

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

B E T W E E N:

**HER MAJESTY THE QUEEN**

Appellant  
(Respondent)

– and –

**J.J**

Respondent  
(Appellant)

– and –

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ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF MANITOBA,  
ATTORNEY GENERAL OF SASKATCHEWAN and  
ATTORNEY GENERAL OF ALBERTA**

Interveners

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**MOTION RECORD OF THE PROPOSED INTERVENER,  
BARBRA SCHLIFER COMMEMORATIVE CLINIC  
(Motion for Leave to Intervene)**

(Pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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

B E T W E E N:

**HER MAJESTY THE QUEEN**

Appellant  
(Respondent)

– and –

**J.J**

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– and –

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ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF MANITOBA,  
ATTORNEY GENERAL OF SASKATCHEWAN and  
ATTORNEY GENERAL OF ALBERTA**

Interveners

**NOTICE OF MOTION FOR LEAVE TO INTERVENE OF THE  
PROPOSED INTERVENER, BARBRA SCHLIFER COMMEMORATIVE CLINIC**  
(Pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

**TAKE NOTICE** that the Barbra Schlifer Commemorative Clinic (the “Clinic”), hereby applies to a Judge of this Honourable Court pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada* for an order:

- a) granting the Clinic leave to intervene in this appeal and cross-appeal;
- b) permitting the Clinic to file a factum not exceeding 10 pages;
- c) permitting the Clinic to present oral argument at the hearing of the appeal and cross-appeal;
- d) providing that no order of costs of this motion and this appeal may be made for or against the Clinic;

And any further order that the Court may deem appropriate.

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

1. The Affidavit of Deepa Mattoo, Executive Director of the Clinic, affirmed on February 4, 2021.
2. Such further and other material as counsel may advise and may be permitted.


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

1. The Clinic is a multi-disciplinary, front-line service provider to women experiencing violence. It was established in the memory of Barbra Schlifer, who was sexually assaulted and murdered on the night of her call to the Bar. The Clinic's objective is to support women who have experienced violence by, among other things, offering avenues for redressing the harms they have suffered. As part of its mandate, the Clinic works to change the legal conditions that threaten women's safety, dignity, and equality, and advocates to improve access to justice for survivors of sexual violence.
2. The Clinic has a long history of intervening to provide assistance to this Court, as well as other courts in Canada, in proceedings where the outcome may influence women's safety, dignity, and equality.
3. The issues raised in this appeal include legal issues of significant public interest that have impacts beyond the immediate parties to the case. The equality, dignity and privacy rights of women who report sexual assault to the police, including racialized, migrant, Black, Indigenous, trans and gender non-conforming women, are significantly engaged by the constitutional challenge to ss.278.92-278.94 of the *Criminal Code of Canada*.
4. More generally, this appeal concerns access to justice for sexual violence survivors, including the willingness of sexual violence survivors to report violence or abuse.
5. The Clinic works with survivors of sexual violence and other forms of gender-based violence and has expertise in the areas of intersecting experiences and vulnerabilities that impact a woman's experience of violence.

6. If granted leave to intervene, the Clinic will bring a useful, distinct, and crucial perspective to this appeal that is different from that of the parties. The Clinic's regular and direct contact with survivors of sexual violence means it understands how survivors perceive and interact with the justice system, enabling it to provide this Court with useful submissions infused with these perspectives.
7. The Clinic's proposed submissions are set out in the Affidavit of Deepa Mattoo at paragraphs 40-63. These proposed submissions will be useful to the Court in determining the multiple and layered issues raised in the appeal and cross-appeal. The Clinic commits to working cooperatively with other interveners to avoid duplication.

Dated at Toronto, Ontario this 5<sup>th</sup> day of February 2021.

