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The Production and Admission of Complainants' Records Under The *Criminal Code*

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Superior Court of Justice (North Bay)

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THE PRODUCTION AND ADMISSION OF COMPLAINANTS' RECORDS UNDER THE *CRIMINAL CODE*

SUPERIOR COURT OF JUSTICE

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I. Overview

Bill C-51 made numerous changes to the *Criminal Code*, R.S.C. 1985, c. C-46, regarding the production and admission of evidence relating to the complainant in the prosecution of sexual offences. The changes came into effect on December 13, 2018. They include:

- a new definition of "sexual activity", which now includes communications made for a sexual purpose or whose content is of a sexual nature;
- a new timeline for s. 278.3 ("*Mills*") applications requiring that such applications be served at least 60 days before the hearing, instead of 14 days (s. 278.3(5));
- a new regime to determine the admissibility of a complainant's private records in the possession of the defence (s. 278.92) and of evidence of a complainant's sexual activity (ss. 278.93 and 278.94); and
- a new right on the part of the complainant to participate in the hearing to determine the admissibility of evidence of both sexual activity and private records (ss. 278.94(2) and 278.94(3)).

This paper discusses these changes. The paper began as a bench memo prepared for judges of the Northeast region. It was later updated to include recent cases, a summary of which is found at the end of the paper. It was then edited for inclusion in the materials produced for the Law Society of Ontario's "The Six-minute Criminal Court Judge 2020" program.

The paper is not intended to be a treatise. Rather, its purpose is to highlight some of the issues arising out of the recent changes and to canvas some of the ways in which these issues are being dealt with by the courts.

II. Production of Private Records under s. 278.3

Sections 278.1 to 278.9 of the *Criminal Code* (the "production provisions") were enacted following the decision of the Supreme Court of Canada in *R. v. O'Connor*, [1995] 4 S.C.R. 411. In *O'Connor*, the Supreme Court devised a Charter-compliant common law process to govern requests by an accused for the production of records containing personal information about complainants from third parties ("private records").

The constitutionality of the production provisions was upheld in *R. v. Mills*, [1999] 3 S.C.R. 668. For this reason, applications for production of a complainant's private records are often referred to as "*Mills* applications".

Mills applications relate to records as that term is defined in s. 278.1 of *Criminal Code*. Bill C-51 made no changes to the definition, except to remove the words "without limiting the generality of the foregoing" after the word "includes", such that the section now reads:

> 278.1 For the purposes of sections 278.2 to 278.92, record means any form of 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, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

By virtue of s. 278.1, this definition also applies to the admissibility provisions of s. 278.92.

The jurisprudence indicates that, for the purposes of production, courts will give the definition of "record" in s. 278.1 an expansive one and will interpret the exceptions to that definition narrowly. See, for e.g., *R. v. Blakley*, 2019 ONSC 5754. Early indications are that the courts may be willing to give the definition a less expansive meaning when it comes to admission: *R. v. Mai*, 2019 ONSC 6691; *R. v. W.M*, 2019 ONSC 6535.

The only significant change regarding *Mills* applications relates to the time for service of the application. Section 278.3(5) now requires that applications for access to records held by a third party must be served **at least 60 days** before the hearing, rather than the 14 days previously required.

Production to the Judge

The production provisions contemplate a two-stage process.

In *Mills*, McLachlin J. explained that, "at the first stage, the issue is whether the document should be produced to the judge. If that stage is passed, the judge looks at the document to determine whether it should be produced to the accused. Section 278.5 establishes the procedure for production to the judge at the first stage": at para. 122.

Pursuant to s. 278.4(2), the complainant and the record keeper have the right to appear and to make submissions at the hearing to determine whether the records should be produced for the judge's review. Section 276.4(2.1) provides that they also have the right to be represented by counsel and to be advised of that right by the judge "as soon as feasible".

Pursuant to s. 278.5(1), before a judge can order the production of private records for his[1] review alone, the accused must satisfy the court that:

(i) he has met the technical requirements of ss. 278.3(2) to 278.3(6);
(ii) the record is likely relevant to an issue at trial or to the competence of a witness to testify; and that
(iii) production of the record is necessary in the interests of justice.

(i) Technical Requirements

[1] For the sake of convenience, this paper will use the masculine tense to refer to both the judge and the accused, and the feminine tense to refer to the complainant. Sadly, these tenses are probably apt when it comes to the accused and the complainant in most cases.

Sections 278.3(2) to 278.3(6) require that the application must:

(i) be in writing;
(ii) identify the record that the accused seeks to have produced and names the person who has possession or control of the record;
(iii) contain the grounds on which the accused relies to establish that the record is likely relevant to an issue at trial or the competence of a witness to testify; and
(iv) be served on the prosecutor, the person who has possession or control of the record, the complainant or witness, and on any other person to whom, to the knowledge of the accused, the record relates, at least 60 days before the hearing.

In addition, the accused must serve a subpoena *duces tecum* on the party who has possession or control of the record at the same time as the application is served.

(ii) Likely Relevance

In *O'Connor*, the Supreme Court defined the standard of likely relevance as "a reasonable possibility that the information is logically probative to *an issue at trial or the competence of a witness to testify*": at para. 22; *Mills*, at para. 124 (emphasis in original). Relevance to an issue at trial refers "not only to evidence that may be probative to the material issues in the case (i.e. the unfolding of events), but also to evidence relating to the credibility of witnesses and to the reliability of other evidence in the case": *O'Connor*, at para. 22.

The accused bears the onus of establishing the likely relevance of the disclosure at issue and cannot rely on speculative assertions or stereotypical assumptions for that purpose: *R. v. Batte* (2000), 49 O.R. (3d) 321 (ONCA), at para. 53. This is a higher burden than in the context of Crown disclosure where relevance is met if the documents "may be useful to the defence": *Mills*, at para. 45. While the likely relevance threshold is significant, it should not be overly onerous: *Batte*, at para. 65.

Section 278.3(4) lists assertions that are insufficient, on their own, to establish likely relevance. Specifically, these assertions are:

(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;
(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.

In upholding the constitutionality of s. 278.3, the majority of the Supreme Court in *Mills* held, at para. 120, that:

> The purpose and wording of s. 278.3 do not prevent an accused from relying on the assertions set out in s. 278.3(4) where there is an evidentiary or informational foundation to suggest that they may be related to likely relevance… The section requires only that the accused be able to point to *case specific evidence or information* to show that the record in issue is likely relevant to an issue at trial or the competence of a witness to testify… [Emphasis added.]

The need for case-specific evidence or information was explained by the Ontario Court of Appeal in *Batte*, where Doherty J.A., wrote for the court, at para. 75:

> In my view, an accused must be able to point to something in the record adduced on the motion that suggests that the records contain *information which is not readily available to the defence or has potential impeachment value*. [Emphasis added.]

The court in *Batte* was careful to point out that the need to show that the records may contain new information or have potential impeachment value did not raise the bar set by the Supreme Court in *O'Connor*.

(iii) Necessary in the Interests of Justice

In addition to establishing that the disclosure is likely relevant, the accused must also satisfy the court that production to the judge alone is necessary in the interests of justice.

Section 278.5(2) sets out a number of factors to be considered by the judge in deciding whether the record(s) should be produced for his review. In *Mills*, at para. 134, McLachlin J. highlighted that s. 278.5(2) "serves as a check-list of the various factors that may come into play in making the decision regarding production to the judge." These factors include:

(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.

The majority in *Mills* held that, while these factors are relevant, "in the final analysis the judge is free to make whatever order is 'necessary in the interests of justice' — a mandate that includes all of the applicable principles of fundamental justice at stake": at para. 134. At para. 138, McLachlin J. explained:

> [T]he trial judge is merely directed to "consider" and "take into account" the factors and rights listed. Where the record sought can be established as "likely relevant", the judge must consider the rights and interests of all those affected by production and decide whether it is necessary in the interests of justice that he or she take the next step of viewing the documents. If in doubt, the interests of justice require that the judge take that step.

Notably, the majority held that "[w]here the privacy right in a record is strong and the record is of low probative value or relates to a peripheral issue, the judge might decide that non-disclosure will not prejudice the accused's right to full answer and defence and dismiss the application for production": *Mills*, at para. 131. On the other hand, " [i]f a record is established to be 'likely relevant' and, after considering the various factors, the judge is left uncertain about whether its production is necessary to make full answer and defence, then the judge should rule in favour of inspecting the document": at para. 132. Where there is a danger that the accused's right to make full answer and defence will be violated, the trial judge should err on the side of production to the court: at para. 137.

Production to the Accused

Once the first hurdle is passed and the records are produced to the judge, the judge must determine whether it is in the interests of justice that they be produced to the accused. Again, the judge must be satisfied that the records are "likely relevant" and that production, this time to the accused, is necessary in the interests of justice: *Criminal Code*, s. 278.7. In making this decision, the judge must, once again, consider the factors set out in s. 278.5(2).

Under s. 278.6(2), a judge may hold a hearing *in camera* after the records have been produced for his review, in order to determine whether to produce some or all of the records to the accused. Section 276.6(3) provides that the complainant and the record keeper have the same rights of appearance at this hearing as they do at the hearing to determine whether the records should be produced to the court. However, the fact that the records have not yet been produced to the accused or the Crown at this stage presents a problem. The defence and the Crown cannot make fulsome submissions with respect to the contents of the records without seeing them. However, is it likely that neither the complainant nor the record keeper can make fulsome submissions without revealing the contents of those records. For this reason, the court may decide to exclude the Crown and the defence from the hearing: *R. v. C.F.*, 2019 ONSC 3606. However, where possible, the better practice may be to have a summary of the documents prepared and provided to the Crown and the defence (see the discussion below regarding the

procedure adopted by the courts in *R. v. W.M.*, 2019 ONSC 6535 and *R. v. Mai*, 2019 ONSC 6691.

