TAB 5

Disclosure in Child Protection Cases

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Best Practices For The Conduct Of A Child Protection File - Part II

Strategies to Move your Case Forward to Settlement, ADR or Trial

The Law Society of Upper Canada | Barreau du Haut-Canada

Continuing Legal Education

Disclosure in Child Protection Cases

Part 1. <u>Documents in Society's Possession Counsel will want to examine</u>

- Generally divided into Family Service Files and Child Service Files. Counsel should examine both.
- The Family Service files will usually contain:
  - Intake Documents setting out the basis for the apprehension, the protection investigation report.
  - Day-to-day notes of the Intake worker and Family Service Worker.
  - Plans of Care for the Family – every 90 days.
  - Comprehensive Risk Assessments.
  - Plans of Service which set out goals and expectations for the family and services to be provided to the family.
  - Court proceedings folder.
  - Often they will contain observation reports of supervised visits.
  - Social History summaries concerning the family. (Prepared when Crown Wardship is being considered)
  - Correspondence with Service providers for the family.
  - Medical, Psychological and other reports concerning the family.

- The Children's Service files will contain:
  - The day to day notes of the Children's Service workers who works with the children.
  - Medical reports concerning the children.
  - Social Histories of the children.
  - Observation reports of supervised access with the children.
  - Often, they will contain foster home reports when the foster homes are part of an organized group of foster homes having reporting requirements.

Part 2 - <u>Using Disclosure</u>

A) **What to look for and Determine**.

- Understand the case against your client.
- Understand your client's deficiencies.
- Determine if there are battles that you will not be able to win and narrow your focus. Should you challenge finding? Is the case really only about access at this stage?
- Determine what the special needs of the child are to determine what services your client will need to propose for the child in their Plan of Care.
- Determine weaknesses in the basis for the apprehension.

- See if the Society worker has left out relevant facts in their affidavit which could create a different way of looking at the case, if included. Have they only told 75% of the story.
- Determine what efforts the Society has made to first provide services for the family and if they have given adequate time for these services to work.
- See if any strengths of your client have been acknowledged and if so, are they included in the Society's worker's affidavit.
- Determine if the Society has adequately explored alternatives to apprehension (i.e. family plan).
- See what steps the Society has taken to check the reliability of their information.
- Examine the file history (if one exists) to see if your client has been able to make positive use of services in the past. See if that is acknowledged in the Society's material. See if you can take steps to plug back in those services.
- Examine the file history to determine if your client has been able to parent effectively in the past. Determine what factors might have caused this to change (i.e. drugs, abusive spouse) and see if you can start to take steps to recreate the positive parenting environment.

- If the Society previously was involved and terminated their involvement there will likely be a lot of positive statements about your client in the records to justify the termination. (i.e. when Judy is not with her abusive spouse, she can be an excellent parent). This information can be filed on any temporary motion and you will want to note who the worker was in the event of a trial.
- Read closely any Access Observation notes. They are often written by workers or volunteers not closely connected to the litigation. They are more likely to be positive.
- Many of the foster home organizations keep records which can be helpful. They sometimes comment on positive reactions by the child to visits which contradict the Society's material.
- See if the Society has reevaluated it's case as more information has become available to them.
- Make a checklist of any positive statements about your client for future use. These records can sometimes be used to contradict Psychological assessment findings. For example test results might characterize your client as being mistrustful and unlikely to be able to accept services; but empirical evidence in the disclosure can be used to contradict these findings.

- Determine if the primary worker ever says anything positive about your client. See if other workers are more positive. This is especially important if there has been a change in workers.
- Examine if the tenor of a worker's notes change after it has been established that the matter will be litigated, or if the Society has amended their application to seek Crown Wardship. Some workers tend to focus more on advocating and supporting their position as opposed to balancing their reporting once they know there is serious litigation.
- Determine if the facts in the disclosure mesh with the risk assessment.
- Determine if the risk assessor has properly considered factors which can reduce the risk.

B) **Setting up your Baseline and Follow-up**

- The Baseline is establishing what your client needs to do to get their child back. This can be a moving target and the documentation can assist in clearly defining this.

- Understand what needs to be done to rehabilitate your client.

  The most common areas that can be worked on are:

  1) Addiction.

  2) Parenting Skills.

  3) Abusive Partners.

  4) Hostile Attitude.

  5) Mental Health (client not following through on medical advice; taking medication).

- Start education process with your client as soon as possible.

  Redirect client's hostility to Society to addressing concerns.

- If possible bring Society staff into the process of client rehabilitation.

  Set up meetings with counsel, society staff, parents and service providers to establish collaborative effort.

- Set up clear, defined goals for the client which they can meet and you can monitor.

C) **Using the Disclosure in Litigation**

1. **<u>Motions</u>**

- On Motions you can file the documentation as exhibits to your client's or secretary's affidavit as it will likely meet the criteria of being reliable and trustworthy evidence.

