

WAYLAW

ADVOCACY . COMPASSION . EXPERIENCE

OVERVIEW

Role of complainant's counsel

Independent Legal Advice

Production of records held by third parties (ss. 278.1 – 278.91)

Admissibility of evidence of other sexual activity (ss. 276, 278.93, 278.94)

Admissibility of evidence in the hands of the defence (s. 278.92, 278.93, 278.94)

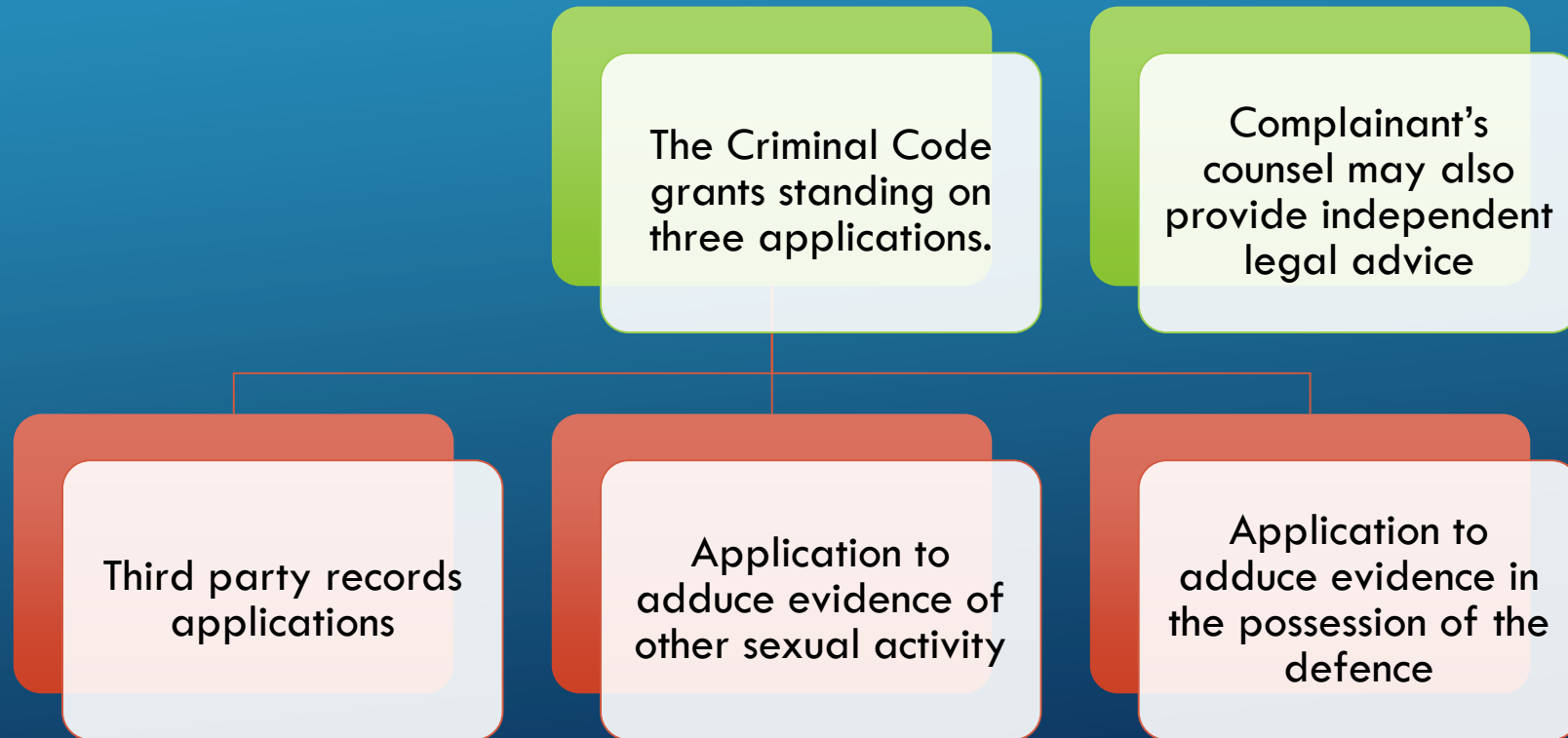
THE ROLE OF COMPLAINANT'S COUNSEL

The role of counsel for the complainant is to advocate for the complainant and ensure she receives the benefit of the protections she is afforded in law.