If the judge decides that some or all of the private records should be produced to the accused, s. 278.7(3) provides a non-exhaustive list of ways to protect the privacy interests of the complainant as much as possible: see, for e.g. *R. v. C.F.*, 2019 ONSC 1029. Section 278.9 prohibits publication of the contents of the application and the evidence taken on the application. It also prohibits publication of the judge's reasons, unless the judge orders otherwise. This prohibition may explain the dearth of case law with respect to some of the issues arising under the production provisions.

III. Admission of Private Records of the Complainant in the Possession or Control of the Defence under s. 278.92

Bill C-51 enacted an entirely new regime with respect to the admission of private records of the complainant in the possession of the defence. The regime begins with a blanket prohibition against the admission of such records. Section 278.92 prohibits the use of private records of a complainant in a trial for a listed offence unless leave of the court is granted. The list of offences is similar to the list of offences set out in s. 276(1), which has been interpreted broadly: *R. v. Barton*, 2019 SCC 33.

An application under s. 278.92 is required even if the defence came into possession of the private records as a result of a production order made under s. 278.7(1): *R. v. Boyle*, 2019 ONCJ 226, at para. 40.

Sections 278.93 and 278.94 ("the admission provisions") create a process which applies both to applications to admit personal records and to applications to admit evidence of prior sexual activity. However, as discussed below, both issues can arise at once.

Applicability of s. 278.92

As mentioned earlier, the definition of "record" is the same for both the production provisions and the admission provisions: s. 278.1. Under s. 278.1, a record includes “any form of record that contains personal information for which there is a reasonable expectation of privacy”. This definition has the potential to encompass a wide variety of records, including text messages, social media messages, photographs and videos: *R. v. Marakeh*, 2017 SCC 59; *R. v. W.M.*; *R. v. Mai*: *R. v. J.M.*, 2019 ONSC 5747; *R. v. Lennox*, 2019 ONSC 3844.

The admission provisions apply regardless of whether the record in question was produced to the accused under s. 278.7, or was already in his possession. However, where the record was not produced to the accused under the production provisions, interesting issues can arise where there is uncertainty as to whether a record fits within the definition of that term in s. 278.1 and, therefore, whether the admission provisions apply. This can only occur with respect to records

that are not specifically mentioned in s. 278.1 (such as medical or therapeutic records) where the test is whether there is a reasonable expectation of privacy. Frequently, these records take the form of electronic communications, in which case the question may also be whether the communication was made for a sexual purpose or is of a sexual nature, so as to fit within the definition of "sexual activity" set out in s. 276(4), and therefore bring the admission provisions into play for that reason.

Where an issue arises as to the applicability of the admission provisions, courts have held that an accused may bring a motion for directions: *W.M.* One of the issues that arises in such a motion is whether the complainant has standing at that point. Although the complainant has no statutory right to participate in the motion, in *R. v. Mai*, the court granted the complainant intervenor status.

In cases where the defence seeks a ruling on the applicability of the admission provisions with respect to private records, issues similar to those arising where the judge conducts a hearing under s. 278.6(2) (see the discussion above) may also arise. The conundrum is how to provide sufficient information to the Crown (and, potentially, the complainant) without revealing too much of the private record. As the court pointed out in *W.M.*, the accused is not required to provide disclosure to the Crown and doing so may have significantly negative consequences on his defence: at para. 22. In the cases decided so far, the courts have received the defence documents for their own review, in the same way the court receives documents for its review under s. 278.5 of the production provisions. In *W.M.*, the court then provided a judicial summary of the records. In *Mai*, the summary was provided by the accused. In each case, the parties were able to participate in the motion.

For a thorough discussion on the analytical framework to apply to the question of whether the complainant had a reasonable expectation of privacy in electronic communications, see the decision of G. Roberts J. in *Mai*, which borrows and builds on the work of Davies J. in *W.M.*

While the admission provisions apply both to private records and to evidence of sexual activity, the two are not necessarily discrete from one another. As pointed out above, there can be overlap where the record relates to sexual activity. Where that occurs, there is no need to engage in a determination of the privacy expectations of the complainant. For a helpful approach, see *Mai*, at para. 20.

Finally, it should be noted that the admission provisions apply regardless of whether or not the defence seeks to admit into evidence the physical record it has in its possession, or simply to cross-examine the complainant on the contents of the record: *R. v. Boyle*, 2019 ONCJ 226.

Procedures for the hearing under s. 278.94

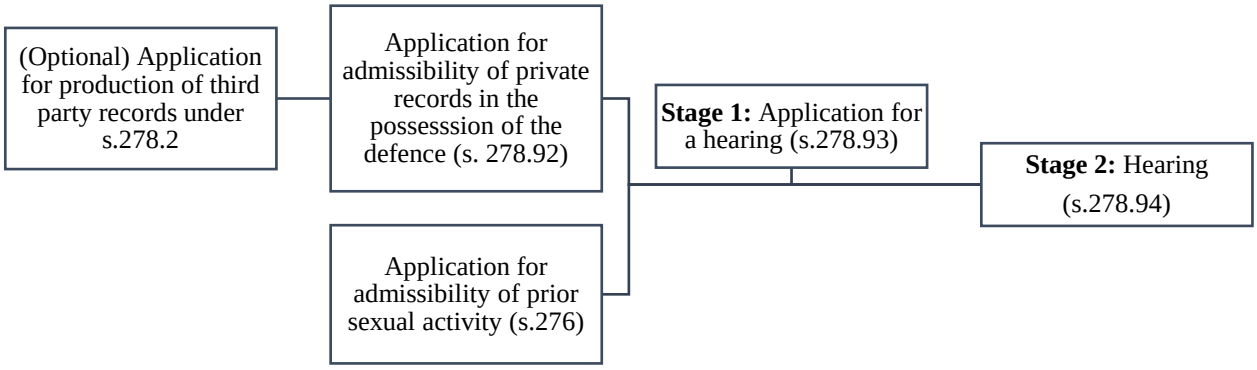
Once it has been determined that the admission provisions apply to the record in question, the court must then determine whether to conduct a hearing ("an admission hearing"). Like the production provisions, the accused must satisfy certain statutory requirements before the court

will convene an admission hearing. However, unlike the production provisions, the statutory requirements that must be met before the court will convene an admission hearing include a threshold assessment of the merits of the application.

Similar to the production provisions, there are two stages to the admission process:

1. a written application for a hearing; and, if the statutory requirements are met,
2. a hearing.

The following chart illustrates the process:



Stage 1: Statutory Requirements of the Application

The accused must make an application in writing for a hearing under ss. 276 or 278.92. Once an application is brought, the court must decide if the application meets the standard set out in s.278.93(4). If so, the matter will proceed to stage 2 and the court will hold a hearing.

For the application to meet the statutory requirements, the following conditions must be met (s. 278.93(4)):

- the application must be in writing;
- the application must contain detailed particulars of the evidence that the accused seeks to adduce;
- the applicant must show the relevance of that evidence to an issue at trial;
- the application must be served to the prosecutor and the court clerk **at least seven days** before the hearing, unless a shorter interval is allowed by a judge; and
- the evidence sought to be adduced must be capable of being admissible under s.276(2) (the "threshold test").

The threshold test under s. 278.93(4) entails only a facial consideration of the matter and a tentative decision concerning the admissibility of the evidence. Courts should be cautious in limiting the defendant's right to cross-examine and adduce evidence. Unless the evidence clearly

appears to be incapable of admissibility, having regarding to the statutory criteria, the court should proceed to the second stage and hold a hearing under s.278.94*: R. v. Ecker* (1995), 96 C.C.C. (3d) 161 (Sask. C.A.); see also *R. v. Barakat*, 2019 CarswellOnt 1822 (Ont. C.J.), at para. 18.

There is controversy in the case law about the complainant's right to participate in stage 1. In *R. v. Boyle*, 2019 ONCJ 11 ("*Boyle No. 1*"), the court held that a complainant is only entitled to a copy of the application materials and to attend court at the second stage of the process, that is, only after the court determines that a hearing should be conducted. Doody J. found that the complainant had no standing at the first stage and was not entitled to any of the materials at that stage. However, he held that the complainant has the right to see the application sufficiently in advance of the hearing to allow her to prepare and make meaningful submissions at the hearing.

In *R. v. T.P.S.*, 2019 NSSC 48, the court reached the opposite conclusion, holding that the delay in appointing counsel until the defendant had passed the first stage would result in unwarranted delays. Lynch J. explained at paras. 33-35:

> While the complainant does not have a right to participate in stage one of the process, in reality the two stages are frequently held on the same date with the admissibility hearing following immediately after the stage one determination. Delaying the complainant's right to counsel would prolong proceedings when a s. 276 application is made. The stage one determination would have to be made and then the matter adjourned for the complainant to obtain counsel, instruct counsel and for counsel to prepare submissions.
>
> Unlike in *R. v. Boyle*, 2019 ONCJ 11 (Ont. C.J.), there has been no submission made that the accused's rights would be harmed by the complainant receiving the application and supporting evidence prior to the stage one proceeding. If the evidence is found not to meet the threshold at stage one the evidence cannot be adduced at trial. If the evidence is found to meet the threshold at stage one, a hearing is held to determine the admissibility of the evidence and the complainant must be served with the application. I do not see a danger or threat to the ability of the accused to make full answer and defence because the complainant has the details of the application prior to the stage one determination.
>
> For s. 278 applications, the amendments to the *Criminal Code* require that the application be served on the complainant at least 60 days before the hearing. Providing complainants with at least 60 days or some lesser amount of time to retain counsel, instruct counsel and be prepared for the hearing between stage one and stage two would cause delays in trials. Such delay would be contrary to the Supreme Court of Canada's direction to trial judges to minimize delay and to implement more efficient procedures and scheduling practices (*R. v. Cody*, 2017 SCC 31 (S.C.C.), paras. 37-39).

The idea of convening the first and second stage hearings together has been frowned upon in Ontario: *R. v. Barakat*, 2019 CarswellOnt 1822 (Ont. C.J.).