- In the affidavit it is best to highlight the relevant passages in the exhibits that you wish to rely upon as the material might be voluminous.
- You will want to demonstrate that the worker in their affidavit only told part of the story and that the new information excluded by the worker creates a different context in which to examine the case.

2. **Discovery of Worker**

- You are entitled to do this as of right pursuant to Rule 20(3).
- You can use the transcript on a motion or at trial.

- **Considerations as to Whether or not to examine the worker**.
  - Does the file disclosure provide you with the information that you require?
  - Does the file disclosure adequately define your baseline? You might wish to use the discovery to clearly set this out.
  - Do you want the Society to be examining your client at this stage? Does the benefit exceed the cost?
  - Will setting up the discovery cost you time in arguing a motion?
  - Do you believe that there are positive points to be obtained which are not contained in the file disclosure?
  - Do you want to foster goodwill and establish a collaborative effort? The discovery may undermine this.

- Is the worker taking a rigid stance and is there a need to attempt a shift in attitude.
- If you feel the matter will go to trial the discovery might serve as practice for the worker and they will likely be a better witness at trial.

3. **Request to Admit** **Rule 22**

- This can be a useful tool to have the Society admit positive facts set out in their files about your client. Use it to tell a more positive story about your client.
- Any facts not denied within 20 days are deemed to be admitted.
- Have the Admitted Facts placed in the trial record pursuant to Rule 23. It can counterbalance the bad first impression created by the Society's affidavits.
- You can get into evidence positive statements of previous workers who are no longer with the Society or service providers who may be difficult to locate.
- If facts and documents are not admitted and should have been there can be costs consequences. Given that the facts and documents are contained in their own files it is difficult for the Society to dispute them.
- Use short statements in the Request to Admit so confusion can't be argued. Each statement should be drafted to add the simple question "Is this true or not?
- A Request to Admit is also a tool that can be used by the Society.

Counsel should be attempting to work with the Society in each case on an Agreed Statement of Facts to shorten the length of the trial and to avoid having the Society call more evidence than is necessary, which in the end could prove unhelpful to your client.

Note: Just because a document is admitted as genuine is not an admission of the facts in the document, so you should list the facts you want admitted, that are contained in the documents.

4. **Prior Inconsistent Statements**

° Worker notes can be used as prior inconsistent statements to contradict testimony at trial.

5. **Business Act Notice**

° If not admitted in the Request to Admit, serve a notice under s. 35 of The Ontario Business Act, at least 7 days prior to trial of your intention to rely on the documents at trial.

° Note that the documents must be relevant. You can't just pile extensive records into the trial.

See: Setak Computer Service Corporation Ltd. v. Burroughs et. al. (1977) 15 O.R. (2d).

6. **Affidavit of Documents**

° Although Rule 19 permits you to continually ask for these, it really is impractical in child protection cases. You will lose goodwill quickly if you seek these. Disclosure is more effective using the other methods set out above.

° However you can use Rule 19 to ask for an Affidavit of Documents from another party in your case. You must decide if the benefit exceeds any cost of your client providing one.

° You can examine the other party as of right Rule 20(3). Many of the previous considerations apply.

Part 3
Pre-Trial Disclosure and Discovery
In Child Protection Cases - The Society's Perspective

During the course of a child protection proceeding, the Society has an obligation to provide full and frank disclosure to all of the parties to the proceeding. This means that virtually all of the information contained in a Society's file should be made available to "the other side". Parties are entitled to know what information the Society relied upon in reaching conclusions and making recommendations and what information, if any, was disregarded in the process.

What information will/should definitely be excluded from disclosure

- Any solicitor-client communications:
    - Court dictations
    - Case notes of conversations between workers and CAS counsel
    - Memos from counsel to workers
    - Minutes/notes of meetings where legal advice is sought and/or given
- Documents that are legally prohibited from being disclosed (for example under the *Mental Health Act*, or *Youth Criminal Justice Act*)

What information might be excluded from disclosure

- Foster parents' names or addresses
- Names and locations of a child's school or teachers
- Information that a child has requested not be shared with a parent (for example information about a child using birth control or having an abortion)
- A child's record, such as a medical or counseling record, where the child has a reasonable expectation of privacy

- Information that might lead to the parent discovering the location of the child in cases where safety is an issue
- Information that might somehow put the child at risk

(If a party wants this type of information, a motion can be brought before the Court to request disclosure.)

