

WAYLAW

ADVOCACY . COMPASSION . EXPERIENCE

OVERVIEW

1. The process ss. 278.93 – 278.94
2. Admissibility of evidence in the hands of the defence (s. 278.92)
3. Admissibility of evidence of other sexual activity (ss. 276)

WHAT IS A “RECORD”?

- Section 278.1 – **any form of a record** that contains personal information for which there is a reasonable expectation of privacy and includes medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals, and diaries...
- These are “enumerated” records.
- The definition is central to third party records applications s. 278.1 – 278.91 and to applications regarding evidence in the possession of the defence s. 278.92.

“Record” continued

- But does not include records made by persons responsible for the investigation or prosecution of the offence.
- The definition of a record is not exhaustive *R. v. Quesnelle* 2014 SCC 46 at para 22.

Procedures for ss. 278.92 and 276 applications are set out in s. 278.93 and 278.94

s. 278.93 Application for a hearing (stage one)

- Form and content of the application s. 278.93(2)
 - Must be in writing
 - Must set out detailed particulars of the evidence the defence seeks to adduce
 - Must set out the relevance of the evidence
 - A copy must be given to the prosecutor and the court
 - The complainant does not have standing at stage one

Affidavit in support of a s. 276 application for stage one s. 278.93

- For a s. 276 application at stage one an information and belief affidavit may be sufficient. *Darrach*

s. 278.93(3)

- The hearing is held in camera (public and jury excluded)

s. 278.93(4) Judge may hold a hearing

- The judge may order a hearing if it is satisfied that:
 - S. 278.93(2) has been met;
 - The application was served at least 7 days previous (or shorter time if so ordered); and
 - The proposed evidence is **capable** of being admitted (not twin myths).
- If the judge is satisfied that the requirements have been met the judge may order a hearing pursuant to s. 278.94.

7 day notice period

- The seven day notice period is far too short and some jurisdictions set these applications with a longer notice period

s. 278.93

- The threshold at stage one is low.
- Sometimes the Crown will concede stage one.
- Stage one could be completed in writing especially if the Crown concedes that the application can proceed to stage two
- The complainant does not have standing at stage one.

s. 278.94(1) – (5) The hearing

- The hearing is held in camera;
- The complainant is not compellable but has the right to make submissions and be represented by counsel;
- The judge shall, as soon as feasible, advise the complainant that she has the right to counsel (in reality this is usually done in advance by victim services); and
- The judge shall give reasons for determining whether the evidence or any part of it is admissible. The reasons must specify what part of the evidence is admissible, the factors that affected the judge's determination and the manner in which the evidence is expected to be relevant to an issue at trial.

Affidavit in support of a s. 276 hearing at stage two

- At stage two the affidavit in support must be sworn by someone who has personal knowledge. This is usually the defendant.
- The defendant must make himself available for cross.
- It is not unfair to the defendant to tip his hand regarding his planned defence (*Darrach*)

s. 278.95(1)

- Publication of the application, and evidence is prohibited.
- Publication of the judge's determination and reasons is barred unless the judge ruled that the evidence is admissible or if the judge orders that the reasons may be published.
- The prosecution of counsel for the complainant will often request that the motion materials be sealed.

s. 278.96 – Jury instruction

- If the evidence or part of the evidence is admissible the judge shall instruct the jury of the uses that can be made of the evidence.

Evidence in the possession of the defence s.
278.92

s. 278.92 evidence in the possession of the defence

- The Supreme Court of Canada considered and upheld the constitutionality of the new regime in JJ.
- For a summary of JJ from the perspective of the complainant see:

Way, D. “J.J. and A.S. – Complainant’s Counsel Perspective” (2023) 43:1
For the Defence 10

The Shearing 2002 SCC 58 issue

- What to do when the defence is in lawful possession of evidence in which the complainant has a reasonable expectation of privacy?
- Shearing has bedeviled Canadian law since 2002 – in 2018 Parliament gave us s. 278.92

s. 278.92

Records relating to the complainant in the possession of the defence are subject to an admissibility hearing



s. 278.92(2)(a)

If the application concerns **sexual activity** pursuant to s. 276(4) then s. 276(2) applies as well as the factors in s.278.92(3)

s. 278.92(2)(b)

If the application **does not concern sexual activity** pursuant to s. 276(4) then the evidence sought to be admitted must be relevant to an issue at trial and have significant probative value not substantially outweighed by prejudice

s. 278.92

- Controversial section that requires the defence to reveal evidence they intend to rely upon at trial
- In R v JJ the Supreme Court of Canada has upheld constitutionality of the section.