Stage 2: Hearing under s. 278.94

Once it is determined that the admission provisions apply and that the application meets the statutory requirements, the judge must then hold an admissibility hearing under s. 278.94. There is no controversy about the right of the complainant to participate at this stage. Pursuant to s. 278.94(2), the complainant is entitled to attend the hearing and to make submissions. While she is not a compellable witness (just as she is not a compellable witness at a production hearing), it has been held that the complainant is entitled to cross-examine witnesses at the hearing, including the accused: *R. v. Boyle*, 2019 ONCJ 253 ("*Boyle No 2*").

Like s. 278.4(2.1) of the production provisions, s. 278.94(3) of the admission provisions requires the judge to advise the complainant of her right to participate in the hearing "as soon as feasible". As noted above, differences of opinion have arisen in the jurisprudence decided to date as to when this should be done in the admission context.

Analysis for admissibility under s. 278.92

The admission provisions under ss. 278.93 and 278.94 apply both to applications to admit sexual activity evidence under s. 276(2) and to applications to admit private records under s. 278.92(2). Different tests for admissibility apply with respect to each type of evidence. As noted earlier, however, the two types of evidence are not mutually exclusive. Private records may engage the prohibition in s. 276 against admitting evidence of a complainant's sexual activity. In order to determine which test applies, the court must answer the following questions:

1. Is the evidence contained in the record subject to the s. 276 regime?
2. If so, it will be admissible if it meets the conditions set out in s. 276(2), while taking into account the factors set out in s. 276(3).
3. If not, the evidence is admissible if:
    a. it is relevant to an issue at trial; and
    b. it has a significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice: (s. 278.92(2)(b)).

Regardless of whether or not the record engages the s. 276 regime, in determining whether the record is admissible at trial, the court must consider the following nine factors under s. 278.92(3):

1. the interests of justice, including the right of the accused to make a full answer and defence;
2. society's interest in encouraging the reporting of sexual assault offences;
3. society's interest in encouraging the obtaining of treatment by complainants of sexual offences;
4. whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
5. the need to remove from the fact-finding process any discriminatory belief or bias;
6. the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

7. the potential prejudice to the complainant's personal dignity and right of privacy;
8. the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
9. any other factor that the judge, provincial court judge or justice considers relevant.

The factors in s. 278.92(3) mirror those the court is required to consider on an application under s. 276(3). The only addition is the third factor: society's interest in encouraging the obtaining of treatment by complainants of sexual offences.

If, at the end of the hearing, the court finds that the evidence is admissible at trial, the judge must give reasons pursuant to the requirements contained in s. 278.94(4). Like the production provisions, the admission provisions ban publication of the contents of the application, the evidence called during the hearing, and the judge's reasons (unless the judge orders otherwise).

In addition, the judge must provide instructions to the jury regarding the use that they may make of this evidence: s. 278.96. Importantly, s. 278.96 also requires the judge to instruct the jury on the uses that it may *not* make of the evidence.

IV. Recent Case Law

***R. v. W.M.*, 2019 ONSC 6797**

In this case the accused and the complainant provided different versions of the nature of their relationship; the complainant said they were just casual acquaintances who had only met three or four times before the incident, while the accused claimed that they had a previous sexual relationship. Davies J. was asked to give reasons on defence's application under ss. 276(2) and 278.93 in light of the Supreme Court's recent decisions in *Barton*, *Goldfinch*, and *R.V.*

In permitting the defence to adduce evidence through cross-examination of the complainant that she and the accused were in a romantic, sexual relationship before the alleged sexual assault (but not to adduce evidence that would disclose the details of any sexual activity other than what transpired on the date in question), Davies J. distinguished the case from *Goldfinch*, in which there was no dispute about the nature of the relationship.

Davies J. noted, at para. 21, that though trial judges must be very cautious, as per *Goldfinch*, about admitting evidence of a prior sexual relationship for the purpose of providing "context," there will be cases where evidence of a pre-existing sexual relationship will be relevant. For example, in *Goldfinch*, the Court held, at para. 63, that evidence of a sexual relationship may be relevant when the complainant has given "inconsistent statements regarding the very existence of a sexual relationship" or if it is truly fundamental to the coherence of the defence narrative.

Evidence of an existing sexual relationship can also be admissible if the fact-finding process will be distorted without that information.

Given the dispute in the evidence and the relevance of the nature of the relationship between the accused and the complainant, Davies J. allowed the accused to adduce evidence that he and the complainant were in an intimate relationship that included past sexual encounters, because to prohibit that evidence would, in the circumstances of this case, distort the fact-finding process. Davies J. held that evidence that could establish that the accused and the complainant were in an intimate, sexual relationship prior to the date in question has significant probative value and, if used for the limited purpose described, does not engage either of the prohibited inferences (at para. 24).

_R. v. J.M._, 2019 ONSC 5747

The accused was charged with sexual assault, administering a noxious substance, and possession of drugs for purpose of trafficking. The accused brought an application for an order that he be permitted to use photographs, which depict sexual activity, and messages, which acknowledge that sexual activity took place, during his cross-examination of complainant.

In dismissing the application, Goldstein J. found that though the pictures and messages were relevant, their prejudicial effect outweighed their probative value, noting at para. 31:

> Probative value, however, is not the same thing as relevance. There are degrees of probative value and prejudicial effect. Unlike relevance, probative value requires a trial judge to assess the weight of the evidence. That is why a trial judge must balance them. It is a gate-keeper function.

Goldstein J. applied the reasoning of Karakatsanis J. and Moldaver J. in their separate concurring reasons in *Goldfinch*, to hold that there must be a logical link between the proposed evidence and the issues that the jury must decide (at para. 33).

Goldstein J. accepted, at para. 43, the accused's argument that the evidence is not being adduced for the purpose of advancing one of the "twin myths," but that there is a danger that the first of the twin myths—that the complainant is more likely to consent because she has consented to other sexual activity—could be accepted by the jury. To cross-examine on that point would also likely require the complainant to explain her relationship with another person, which bears directly on the first of the "twin myths": it almost invites a jury to speculate that the complainant consented to sex with J.M. because she consented to sex with others during the same time frame. Moreover, that danger would likely not be overcome with an appropriate jury instruction, but even if it could, the probative value does not outweigh the substantial prejudicial effect (at para. 44).

R v. Ali, 2019 ONSC 5740

The accused was an Uber driver who was alleged to have sexually assaulted two inebriated young women in separate incidents that occurred several months apart. The accused admitted that the complainants had been passengers in his vehicle. Neither complainant consented to

sexual contact and neither had capacity to consent. The issue was whether sexual conduct occurred.

The trial judge dismissed a s. 276 application made pre-trial with respect to one of the complainants. She had said to the police that she had a boyfriend at the time of the events. At the preliminary hearing she said that she did not have a boyfriend. This appeared to be a discrepancy rooted in semantics. In any case, it was not evidence of sexual activity and thus did not engage s. 276. It was admissible. The ruling was that if the complainant was to explain the discrepancy by referring to her sexual prior history, although this would engage s. 276, it would be admissible for that very narrow purpose. This, in essence, is what happened at the trial (at para. 28).

Another part of the accused's s. 276 application was based on the finding of the complainant's boyfriend's semen on her underwear. As she said to the police, the complainant could not remember having sex with him around that time. The defence wanted to cross-examine her to test her memory generally. The trial judge, applying *Goldfinch*, found that this was a blatantly inadmissible purpose. It was completely irrelevant to any issues in the case. It also engaged the twin myths. Cross-examination on this subject matter was prohibited (at para. 29).

R. v. John, 2019 ONSC 3602

Davies J. clarified that it is important for trial judges not to conflate the issues at the first and second stages of the s. 276 regime. The first stage involves deciding whether the proposed evidence is capable of being admissible, which is a relatively low threshold. If there is a viable argument that the evidence is admissible, a full hearing should be held (at para. 19).

Nonetheless, Davies J. noted, at para. 20, many of the same factors will be relevant to both the first and second stage of the s. 276 regime. In other words, to determine if the proposed evidence is capable of being admitted, the court will also consider:

(1) whether the evidence engages either of the prohibited inferences and is therefore barred;
(2) whether the evidence relevant to an issue at trial; and
(3) whether there is any risk of prejudice from the admission of the evidence.

Again, the issue at this stage is not whether the evidence is admissible but whether it is capable of being admissible.

Notwithstanding the low threshold, Davies J. found that the proposed evidence was not capable of being admissible because it was not relevant and there was risk of significant prejudice in that it would be a profound breach of the complainant's privacy and is the type of cross-examination that could discourage people from reporting sexual violence in the future (at para. 52). Therefore, there was no hearing into the admissibility of the evidence.

R. v. Lennox, 2019 ONSC 3844

This was a threshold motion to admit evidence of text messages exchanged between the complainant and the accused prior to the encounter at issue. In this case, the accused wished to show that the version of events sketched by the complainant to the police is at odds with the content of their communication. He also wanted to put forward his narrative of enthusiastic consent which he says is consistent with that communication. MacLeod J. agreed, at para. 24, that it would be difficult to put forward this evidence without reference to communication which the accused states corroborates and explains his version of events.

MacLeod J. also noted, at para. 27, that another consideration is that the communication in question is neither entirely for a sexual purpose nor entirely of a sexual nature. There is no doubt the parties intended to meet. They had been discussing dinner plans. Some of the communication would be admissible without a s. 276 analysis but it is extremely difficult to draw that line given that the accused seeks to put a construction on the communication with which the complainant may disagree. In a sense this is hybrid evidence which may or may not engage s. 276 depending on the answer given to questions that have yet to be posed. To be on the safe side and to avoid delays in the trial, MacLeod J. found that it is prudent to err on the side of caution and to assume that all of this evidence requires passing through the filter of the s. 276 analysis, despite the fact that it is not clear that questions about this communication are the type of evil which parliament intended to address.

Finally, MacLeod J. emphasized, at para. 32, that this is a threshold ruling only. It does not preclude objections to the propriety or admissibility of evidence for any other reason. It does not preclude objections to questions which may appear to go beyond the scope of the ruling. Finally, it does not preclude the possibility that under certain circumstances, evidence adduced by the Crown might open the door to further argument.