How to get disclosure of CAST files

- Make an appointment with the worker to see the file
- Let the worker know what you are looking for
- Ask to see both the family service and children's service files
- If there is a history, ask to see a copy of the Society's old records (these used to be microfiched and are now kept on a disk; they can be printed off with sufficient notice)
- If there are medical issues, ask the Society lawyer to get copies of any reports from the Society's doctors
- Parties should be getting copies of psychological reports and any other reports that the Society is relying on as a matter of course, if you do not have them, ask the worker for them
- **DO NOT** call up and ask to have the entire file copied and sent to you
- If you would like ongoing disclosure of the file, you can make regular appointments to review the file or ask that specific documents be sent (such as plans of care or reports)
- The Society **will not** just send you copies of case notes as they are made
- Once you have looked at a file, the Society will make copies of documents as requested and bill you at the rate approved under the *Family Law Rules*

What's expected of counsel when they get disclosure of a Society file

- Children's Aid Society records are intended to be confidential and should be treated as such

- If you are sharing information with a professional in order to prepare your case, you must make it clear that this information is confidential and not to be further distributed
- If you are sharing the information with a professional, he/she should be given all of the information
- The information should not be used in other litigation
- Use your discretion in sharing details with your client (for example, if a name or address is inadvertently disclosed, don't share this with your client)

Some tips on getting along with the Society

- Don't make unreasonable requests of the workers, such as "I am coming to your office in half an hour, have the file ready"
- If you treat the social workers as professionals, they will likely respond in kind
- Respect the fact that child protection workers often have to deal with unexpected crises and they may not be able to respond to you immediately
- If you are having trouble getting information from a worker, speak to the lawyer on the case
- If you think it would be helpful to your client or to the case as a whole, request a meeting with workers and lawyers
- Share information about your client in a timely manner—remember disclosure is a two-way street
- Don't advise your clients not to speak to the worker
- Don't advise your clients to never sign consents—if you want the Society to take into account that your client is attending counseling, a parenting group or whatever other supportive service, the Society needs to be able to verify and get information about their progress

- Don't treat the Society as "the enemy"

Part 4 - Third Party Disclosure - Parent's Perspective

A. General

- Key Rule is 19.11 – Family Law Rules.
- Test: Must be unfair to a party to go on with the case without the document.
- Must not be protected by legal privilege.
- Possible objections to disclosure are:
  - (a) Irrelevancy.
  - (b) Privilege.
  - (c) Privacy.
  - (d) Public Interest i.e. (Ongoing Criminal Investigation).
- You can't use third party disclosure as a fishing expedition.

  Franco v. White (2001) 53 O.R. (3d) 391 Ont. C.A.

B. Legal Privilege

- In assessing whether legal privilege applies determine if:

1) The communication originated in a confidence that it will not be disclosed.

2) Is the element of confidentiality essential to the relationship between the parties to the communication.

3) Is the relationship one, which is the opinion of the community ought to be fostered.

4) Do the interests served by the protection of the communication outweigh the benefits of full disclosure.

M.(A) v. Ryan (1997), 143 D.L.R (4^{th}) 1 (S.C.C.)

R. v. Mills (1999) 3 SCR 668.

Smith v. Smith [1997] S.J. No. 483.

° Solicitor-client privilege is a separate legal privilege which will be protected.

C. Additional Considerations the Court should address in determining Production of Third Party Records.

A) The importance of the documents in the litigation. Whether a non-production order would constitute a reasonable limit on the ability of the parties to meet the Society's case.

B) Is Production necessary at a preliminary stage or can it wait until trial?

C) The availability of the documents elsewhere.

D) The relationship of the third party to the litigation.

1) Attorney General v. Stavro (1995) 26. O.R. (3d) 39 (67).

2) Catholic Children's Aid Society of Toronto and D.W. (unreported) January 8/03. (Mr. Justice Nevins)

Section 278(5)(2) of the Criminal Code sets out useful criteria to determine production in the Criminal context which could be argued in Child Protection cases as follows:

(a) the extent to which the record is necessary to make a full answer and defence.

(b) the probative value of the records.

(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.

(h) The effect of the determination on the integrity of the trial process.

- The judge doesn't have to make a conclusive determination of each factor. While the enumerated factors are relevant, the trial judge is free to make whatever order is necessary in the interest of the children.
- Where the judge has ordered that production of the record is necessary, they shall then review the record in the absence of the parties in order to determine what if any part of the record should be produced and on what conditions. (s. 278.6, s. 278.7)

R v. Mills (supra).

D. Procedure if Objection

- Serve Motion and affidavit on every party.
- Also serve Third Party with motion and affidavit by special service.

- The affidavit should:
  - provide evidentiary basis that the requested documentation is important to the litigation. This can be done through evidence of parties, file disclosure, transcripts of examination.
  - Demonstrate that the information is necessary to prepare full answer to the society's case.
  - Demonstrate that the information is necessary at a preliminary stage to assess the case for either settlement or challenge.
  - Demonstrate that the public interest of full disclosure in a child protection case supercedes any privacy or public interest challenge against disclosure, so that it would be unfair to proceed to trial without it.
  - Set out conditions that would be agreed upon in order to respect privacy or public interest concerns. See s. 278.7(3) of Criminal Code for types of protections ordered in criminal cases.
- The motion may be argued or in some cases a Voir dire held to weigh competing interests.

