *Act to Amend the Criminal Code (production of records in sexual offence proceedings)*" (December 2012) Final Report, *supra* note 8 [**Tab 14**]

20. In Alberta, prosecutors assist the complainant in obtaining counsel through Legal Aid. It is the prosecutor who submits the necessary documents to the Legal Aid Society of Alberta, and counsel is appointed. This is done in recognition that unnecessarily prolonged proceedings negatively impact cases involving sexual violence towards women and children. The seven-day notice period is a modest attempt to ensure that a complainant's legitimate section 7 and 15 *Charter* rights can be advanced in a timely fashion. This can only serve to advance the interests of justice.

Conclusion

21. If this impugned provision is not constitutional, then we permit the harms and continued usage of gender mythology. The requirement of notice is the first step toward providing that protection to complainants. With visible legislative protection and reasonable procedures hopefully the fear of coming forward currently held by many victims of sexual violence will dissipate. This is a laudable goal.

PART IV – SUBMISSIONS ON COSTS

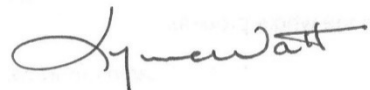
22. AG Alberta does not seek costs and submits that the ordinary rule that costs are not awarded against interveners should apply.

PART V – ORDER SOUGHT

23. AG Alberta submits that the declaration of invalidity of the seven-day notice provision in section 278.93(4) *Criminal Code* and the resultant reading down of this section be set aside. AG Alberta further requests permission to present oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Edmonton, Alberta, this 27th day of January, 2021.


for:

DEBORAH J. ALFORD
COUNSEL FOR THE INTERVENER,
ATTORNEY GENERAL OF ALBERTA

PART VII – TABLE OF AUTHORITIES AND SECONDARY SOURCES

TAB	AUTHORITIES	Cited at Paragraph No.
1	<i>R. v. Khaery</i> , 2014 ABQB 676	15

	SECONDARY SOURCES	
2	A. Cotter & L. Savage, “Gender-based violence and unwanted sexual behaviour in Canada, 2018: Initial Findings from the Survey of Safety in Public and Private Spaces” (Statistics Canada, December 5, 2019)	8, 13
3	A. Cotter & S. Conroy, “Self-reported sexual assault in Canada, 2014,” Statistics Canada, July 11, 2017	8
4	Alana Prochuk, “We are Here: Women’s Experiences of the Barriers to Reporting Sexual Assault” (West Coast Leaf November 2018)	8
5	C. Rottenberg, “Police-Reported Sexual Assaults in Canada, 2009-2014: A Statistical Profile” (Statistics Canada, October 3, 2017)	8
6	Cecilia Benoit et al, “Issue Brief: Sexual Violence Against Women in Canada”, December 2015	8
7	David M Tanovich, “Whack No More”: Infusing Equality Into the Ethics of Defence Lawyering in Sexual Assault Cases” (2013), 45 Ottawa L. Rev. 495	14
8	G. Moreau, B. Jaffray and A. Armstrong, “Police Reported Crime Statistics in Canada 2019” (Statistics Canada, October 29, 2020)	9
9	G. Moreau, Police-reported crime statistics in Canada, 2018, (Statistics Canada July 22, 2019)	9
10	Lois Haight Herrington, “President’s Task Force on Victims of Crime” December 20 1982	10
11	Mary Allen, “Police-reported crime statistics in Canada, 2017” July 23, 2018	16
12	S. Perreault, “Criminal Victimization in Canada, 2014,” (Statistics Canada, 2015) p 3 says reports of sexual assaults to police is as little as 5 percent	8

13	Sarah Zydervelt et al, "Lawyers' Strategies for Cross-examining Rape Complainants: Have We Moved Beyond the 1950s?" (2017), 57 Brit. J. Criminal.	11, 12
14	Senate Standing Committee on Legal and Constitutional Affairs, "Statutory Review on the Provisions and Operation of the Act to Amend the Criminal Code (production of records in sexual offence proceedings)" (December 2012) Final Report	12, 17
15	Shaffer, Martha. "The Impact of the Charter on the Law of Sexual Assault: Plus ca Change, Plus C'est La Meme Chose." The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 57, (2012)	12