***R. v. Blakley*, 2019 ONSC 5754**

P., a former intimate partner of accused, who was not the complainant, contacted a police officer and told him that she had evidence that would help to prove the complainant's allegations. The accused had collected images of himself and the complainant, some of which were sexual in nature, on his computer. At the time of the motion, the images were not available as the accused destroyed the computer. P. had found USB drive that contained images that she saw and an officer attended at her home and seized drive pursuant to a search warrant. The accused brought an application, pursuant to s. 278.3, for disclosure to court and himself of electronic images on the USB drive that was in possession of police. The accused claimed he needed the images to make full answer and defence to the sexual assault charge.

Section 278.1 of *Criminal Code* excludes from definition of "record," to which the application procedure under s. 278.3 applied, records made by persons responsible for investigation or prosecution of offence. The police officer examined 93 images and wrote report. The accused claimed that these images were subject to disclosure without making application under s. 278.3.

Kurke. J. granted the application in part. He found that the non-intimate images from the USB drive that was in possession of Crown were to be disclosed. If parties could not agree on which images were to be disclosed, the court would assist them in making that determination.

The exception contained in s. 278.1 did not apply to images that were the subject of police report. Kurke J. applied, at para. 16, *R. v. Quesnelle*, 2014 SCC 46, to find that not all records in the custody of police must be routinely disclosed. In *Quesnelle*, at para. 56, Karakatsanis J. considers records unrelated to the offence at issue but that are in police custody and holds that the assessment in the s. 278.3 regime will still "often have important work to do." Additionally, as s. 278.2(2) provides that the s. 278.3 regime is to apply even to records "in the possession of the prosecutor," it cannot be intended that highly sensitive records that find their way into the police file lose the protections of the s. 278.3 regime simply as a result of being subjected to police analysis and inclusion in some other report: *Quesnelle*, at para. 61.

Pursuant to the definition of "record" in s. 278.1, the s. 278.3 regime is intended to deal with records over which there is a reasonable expectation of privacy. The accused conceded that the complainant has a reasonable expectation of privacy in images that are "intimate in nature," but argued that the bulk of the images on the drive were not intimate.

Kurke J. found that while there may be some personal aspects inherent even in non-intimate images, the circumstances of this case weaken any legitimate claim for a reasonable expectation of privacy. The images in question were already in the hands of the applicant for many years, and any expectation of privacy in his viewing of them must be minimal (at para. 22). Therefore, the non-intimate images do not attract the protections of s. 278.3 and are subject to the ordinary disclosure regime.

As for the intimate images, the accused submitted that they were relevant for him to help establish a "timeline" of the relationship. Kurke J. noted the cautions from *Goldfinch* about claims related to "context," and found that at best the relevance of the images are a possibility but fail to meet the "likely relevant" standard prescribed in s. 278.5(1).

***R. v. Mai*, 2019 ONSC 6691**

Whether a record "contains personal information for which there is a reasonable expectation of privacy" must be answered by considering the "totality of circumstances," including whether the complainant ought to expect privacy in the particular circumstances. Relevant circumstances include the content of the communication, the manner in which the communication was sent or conveyed, and the nature of the relationship giving rise to the communication (at para. 19).

Roberts J., at para. 20, divided the relevant circumstances into two broad categories: 1) the nature of the information contained in the record; and 2) the context in which the record was created and obtained by the accused. Roberts J. adopted this approach for two reasons. First, because it makes sense to begin by looking at the content of the record in light of purpose of the legislation, namely to protect the privacy and equality rights of the complainant. Second, the nature of the information will in many, if not most, cases be determinative of the threshold question. This is the case if the records fall within the broad definition of "sexual activity" in

s.276(4), one of the enumerated categories set out in s.278.1, or the further included category set out in ss. 278.93-94.

Roberts J. found that only where a record does not fall within one of the above categories is it necessary to go on and consider the context of the record. If, however, a record falling outside the above list clearly does not contain personal information, there is no need to go on and consider its context. It falls outside the scope of the scheme. For example, in this case, the Crown acknowledged that to the extent the electronic communications simply concerned making arrangements between the complainant and the accused to meet on a particular date and time, they did not contain "personal information" so as to engage the s. 278.92 regime (at para. 21).

Where a record falling outside the above list arguably does contain personal information, Roberts J. held, at para. 22, that it is essential to also look at the context in which the record was created, and obtained by the accused, in order to decide whether there is a reasonable expectation of privacy in the record in the totality of circumstances. All the circumstances, including the content of the record and its context, must be considered cumulatively, and in totality. The context of the record includes circumstances such as the following:

- The relationship between the parties to the record (new friends, casual friends, good friends, old friends, family members, lovers);
- The manner of dissemination of the record (is it an open platform, a secure platform);
- The scope of dissemination of the record (does it involve two people, a closed group of intimates, a larger group, a shifting group).

In reaching her decision, Roberts J. had regard to the principles in *R. v. Jarvis*, 2019 SCC 10 and *R. v. Mills*, 2019 SCC 22. In *Jarvis*, at para. 60, the Supreme Court concluded that it follows from privacy jurisprudence developed under s. 8 of the *Charter* and common sense, "that determining whether a person can reasonably expect privacy in a particular situation requires a contextual assessment that takes into account the totality of the circumstances" (at para. 17).

In *Mills*, at para. 20, the majority noted that the concept of 'reasonable expectation of privacy' includes a normative assessment "about whether Canadians ought to expect privacy" in the totality of the particular circumstances at issue. While these comments occurred in the context of a complaint that the state violated s. 8 vis-à-vis the individual, Roberts J. found, at para. 18, that they are relevant and helpful in considering the meaning of 'reasonable expectation of privacy' in s. 278.1 of the *Criminal Code*.

Although, in *Jarvis*, in the context of interpreting the voyeurism provision in s. 162(1) of the *Criminal Code*, the majority notes that a risk analysis is not determinative of whether there is a reasonable expectation of privacy in a particular situation (para. 68), Roberts J., at para. 22, still found that a "risk analysis" forms an important part of assessing whether there is a reasonable expectation of privacy in the totality of circumstances.

While Roberts J., at para. 25, noted that the fact that an accused possesses the potential "record" in question is not determinative of the analysis, as s. 278.92 is explicitly intended to apply to materials in the possession of the accused, she found the fact that a complainant chose to share the information found in the record with the accused to be a relevant circumstance. In doing so, the complainant can usually be reasonably expected to contemplate a risk that the accused would seek to use that information to defend himself against a subsequent allegation by the complainant. While the nature of that expectation will depend on the particular circumstances, Roberts J. believed it does bear on a complainant's expectation of privacy in the record.

_R. v. W.M._, 2019 ONSC 6535

The defence had in its possession several Facebook messages between the complainant and the accused. The accused brought application for directions on whether he was required under s. 278.92 to apply for a ruling permitting him to use Facebook messages during cross-examination of complainant at trial. Generally, the defence has no reciprocal disclosure obligation in criminal matters, but s. 278.92 has created an exception to this rule. If the complainant has a reasonable expectation of privacy in records that are in the possession of the defence, the defence has to bring an application in advance of trial to determine whether messages were admissible.

In this case, Davies J. granted the accused's application. The complainant did not have a reasonable expectation of privacy in records in this case because there is no suggestion that she sent the messages to the accused for any limited or specific purpose. In addition, the messages do not contain any express or implied request by the complainant to keep the content of the messages private and not use them or further disseminate them (at para. 46). Moreover, the Facebook messages did not contain any information of a sexual nature. As a result, there was no risk that the use of the messages in cross-examination could engage either of the twin myths expressly prohibited by s. 276(1) of the *Code*. There is also no risk that making the content of the messages public will undermine the complainant's personal dignity or security (at para. 42).

Davies J. also noted, at para. 54, that interpreting the definition of "record" in an expansive manner to include any private communication between an accused and complainant may well infringe the accused's s. 7 rights. The Facebook messages are prior statements by the complainant that may well be inconsistent with her testimony at trial. Cross-examination of witnesses on prior inconsistent statements is one of the most important means of testing their credibility and reliability. Requiring the defence to disclose prior statements which may be inconsistent with evidence given at trial before the witness testifies could seriously undermine the accused's rights under s. 7 of the *Charter*.

Because the records were not sexual in nature and did not have a reasonable expectation of privacy in the messages, it followed that accused was not required to bring application under s. 278.93 before using records in question at trial.

_R. v. E.M._, 2019 ONSC 6120

In this case, the evidence in question consisted of an audio recording, a video recording, and three photographs taken in a vehicle in the night in question. It was alleged that the audio recording captures the complainant being asked by the applicant whether she agrees to have sexual relations with the accused, and her ostensible agreement. The applicant contended that the audio recording demonstrates that the accused ensured that the complainant was consenting to the sexual activity and goes directly to the elements of the offence of sexual assault. The video recording shows the complainant performing oral sex on one of the co-accused. The complainant appears naked in each of the photographs in question.

In this case, all counsel agreed, and Charney J. was satisfied, that the sexual activity depicted in the proffered records was the sexual activity that forms the subject-matter of the charge, and that therefore s. 276 does not apply. However, that does not end the inquiry, because s. 278.92(1) provides that certain personal records of the complainant in the possession of the accused are presumptively inadmissible unless the trial judge rules to the contrary pursuant to s. 272.92(2) and (3).

The first question, according to Charney J. (at para. 25), is whether the audio recording, video recording and photographs qualify as "records" within the meaning of s. 278.1. In this regard, Charney J. adopted the analysis of Chapman J. in *R. v. M.S.*, 2019 ONCJ 670, at para. 37, that the definition of records in s. 278.1 is not limited to the enumerated records listed in the section, and whether a document is a record is to be decided in the context of the privacy interest in a specific case. Charney J., at para. 26, also adopted Chapman J.'s conclusion, at para. 60 of *M.S.* that photos which, though not explicitly sexual, are intimate in nature are likely private records and must be vetted for relevance.