Per:

  
\_\_\_\_\_  
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Interveners

**AFFIDAVIT OF DEEPA MATTOO, IN SUPPORT OF A  
MOTION FOR LEAVE TO INTERVENE OF THE PROPOSED INTERVENER,  
BARBRA SCHLIFER COMMEMORATIVE CLINIC**

(Pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

I, Deepa Mattoo, of the City of Oakville, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Executive Director of the Barbra Schlifer Commemorative Clinic (the "Clinic"), as such, I have personal knowledge of the matters to which I depose in this affidavit. To the extent that any information herein is based on other sources and belief, I have stated the source of that information and I believe such information to be true.
2. I have been the Executive Director of the Clinic since May 2019. I have over 20 years of experience in multiple roles as a lawyer, manager and law reform advocate on behalf of women's

equality and women victims of violence. I have a long history of working in the field of violence against women and representing marginalized communities.

3. I completed my B.A. in Law (1995) and L.L.B. (1998) from M.D.U. Rohtak, India. After completing my legal education, I registered as a member of the Delhi Bar Council (1998). I completed my L.L.B. equivalency certification with the National Committee on Accreditation (N.C.A.), a standing committee of the Law Societies of Canada (2010) and became a member of the Law Society of Ontario (2011). I hold a Masters Degree in Business Administration with a specialization in Corporate Social Responsibility from Leeds Beckett University (2004) and a Post-Graduate Certificate in Fundraising and Volunteer Management from Humber College (2007). I was the Law Foundation of Ontario's Community Leadership in Justice Fellow at the Factor-Inwentash Faculty of Social Work at the University of Toronto (2017). I am currently an Adjunct and visiting faculty at the University of Toronto's Faculty of Law and am appointed as Adjunct Professor at Osgoode Hall Law School.

4. In various positions, working globally and more recently as Project Coordinator, Staff Lawyer, interim Executive Director at the South Asian Legal Clinic of Ontario and as Director of Legal Services at the Schlifer Clinic and now as Executive Director, I have gained specialized experience and expertise in the violence and barriers faced by diverse women the Clinic serves, including immigrant and refugee women, racialized, LGBTQ2S and Indigenous women, and women who experience barriers on the basis of poverty, mental health and/or ability. In particular, I have expertise in understanding the very significant barriers faced by these diverse groups of women in reporting or disclosing sexual and other violence.

5. I have trained thousands of service providers for best practices and legal education to work with forced marriage survivors, racialized Non-Status women, and immigration law clients in the context of gender-based violence across Canada. I collaborated with multiple government and non-government organizations for developing best practices, research, and resources for assisting survivors of violence, particularly within the context of forced marriage and "honour"-based violence. I appeared before parliamentary committees and commissions on a wide range of social justice and human rights issues as well as acted as an observer at various forums.

## **The Clinic**

### *The Clinic and Its Legal, Policy, Counselling and Interpretation Services and Advocacy*

6. The Clinic was established in 1985 to commemorate the life and work of Barbra Schlifer, a law student who was sexually assaulted and murdered on the night of her call to the Bar.

7. The Schlifer Clinic is, first and foremost, a multi-disciplinary, front-line service provider to women who have experienced violence, including sexual violence. It provides legal representation, professional counselling, and language interpretation services to women from a broad cross-section of racial, ethnocultural, and socio-economic backgrounds. As such, the Clinic has a deep and integrated understanding of the intersecting and multiple inequalities that exist in women's lives and the impact that sexual offences have on women. The Clinic also has a deep understanding of the barriers to accessing the justice system faced by women who have experienced sexual violence and the financial, emotional, psychological and other burdens that participating in legal proceedings imposes on individual survivors.

8. In 2019-2020, the Clinic assisted more than 9,000 clients. Since 1985, the Clinic has provided services to more than 80,000 women in the Greater Toronto Area.

9. The Schlifer Clinic provides legal representation in administrative, family and immigration law, as well as advocacy services (such as summary legal advice) in administrative, criminal and civil law. In addition to legal services, the Clinic provides a variety of group-based and individual counselling programs. The Clinic also offers a language interpretation service, which provides language interpreters in over 100 languages to service providers that are working with women survivors in shelters, hospitals or Toronto's Domestic Violence Courts.

10. The breadth of services and activities engaged in by the Clinic is unique in Canada amongst social service organizations.