Complainant's counsel is independent of both the prosecution and defence.

Counsel for the complainant must be mindful of the limitations to a complainant's standing.

TYPES OF APPLICATIONS USUALLY ENGAGED IN COMPLAINANT WORK



APPLY FOR STANDING

01

Counsel for the complainant may consider applying for standing in cases other than applications for which standing is statutorily prescribed.

02

Standing may be granted in a case in which the complainant will be directly affected by the outcome
L.L.B. v. A.B. [1995] 4 S.C.R. 536.

03

Examples – *Stinchcombe* applications, media motion for access to an exhibit, applications for testimonial supports, applications for a material witness warrant, recusal motion

TYPES OF CASES

Over-representation of sexual assault cases

In order to engage the sections of the Code we are discussing today the charges must include an “enumerated offence” found at s. 278.2(a). This means that complainants in cases of domestic violence will not have the benefit of the Code provisions where there have been no allegations of sexual assault.

If a third party records application comes up in a domestic violence or other case that does not include an enumerated offence the O’Connor regime applies

Where an enumerated offence **underlies** the offence charged, the Code provisions may apply (*Barton*), ie murder, human trafficking

HUMAN TRAFFICKING COMPLAINANTS

- Among the most disadvantaged complainants are often those who have been human trafficking victims.
- Those victims are often recruited from group homes and present with an array of challenges, lack of family support, poverty, drug addiction and mental health issues. While people from all socio-economic groups can fall prey to human trafficking there is an over-representation of profoundly disadvantaged complainants in this category.

HUMAN TRAFFICKING


- Human trafficking offences are not enumerated therefore complainants are not automatically entitled to the protections in the Code
- The question of whether the complainant should be provided with the Code protections has been the subject of several cases, with decisions going both for and against.

HOW COMPLAINANT'S COUNSEL GET INVOLVED

Usually the referral to counsel comes from a worker with the Victim Witness Assistance Program, Victim Services or the Crown but it may come from Boost, the CAS, legal aid or another counselling agency.



Funding sources include legal aid, the Ontario Independent Legal Advice for Sexual Assault Survivors Program or, rarely, private retainers.



If the Crown obtains an order from a judge appointing counsel for the complainant legal aid will issue a certificate to the lawyer. The certificate has a limited number of hours and payment is at the discretion of legal aid.