Following *M.S.*, Charney J. found, at para. 27, that the photos and videos in this case clearly meet the definition of a "record that contains personal information for which there is a reasonable expectation of privacy." Charney J. was less certain that the audio recording was a record "that contains personal information," but assumed, for the purposes of his analysis, that it is also captured by the definition of records in s. 278.1.

There was no evidence that the complainant consented to the audio or video recordings or photos, or that she even knew that they were being made or taken. Surreptitious videos/photos of this nature are a serious invasion of the complainant's personal privacy, and she has a significant expectation of privacy in these circumstances.

Since s. 276 does not apply, Charney J. assessed the admissibility of the records pursuant to s. 278.92(2)(b). He agreed with all parties that the audio recording was of significant probative value and found that it should be admitted. However, Charney J. found that the video, which merely showed that the complainant was conscious for 22 seconds was of limited probative value, since as the Court of Appeal found in *R. v. G.F.*, 2019 ONCA 493, at para. 40, "that incapacity may arise from conditions short of unconsciousness," and therefore the video would not assist the jury in determining her capacity to consent. On the other hand, showing the video would result in significant prejudice to the complainant's personal dignity and right of privacy.

Showing such a video to the jury is potentially humiliating to a complainant who alleges that she was sexually assaulted.

Charney J. found that the photographs were of even less probative value than the video but would result in the same prejudice to the complainant's dignity and right of privacy. Therefore, the video recording and photographs were not admitted.

***R. v. A.C.*, 2019 ONSC 4270**

The accused was charged with two counts of sexual assault. He brought an application challenging the constitutionality of ss. 278.94(2) and 278.94(3), as amended. The application contends that the offending subsections offended the defendant's ss. 7 and 11(d) rights, as enshrined in the *Charter*. He contended, at para. 12, that the amendments in question are contrary to the principles of fundamental justice because they:

> i. "...require an accused to disclose evidence to the complainant that he wishes to use to challenge that person's evidence, and to further require him to disclosure to the complainant the relevance of that evidence to the trial (the defence strategy)."
>
> ii. "...allow a witness to a criminal proceeding to object to proposed evidence and to make submissions on the admissibility of that proposed evidence."
>
> iii. "...to grant standing to a witness on questions of evidence in a criminal proceeding conducted by the Crown as it infringes of the Crown's exclusive and sole authority to prosecute such cases."

Sutherland J. found, at para. 57, that the involvement of the complainant is for this sole and focused purpose at the hearing on admissibility, and that such an incremental change by Parliament does not infringe the defendant's s. 7 *Charter* right of a fair hearing and fundamental justice.

Sutherland J. was not persuaded that the offending subsections are so vague that they lack precision to give sufficient guidance. The meaning of "attend and make submission" and "participate," with respect to the complainant, he found to be precise, and the phrasing flexible enough to allow the court to interpret the meaning of the offending subsections to comply with the *Charter* (at para. 54).

Further, Sutherland J. did not interpret the meaning of the impugned subsections to offend the principle that there shall be only one prosecutor, nor that they interfered with the independence of the Crown. The obligation of the Crown has not been changed or affected in any way. The Crown, not the complainant, has to prove the offence(s) against the defendant beyond a reasonable doubt. The Crown also retains the sole discretion to decide whether there exists a reasonable prospect of conviction and/or whether the prosecution is in the public interest. The complainant's involvement at the hearing is not mandatory and the complainant can choose not to participate at the hearing. If the complainant decides to be involved at the hearing, her involvement is limited. Her involvement is solely and strictly for the purpose of providing the court with her submission/perspective on the determination of whether the evidence in question is admissible at the trial. It is not the guilt or innocence of the defendant. That burden remains solely with the Crown (at paras. 60-63).

Moreover, Sutherland J. noted, at para. 71, that as the gatekeeper, it is the obligation of the court to make sure that the involvement of the complainant is focused and limited. The cross-examination, affidavit, or testimonial evidence provided at the hearing by the complainant must be focused and limited to the issue(s) on the *voir dire*. The Crown and the complainant must stay on track and not diverge from the limited scope of involvement of the complainant at the hearing. It is not a forum for the Crown or the complainant to conduct "unfair questioning of the accused."

***R. v. C. C.*, 2019 ONSC 6449**

Raikes J. found, at para. 70, that the required application, its timing and/or the role of the complainant on the application do not violate the defendant's right to make full answer and defence or the fundamental fairness of the trial.

Raikes J. noted, at para. 71, that the defendant is not entitled to a process that maximizes his chances of acquittal. Trial fairness must be examined and assessed through multiple lenses including that of the community at large and the victim.

The requirement that an application be brought by the defendant to determine admissibility and the process to be followed which gives the complainant a voice where her privacy interests are at stake undoubtedly represent a change to the way in which these issues have traditionally been addressed. However, Raikes J. found, at para. 75, that the change strikes a balance between the principles of fundamental justice protected by s. 7 and the privacy interests of a complainant. To be sure, defendants would prefer no obligation to apply to determine admissibility and no participation/involvement by the complainant. However, a change to the status quo does not necessarily equate to a violation of the defendant's ss. 7 and 11(d) rights.

With respect to the overbreadth argument, Raikes J., at para. 83, accepted the Crown's submission as to the purpose(s) for which the amendments were enacted:

> • to ensure that the *Charter* rights of complainants—to privacy, security, dignity and equality under ss. 7, 15 and 28—are fully considered, appreciated, and respected in circumstances where a court is charged with making a ruling as to the admissibility of evidence bearing on their other sexual activities;
>
> • to improve victim and community confidence in the criminal justice system, thereby increasing the likelihood that victims of offences of sexual violence will report these crimes and participate in criminal prosecutions; and
>
> • to protect the integrity of the trial process by ensuring that evidence that is misleading or rooted in dangerous myths and stereotypes is not admitted into evidence such as to distort the truth-seeking function.

Raikes J. held, at para. 85, that the means employed in these provisions are connected to the objective of these amendments to the *Criminal Code*. As there is no violation of the right to full

answer and defence and fair trial rights, Raikes J. found it unnecessary to engage in the s. 1 analysis and dismissed the defendant's application.

CANADA

CONSOLIDATION

CODIFICATION

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Code criminel

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Corroboration not required

274 If an accused is charged with an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 271, 272, 273, 286.1, 286.2 or 286.3, no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

R.S., 1985, c. C-46, s. 274; R.S., 1985, c. 19 (3rd Supp.), s. 11; 2002, c. 13, s. 12; 2014, c. 25, s. 16; 2019, c. 25, s. 99.

Rules respecting recent complaint abrogated

275 The rules relating to evidence of recent complaint are hereby abrogated with respect to offences under sections 151, 152, 153, 153.1 and 155, subsections 160(2) and (3) and sections 170, 171, 172, 173, 271, 272 and 273.

R.S., 1985, c. C-46, s. 275; R.S., 1985, c. 19 (3rd Supp.), s. 11; 2002, c. 13, s. 12; 2019, c. 25, s. 99.

Evidence of complainant's sexual activity

276 (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

(b) is less worthy of belief.

Conditions for admissibility

(2) In proceedings in respect of an offence referred to in subsection (1), evidence shall not be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 278.93 and 278.94, that the evidence

(a) is not being adduced for the purpose of supporting an inference described in subsection (1);

(b) is relevant to an issue at trial; and

(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.

Non-exigibilité de la corroboration

274 La corroboration n'est pas nécessaire pour déclarer coupable une personne accusée d'une infraction prévue aux articles 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 271, 272, 273, 286.1, 286.2 ou 286.3. Le juge ne peut dès lors informer le jury qu'il n'est pas prudent de déclarer l'accusé coupable en l'absence de corroboration.

L.R. (1985), ch. C-46, art. 274; L.R. (1985), ch. 19 (3e suppl.), art. 11; 2002, ch. 13, art. 12; 2014, ch. 25, art. 16; 2019, ch. 25, art. 99.

Abolition des règles relatives à la plainte spontanée

275 Les règles de preuve qui concernent la plainte spontanée sont abolies à l'égard des infractions prévues aux articles 151, 152, 153, 153.1 et 155, aux paragraphes 160(2) et (3) et aux articles 170, 171, 172, 173, 271, 272 et 273.

L.R. (1985), ch. C-46, art. 275; L.R. (1985), ch. 19 (3e suppl.), art. 11; 2002, ch. 13, art. 12; 2019, ch. 25, art. 99.

Preuve concernant le comportement sexuel du plaignant

276 (1) Dans les poursuites pour une infraction prévue aux articles 151, 152, 153, 153.1 ou 155, aux paragraphes 160(2) ou (3) ou aux articles 170, 171, 172, 173, 271, 272 ou 273, la preuve de ce que le plaignant a eu une activité sexuelle avec l'accusé ou un tiers est inadmissible pour permettre de déduire du caractère sexuel de cette activité qu'il est :

a) soit plus susceptible d'avoir consenti à l'activité à l'origine de l'accusation;

b) soit moins digne de foi.

Conditions de l'admissibilité

(2) Dans les poursuites visées au paragraphe (1), l'accusé ou son représentant ne peut présenter de preuve de ce que le plaignant a eu une activité sexuelle autre que celle à l'origine de l'accusation sauf si le juge, le juge de la cour provinciale ou le juge de paix décide, conformément aux articles 278.93 et 278.94, à la fois :

a) que cette preuve n'est pas présentée afin de permettre les déductions visées au paragraphe (1);

b) que cette preuve est en rapport avec un élément de la cause;

c) que cette preuve porte sur des cas particuliers d'activité sexuelle;

d) que le risque d'effet préjudiciable à la bonne administration de la justice de cette preuve ne l'emporte pas sensiblement sur sa valeur probante.

Factors that judge must consider

(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) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(f) the potential prejudice to the complainant's personal dignity and right of privacy;

(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(h) any other factor that the judge, provincial court judge or justice considers relevant.

Interpretation

(4) For the purpose of this section, ***sexual activity*** includes any communication made for a sexual purpose or whose content is of a sexual nature.