In the recent case of Catholic Children's Aid Society of Toronto v. T.K. [2004] O.J. No. 61 (Ontario Court of Justice) Madam Justice Jones set out a procedure to determine how to deal with the disclosure of police records where there were 14 Banker boxes of material and charges had been laid. The steps were as follows:

1) Counsel for the police had to produce a detailed inventory of the contents of the boxes with sufficient detail to indicate whether the documents

referred to have information which she deemed to be relevant to the action such as medical reports, previous occurrence reports about the parents, information about the condition of the parent's home and information con-concerning the parenting skills and practices of the parents.

2) Counsel were then to meet and review the inventory and decide:

(a) Which documents were relevant and disclosable.

(b) Which documents were relevant, but which the Attorney General wished to exclude based on public policy considerations.

3) If counsel could not agree on relevance and discoverability based on the inventory alone, a copy of the document was to be provided for review by counsel, such copy not to be further copied and to be returned to the police in the event such document was subsequently held not to be disclosable.

4) Counsel were ordered not to disclose the contents of the file unless by agreement of the Attorney General or court order.

5) The list of documents agreed to be discoverable would be provided to the court and a consent disclosure order would be made.

6) A record of documents would be prepared where disclosure was sought but where there is no consent. Counsel were to make brief written submissions referring to each contested document, or category of documents, and provide reasons why it should or should not be disclosed.

This case is a useful model.

E. Helpful Principles

Police/Crown Records

° Criminal proceedings are not necessarily more important than Child Protection proceedings. Both proceedings are important and the law, both substantive and procedural; the Court has to strive to accommodate the goals and aims of each.

Children's Aid Society of Algona v. L.H. (1996) O.J. No. 1978 (Ontario Court of Justice) Kukarin J. (where Police ordered to produce file while there was an ongoing investigation).

° The future of the investigation which is in the possession of counsel for the Crown is not their property for securing a conviction but the property of the public to be used to ensure that justice is done. In child protection matters, the Court must ensure that justice is done. Counsel must receive full and fair access to relevant information. Children's Aid Society for the District of Sudbury and Manitoulin v. G.M. (1992) O.J. No. 181.

° The guarantee of fundamental justice in s. 7 of the Canadian Charter of Rights and Freedoms is applicable to child protection proceedings.

1) New Brunswick (Minister of Health and Community Services) v. G.(J) (J.G.) [1993] 3 S.L.R. 46 (Supreme Court of Canada).

2) Catholic Children's Aid Society of Toronto v. T.K. (supra).

° Statements given to the police during investigations are not privileged. Smerchanski v. Asta Securities Corporation Limited (1981) 31 O.R. (2d) 705 (Ontario Court of Appeal).

Note that:

° If a prosecution has started it is advisable to serve the Attorney General with the motion. Catholic Children's Aid Society of Toronto v. T.K. (supra).

2. Clinical Notes/Raw Data in Medical Reports

° Early Production of these documents can bring about settlement of actions and is to be encouraged.

1) Cook v. Ip et at (1986) 52 O.R. (2d) 289 (Ont. Ct. Appeal)

2) Cacic et. al. v. O'Connor et. al (1990) 71 O.R. (2d) 751 (H.C.J.).

° Civil courts have stated that privilege is waived if the Plaintiff intends to rely on the witness at trial. The Plaintiff who raises the issue cannot seek refuge underneath the umbrella of confidentiality. If a medical report is released to the Society, the data that supports it is likely relevant.

1) Mather v. Turnbull [1991] O.J. No. 73.

2) Fleming v. Laura Second Inc. [2000] O.J. No. 2116.

° Raw Data from clinical Psychologists has been ordered produced in civil cases on the basis that "findings" under Rule 31.06(3) of The Civil Rules of Procedure include this.

1) Cacic (Supra).

2) Mather (Supra).

3) Fleming (Supra).

4) Klein v. Leggieri Action #33309/88 (Toronto) May 13/91.

5) Allen v. Oulahen (1992) 10 O.R. (3d) 613.

° In The Children's Aid Society of Toronto and D.W. Mr. Justice Nevins ordered the production of raw data including the tests scores of a Psychologist who did a Parenting Capacity Assessment. The Psychologist argued that he had an ethical obligation to preserve the integrity of the psychological testing protocol and that the tests needed to be kept secret. He also argued that there were copyright concerns.

The Psychologist was prepared to release the results to another psychologist. After weighing the competing interests the court ordered the raw data and tests to be produced and applied the Stavro considerations set out above. The suggestion to release the information only to another psychologist was rejected. The court stated:

> "It's not just a question of counsel being able to get some other psychologist to interpret the answers or to perhaps come up with a different interpretation. Counsel actually needs the information herself to be able to review, first of all, the evidence, to digest it, to organize it, consider it, and if necessary, get expert advice on the questions and answers."