11. In 2016, the Clinic was selected by the Ministry of the Attorney General as a pilot site for the Independent Legal Advice ("ILA") program for sexual assault survivors, as part of the Ministry's broader mandate to end sexual harassment and violence in the province. Through this program, the province provides independent legal advice to men, women and non-binary sexual

assault survivors in Toronto, Ottawa, and Thunder Bay. These services are designed to assist survivors in seeking meaningful legal remedies (both civil and otherwise) and ensuring access to justice to secure legal protections and redress from violence. In addition, the province contracted the Clinic to train the private bar lawyers whom the province is funding to provide this advice on a voucher system.

12. The Clinic's objective is to support women who have experienced violence by, among other things, offering avenues for redressing the harms they have suffered. These avenues include participating as Complainants in criminal sexual violence proceedings.

13. The Clinic also runs the Criminalization of Women Project. This project was conceived to address the disproportionate impact of the law on women who identify violence against them (particularly intimate partner abuse and sexual violence) but then find themselves facing criminal and other consequences.

14. In recent years, the Clinic has noticed an increase in women being criminalized when requesting state protection from gender-based violence.

15. The Criminalization of Women Project seeks to increase access to justice for women who are or have been charged or convicted with one or more criminal offences. Through the program, the Clinic provides women with access to summary legal advice, brief services and appropriate referrals to services for their criminal matters.

16. The Clinic is the only one of its kind in Ontario offering a program such as this one to women. With this experience, the Clinic is in a unique position to understand the different legal needs of sexual assault survivors, as well as how the evolution of criminal law can impact survivors of sexual assault.

17. The Clinic also advances and protects the rights of women who have experienced violence, through systemic legal advocacy. In 2014, the Clinic commenced *Charter* litigation as a public interest litigant in *Barbra Schlifer Commemorative Clinic v. Canada* [2014 ONSC 5140](#), to challenge the eradication of the long-gun registry. The Clinic submitted that changes to gun control laws violated women's constitutional rights to equality and security of the person by increasing women's risk of harm, including lethal harm, in situations of domestic violence. The

Clinic chose to act as a test case litigant in this case due to the importance of the issue and the reality that shouldering *Charter* litigation is extremely difficult for individual plaintiffs, particularly without institutional support.

18. The Clinic also engages in various public advocacy initiatives, including public legal education, professional development for legal professionals, clinical education for law students, law reform and participating as a party and/or friend of the court in litigation.

19. In 2015 and 2016, the Clinic was one of the key organizations consulted by the Minister's Task Force on the Prevention of Sexual Abuse of Patients under the *Regulated Health Professions Act*, [1991, S.O. 1991, c. 18](#). In this regard, the Task Force recognized the Clinic's "experience and expertise in providing summary advice to patients who have been sexually abused by regulated health professionals."

20. The Clinic sat on the Premier's Roundtable on Violence Against Women as part of the Province of Ontario's Sexual Violence and Harassment Action Plan ("SVHAP"), implemented in March 2015. Among other initiatives, the SVHAP involved amendments to certain provincial statutes such as the *Limitations Act*, [2002, S.O. 2002, c.24](#), to make the legal and justice systems more responsive to the needs of survivors. As part of that work, the Roundtable — including the Clinic — reviewed and commented on proposed legislative changes to those statutes before those changes were reviewed by the Legislature.

21. Currently, the Clinic sits on various networks and system planning tables in multiple sectors that include Justice, Social Services, Immigration and Settlement.

22. In addition to our work on legal and policy reforms, the Clinic has a long record of community education and collaborations on issues of sexual violence against women. We have participated in numerous multi-sector committees, coalitions and consultation groups. The Clinic regularly engages in various service-delivery partnerships and consultations with a wide range of service providers representing diverse communities in Toronto. Through this work, we have gained extensive knowledge and expertise in the systemic access to justice barriers faced by members of diverse communities.



### *Mandate and Organizational Structure*

23. The Clinic's institutional objectives are captured by its Mission Statement:

Barbra Schlifer Commemorative Clinic offers legal services and representation, trauma-informed counselling, and multilingual interpretation to diverse women<sup>1</sup> who have experienced violence. We cultivate women's skills and resilience by fostering their safety, dignity and equality and we amplify women's voices to create individual and collective change.