INDEPENDENT LEGAL ADVICE FOR COMPLAINANTS

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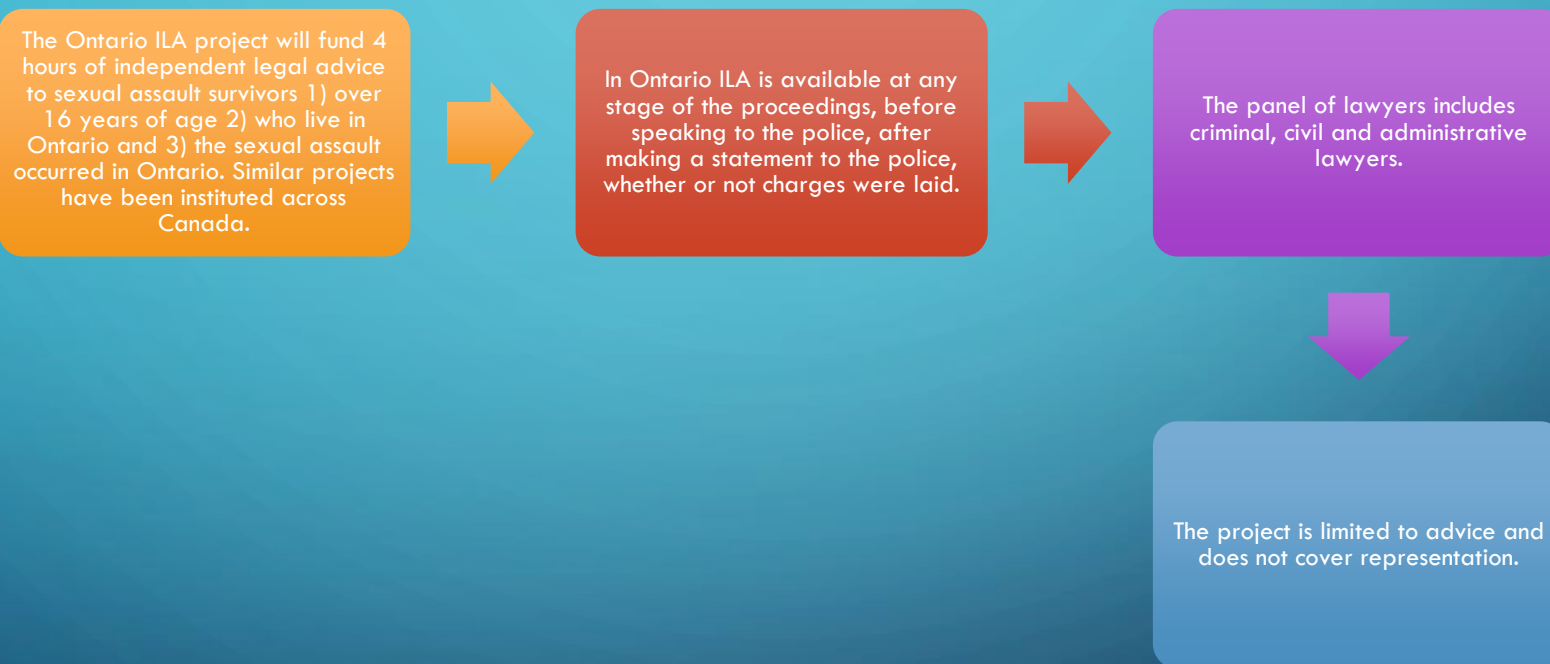
ILA AT THE REQUEST OF THE PROSECUTION

- Prosecution is in possession of a record and wants to know if the complainant will waive her privacy rights in the record. If she does so the record can be produced to the defence without the necessity of a third party record application. Medical records and text messages are frequently the focus of this type of ILA.

ILA AT THE REQUEST OF THE PROSECUTION

- Electronic data – e-communications, internet searches, GPS locations etc.
- The prosecution frequently wants to access information from the complainant’s cellphone or laptop.
- The complainant should receive ILA in every case before she signs a waiver allowing the police to access her data.
- Any such waiver should be drafted to ensure that only relevant information is captured.

ILA SOUGHT BY THE COMPLAINANT



WHEN PROVIDING ILA

Affirm the complainant's experience.

Listen carefully to the complainant.

Advise the complainant that the conversation is protected by solicitor/client privilege **and that her conversations with investigators, prosecution and victim services are not.**

Do not make promises.

As much as possible try to provide a realistic picture of the path ahead.

Stay within counsel's expertise.

Presumably any lawyer who undertakes to provide advice to a complainant of sexual assault who is considering filing a police report would have significant experience in criminal law. Counsel should be cautious when providing advice and ensure that it does not stray into areas in which counsel is not competent.

It may be necessary to refer a complainant to a lawyer who practices in the area of civil sexual assault torts to provide advice.

BENEFITS OF WELL-TIMED ILA

- ILA can avoid litigation down the road. For example, if the complainant receives ILA and provides a valid waiver for the disclosure of private records such as medical records or texts, time consuming third party records applications may be avoided.
- If the complainant has received ILA early in the process she may feel more empowered and knowledgeable as the charges move through the system.

