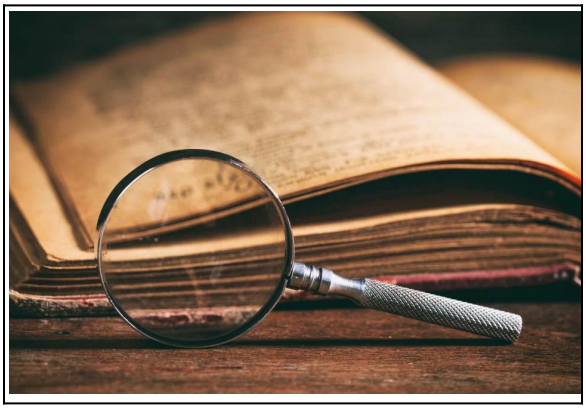
NEUBERGER & PARTNERS LLP
Toronto Criminal Defence Lawyers

NEWSLETTER: Sexual Assault Law Updates

October 2021

Supreme Court to Hear Challenge of New Rules



The Balancing Of Interests and The Tilting Of Scales

On October 5th and 6th, 2021, the Supreme Court will hear arguments in *R. v. J.J.* challenging the constitutionality of the new "reverse disclosure" legislation created by Bill C-51 in 2018.

The entire records screening regime is subject of the appeal and cross-appeal, primarily focusing on the treatment of non-sexual records in the possession of the accused.

The legislation has largely been seen as a response to the trial of Jian Ghomeshi, in which each complainant was confronted with emails and other correspondences that dramatically undermined their credibility.

The Attorneys General often argue that the legislation is a response to the Supreme Court's decision in *R. v. Shearing*, 2002 SCC 58 , [2002] 3 S.C.R. 33 which dealt with privacy interests in a complainant's diary which had lawfully fallen into the possession of the accused.

The debate about what comprises a "record" with an expectation of privacy looms large at the heart of the legislation. The Courts have come to different conclusions on privacy interests, particularly where the evidence is electronic communications between the complainant and accused.

Complainants have always been free to provide police with text messages or other electronic communications to support their allegations without need for a warrant. In *R. v. Marakah*, 2017 SCC 59 (CanLII), [2017] 2 SCR 608, Justice Moldaver wrote in dissent that a finding of privacy interests in text messages could interfere with the reporting of sexual assaults.

If electronic communications in sexual assault cases are found to carry an expectation of privacy it would have an impact on both the defence and prosecution of all charges enumerated in these sections of the Criminal Code.

Counsel for J.J. argues that the new sections 278.92 to 278.94 "represent Parliament's

legislative choice to protect complainants' interest, not their constitutionally protected rights." They submit that in this attempt to balance the interests of a complainant against the constitutionally protected fair trial rights of an accused, the new legislation is "ineffective, harmful, and ultimately unsalvageable."

An important consideration is that the presumptive inadmissibility of non-sexual evidence under s. 278.92 is not based on the nature of the evidence. Unlike sexual history evidence there is nothing inherently prejudicial about the type of non-sexual evidence in the accused's possession and it is only inadmissible because of who possesses the evidence.

One of the issues which is not as commonly addressed is an access to justice concern. With the new regime an accused must pay for extended evidentiary hearings and the time delays that go along with it. Meanwhile, complainants are provided with free legal counsel regardless of their ability to pay for their own representation. No complainant is denied "legal aid."

Many of the problems with the new legislation arise from the lack of precision or guidance regarding how the new rules are to be applied. There have been diverse rulings about whether or not a complainant should be given access to the full application record, whether or not they have standing at stage one to determine if a hearing should even be granted and, of course, which unlisted types of evidence attract a reasonable expectation of privacy.

Where an accused brings a motion for directions to find out if the evidence in their possession constitutes a "record" which requires an application, complainants have sometimes been granted standing to determine the status of the evidence and whether or not the complainant should be permitted to see the evidence or it should be sealed until a ruling is made.

This type of uncertainty and unequal outcomes in pre-trial applications lends to the argument that the legislation cannot survive proper scrutiny.

The most obvious concern with the changes for both evidence of a sexual and non-sexual nature is the complainant's standing and ability to know which evidence the defence plans to cross-examine her on.

Legitimate arguments have been made by the Crown that there are other situations which have the same effect. In the case of a re-trial, the defence will already have the earlier testimony to address any changes in the complainant's evidence. In a third party records application the complainant already has constitutional standing at the hearing but the application record is limited to arguing potential relevance only of the records the defence seeks to acquire.