24. The Barbra Schlifer Clinic offers legal representation, professional counselling and multilingual interpretation for women who have experienced violence. Our diverse, skilled and compassionate staff accompany women through personal and practical transformation, helping them to build lives free from violence. We are a centre by, for and about women. We amplify women's voices and cultivate their skills and resilience. Together with our donors and volunteers, we are active in changing the conditions that threaten women's safety, dignity, and equality.

25. The Clinic is overseen by a volunteer Board of Directors consisting of 14 members and employs 46 full and part time staff members. The Clinic's Executive Office has four access to justice projects with two project lawyers, one coordinator and two Case Managers supervised by the Executive Director, who is a lawyer. The Legal Department of the Clinic has a staff of thirteen full-time employees. It is comprised of a Director of Legal Services who is a lawyer, a Manager of Legal Operations who is a paralegal, three staff lawyers, one articling student, two intake counsellors, two administrative staff and three Family Court Support Worker positions.

26. The Clinic's Director of Legal Services, staff lawyers and contracted consultant lawyers have extensive experience providing services to women survivors of violence who are from highly marginalized communities. The regular duties of the lawyers at the Clinic include providing general legal information and advice, as well as representation in family and

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<sup>1</sup>The umbrella term "woman" recognizes that gender is self-identification that is not necessarily correspondent with assigned sex at birth. We recognize the complexity and diversity of gender and aim to be inclusive to people outside of and across the gender spectrum.

immigration law matters, to women who have been exposed to gender-based violence including sexual assault and abuse.

27. The regular and direct contact with women survivors of sexual violence has given the Clinic significant knowledge and a uniquely informed perspective about how women survivors of sexual violence perceive and interact with the justice system.

28. The Clinic's mandate and the individual services it provides to its clients are designed, among other things, to address the need for legal protection for women vulnerable to violence, the systemic problem of underreporting of sexual violence against women, the ineffectiveness of systemic responses to survivors of sexual violence, and the social exclusion of already marginalized women.

***The Schlifer Clinic's Expertise as a Public Interest Advocate on Issues of Violence Against Women***

29. For over 30 years, the Schlifer Clinic has been and continues to be consulted by the provincial and federal government on proposed legislation and initiatives related to sexual violence. In 1987 to 1988, the Clinic was a member of Attorney General Ian Scott's Access to Civil Justice Advisory Committee.

30. Since the Clinic's early days and work with the Civil Justice Advisory Committee, it has made representations on issues related to sexual violence and gender equality to the Senate and House of Commons Standing Committees, as well as to the Quebec General Assembly.

31. Outside of the Canadian context, the Clinic has (Non-Governmental) status with The United Nations Economic and Social Council and has made submissions and presentations to various bodies. In 2018, the Clinic presented at the Universal Periodic Review pre-session at the United Nations. As part of that presentation, the Clinic recommended that governments should be required to ensure that existing judges (in addition to newly appointed judges) receive mandatory judicial training for sexual violence.

32. The Clinic has significant experience intervening in legal proceedings. In 1988 and 1991, following the enactment of the *Charter of Rights and Freedoms* ("*Charter*"), the Clinic

participated in two landmark constitutional cases concerning the *Charter* rights and interests of sexual assault survivors. The Clinic intervened at the Supreme Court of Canada in *Canadian Newspapers Co. v. Canada (Attorney General)*, [\[1988\] 2 S.C.R. 122](#) and *R. v. Seaboyer; R. v. Gayme*, [\[1991\] 2 S.C.R. 577](#).

33. Since that time, the Clinic has been granted standing and participated as an intervener in numerous proceedings in the federal and Ontario courts and at the Supreme Court of Canada, including (but not limited to):