R.S., 1985, c. C-46, s. 276; R.S., 1985, c. 19 (3rd Supp.), s. 12; 1992, c. 38, s. 2; 2002, c. 13, s. 13; 2018, c. 29, s. 21; 2019, c. 25, s. 100.

276.1 [Repealed, 2018, c. 29, s. 22]

276.2 [Repealed, 2018, c. 29, s. 22]

276.3 [Repealed, 2018, c. 29, s. 22]

276.4 [Repealed, 2018, c. 29, s. 22]

276.5 [Repealed, 2018, c. 29, s. 22]

Reputation evidence

277 In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, subsection 160(2) or (3) or

Facteurs à considérer

(3) Pour décider si la preuve est admissible au titre du paragraphe (2), le juge, le juge de la cour provinciale ou le juge de paix prend en considération :

a) l'intérêt de la justice, y compris le droit de l'accusé à une défense pleine et entière;

b) l'intérêt de la société à encourager la dénonciation des agressions sexuelles;

c) la possibilité, dans de bonnes conditions, de parvenir, grâce à elle, à une décision juste;

d) le besoin d'écarter de la procédure de recherche des faits toute opinion ou préjugé discriminatoire;

e) le risque de susciter abusivement, chez le jury, des préjugés, de la sympathie ou de l'hostilité;

f) le risque d'atteinte à la dignité du plaignant et à son droit à la vie privée;

g) le droit du plaignant et de chacun à la sécurité de leur personne, ainsi qu'à la plénitude de la protection et du bénéfice de la loi;

h) tout autre facteur qu'il estime applicable en l'espèce.

Précision

(4) Il est entendu que, pour l'application du présent article, ***activité sexuelle*** s'entend notamment de toute communication à des fins d'ordre sexuel ou dont le contenu est de nature sexuelle.

L.R. (1985), ch. C-46, art. 276; L.R. (1985), ch. 19 (3e suppl.), art. 12; 1992, ch. 38, art. 2; 2002, ch. 13, art. 13; 2018, ch. 29, art. 21; 2019, ch. 25, art. 100.

276.1 [Abrogé, 2018, ch. 29, art. 22]

276.2 [Abrogé, 2018, ch. 29, art. 22]

276.3 [Abrogé, 2018, ch. 29, art. 22]

276.4 [Abrogé, 2018, ch. 29, art. 22]

276.5 [Abrogé, 2018, ch. 29, art. 22]

Preuve de réputation

277 Dans des procédures à l'égard d'une infraction prévue aux articles 151, 152, 153, 153.1 ou 155, aux paragraphes 160(2) ou (3) ou aux articles 170, 171, 172, 173, 271, 272 ou 273, une preuve de réputation sexuelle

section 170, 171, 172, 173, 271, 272 or 273, evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.

R.S., 1985, c. C-46, s. 277; R.S., 1985, c. 19 (3rd Supp.), s. 13; 2002, c. 13, s. 14; 2019, c. 25, s. 101.

visant à attaquer ou à défendre la crédibilité du plaignant est inadmissible.

L.R. (1985), ch. C-46, art. 277; L.R. (1985), ch. 19 (3e suppl.), art. 13; 2002, ch. 13, art. 14; 2019, ch. 25, art. 101.

Spouse may be charged

278 A husband or wife may be charged with an offence under section 271, 272 or 273 in respect of his or her spouse, whether or not the spouses were living together at the time the activity that forms the subject-matter of the charge occurred.

1980-81-82-83, c. 125, s. 19.

Inculpation du conjoint

278 Un conjoint peut être inculpé en vertu des articles 271, 272 ou 273 pour une infraction contre l'autre conjoint, peu importe s'ils cohabitaient ou non au moment où a eu lieu l'activité qui est à l'origine de l'inculpation.

1980-81-82-83, ch. 125, art. 19.

Definition of *record*

278.1 For the purposes of sections 278.2 to 278.92, ***record*** means any form of 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, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

1997, c. 30, s. 1; 2018, c. 29, s. 23.

Définition de *dossier*

278.1 Pour l'application des articles 278.2 à 278.92, ***dossier*** s'entend de toute forme de document contenant des renseignements personnels pour lesquels il existe une attente raisonnable en matière de protection de la vie privée, notamment : le dossier médical, psychiatrique ou thérapeutique, le dossier tenu par les services d'aide à l'enfance, les services sociaux ou les services de consultation, le dossier relatif aux antécédents professionnels et à l'adoption, le journal intime et le document contenant des renseignements personnels et protégé par une autre loi fédérale ou une loi provinciale. N'est pas visé par la présente définition le dossier qui est produit par un responsable de l'enquête ou de la poursuite relativement à l'infraction qui fait l'objet de la procédure.

1997, ch. 30, art. 1; 2018, ch. 29, art. 23.

Production of record to accused

278.2 (1) Except in accordance with sections 278.3 to 278.91, no record relating to a complainant or a witness shall be produced to an accused in any proceedings in respect of any of the following offences or in any proceedings in respect of two or more offences at least one of which is any of the following offences:

(a) an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3; or

(b) any offence under this Act, as it read from time to time before the day on which this paragraph comes into force, if the conduct alleged would be an offence referred to in paragraph (a) if it occurred on or after that day.

Application of provisions

(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

Communication d'un dossier à l'accusé

278.2 (1) Dans les poursuites pour une infraction mentionnée ci-après, ou pour plusieurs infractions dont l'une est une infraction mentionnée ci-après, un dossier se rapportant à un plaignant ou à un témoin ne peut être communiqué à l'accusé que conformément aux articles 278.3 à 278.91 :

a) une infraction prévue aux articles 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 ou 286.3;

b) une infraction prévue par la présente loi, dans toute version antérieure à la date d'entrée en vigueur du présent alinéa, dans le cas où l'acte reproché constituerait une infraction visée à l'alinéa a) s'il était commis à cette date ou par la suite.

Application

(2) L'article 278.1, le présent article et les articles 278.3 à 278.91 s'appliquent même si le dossier est en la possession ou sous le contrôle du poursuivant, sauf si le

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.

Duty of prosecutor to give notice

(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; 2014, c. 25, ss. 17, 48; 2015, c. 13, s. 5; 2019, c. 25, s. 102.

Application for production

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.

No application in other proceedings

(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.

Form and content of application

(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.

Insufficient grounds

(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;

plaignant ou le témoin auquel il se rapporte a expressément renoncé à l'application de ces articles.

Obligation d'informer

(3) Le poursuivant qui a en sa possession ou sous son contrôle un dossier auquel s'applique le présent article doit en informer l'accusé mais il ne peut, ce faisant, communiquer le contenu du dossier.

1997, ch. 30, art. 1; 1998, ch. 9, art. 3; 2014, ch. 25, art. 17 et 48; 2015, ch. 13, art. 5; 2019, ch. 25, art. 102.

Demande de communication de dossiers

278.3 (1) L'accusé qui veut obtenir la communication d'un dossier doit en faire la demande au juge qui préside ou présidera son procès.

Précision

(2) Il demeure entendu que la demande visée au paragraphe (1) ne peut être faite au juge ou juge de paix qui préside une autre procédure, y compris une enquête préliminaire.

Forme et contenu

(3) La demande de communication est formulée par écrit et donne :

a) les précisions utiles pour reconnaître le dossier en cause et le nom de la personne qui l'a en sa possession ou sous son contrôle;

b) les motifs qu'invoque l'accusé pour démontrer que le dossier est vraisemblablement pertinent quant à un point en litige ou à l'habileté d'un témoin à témoigner.

Insuffisance des motifs

(4) Les affirmations ci-après, individuellement ou collectivement, ne suffisent pas en soi à démontrer que le dossier est vraisemblablement pertinent quant à un point en litige ou à l'habileté d'un témoin à témoigner :

a) le dossier existe;

b) le dossier se rapporte à un traitement médical ou psychiatrique ou une thérapie suivis par le plaignant ou le témoin ou à des services de consultation auxquels il a recours ou a eu recours;

c) le dossier porte sur l'événement qui fait l'objet du litige;

(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;

(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.

d) le dossier est susceptible de contenir une déclaration antérieure incompatible faite par le plaignant ou le témoin;

e) le dossier pourrait se rapporter à la crédibilité du plaignant ou du témoin;

f) le dossier pourrait se rapporter à la véracité du témoignage du plaignant ou du témoin étant donné que celui-ci suit ou a suivi un traitement psychiatrique ou une thérapie, ou a recours ou a eu recours à des services de consultation;

g) le dossier est susceptible de contenir des allégations quant à des abus sexuels commis contre le plaignant par d'autres personnes que l'accusé;

h) le dossier se rapporte à l'activité sexuelle du plaignant avec l'accusé ou un tiers;

i) le dossier se rapporte à l'existence ou à l'absence d'une plainte spontanée;

j) le dossier se rapporte à la réputation sexuelle du plaignant;

k) le dossier a été produit peu après la plainte ou l'événement qui fait l'objet du litige.

Service of application and subpoena

(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 60 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.

Service on other persons

(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; 2015, c. 13, s. 6; 2018, c. 29, s. 24.

Hearing *in camera*

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.

Signification de la demande et assignation à comparaître

(5) L'accusé signifie la demande au poursuivant, à la personne qui a le dossier en sa possession ou sous son contrôle, au plaignant ou au témoin, selon le cas, et à toute autre personne à laquelle, à sa connaissance, le dossier se rapporte, au moins soixante jours avant l'audience prévue au paragraphe 278.4(1) ou dans le délai inférieur autorisé par le juge dans l'intérêt de la justice. Dans le cas de la personne qui a le dossier en sa possession ou sous son contrôle, une assignation à comparaître, rédigée selon la formule 16.1, doit lui être signifiée, conformément à la partie XXII, en même temps que la demande.

Signification à d'autres personnes

(6) Le juge peut ordonner à tout moment que la demande soit signifiée à toute personne à laquelle, à son avis, le dossier se rapporte.

1997, ch. 30, art. 1; 2015, ch. 13, art. 6; 2018, ch. 29, art. 24.