THIRD PARTY RECORDS APPLICATIONS PURSUANT TO S. 278.1 – 278.91




WHAT IS A THIRD PARTY RECORDS APPLICATION?

- When the defence believes that there is evidence relevant to full answer and defence in the hands of a third party such as a therapist, physician, school or children's aid society, the defence can apply to the court and ask that the evidence be produced to it.
- That evidence is referred to as a "record".

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...



This 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.



The Code definition of “record” does not specify e-communications which has led to uncertainty about a complainant’s reasonable expectation of privacy in social media postings.

PRODUCTION VS ADMISSIBILITY

The third party records regime concerns the **production** of records to the defence and prosecution.

The legal test is different from ***Stinchcombe*** disclosure and from **admissibility** pursuant to s. 276 or s. 278.92.

STINCHCOMBE TEST FOR DISCLOSURE



“Fruits of the investigation” must be disclosed to the defence

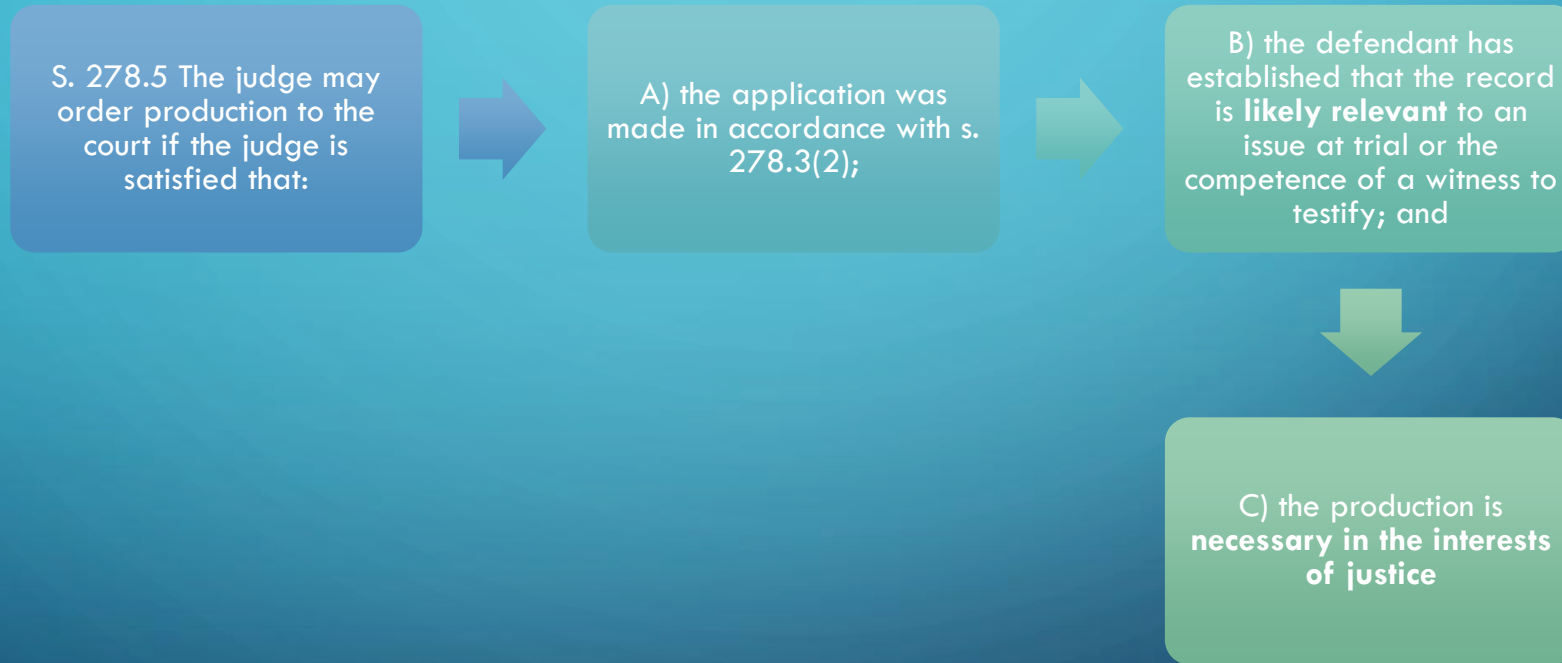


Anything that is not “clearly irrelevant”



Low threshold

TEST FOR PRODUCTION



COMMON LAW TEST FOR PRODUCTION (NON-SEXUAL OFFENCES)

- The applicant must satisfy the court that the records may be logically probative to an issue at trial. *O'Connor* para. 138
- The applicant's demonstration that information is likely to be relevant must be based on **evidence**, not on speculative assertions or on discriminatory or stereotypical reasoning. *O'Connor* paras. 24 and 140

A FEW EXAMPLES OF HOW THIRD PARTY RECORDS MAY ARISE:

During pre-trial discussions – defence says he wants disclosure of all contacts the complainant has had with the police whether as a complainant, witness or accused.

Complainant advises the investigator that she is in therapy because of the alleged assault.

The CAS and the police conduct a joint investigation into allegations of sex assaults against a child.

Rarely a third party records application may arise mid-trial.

THE TEST S. 278.5

- The judge must be satisfied that:
 - The application was made in accordance with s. 278.3(2) to (6); and
 - the applicant has established that the record is likely relevant to an issue at trial or the competence of a witness to testify; and
 - production is necessary in the interests of justice.

CASE SPECIFIC EVIDENCE

In order to meet the test the applicant must adduce case specific evidence to support the application

Not merely rely on speculative/stereotypical/discriminatory assertions

S. 278.2(1)-(3)

- Applies to sexual offences.