- i. As an intervener in *R. v. Slatter*, [2020 S.C.C. 36](#), where the Court considered the reliability and suggestibility of the testimony of a sexual assault Complainant with an intellectual disability, and the trial judge's reasons regarding same;
- ii. As an intervener in *Bent v. Platnick*, [2020 SCC 23](#);
- iii. As an intervener in *Office of the Children's Lawyer v. John Paul Balev, et al.*, [2018 S.C.C. 16](#), an appeal of a decision from the Court of Appeal for Ontario that ordered the return of two children and their mother to Germany pursuant to the [Hague Convention on the Civil Aspects of International Child Abduction](#). In this case, the Clinic offered the perspective of survivors of gender-based violence engaged in transnational family law proceedings;
- iv. As an intervener in *S.C. v. N.S.*, [2017 ONSC 5566](#), an appeal involving whether and how evidence collected from sexual violence survivors through the civil discovery process could be used in subsequent criminal proceedings;
- v. As an intervener in *R. v. Ururyar*, [2017 ONSC 4428](#), an appeal involving the scope of restitution to a Complainant that may be ordered on sentencing an accused in a sexual assault case;
- vi. As an intervener in *R. v. Quesnelle*, [2014 S.C.C. 46](#), where the Supreme Court granted leave to make written and oral submission on the privacy rights and interests of sexual violence Complainants, particularly those most heavily documented as a result of their marginalization and multiple experiences of inequality;

- vii. As an intervener in *R. v. N.S.*, [2012 S.C.C. 72](#), where the Supreme Court granted leave to make oral and written submissions on the barriers to access to justice faced by sexual violence survivors who wear the niqab;
- viii. As an intervener, in coalition with Women Against Violence Against Women, in the [Matter of an Inquiry Pursuant to s. 63\(1\) of the Judges Act Regarding the Honourable Justice Robin Camp](#) on the impacts of Justice Camp's conduct and comments in *R. v. Wagar*, [2015 ABCA 327](#) on sexual violence survivors, and in particular the underreporting of sexual violence; and
- ix. As discussed above, as the applicant in *Barbra Schlifer Commemorative Clinic v. Canada*, [2014 ONSC 5140](#), a [Charter](#) application to strike down amendments to the *Criminal Code and Firearms Act* (eradicating the long-gun registry).

### **The Clinic's Interest in this Appeal**

34. This appeal and cross-appeal address the constitutionality of [s. 278.92](#) to [s. 278.94](#) of the *Criminal Code of Canada* (the “Code”), which provide a number of significant protections for sexual assault Complainants, including advance notice of private records in the possession of the accused if the accused seeks to adduce the records at trial, and the right to standing on the issues of privacy, equality and admissibility, where the accused seeks to rely at trial on the Complainant’s sexual history and/or private records in the accused’s possession.

35. Sexual violence survivors are often highly traumatized by having to testify about their experiences in Court. A common fear expressed by the Clinic’s clients is the fear of being humiliated, harassed or attacked in the trial process on irrelevant, tangential and deeply personal information.

36. The impugned provisions at issue in this appeal were enacted to improve access to justice for sexual assault survivors and to strengthen the integrity of the sexual assault trial, to ensure that the rights of the accused are properly balanced with protecting the privacy, dignity and equality rights of sexual assault Complainants. The Clinic’s clients are directly impacted by this appeal.

### **The Clinic's Position will be Useful and Different**

37. If granted leave to intervene, the Clinic will bring a useful, distinct, and crucial perspective to this appeal. The Clinic's perspective on this appeal is different from the parties.

38. The Clinic's regular and direct contact with, and provision of legal services to, survivors of sexual violence means it understands how survivors perceive and interact with the justice system. If granted leave to intervene, the Clinic will provide useful submissions infused with these perspectives.

39. The Clinic has been engaged on the issue of promoting access to justice for sexual violence survivors for many years. As noted above, the interpretation and application of [s. 278.92](#) to [s. 278.94](#) of the *Code*, will impact the willingness of sexual violence survivors to disclose and report sexual violence and participate in the criminal justice process.

40. If permitted to intervene in this appeal, the Clinic will cooperate with other interveners to avoid any duplication in arguments. In particular, the Clinic has consulted with West Coast LEAF and WAVAW in advance of submitting this leave application, and will ensure that if both parties are granted standing, our respective submissions will address different points. Since there are numerous issues raised by the appeal and cross appeal, it will be difficult if not impossible for one front-line violence against women (“VAW”) intervener to address all of the arguments and issues.