3. Other

- In Catholic Children's Aid Society of Toronto v. D.B. [2001] O.J. No. 5761) Madam Justice Jones released an assessment report done in the course of a protection case involving the mother's first child to the father who was not the parent of the first child. The judge concluded that inadmissibility is not the same as confidentiality. The information contained in the report could be useful for the father in preparing his case.

Conclusion

- Ultimately the court must weigh competing interests; the right to full disclosure to have a fair trial versus privacy or public interests. Evidence must be led to convince the court that the disclosure interest is paramount.

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PRE-TRIAL DISCLOSURE

CFSA

S. 74: Court-ordered access to records

(1) "Record" means recorded information, regardless of physical form or characteristics

(2) A Director or a society may at any time make a motion or an application for an order under subsection (3) or (3.1) for production of a record

(3) Where the court is satisfied that a record contains information that may be relevant to a proceeding under Part 3 and that the person in possession or control of the record has refused to permit it to be inspected, the court may make an order for production

(3.1) Where the court is satisfied that a record may be relevant to assessing compliance with an order under sections 51(2)(b) or (c), 51(2)(c) or (d), 57, 58, 65, or 80, and that the person in possession or control of the record has refused to permit it to be inspected, the court may make an order for production

(5) No person who obtains information by means of an order made under subsections (3) or (3.1) shall disclose the information except:

(a) as specified in the order, **and**

(b) in testimony in a proceeding under this Part

(7) Where a motion or application under subsection (2) concerns a record that is a clinical record within the meaning of s.35 of the Mental Health Act, subsection 35(6) of that Act applies, and the court shall give equal consideration to:

(a) the matters to be considered under subsection 35(7) of that Act, **and**

(b) the need to protect the child

(8) Where a motion or application under subsection (2) concerns a record that is a record of a mental disorder within the meaning of s. 183, that section applies, and the court shall give equal consideration to:

(a) the matters to be considered under subsection 183(6), **and**

(b) the need to protect the child

S. 74.1: (1) The court may issue a warrant for access to a record if reasonable grounds to believe that the record is relevant to investigate an allegation that a child is or may be in need of protection

(2) The warrant authorized the Director or the person designated by the Society to:

(a) inspect the record during normal business hours or during the hours specified in the warrant

(b) make copies from the record in any manner that does not damage it, **and**

(c) remove the record for the purpose of making copies

(6) The Director or person designated by the society may call on a peace officer for assistance in executing the warrant

S. 74.2: (1) Where it would be impracticable to appear personally before the court or a justice of the peace to make application for a warrant in accordance with s.74.1, an information may be submitted on oath by telephone or other means of telecommunication

(2) The information shall:
(a) include a statement of the grounds to believe that the record is relevant to investigate an allegation that a child is or may be in need of protection, **and**
(b) set out the circumstances that make it impracticable for appearing personally

[s. 36.3, *CFSA Regulation 70*:
(1) To apply for a warrant under s.74.2 of the Act, a Director or a person designated by a society may, instead of submitting to the justice an information on oath, submit to the justice by facsimile transmission an information that is not on oath but that includes a written statement, signed by the Director or the person designated by the society, stating that all matters contained in the information are true to his or her knowledge and belief

(2) A written statement described in subsection (1) shall be deemed to be a statement made under oath]

(4) A warrant issued under this section is not subject to challenge by reason only that there were not reasonable grounds to dispense with personal appearance

(g) Subsections 74.1(2) to (9) apply with necessary modifications with respect to a warrant issued under this section

S. 183: Disclosure of records of mental disorders
(1) "Record of a mental disorder" – definition

(2) A service provider shall disclose, etc. a record of a mental disorder pursuant to an order etc. in respect of a matter in issue, unless a physician states in writing that to do so is likely to result in harm to:
(a) the treatment/recovery of the person to whom the record relates
(b)(1) injury to the mental condition of another person **or**
(b)(ii) bodily harm to another person

(4) A motion under subsection (3) shall be on notice to the physician

(5) The court shall consider whether or not the disclosure of the record is likely to have a result described in clause (2)(a) or (b) and for the purpose the court may examine the record

(6) The court shall not order disclosure of the record if satisfied that a result described in clause (2)(a) is likely, unless satisfied that to do so is essential in the interests of justice

Family Law Rules

19: Document disclosure

(1) Every party shall within 10 days after another party's request, give the other party an affidavit listing every document that is:

(a) relevant to any issue in the case, **and**

(b) in the party's control, or available to the party on request

(2) The other party is entitled, on request,

(a) to examine any document listed in the affidavit, unless it is protected by a legal privilege; **and**

