



**Law Society**  
of Ontario

**Barreau**  
de l'Ontario

**TAB 12**

# **The Six-Minute Criminal Court Judge 2020**

§ 276 CCC / Darrach Application Checklist and Decision Tree

**The Honourable Andrea Tuck-Jackson**  
*Ontario Court of Justice*

January 25, 2020



## § 276 CCC / Darrach Application Checklist

### Preparatory / Case Management Phase

- Initial Consideration:
  - consider **whether application is, in law, required:**
    - \* confirm that accused *is* charged with an offence enumerated in § 276 CCC or that the proceeding *implicates*, as contemplated in *R. v. Barton*, 2019 SCC 33, one of the enumerated offences
    - \* confirm that the evidence relates to “sexual activity”, as contemplated by § 276(2) CCC
    - \* confirm that evidence sought to be adduced falls *outside* of the scope of “sexual activity that forms the subject matter of the charge”, as contemplated by § 276(2) CCC
  - identify **material** issue to which the evidence will be relevant
  - consider whether evidence will, indeed, be **probative** of that issue
  - identify **evidentiary foundation** for the application: sourced to the accused, disclosure material, third party records, etc. *N.B.* The complainant is NOT a compellable witness at the application (§ 278.94(2) CCC).
  - consider any **strategic disadvantage(s)** to bringing the application
- Crown Pre-Trial / Judicial Pre-Trial:
  - **advise** that application is contemplated
  - confirm **Crown’s position as to the scope of “sexual activity that forms the subject matter of the charge”**, as contemplated by § 276(2) CCC.
  - confirm **whether the Crown will apply** to admit other sexual activity
  - **work out a timeline** (relative to the start date of the preliminary inquiry or trial) for each phase of the application
- Proceeding Preparation:
  - **prepare materials** for application:
    - \* ensure that content of the *Notice of Application* meets the requirements of § 278.93(2) CCC
    - \* ensure that the enumerated grounds track the relevant legal test

\* have someone commission the affidavit(s)

\* highlight/sidebar relevant passages in case law

- **obtain contact information** for counsel acting on behalf of the complainant/witness
- **serve** materials on the assigned Crown and counsel for the complainant/witness, **and file** them with the court, **in accordance with the timelines** specified in the relevant court rules and/or local practices (or as agreed upon at the JPT)
- **speak with** the assigned **Crown and counsel for the complainant** with a view to (1) confirming their position; and, as appropriate, (2) narrowing down the issues to be litigated at the application
- confirm **whether the affiant** will be **cross-examined** on the affidavit
- **prepare affiant** for cross-examination

### Proceeding Phase I: Should a Hearing Be Convened

- tender any *Application Record*, affidavit, etc. to be marked as an exhibit
- Convey defence position as to the *merits* of the *allegation* in order that judge has an analytical frame of reference for the application:
  - sexual activity (may have) occurred, but not with the accused
  - any interaction between the complainant and the accused did not involve sexual activity
  - sexual activity between the complainant and the accused occurred and it was consensual
  - sexual activity between the complainant and the accused occurred and the accused (mistakenly) believed it to be consensual
- as appropriate, convey position regarding the legal applicability of § 276 CCC in the circumstances of the case
- convey position as to why a hearing under § 278.94 CCC should be convened

### Proceeding Phase II: Admissibility of Evidence

- confirm, as appropriate, that exhibits filed at Phase I are to apply at the hearing at Phase II.
  - tender any additional affidavit, etc. to be marked as an exhibit.

- call any testimonial evidence / make affiant available for cross-examination
- as appropriate, convey position regarding the legal applicability of § 276 CCC in the circumstances of the case
- convey position as to why evidence sought to be adduced is admissible under § 278.92(a) / § 276(2) CCC
- seek any necessary clarification re scope/wording of permissible questions