### **Outline of the Clinic's Proposed Submissions**

41. Sections [278.92](#) to [278.94](#) of the *Code* as amended by Bill C-51 at the end of 2018, reflect legislative recognition that [s.276](#) and [s. 278](#) of the *Code*, enacted to balance the rights of accused persons with the need to protect sexual assault Complainants in the criminal trial process and to encourage treatment and reporting, had not yet fully met their legislative purpose.

42. Sexual history continues to infiltrate the prosecution of sexual assault trials at provincial and superior courts across Canada. Intensely private information of sexual assault Complainants contained in records in the possession of the accused is frequently harnessed to attack the dignity, privacy and equality of Complainants. These challenges to the eradication of

discriminatory practices in the prosecution of sexual assault continue to present significant barriers to the safety of victims in reaching out for therapeutic and other support, and to the willingness of Complainants to report to the police or continue with the criminal process to its conclusion.

43. The impugned amendments to the *Code* represent important, but incremental, additions to the existing [s.276](#) and [s. 278](#) regimes to address targeted areas where these two regimes fell short.

44. As set out in the Appellant's factum, the impugned amendments were met with immediate resistance and opposition. The constitutionality of the amendments under [s. 278.92](#) to [s. 278.94](#) have been challenged, in some cases successfully and in other cases unsuccessfully.<sup>2</sup>

45. Further, the response to the amendments to [s.276](#) and [s.278](#) under Bill C-51 has not been limited to challenging the constitutionality of the new amendments and/or their effect, but has also included regressive efforts (and lower court decisions) which seek to retrench on over twenty-years of established law, including the requirement that sexual history applications must be brought pre-trial (except in the rare cases where the interests of justice dictate otherwise).<sup>3</sup>

46. In some jurisdictions, particularly Ontario, the new amendments have generated a flurry of "motions for directions", which effectively circumvent the requirement of notice to, and participation of, the Complainant under [s. 278.92](#) to [s. 278.94](#) in respect of either non-sexual records in the possession of the accused or sexual records. Complainants have been excluded from participating in the legal determination of one of the questions at the heart of the amendments: whether they have a reasonable expectation of privacy in the records at issue.

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<sup>2</sup> For example, the legislation was found to be constitutional in: *R v. A.C.I.*, [2019 ONSC 4270](#); *R v F.A.*, [2019 ONCJ 391](#); *R v. C.C.*, [2019 ONSC 6449](#); *R v. Whitehouse*, [2020 NSSC 87](#); and the legislation was found to be unconstitutional, in addition to *R v. J.J.*, [2020 BCSC 29](#) and [2020 BCSC 349](#), in: *R v. A.M.*, [2019 SKPC 46](#); *R v. D.L.B.*, [2020 YKTC 8](#); *R v. Anderson*, [2019 SKQB 304](#).

<sup>3</sup> For example, *R v. A.R.S.*, [2019 ONCJ 877](#); *R v. A.M.*, [2020 ONSC 4541](#).

Some of these cases have narrowed the categories of records captured by the regime, without directly challenging the constitutionality of the provisions.

47. Accordingly, a myriad of procedural, practical, and legal issues and principles are raised in this appeal, all of which have significant importance to the *Charter* rights of, and access to justice for, persons who have experienced sexual assault.

48. If granted leave to intervene, the Clinic will focus its submissions on three issues related to the constitutionality of [s. 278.92](#) to [s. 278.94](#) (the “Regime”):

- i. Sexual History and Enumerated Records in the Possession of the Accused are Properly Captured by the Regime;
- ii. Private Information in Digital Records in the Possession of the Accused is Properly Captured by the Regime; and
- iii. The Distinct Role Played by Complainant’s Counsel.

### **Sexual History and Enumerated Records in the Possession of the Accused are Properly Captured by the Regime**

49. In general, the caselaw to date involving records in the possession of the accused under [s. 278.92](#) to [s. 278.94](#) captures four (sometimes overlapping) categories of records:

- a. Enumerated records under s.278.1<sup>4</sup>;
- b. Records that contain communications that are sexual in nature<sup>5</sup>;

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<sup>4</sup> e.g. *R v. F.A.*, [2019 ONCJ 391](#) (diary and medical records); *R v. A.M.*, [2019 SKPC 46](#) (diary); *R v. Boyle*, [2019 ONCJ 232](#) (counselling records ordered produced under s.278); *R v. H.A.R.*, 2019 ONSC 7145 (records created by a foster parent with respect to a child in care).