(b) to receive, at the party's own expense at the legal aid rate, a copy of any document that the party is entitled to examine under clause (a)

(3) Subrule (2) also applies to a document mentioned in a party's application, answer, reply, notice of motion or affidavit

(4) If a party claims that a document is protected by legal privilege, the court may, on motion, examine it and decide the issue

(11) If a document is in a non-party's control, or is only available to the non-party, and it would be unfair to a party to go on with the case without the document, the court may, on motion:

(a) order the non-party to let the party examine the document and to supply the party with a copy; **and**

(b) order that a copy be prepared and used for all purposes of the case instead of the original

20: Questioning a witness and disclosure

(1) Questioning under this rule shall take place orally under oath or affirmation

(2) The right to question a person includes the right to cross-examine

(3) In a *child protection case*, a party is entitled to obtain information from another party about any issue in the case,

(a) y questioning the other party (shall serve other party with a summons to witness by special service; or

(b) by affidavit or by another method (shall serve other party with a request for information)

(5) The court may, on motion, order that a person (whether a party or not) be questioned by a party or disclose information by affidavit or by another method about any issue in the case, if:

1. it would be unfair to the party who wants the questioning or disclosure to carry on with the case without it
2. the information is not easily available by any other method
3. the questioning or disclosure will not cause unacceptable delay or undue expense.

(7) The court may make an order under subrule (5) that a person be questioned or disclose details about information in an affidavit

(9) The court may make an order under this rule affecting a non-party only if the non-party has been served with the notice of motion, a summons to witness, and the witness fee required by subrule 23(4), all by special service

(13) The parties shall, not later than three days before the questioning, be served with notice of the name of the person to be questioned and the address, date and time of the questioning

(16) An order for questioning and a summons to witness may also require the person to bring any document or thing that is:
- (a) relevant to the case, **and**
- (b) in the person's control or available to the person on request

(18) A person to be questioned may be asked about:
- (a) names of persons who might reasonably be expected to know about the claims in the case and, with the court's permission, their addresses
- (b) names of the witnesses whom a party intends to call at trial and, with the court's permission, their addresses
- (c) names, addresses, findings, conclusions and opinions of expert witnesses whom a party intends to call or on whose reports the party intends to rely at trial

....

- (e) any other matter in dispute in the case

(19) If a person being questioned refuses to answer a question,
- (a) the court may, on motion:
  - (i) decide whether the question is proper
  - (ii) give direction s for the person's return to the questioning, **and**
  - (iii) make a contempt order against the person; **and**
- (b) if the person is a party or is questioned on behalf or in place of a party, the party shall not use the information that was refused as evidence in the case, unless the court gives permission under subrule (20)

(20) The court shall give permission unless the use of the information would cause harm to another party or an unacceptable delay in the trial, and may impose any appropriate conditions on the permission, including an adjournment if necessary

(25) Evidence and any information obtained from it may be used for other purposes:
- (a) if the person who gave evidence consents
- (b) if the evidence is files with the court, given at a hearing, or referred to at a hearing
- (c) to impeach the testimony of a witness in another case, **or**
- (d) in a later case between the same parties, if the case in which the evidence was obtained was withdrawn or dismissed.

22: Admission of facts

(1) An admission that a document is genuine is an admission

(a) if the document is said to be an original, that it was written, signed or sealed as it appears to have been

(b) if it is said to be a copy, that it is a complete and accurate copy, **and**

(c) if it is said to be a copy of a document that is ordinarily sent from one person to another (e.g. letter, fax, electronic message), that it was sent as it appears to have been sent and was received by the person to whom it is addressed

(2) At any time, by serving a request to admit on another party, a party may ask the other party to admit, for purposes of the case, only, that a fact is true or that a document is genuine

(3) A copy of any document mentioned in the request to admit shall be attached to it, unless the other party already has a copy or it is impractical to attach a copy

(4) The party on whom the request to admit is served is considered to have admitted, for purposes of the case only, that the fact is true or that the document is genuine, unless the party serves a response within 20 days

(a) denying that a particular fact mentioned in the request is true or that a particular document mentioned in the request is genuine, **or**

(b) refusing to admit that a particular fact mentioned in the request is true or that a particular document mentioned in the request is genuine, and given the reasons for each refusal

(5) An admission that a fact is true or that a document is genuine (whether contained in a document served in the case or resulting from subrule (4)), may be withdrawn only with the other party's consent or with the court's permission

23: Evidence and trial

(1) At least 30 days before the start of a trial, the applicant shall serve and file a trial record containing a table of contents and the following documents:

1. The application, answer, and reply, if any
2. Any agreed statement of facts

....