Audience à huis clos

278.4 (1) Le juge tient une audience à huis clos pour décider si le dossier devrait être communiqué au tribunal pour que lui-même puisse l'examiner.

Persons who may appear at hearing

(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.

Right to counsel

(2.1) The judge shall, as soon as feasible, inform any person referred to in subsection (2) who participates in the hearing of their right to be represented by counsel.

Costs

(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; 2015, c. 13, s. 7.

Judge may order production of record for review

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.

Factors to be considered

(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, personal security and equality of the complainant or witness, as the case may be, and of 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;

Droit de présenter des observations et incontraignabilité

(2) La personne qui a le dossier en sa possession ou sous son contrôle, le plaignant ou le témoin, selon le cas, et toute autre personne à laquelle le dossier se rapporte peuvent comparaître et présenter leurs arguments à l'audience mais ne peuvent être contraints à témoigner.

Droit à un conseiller juridique

(2.1) Le juge est tenu d'aviser dans les meilleurs délais toute personne visée au paragraphe (2) qui participe à l'audience de son droit d'être représentée par un conseiller juridique.

Dépens

(3) Aucune ordonnance de dépens ne peut être rendue contre une personne visée au paragraphe (2) en raison de sa participation à l'audience.

1997, ch. 30, art. 1; 2015, ch. 13, art. 7.

Ordonnance

278.5 (1) Le juge peut ordonner à la personne qui a le dossier en sa possession ou sous son contrôle de le communiquer, en tout ou en partie, au tribunal pour examen par lui-même si, après l'audience, il est convaincu de ce qui suit :

a) la demande répond aux exigences formulées aux paragraphes 278.3(2) à (6);

b) l'accusé a démontré que le dossier est vraisemblablement pertinent quant à un point en litige ou à l'habileté d'un témoin à témoigner;

c) la communication du dossier sert les intérêts de la justice.

Facteurs à considérer

(2) Pour décider s'il doit rendre l'ordonnance prévue au paragraphe (1), le juge prend en considération les effets bénéfiques et préjudiciables qu'entraînera sa décision, d'une part, sur le droit de l'accusé à une défense pleine et entière et, d'autre part, sur le droit à la vie privée et à l'égalité du plaignant ou du témoin, selon le cas, et à la sécurité de leur personne, ainsi qu'à celui de toute autre personne à laquelle le dossier se rapporte et, en particulier, tient compte des facteurs suivants :

a) la mesure dans laquelle le dossier est nécessaire pour permettre à l'accusé de présenter une défense pleine et entière;

b) sa valeur probante;

(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; 2015, c. 13, s. 8.

c) la nature et la portée de l'attente raisonnable au respect de son caractère privé;

d) la question de savoir si sa communication reposerait sur une croyance ou un préjugé discriminatoire;

e) le préjudice possible à la dignité ou à la vie privée de toute personne à laquelle il se rapporte;

f) l'intérêt qu'a la société à ce que les infractions d'ordre sexuel soient signalées;

g) l'intérêt qu'a la société à ce que les plaignants, dans les cas d'infraction d'ordre sexuel, suivent des traitements;

h) l'effet de la décision sur l'intégrité du processus judiciaire.

1997, ch. 30, art. 1; 2015, ch. 13, art. 8.

Review of record by judge

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.

Hearing *in camera*

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

Provisions re hearing

(3) Subsections 278.4(2) to (3) apply in the case of a hearing under subsection (2).

1997, c. 30, s. 1; 2015, c. 13, s. 9.

Judge may order production of record to accused

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).

Factors to be considered

(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, personal security and equality of the complainant or witness, as

Examen du dossier par le juge

278.6 (1) Dans les cas où il a rendu l'ordonnance visée au paragraphe 278.5(1), le juge examine le dossier ou la partie en cause en l'absence des parties pour décider si le dossier devrait, en tout ou en partie, être communiqué à l'accusé.

Possibilité d'une audience

(2) Le juge peut tenir une audience à huis clos s'il l'estime utile pour en arriver à la décision visée au paragraphe (1).

Application de certaines dispositions

(3) Les paragraphes 278.4(2) à (3) s'appliquent à toute audience tenue en vertu du paragraphe (2).

1997, ch. 30, art. 1; 2015, ch. 13, art. 9.

Communication du dossier

278.7 (1) S'il est convaincu que le dossier est en tout ou en partie vraisemblablement pertinent quant à un point en litige ou à l'habileté d'un témoin à témoigner et que sa communication sert les intérêts de la justice, le juge peut ordonner que le dossier — ou la partie de celui-ci qui est vraisemblablement pertinente — soit, aux conditions qu'il fixe éventuellement en vertu du paragraphe (3), communiqué à l'accusé.

Facteurs à considérer

(2) Pour décider s'il doit rendre l'ordonnance prévue au paragraphe (1), le juge prend en considération les effets bénéfiques et préjudiciables qu'entraînera sa décision, d'une part, sur le droit de l'accusé à une défense pleine et entière et, d'autre part, sur le droit à la vie privée et à l'égalité du plaignant ou du témoin, selon le cas, et à la

the case may be, and of 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.

Conditions on production

(3) If 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, personal security and equality interests of the complainant or witness, as the case may be, and of 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 their address, telephone number and place of employment, be severed from the record.

Copy to prosecutor

(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.

Record not to be used in other proceedings

(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.

Retention of record by court

(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

sécurité de leur personne, ainsi qu'à celui de toute autre personne à laquelle le dossier se rapporte et, en particulier, tient compte des facteurs mentionnés aux alinéas 278.5(2)a) à h).

Conditions

(3) Le juge peut assortir l'ordonnance de communication des conditions qu'il estime indiquées pour protéger l'intérêt de la justice et, dans la mesure du possible, les intérêts en matière de droit à la vie privée et d'égalité du plaignant ou du témoin, selon le cas, et de sécurité de leur personne, ainsi que ceux de toute autre personne à laquelle le dossier se rapporte, notamment :

a) établissement, selon ses instructions, d'une version révisée du dossier;

b) communication d'une copie, plutôt que de l'original, du dossier;

c) interdiction pour l'accusé et son avocat de divulguer le contenu du dossier à quiconque, sauf autorisation du tribunal;

d) interdiction d'examiner le contenu du dossier en dehors du greffe du tribunal;

e) interdiction de la production d'une copie du dossier ou restriction quant au nombre de copies qui peuvent en être faites;

f) suppression de renseignements sur toute personne dont le nom figure dans le dossier, tels l'adresse, le numéro de téléphone et le lieu de travail.

Copie au poursuivant

(4) Dans les cas où il ordonne la communication d'un dossier en tout ou en partie à l'accusé, le juge ordonne qu'une copie du dossier ou de la partie soit donnée au poursuivant, sauf s'il estime que cette mesure serait contraire aux intérêts de la justice.

Restriction quant à l'usage des dossiers

(5) Les dossiers — ou parties de dossier — communiqués à l'accusé dans le cadre du paragraphe (1) ne peuvent être utilisés dans une autre procédure.

Garde des dossiers non communiqués à l'accusé

(6) Sauf ordre contraire d'un tribunal, tout dossier — ou toute partie d'un dossier — dont le juge refuse la communication à l'accusé est scellé et reste en la possession du tribunal jusqu'à l'épuisement des voies de recours dans la procédure contre l'accusé; une fois les voies de recours épuisées, le dossier — ou la partie — est

be returned to the person lawfully entitled to possession or control of it.

1997, c. 30, s. 1; 2015, c. 13, s. 10.

Reasons for decision

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).

Record of reasons

(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

278.9 (1) No person shall publish in any document, or broadcast or transmit in any way, 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.

Offence

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

1997, c. 30, s. 1; 2005, c. 32, s. 14.

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.

Admissibility — accused in possession of records relating to complainant

278.92 (1) Except in accordance with this section, no record relating to a complainant that is in the possession or control of the accused — and which the accused intends to adduce — shall be admitted in evidence in any proceedings in respect of any of the following offences or

remis à la personne qui a droit à la possession légitime de celui-ci.

1997, ch. 30, art. 1; 2015, ch. 13, art. 10.

Motifs

278.8 (1) Le juge est tenu de motiver sa décision de rendre ou refuser de rendre l'ordonnance prévue aux paragraphes 278.5(1) ou 278.7(1).

Forme

(2) Les motifs de la décision sont à porter dans le procès-verbal des débats ou, à défaut, à donner par écrit.

1997, ch. 30, art. 1.

Publication interdite

278.9 (1) Il est interdit de publier ou de diffuser de quelque façon que ce soit :

a) le contenu de la demande présentée en application de l'article 278.3;

b) tout ce qui a été dit ou présenté en preuve à l'occasion de toute audience tenue en vertu du paragraphe 278.4(1) ou 278.6(2);

c) la décision rendue sur la demande dans le cadre des paragraphes 278.5(1) ou 278.7(1) et les motifs mentionnés à l'article 278.8, sauf si le juge rend une ordonnance autorisant la publication ou diffusion après avoir pris en considération l'intérêt de la justice et le droit à la vie privée de la personne à laquelle le dossier se rapporte.

Infraction

(2) Quiconque contrevient au paragraphe (1) commet une infraction punissable sur déclaration de culpabilité par procédure sommaire.

1997, ch. 30, art. 1; 2005, ch. 32, art. 14.

Appel

278.91 Pour l'application des articles 675 et 676, la décision rendue en application des paragraphes 278.5(1) ou 278.7(1) est réputée constituer une question de droit.

1997, ch. 30, art. 1.

Admissibilité — dossier relatif à un plaignant en possession de l'accusé

278.92 (1) Dans les poursuites pour une infraction mentionnée ci-après, ou pour plusieurs infractions dont l'une est une infraction mentionnée ci-après, un dossier se rapportant à un plaignant qui est en possession de l'accusé ou sous son contrôle et que ce dernier se dispose

in any proceedings in respect of two or more offences at least one of which is any of the following offences:

(a) an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3; or

(b) any offence under this Act, as it read from time to time before the day on which this paragraph comes into force, if the conduct alleged would be an offence referred to in paragraph (a) if it occurred on or after that day.