<sup>5</sup> e.g. *R v. X.C.*, 2020 ONSC 410; *R v. Marell*, [2020] O.J. No. 3617; *R v. A.M.*, 2020 ONSC 4541; it is also noted that the records in issue in the case under appeal, *R. v. J.J.* were photographs of the Complainant naked, albeit photographs which the trial judge ruled were not caught by [s.276](#).

- c. Digital records (usually digital communications between the Complainant and accused and/or photos or videos);<sup>6</sup> and
- d. Miscellaneous other records.

50. Almost all of the litigation under [s. 278.92](#) to [s. 278.94](#) since Bill C-51 came into force, however, has involved digital communications between the complainant and the accused or similar records, whether emails, texts, or other social media communications, as well as photos, videos and other digital recordings.

51. The Clinic will submit that the constitutional analysis of the entirety of the impugned amendments on appeal should not be eclipsed by the issues that surround this subset of digital records (and the information in them). Rather, a starting point which focuses on enumerated records and records containing sexual history in the possession of the accused assists in clarifying the constitutional issues and the rights and interests engaged.

52. In a sense, sexual history was always in the ‘possession of the accused’. For over two decades, defence counsel has been expected to identify whether sexual history may be an issue at trial and, if so, seek leave in advance of trial to put sexual history to the Complainant, on the basis of an evidentiary record. The constitutional force of [s.276](#) is unchanged by the fact that [s. 278.92](#) to [s. 278.94](#) has confirmed and clarified what was already the law: that sexual content in digital or other records and communications fall within [s.276](#) of the *Code*.

53. Similarly, on a correct approach to the balancing of the interests at stake (the rights of the accused; the dignity and *Charter* rights of the Complainant; societal interests in encouraging reporting; a fair trial in the eyes of the community), the requirement that an accused must provide notice and obtain approval for use of non-sexual records of the Complainant such as her diary, her medical or counselling records, child protection agency or other institutional records, clearly passes constitutional muster. Accused persons frequently only have access to these private records of a Complainant because of a relationship of intimacy or power. This context of power and inequality by which the accused has possession of the records in the first place

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<sup>6</sup> e.g. *R. v. Mai*, [2019 ONSC 669](#); *R v. M.S.*, [2019 ONCJ 670](#); *R v. T.A.*, [2020 ONSC 2613](#); *R. v. R.M.R.*, [2019 BCSC 1093](#); *R v. W.M.*, [2019 ONSC 6535](#); *R v. M.S.*, [2019 ONCJ 670](#); *R v. A.M.*, [2020 ONSC 1846](#); *R v. McKnight*, [2019 ABQB 755](#).



informs the constitutional analysis. Further, having corrected the *Shearing*<sup>7</sup> distinction between “production” and “admissibility” in the regime, it matters not that it is the accused, rather than a third party, who possesses these clearly private records.

### **Private Information in Digital Records in the Possession of the Accused is Properly Captured by the Regime**

54. Digital records, including communications, are frequently in the possession of the accused because most sexual assault complainants experience sexual victimization at the hands of someone they know (whether a friend, intimate partner, dating acquaintance, employer, teacher, health professional, family member, etc.).

55. The element of surprise which is at the core of the constitutional challenge to the impugned provisions, often arises because Complainants frequently erase these communications from their devices. Due to the intimate violation of sexual assault and its mental-health effects on the victim, as well as the dynamics of power and inequality underlying the offence, Complainants’ instinct to delete digital records is an understandable coping or survival mechanism.

56. The Clinic will address the constitutionality of the Regime as it applies to digital communications over which a Complainant has a reasonable expectation of privacy. The Clinic will provide a lived-experience perspective on the types of highly sensitive information that is contained in digital communications between a Complainant and accused, whether sexual or enumerated (such as discussions of abortions, suicidality or child protection issues) or otherwise highly private (such as discussions relating to grief or shame or marital breakdown) and the importance of pre-trial disclosure of these records to the Complainant.