4. Any assessment report ordered by the court or obtained by consent of the parties
5. Any temporary order relating to a matter still in dispute
6. Any order relating to the trial
7. The relevant parts of any transcript on which the party intends to rely at trial
8. Any expert report on which the party intends to rely at trial

(2) Not later than 7 days before the start of the trial, a respondent may serve, file and add to the trial record any document referred to in subrule (1) that is not already in the trial record

(18) The court may order that a witness whose evidence is necessary at trial may give evidence before trial at a place and before a person named in the order, and then may accept the transcript as evidence

(20) The court may allow a witness to give evidence at trial by affidavit or electronic recording if:
    (a) the parties consent
    (b) the witness is ill or unavailable to come to court for some other good reason
    (c) the evidence concern minor or uncontroversial issues, **or**
    (d) it is in the interests of justice to do so

(21) Evidence at trial by affidavit ro electronic recording may be used only if:
    (a) the use is in accordance with an order under subrule (20)
    (b) the evidence is served at least 30 days before the start of the trial, **and**
    (c) the evidence would have been admissible if given by the witness in court

(22) At an uncontested trial, evidence by affidavit my be used without an order under subrule (20), unless the court directs that oral evidence must be given

(23) A party who want to call an expert witness at trial shall, at least 14 days before the start of the trial, serve on all other parties and file a report that:
    (a) is signed by the expert
    (b) sets out the expert's name, address and qualifications, **and**
    (c) summarized the expert's proposed evidence

(24) A party who has not followed subrule (23) may not call the expert witness unless the trial judge allows otherwise

PRODUCTION OF RECORD TO ACCUSED / Application of provisions / Duty of prosecutor to give notice.

278.2 (1) No record relating to a complainant or a witness shall be produced to an accused in any proceedings in respect of

(*a*) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272 or 273,

(*b*) an offence under section 144, 145, 149, 156, 245 or 246 of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(*c*) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,

or in any proceedings in respect of two or more offences that include an offence referred to in any of paragraphs (*a*) to (*c*), except in accordance with sections 278.3 to 278.91.

(2) Section 278.1, this section and sections 278.3 to 278.91 apply where a record is in the possession or control of any person, including the prosecutor in the proceedings, unless, in the case of a record in the possession or control of the prosecutor, the complainant or witness to whom the record relates has expressly waived the application of those sections.

(3) In the case of a record in respect of which this section applies that is in the possession or control of the prosecutor, the prosecutor shall notify the accused that the record is in the prosecutor's possession but, in doing so, the prosecutor shall not disclose the record's contents. 1997, c. 30, s. 1; 1998, c. 9, s. 3.

APPLICATION FOR PRODUCTION / No application in other proceedings / Form and content of application / Insufficient grounds / Service of application and subpoena / Service on other persons.

278.3 (1) An accused who seeks production of a record referred to in subsection 278.2(1) must make an application to the judge before whom the accused is to be, or is being, tried.

(2) For greater certainty, an application under subsection (1) may not be made to a judge or justice presiding at any other proceedings, including a preliminary inquiry.

(3) An application must be made in writing and set out

(*a*) particulars identifying the record that the accused seeks to have produced and the name of the person who has possession or control of the record; and

(*b*) the grounds on which the accused relies to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify.

(4) Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify:

(*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 psy chiatric treatment, therapy or counselling;

(*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 complain ant'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.

(5) The accused shall serve the application on the prosecutor, on the person who has possession or control of the record, on the complainant or witness, as the case may be, and on any other person to whom, to the knowledge of the accused, the record relates, at least seven days before the hearing referred to in subsection 278.4(1) or any shorter interval that the judge may allow in the interests of justice. The accused shall also serve a subpoena issued under Part XXII in Form 16.1 on the person who has possession or control of the record at the same time as the application is served.

(6) The judge may at any time order that the application be served on any person to whom the judge considers the record may relate. 1997, c. 30, s. 1.

HEARING *IN CAMERA* / Persons who may appear at hearing / Costs.

278.4 (1) The judge shall hold a hearing *in camera* to determine whether to order the person who has possession or control of the record to produce it to the court for review by the judge.

(2) The person who has possession or control of the record, the complainant or witness, as the case may be, and any other person to whom the record relates may appear and make submissions at the hearing, but they are not compellable as witnesses at the hearing.

(3) No order for costs may be made against a person referred to in subsection (2) in respect of their participation in the hearing. 1997, c. 30, s. 1.

JUDGE MAY ORDER PRODUCTION OF RECORD FOR REVIEW / Factors to be considered.

278.5 (1) The judge may order the person who has possession or control of the record to produce the record or part of the record to the court for review by the judge if, after the hearing referred to in subsection 278.4(1), the judge is satisfied that

(*a*) the application was made in accordance with subsections 278.3(2) to (6);
(*b*) the accused has established that the record is likely relevant to an issue at trial or to the competence of a witness to testify; and
(*c*) the production of the record is necessary in the interests of justice.