Requirements for admissibility

(2) The evidence is inadmissible unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 278.93 and 278.94,

(a) if the admissibility of the evidence is subject to section 276, that the evidence meets the conditions set out in subsection 276(2) while taking into account the factors set out in subsection (3); or

(b) in any other case, that the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Factors that judge shall consider

(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;

(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;

à présenter en preuve ne peut être admissible qu'en conformité avec le présent article :

a) une infraction prévue aux articles 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 ou 286.3;

b) une infraction prévue par la présente loi, dans toute version antérieure à la date d'entrée en vigueur du présent alinéa, dans le cas où l'acte reproché constituerait une infraction visée à l'alinéa a) s'il était commis à cette date ou par la suite.

Conditions de l'admissibilité

(2) La preuve n'est admissible que si le juge, le juge de la cour provinciale ou le juge de paix décide, conformément aux articles 278.93 et 278.94 :

a) dans le cas où son admissibilité est assujettie à l'article 276, qu'elle répond aux conditions prévues au paragraphe 276(2), compte tenu toutefois des facteurs visés au paragraphe (3);

b) dans les autres cas, qu'elle est en rapport avec un élément de la cause et que le risque d'effet préjudiciable à la bonne administration de la justice de la preuve ne l'emporte pas sensiblement sur sa valeur probante.

Facteurs à considérer

(3) Pour décider si la preuve est admissible au titre du paragraphe (2), le juge, le juge de la cour provinciale ou le juge de paix prend en considération :

a) l'intérêt de la justice, y compris le droit de l'accusé à une défense pleine et entière;

b) l'intérêt de la société à encourager la dénonciation des agressions sexuelles;

c) l'intérêt qu'a la société à ce que les plaignants, dans les cas d'infraction d'ordre sexuel, suivent des traitements;

d) la possibilité, dans de bonnes conditions, de parvenir, grâce à elle, à une décision juste;

e) le besoin d'écarter de la procédure de recherche des faits tout préjugé ou opinion discriminatoire;

f) le risque de susciter abusivement, chez le jury, des préjugés, de la sympathie ou de l'hostilité;

g) le risque d'atteinte à la dignité du plaignant et à son droit à la vie privée;

(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.

2018, c. 29, s. 25; 2019, c. 25, s. 403.

h) le droit du plaignant et de chacun à la sécurité de leur personne, ainsi qu'à la plénitude de la protection et du bénéfice de la loi;

i) tout autre facteur qu'il estime applicable en l'espèce.

2018, ch. 29, art. 25; 2019, ch. 25, art. 403.

Application for hearing — sections 276 and 278.92

278.93 (1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 278.94 to determine whether evidence is admissible under subsection 276(2) or 278.92(2).

Demande d'audience : articles 276 et 278.92

278.93 (1) L'accusé ou son représentant peut demander au juge, au juge de la cour provinciale ou au juge de paix de tenir une audience conformément à l'article 278.94 en vue de décider si la preuve est admissible au titre des paragraphes 276(2) ou 278.92(2).

Form and content of application

(2) An application referred to in subsection (1) must be made in writing, setting out detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial, and a copy of the application must be given to the prosecutor and to the clerk of the court.

Forme et contenu

(2) La demande d'audience est formulée par écrit et énonce toutes précisions utiles au sujet de la preuve en cause et le rapport de celle-ci avec un élément de la cause; une copie en est expédiée au poursuivant et au greffier du tribunal.

Jury and public excluded

(3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.

Exclusion du jury et du public

(3) Le jury et le public sont exclus de l'audition de la demande.

Judge may decide to hold hearing

(4) If the judge, provincial court judge or justice is satisfied that the application was made in accordance with subsection (2), that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice and that the evidence sought to be adduced is capable of being admissible under subsection 276(2), the judge, provincial court judge or justice shall grant the application and hold a hearing under section 278.94 to determine whether the evidence is admissible under subsection 276(2) or 278.92(2).

2018, c. 29, s. 25.

Audience

(4) Une fois convaincu que la demande a été établie conformément au paragraphe (2), qu'une copie en a été expédiée au poursuivant et au greffier du tribunal au moins sept jours auparavant, ou dans le délai inférieur autorisé par lui dans l'intérêt de la justice, et qu'il y a des possibilités que la preuve en cause soit admissible, le juge, le juge de la cour provinciale ou le juge de paix accorde la demande et tient une audience pour décider de l'admissibilité de la preuve au titre des paragraphes 276(2) ou 278.92(2).

2018, ch. 29, art. 25.

Hearing — jury and public excluded

278.94 (1) The jury and the public shall be excluded from a hearing to determine whether evidence is admissible under subsection 276(2) or 278.92(2).

Audience — exclusion du jury et du public

278.94 (1) Le jury et le public sont exclus de l'audience tenue pour décider de l'admissibilité de la preuve au titre des paragraphes 276(2) ou 278.92(2).

Complainant not compellable

(2) The complainant is not a compellable witness at the hearing but may appear and make submissions.

Non-contraignabilité

(2) Le plaignant peut comparaître et présenter ses arguments à l'audience, mais ne peut être contraint à témoigner.

Right to counsel

(3) The judge shall, as soon as feasible, inform the complainant who participates in the hearing of their right to be represented by counsel.

Judge's determination and reasons

(4) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part of it, is admissible under subsection 276(2) or 278.92(2) and shall provide reasons for that determination, and

(a) if not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;

(b) the reasons must state the factors referred to in subsection 276(3) or 278.92(3) that affected the determination; and

(c) if all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.

Record of reasons

(5) The reasons provided under subsection (4) shall be entered in the record of the proceedings or, if the proceedings are not recorded, shall be provided in writing.

2018, c. 29, s. 25.

Publication prohibited

278.95 (1) A person shall not publish in any document, or broadcast or transmit in any way, any of the following:

(a) the contents of an application made under subsection 278.93;

(b) any evidence taken, the information given and the representations made at an application under section 278.93 or at a hearing under section 278.94;

(c) the decision of a judge or justice under subsection 278.93(4), unless the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the decision may be published, broadcast or transmitted; and

(d) the determination made and the reasons provided under subsection 278.94(4), unless

(i) that determination is that evidence is admissible, or

(ii) the judge or justice, after taking into account the complainant's right of privacy and the interests

Droit à un avocat

(3) Le juge est tenu d'aviser dans les meilleurs délais le plaignant qui participe à l'audience de son droit d'être représenté par un avocat.

Motifs

(4) Le juge, le juge de la cour provinciale ou le juge de paix rend une décision, qu'il est tenu de motiver, à la suite de l'audience sur l'admissibilité de tout ou partie de la preuve au titre des paragraphes 276(2) ou 278.92(2), en précisant les points suivants :

a) les éléments de la preuve retenus;

b) ceux des facteurs mentionnés aux paragraphes 276(3) ou 278.92(3) ayant fondé sa décision;

c) la façon dont tout ou partie de la preuve à admettre est en rapport avec un élément de la cause.

Forme

(5) Les motifs de la décision sont à porter dans le procès-verbal des débats ou, à défaut, donnés par écrit.

2018, ch. 29, art. 25.

Publication interdite

278.95 (1) Il est interdit de publier ou de diffuser de quelque façon que ce soit le contenu de la demande présentée en vertu de l'article 278.93 et tout ce qui a été dit ou déposé à l'occasion de cette demande ou aux audiences mentionnées à l'article 278.94. L'interdiction vise aussi, d'une part, la décision rendue sur la demande d'audience au titre du paragraphe 278.93(4) et, d'autre part, la décision et les motifs mentionnés au paragraphe 278.94(4), sauf, dans ce dernier cas, si la preuve est déclarée admissible ou, dans les deux cas, si le juge ou le juge de paix rend une ordonnance autorisant la publication ou la diffusion après avoir pris en considération le droit du plaignant à la vie privée et l'intérêt de la justice.

of justice, orders that the determination and reasons may be published, broadcast or transmitted.

Offence

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

2018, c. 29, s. 25.

Judge to instruct jury — re use of evidence

278.96 If evidence is admitted at trial on the basis of a determination made under subsection 278.94(4), the judge shall instruct the jury as to the uses that the jury may and may not make of that evidence.

2018, c. 29, s. 25.

Appeal

278.97 For the purposes of sections 675 and 676, a determination made under subsection 278.94(4) shall be deemed to be a question of law.

2018, c. 29, s. 25.

Kidnapping, Trafficking in Persons, Hostage Taking and Abduction

Kidnapping

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.

Punishment

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

(a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, five years, and

Infraction

(2) Quiconque contrevient au paragraphe (1) commet une infraction punissable sur déclaration de culpabilité par procédure sommaire.

2018, ch. 29, art. 25.

Instructions données par le juge au jury : utilisation de la preuve

278.96 Au procès, le juge donne des instructions au jury quant à l'utilisation que celui-ci peut faire ou non de la preuve admise au titre du paragraphe 278.94(4).

2018, ch. 29, art. 25.

Appel

278.97 Pour l'application des articles 675 et 676, la décision rendue au titre du paragraphe 278.94(4) est réputée être une question de droit.

2018, ch. 29, art. 25.

Enlèvement, traite des personnes, prise d'otage et rapt

Enlèvement

279 (1) Commet une infraction quiconque enlève une personne dans l'intention :

a) soit de la faire séquestrer ou emprisonner contre son gré;

b) soit de la faire illégalement envoyer ou transporter à l'étranger, contre son gré;

c) soit de la détenir en vue de rançon ou de service, contre son gré.

Peine

(1.1) Quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel passible :

a) s'il y a usage d'une arme à feu à autorisation restreinte ou d'une arme à feu prohibée lors de la perpétration de l'infraction, ou s'il y a usage d'une arme à feu lors de la perpétration de l'infraction et que celle-ci est perpétrée au profit ou sous la direction d'une organisation criminelle ou en association avec elle, de l'emprisonnement à perpétuité, la peine minimale étant :

(i) de cinq ans, dans le cas d'une première infraction,