- **The witness who has a privacy interest in the records can waive that interest with a valid waiver.**
- If the prosecution is in possession of the record to which the section applies, it has a duty to notify the defence that it is in possession of the record and the nature of the record, however they should not advise the defence of the contents of the record.

BARE ASSERTIONS ARE INSUFFICIENT S. 278.3(4)

(a) that the record exists;

(b) that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;

(c) that the record relates to the incident that is the subject-matter of the proceedings;

(d) that the record may disclose a prior inconsistent statement of the complainant or witness;

(e) that the record may relate to the credibility of the complainant or witness;

(f) that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;

BARE ASSERTIONS CONTINUED

(g) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;

(h) that the record relates to the sexual activity of the complainant with any person, including the accused;

(i) that the record relates to the presence or absence of a recent complaint;

(j) that the record relates to the complainant's sexual reputation; or

(k) that the record was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused.

S. 278.4



THE HEARING IS HELD IN CAMERA.



THE WITNESS AND THE RECORD-HOLDER
MAY ATTEND THE HEARING AND MAKE
SUBMISSIONS, BUT THEY ARE **NOT**
COMPELLABLE AS WITNESSES.

278.5(2) FACTORS

- (a) the extent to which the record is necessary for the accused to make a full answer and defence;
- (b) the probative value of the record;
- (c) the nature and extent of the reasonable expectation of privacy with respect to the record;
- (d) whether production of the record is based on a discriminatory belief or bias;
- (e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
- (f) society's interest in encouraging the reporting of sexual offences;
- (g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
- (h) the effect of the determination on the integrity of the trial process.

S.278.6

01

Upon reviewing the records the judge may rule that none of the records are relevant and may dismiss the application

02

The judge may hold a second hearing to determine whether any of the records should be produced

03

The witness and record-holder have standing at the second hearing



S.278.7

ONLY THAT PART OF
THE RECORD THAT IS
LIKELY RELEVANT TO
THE CHARGES
SHOULD BE
PRODUCED

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S. 278.7(3) CONDITIONS ON PRODUCTION

- In order to protect the privacy interests of the witness or others the judge can place certain conditions on production, for example, that the record be redacted.