(2) In determining whether to order the production of the record or part of the record for review pursuant to subsection (1), the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy and equality of the complainant or witness, as the case may be, and any other person to whom the record relates. In particular, the judge shall take the following factors into account:

(*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. 1997, c. 30, s. 1.

REVIEW OF RECORD BY JUDGE / Hearing *in camera* / Provision re hearing.

278.6 (1) Where the judge has ordered the production of the record or part of the record for review, the judge shall review it in the absence of the parties in order to determine whether the record or part of the record should be produced to the accused.

(2) The judge may hold a hearing *in camera* if the judge considers that it will assist in making the determination.

(3) Subsections 278.4(2) and (3) apply in the case of a hearing under subsection (2). 1997, c. 30, s. 1.

JUDGE MAY ORDER PRODUCTION OF RECORD TO ACCUSED / Factors to be considered / Conditions on production / Copy to prosecutor / Record not to be used in other proceedings / Retention of record by court.

278.7 (1) Where the judge is satisfied that the record or part of the record is likely relevant to an issue at trial or to the competence of a witness to testify and its production is necessary in the interests of justice, the judge may order that the record or part of the record that is likely relevant be produced to the accused, subject to any conditions that may be imposed pursuant to subsection (3).

(2) In determining whether to order the production of the record or part of the record to the accused, the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy and equality of the complainant or witness, as the case may be, and any other person to whom the record relates and, in particular, shall take the factors specified in paragraphs 278.5(2)(*a*) to (*h*) into account.

(3) Where the judge orders the production of the record or part of the record to the accused, the judge may impose conditions on the production to protect the interests of justice and, to the greatest extent possible, the privacy and equality interests of the complainant or witness, as the case may be, and any other person to whom the record relates, including, for example, the following conditions:

(*a*) that the record be edited as directed by the judge;
(*b*) that a copy of the record, rather than the original, be produced;
(*c*) that the accused and counsel for the accused not disclose the contents of the record to any other person, except with the approval of the court;
(*d*) that the record be viewed only at the offices of the court;

(*e*) that no copies of the record be made or that restrictions be imposed on the number of copies of the record that may be made; and

(*f*) that information regarding any person named in the record, such as the address, telephone number and place of employ ment, be severed from the record.

(4) Where the judge orders the production of the record or part of the record to the accused, the judge shall direct that a copy of the record or part of the record be provided to the prosecutor, unless the judge determines that it is not in the interests of justice to do so.

(5) The record or part of the record that is produced to the accused pursuant to an order under subsection (1) shall not be used in any other proceedings.

(6) Where the judge refuses to order the production of the record or part of the record to the accused, the record or part of the record shall, unless a court orders otherwise, be kept in a sealed package by the court until the later of the expiration of the time for any appeal and the completion of any appeal in the proceedings against the accused, whereupon the record or part of the record shall be returned to the person lawfully entitled to possession or control of it. 1997, c. 30, s. 1.

REASONS FOR DECISION / Record of reasons.

278.8 (1) The judge shall provide reasons for ordering or refusing to order the production of the record or part of the record pursuant to subsection 278.5(1) or 278.7(1).

(2) The reasons referred to in subsection (1) shall be entered in the record of the proceedings or, where the proceedings are not recorded, shall be provided in writing. 1997, c. 30, s. 1.

PUBLICATION PROHIBITED / Offence.

278.9 (1) No person shall publish in a newspaper, as defined in section 297, or in a broadcast, any of the following:

(*a*) the contents of an application made under section 278.3;

(*b*) any evidence taken, information given or submissions made at a hearing under subsection 278.4(1) or 278.6(2); or

(*c*) the determination of the judge pursuant to subsection 278.5(1) or 278.7(1) and the reasons provided pursuant to section 278.8, unless the judge, after taking into account the interests of justice and the right to privacy of the person to whom the record relates, orders that the determination may be published.

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction. 1997, c. 30, s. 1.

APPEAL.

278.91 For the purposes of sections 675 and 676, a determination to make or refuse to make an order pursuant to subsection 278.5(1) or 278.7(1) is deemed to be a question of law. 1997, c. 30, s. 1.

Kidnapping, Hostage Taking and Abduction

KIDNAPPING / Punishment / Forcible confinement / Non-resistance.

279. (1) Every person commits an offence who kidnaps a person with intent

(a) to cause the person to be confined or imprisoned against the person's will;

(b) to cause the person to be unlawfully sent or transported out of Canada against the person's will; or

(c) to hold the person for ransom or to service against the person's will.

(1.1) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

(2) Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

(3) In proceedings under this section, the fact that the person in relation to whom the offence is alleged to have been committed did not resist is not a defence unless the accused proves that the failure to resist was not caused by threats, duress, force or exhibition of force. R.S., c. C-34, s. 247; R.S.C. 1985, c. 27 (1st Supp.), s. 39; 1995, c. 39, s. 147; 1997, c. 18, s. 14.