For records that do not include sexual content the definition of a “record” found at s. 278.1 is key

- If the complainant does not have a reasonable expectation of privacy in the subject records, then no application is required.
- The definition of a record is not exhaustive. *R. v. Quesnelle* 2014 SCC 46 at para 22

When does the section apply?

- If the complainant has a reasonable expectation of privacy in the records, then the section applies.
- The case law is divided on whether the defence has bring a s. 278.92 application to determine the admissibility of records received through a section applies to records produced to the defence via a third party records application, but the trend seems to be that an application is required.
- The section applies to communications in which the complainant has a reasonable expectation of privacy including communications with the defendant.
- The section applies to records lawfully obtained by the defence (a *Shearing* situation).

JJ has provided guidance

- A “record” is limited to “personal information for which there is a reasonable expectation of privacy” (see s. 278.1).
- If the evidence falls into one of the enumerated categories listed in s. 278.1 the defence must bring an application (para.39)
- If the record is non-enumerated it **might** attract a reasonable expectation of privacy.

Non-enumerated records that attract a reasonable expectation of privacy

- Records that contain information of an intimate or highly personal nature that is integral to the complainant's overall physical, psychological or emotional well-being.
- Such information will have implications for the complainant's dignity. JJ para. 42
- If the factors listed at s. 278.92(3) are engaged the evidence may be a record. JJ at para. 52

Non-enumerated – what is not a record?

- Mundane information such as general emotional states, everyday occurrences, general biological information is not a record (JJ para. 56)
- Even if communicated privately (JJ para. 53)

Context of the record should be considered

- The reason the person shared the information
- The relationship between the parties (relationship of trust may not be necessary, but it may be sufficient, to establish REP)
- Whether the information was shared in the public domain (Twitter) or private (text message between two people)

Text messages

- The complainant may have a reasonable expectation of privacy in the text if they are:
 - The sender;
 - The recipient; or
 - If the content of the communication pertains to the complainant. JJ para. 63

When the defence is *not* in lawful possession of the record

- If the defence is in possession of the record because it was mistakenly disclosed by the Crown the court may order that the record be returned to the Crown
 - *R v Gray* [2015] O.J. No. 2633 (SCJ)
 - *R v J.M.* [2020] O.J. No. 469 (SCJ)
 - *R v Balondo* 2021 ONSC 4542 (SCJ) – Balondo says that the defence must return the record if the Crown requests it

- In cases involving social media the authenticity and completeness of the e-communication may be a live issue
- Some applications omit information about how the defendant came into possession of the social media postings. This should be raised as an issue by the responding parties.

Factors

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account:

- (a)** the interests of justice, including the right of the accused to make a full answer and defence;
- (b)** society's interest in encouraging the reporting of sexual assault offences;
- (c)** society's interest in encouraging the obtaining of treatment by complainants of sexual offences;
- (d)** whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

Factors continued

- (e)** the need to remove from the fact-finding process any discriminatory belief or bias;
- (f)** the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (g)** the potential prejudice to the complainant's personal dignity and right of privacy;
- (h)** the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- (i)** any other factor that the judge, provincial court judge or justice considers relevant.

EVIDENCE OF OTHER SEXUAL ACTIVITY s. 276

What is Other Sexual Activity?

- Sexual activity other than the sexual activity that forms the subject matter of the charge, whether with the defendant or someone else, both consensual and non-consensual
- The defence must apply under s. 276
- The prosecution must ask the court's permission to adduce evidence of other sexual activity, a Seaboyer application
- The complainant does not have standing on a Seaboyer application

History

- Historically it was common to adduce evidence of the complainant's other sexual history even when it had little probative value and was adduced to suggest that she was more likely to have consented or was less worthy of belief.
- The constitutionality of s. 276 was upheld in 2000 in *R. v. Darrach*.
- S. 276 was amended in December 2018 with the passing of Bill C-51 and for the first time provided the complainant with standing.