CONSIDER A CONDITION SUCH AS:

“At no time will the defence allow the defendant to take possession or control of the records.”

This is to avoid a screenshot of sensitive material being disseminated through social media.

CATEGORIES OF RECORDS COMMONLY SOUGHT

Counselling – see

- The mere fact a complainant has spoken to a counsellor about the allegations is insufficient to pass the test for likely relevance.
- “there must be some basis for concluding that the statements have some potential to provide the accused with some added information **not already available to the defence** or have some impeachment value.”
- There must be **case specific** evidence or information. A mere assertion that the record is relevant to credibility is not enough.

- *An application for the production of therapeutic records can pass the first stage of the test for likely relevance, for example:*
 - Where there was a statement to the police, then counselling, then a prelim and there is a material difference between the police statement and the prelim evidence.
 - The records may be likely relevant if the defence can establish that “the counselling process played any role in reviving, refreshing or shaping the memory”

CATEGORIES OF RECORDS COMMONLY SOUGHT

Psychiatric records

Police records

CAS records

Electronic communications – very rich area for applicants. Please discourage unnecessary or unfocused seizure of cellphones or gratuitously accessing various social media accounts.

R. V. PASCAL

- *R. v. Pascal* 2020 ONCA 287 held that a witness's criminal record and outstanding charges are first party disclosure

IS IT *STINCHCOMBE* OR THIRD PARTY?

- If the police or Crown have obtained the record, either intentionally or by mistake, the defence will often argue that *Stinchcombe* is triggered.
- Unless there has been a valid waiver the witness maintains a privacy interest in the records and the third party regime applies.

WHAT IS A VALID WAIVER?

- The witness should receive independent legal advice before deciding whether or not to provide a waiver.

EVIDENCE OF OTHER SEXUAL ACTIVITY SECTION 276

WHAT IS “OTHER SEXUAL ACTIVITY”?

Other sexual activity refers to sexual activity **other than the sexual activity that forms the subject matter of the charge**, whether it is with the defendant or someone else, both consensual and non-consensual.

The Crown and defence can adduce evidence regarding the allegations, both must seek leave of the court before adducing evidence of other sexual activity.

Crown = Seaboyer application

Defence = Section 276 application

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. If the evidence is being adduced to support the notion that the complainant is **more likely to have consented** or **is less worthy of belief** than the evidence is inadmissible.

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.

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.

S. 276 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.

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.

**APPLICATIONS TO DETERMINE
THE ADMISSIBILITY OF
EVIDENCE IN THE POSSESSION
OF THE DEFENCE
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



The constitutionality of the section was upheld by the Supreme Court in JJ/AS.

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.

WHEN DOES THE SECTION APPLY?

- The section applies to records produced to the defence via a third party records application.
- The section applies to communications in which the complainant has a reasonable expectation of privacy.
- The section *MAY* apply to communications between the complainant and the defendant.
- The section applies to records lawfully obtained by the defence (a *Shearing* situation).

WHEN THE DEFENCE IS *NOT* IN RIGHTFUL 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 or complainant
 - *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

IF THE EVIDENCE INCLUDES SEXUAL ACTIVITY S. 276 APPLIES

- S.276(4) – “sexual activity” includes any communication made for a sexual purpose or whose content is of a sexual nature

COMMUNICATIONS BETWEEN THE COMPLAINANT AND THE DEFENDANT

- The defence may bring a motion for directions, asking a judge to review the records and determine whether the complainant has reasonable expectation of privacy (thereby determining whether or not a s. 278.92 application is required)
- From the complainant's perspective this is a problematic approach as she does not have standing on a motion for directions and yet her privacy is directly implicated.

- 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 prosecution.

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.