57. There is no dispute as to the fundamental importance of the right to full answer and defence in our criminal justice system or that cross-examination of Crown witnesses plays a central role in supporting that right. The Court, however, should carefully probe overstatements and hyperbole as to the asserted detrimental impact of the legislated amendments on those rights.

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<sup>7</sup> *R v. Shearing*, [2002 SCC 58](#).

58. In most, if not almost all cases, the relevance of records in the possession of the accused, including digital communications, is to contradict a statement the Complainant made to the police. The contradiction has thus crystallized prior to trial. While the Clinic submits that the persistent fear that a Complainant will lie and change her evidence is itself a discriminatory assumption in sexual assault cases, the impact of the impugned provisions on cross examination of trapping the lying witness is, in reality, more theoretical than real.

59. On the other hand, the significant concern by sexual assault Complainants that their entire lives and intimate personal histories, thoughts and feelings previously shared with their assailants will be under the microscope in a sexual assault trial, remains a significant barrier to reporting. Cross-examination on private information contained in records continues to be an opportunity for humiliation and destabilization of the witness at trial, in a manner that does not advance truth-seeking or the integrity of the administration of justice.

60. The Clinic will bring its unique front-line perspective to bear on the legislation's having achieved the correct balance of societal expectations, the dignity, privacy and equality rights of Complainants in highly private communications, and the rights of the accused.

### **The Distinct Role of Complainant's Counsel**

61. The Respondent/Appellant on Cross-Appeal submits that standing of the Complainant in the [s. 278.92](#) to [s. 278.94](#) hearing, whether in sexual history applications or hearings involving non-sexual private records, unconstitutionally injects a private party in the "decision-making" about the merits of the case or fetters the rights of the accused.<sup>8</sup>

62. The Clinic and its legal team provide support to sexual assault Complainants, including most recently through the government of Ontario's Independent Legal Advice for sexual assault survivors pilot program. If granted leave to intervene, the Clinic will address the distinct and important role played by Complainant's counsel in [s. 278.92](#) to [s. 278.94](#) hearings and the ways in which that role does not overlap with the Crown's.

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<sup>8</sup> Memorandum of Argument of the Respondent/Cross-Appellant for leave to cross-appeal, at paragraphs 28, 41-46.

63. The Clinic will also address the concerning submissions made by the Cross-Appellant which suggest that the fact that accused persons cannot probe solicitor-client privileged discussions between a sexual assault Complainant and her counsel is a violation of full answer and defence, and that the solution to that problem is to deprive the Complainant of pre-trial notice and meaningful access to counsel.<sup>9</sup>

64. The Clinic will also address the Cross-Appellant's submissions about the asserted constitutional infringement arising from the Complainant's access to the "defence theory of the case." The Clinic's submissions in this regard will include a perspective on the role of counsel under the [s. 276](#) regime prior to 2018 and the minimal impact of the amended provisions on the accused's rights in terms of access to the "defence theory of the case".

### **Order Sought**

65. The Barbra Schlifer Commemorative Clinic respectfully requests an Order from this Court:

- a. Granting the Clinic leave to intervene in this appeal;
- b. Permitting the Clinic to file a factum of not more than ten (10) pages, or such other length as this Court deems appropriate;
- c. Permitting the Clinic to present oral argument at the appeal;
- d. Providing that no order of costs of this motion and this appeal may be made for or against the Clinic; and
- e. Any further or other Order that this Court deems appropriate.

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<sup>9</sup> Memorandum of Argument of the Respondent/Cross-Appellant for leave to cross-appeal, at paragraph 40.

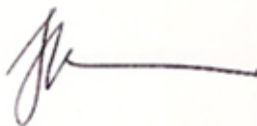
I make this Affidavit for no improper purpose but in support of a motion for leave to intervene on behalf of the Proposed Intervener, Barbra Schlifer Commemorative Clinic.

AFFIRMED BEFORE ME at the City of )  
Toronto, in the Province of )  
Ontario, this 4<sup>th</sup> day of February 2021 )  
)

*Deepa Mattoo*

Deepa Mattoo

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Tamar Witelson LSO #45845F  
Commissioner for taking  
Affidavits in Ontario