Leading cases

- *R. v. Darrach* 2000 SCC 46
 - S. 276 is constitutional
 - An information and belief affidavit is sufficient for stage one but for stage two the affiant will usually be the defendant
 - The affiant must make himself available for cross examination
 - Other sexual activity will rarely be relevant to the determination of consent

Leading cases - Darrach and the Trilogy

R. v. Barton 2019 SCC 33

- Overview of the development of the law re s. 276
- The responsibility for determining admissibility lies with the judge, not the Crown
- Crown should refrain from commenting on the complainant's sexual history
- S. 276 may also apply when the enumerated offences are not charged but underlie the allegations ie a sexual assault that leads to a death will attract s. 276 analysis paras. 70 - 78
- Privacy continues after death para. 83
- Honest but mistaken belief in **communicated** consent
- Strong statement by the court barring evidence that is based on biases against sex workers and Indigenous peoples

Leading cases

- *R. v. R.V.* 2019 SCC 41
 - Concerns s. 276 in response to evidence led by the Crown
- *R. v. Goldfinch* 2019 SCC 38
 - “Friends with benefits” case
 - Citing the need for “context” or “narrative” is insufficient to establish admissibility para. 65
 - Judges are the gate-keepers para. 75
 - Generic references to “credibility” are insufficient para. 56
 - “Goldfinch exception” evidence may be admissible when the complainant has provided inconsistent statements on the sexual nature of the relationship para. 63

The intention of s. 276

- S. 276 is intended to prohibit the admission of evidence of other sexual activity that is irrelevant, prejudicial and based on improper reasoning about sexual behavior
- The section only applies to the complainant, not other witnesses
- The “twin myths” are strictly prohibited.

s. 276(2)

- The proposed evidence is inadmissible unless the judge determines that the evidence is:
 - (a) Not being adduced in support of the twin myths;
 - (b) Is relevant to an issue at trial;
 - (c) Is of specific instances of sexual activity; and
 - (d) Has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Relevance

- “Relevance is the key which unlocks the evidentiary bar” *Goldfinch* at para 5.
- In order to establish relevance the applicant must identify specific facts or issues that can only be properly understood if reference is made to the other sexual activity (*Goldfinch* at para 95).

Relevant to an issue at trial – credibility

- Many applications assert that the evidence of other sexual activity is relevant to the complainant's credibility.
- General credibility is not a basis to establish admissibility.
- Specific credibility, for example inconsistent statements, may be a valid ground.

Specific instances of sexual activity

- If the evidence of other sexual activity goes to the nature of the relationship, then the defence must only establish the parties, the relevant time period and the nature of the relationship.
- If the other evidence of sexual activity is of a specific incident then there must be sufficient details to identify that incident.

Significant probative value that is not significantly outweighed by the danger to the proper administration of justice

This is more art than science and is determined on a case by case basis.

Factors 276(3)(a)-(e)

- The interests of justice, including the right to full answer and defence;
- Society's interest in encouraging the reporting of sexual assault offences;
- Whether there is a reasonable prospect that the evidence will assist in arriving at a just determination of the case;
- The need to remove from the fact-finding process any discriminatory belief or bias;
- The risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

Factors 276(3)(f)-(h)

- The potential prejudice to the complainant's personal dignity and right of privacy;
- The right of the complainant and every individual to personal security and to the full protection and benefit of the law; and
- Any other factor the court considers relevant.

Complainant standing re applications brought pursuant to ss. 276/278.2 and 278.93		
Section	Stage one	Stage two
<p>s. 278.3</p> <p>Third party records application (records are in the possession of a third party, ie CAS, physician, police....) and must be subpoenaed to court 60 days before stage one hearing and released to counsel for complainant). Issue is whether records should be produced to defence and Crown (not admissibility)</p>	<p>Complainant has standing</p> <p>Hearing generally take 2 - 3 hours</p>	<p>Complainant has standing</p> <p>Hearings are generally brief as the judge has reviewed the records</p>
<p>s. 278.92</p> <p>Records in the possession of the defence in which the complainant has a reasonable expectation of privacy (usually text messages or other social media posting but could be diary, photos etc). Issue is admissibility.</p> <p>If the records pertain to sexual activity the s. 276 test applies.</p>	<p>Complainant does not have standing</p> <p>If the Crown concedes admissibility this is a brief appearance</p>	<p>Complainant has standing</p> <p>More lengthy hearing</p>
<p>s. 276</p> <p>Evidence of other sexual activity. Issue is admissibility.</p>	<p>Complainant does not have standing.</p> <p>If the Crown concedes admissibility this is a brief appearance</p>	<p>Complainant has standing.</p> <p>More lengthy hearing</p>

See sections 278.93 and 278.94 re procedure for applications under ss. 276 and 278.92.

See sections 278.1 – 278.91 re procedure for applications under s. 278.3.