

=

Counsel for Complainants and the Role of Court Services

Prepared by Senior Crown Counsel

Audrey Olson

Presented by Dale Tesarowski

Executive Director Corporate Initiatives SK Justice



**Law Society
of Saskatchewan**



Overview

- Bill C-51 and its implications
- Summarize the amendments and resulting court process
 - Application to produce records
 - Application to adduce evidence at trial
- The role of Court Services in locating counsel for the complainant
- Challenges
- Plans for Improvement

Bill C-51

- Introduced on June 6, 2017; Assented to December 13th, 2018
- Expands “rape shield” provisions to include communication of a sexual nature or communications for a sexual purpose
- Requires formal court application to introduce records that contain, in whole or in part, “private” information of the complainant
- Provides that a complainant has a right to be represented and make submissions in response to a defence application



Court Procedure: **Sexual Activity Evidence**

- The “rape shield” provisions
 - S. 276 of *The Criminal Code*
 - Evidence is not admissible to support inference that complainant:
 - (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
 - (b) is less worthy of belief.

Court Procedure: Evidence of Sexual Activity

- Evidence may be admitted if Court determines, pursuant to an application by defence, that it:
 - (a) is not adduced to support either of the two inferences in 276(1);
 - (b) is relevant to an issue at trial; and
 - (c) is of specific instances of sexual activity; and
 - (d) has significant probative value not outweighed by the danger of prejudice to the proper administration of justice.
- Court to consider factors outlined in Section 276(3)
- *Code* requires defence to apply to adduce evidence regarding complainant's sexual activity or communications related to sexual activity (Sections 278.93 and 278.94)



Court Procedure: **Records**

- Section 278.1 – Access to “Private” Records
- “Record” - any form of record containing personal information where there is a reasonable expectation or privacy



What is a Record?

- Medical/Psychiatric/Counselling
- Education
- Employment
- Child Welfare
- Adoption/Social Services
- Personal journals/diaries/correspondence
- E-mail, texts
- Record otherwise governed by privacy legislation
- Does *not* include records made by persons responsible for investigation/prosecution

What happens to a Record?

Section 278.2(1)

- Cannot be produced to defence on cases involving sexual violence
- Applies even if record is in the Crown's possession
- Crown still obligated to advise defence that record exists, but cannot disclose
- Exception: If complainant expressly waives their right to privacy



Applications: **Record Production**

- Section 278.3: Formal Application to Produce Record
- 60 days' notice
- Defence to serve:
 - Prosecutor
 - Person possessing the record
 - Complainant/Witness to which it relates
 - Any other person to which the record relates (in the knowledge of the accused)

Applications: Record Production

- Section 278.4(2.1)
 - Court obliged to inform complainant/witness, person possessing the record, and any other identified parties of their right to participate in the hearing of the application and to be represented by counsel
 - Participants (including complainant) can appear and make submissions but are not compellable as witnesses on the application
- Section 278.5 - After hearing, Court may order that the record be produced to the judge for review
- Section 278.6 – Once Court reviews the document, can determine whether record of part of the record should be produced to the accused



Applications: **Adducing Evidence at Trial**

- Single Application Procedure applies:
 - Section 278.93 and 278.94
 - Where accused wishes to adduce evidence captured by Section 276 (sexual activity or communications of a sexual nature); or
 - Where accused plans to adduce a record related to the complainant.

Applications: **Adducing Evidence at Trial**

- Written application required
- Detail the evidence at issue and its relevance
- Copy of application to be given to prosecutor and the clerk of the Court ; no service requirement
- 7 days' notice required
- Judge required to inform complainant as soon as possible of their right to be represented by counsel
- Complainant not compellable as witness on hearing, but may appear and make submissions



Counsel for the Complainant

- Victim Services
- Court Services
- Court appointment vs. Assignment of counsel



Challenges

- Serving the complainant with notice of an application
 - Court's responsibility to inform problematic in practice
 - Service by defence counsel
- Time constraints in locating counsel
- General lack of knowledge regarding the amendments

Current Practice

- When application received:
 - Prosecutor advises complainant that application has been made
 - Also assists with serving the complainant of records application
 - Asks if they want independent advice or to be represented at a hearing
- If complainant requests counsel:
 - Prosecutor contacts Court Services
 - Court Services locates counsel for the complainant



Proposed Way Forward

- Roster of Lawyers
- Sets terms and conditions for assignment
- Experience in criminal law
- Demonstrated knowledge of updated *Criminal Code* and court process



Recent Developments

- Constitutional challenges of Bill C-51 amendments
- *R v. A.M.* [2019] SJ No. 281
- *R v. Anderson* [2019] SKQB 304
- *R. v. J.J.*
- Continuing developments in the case law regarding the role of the complainant and their counsel in criminal proceedings



Finis

QUESTIONS/COMMENTS?

Contact Audrey Olson @ audrey.olson@gov.sk.ca
to volunteer to join the roster