The new regime requires that the defence lay out much more detail of their anticipated theory and trial strategy. The presumptive inadmissibility of all evidence in the accused's possession practically assumes that there is no legitimate defence to a sexual assault allegation.

Pre-trial applications cannot substitute for a trial and with the elimination of most

preliminary inquiries it is unrealistic to expect the defence to know which evidence they will need to call at trial before capturing the complainant's accusation under oath in a proper court of law.

While counsel for J.J. and intervenors for criminal defence lawyers have largely based their written submissions on foundational principles of our legal system, the facta for the Attorneys General and groups who advocate for complainants focus more on emotional arguments and public faith in the legal system.

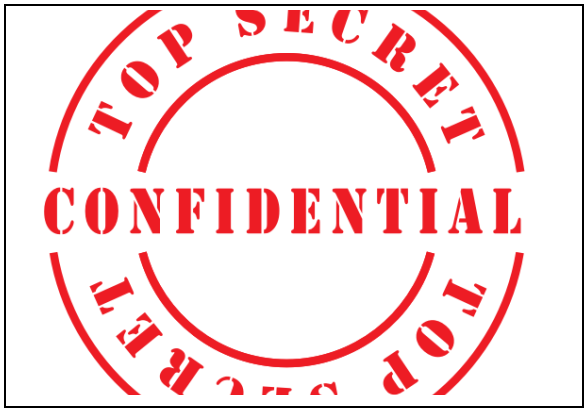
The Attorney General of Ontario argues in her factum that complainants are harmed by the trial itself, without explaining how to prevent a complainant from having to be involved in a trial.

One of the claimed traumas is described as being that "the rituals of the courtroom, such as its physical layout and the robing of those educated in the law, make clear that the complainant plays a subordinate role that often mirrors the gender, race and socio-economic status-based societal hierarchies in which the problem of sexual violence is rooted."

While it is a noble goal to address the problems specific to sexual assault trials, this particular point is repugnent and fails to recognize the importance of the process bringin home to any witness, including complainants, the solemnity of the trial. In addition is offensive to the presumption of innocence which must remain intact. Complainants are not the only people traumatized by the trial process, especially where the accusation is false. An accused and complainant both have their privacy violated by having to speak about their sexual lives in a public courtroom, never mind the harm done to an individual charged with such an offence. These arguments presuppose the allegation is true and are harmful to trial fairness.

Hence these are unsolvable problems. Accused people must have trials and those trials will be difficult for all involved. While it would be nice if everyone could retain their dignity and privacy in a sexual assault trial, the legal system is not capable of tilting the scales so far that innocent people are at risk of wrongful convictions due to a presumption that any evidence in their defence is inadmissible.

The Supreme Court has overwhelmingly ruled in favour of the Crown in the majority of sexual assault appeals over the last year. They have deferred to the decisions of trial judges who were in the position to view all the evidence. Now is their chance to make sure all the relevant evidence is permitted into the trial.



Production of CAS Records

A recent decision from the Ontario Court of Appeal determined that Children's Aid Society (CAS) records should be accessible on a third

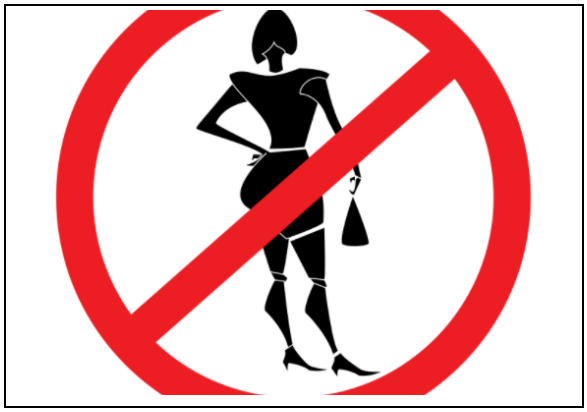
party records application when a parallel investigation has taken place.

In *R. v. S.S.S.*, 2021 ONCA 552, the CAS had conducted a "targeted" investigation into the subject matter of the criminal charges. Justice Feldman agreed with the defence that "any statement by the complainant to the CAS, if she made one, would have related to the allegations in this case and would not have been of a therapeutic nature, the privacy interest in the record is not as high as in counselling records."

As such, the records should have been produced for review by the court to determine the probative value. This decision is consistent with *R. v. K.C.*, 2021 ONCA 401 in which the likely relevance threshold for a second stage *Mills* application was met. In *K.C.*, the appellant was not granted a retrial because the complainants had already admitted they lied to the CAS during the investigation so the probative value of any inconsistencies was reduced. Justice Fairburn, in dissent, would have granted the appeal in *K.C.* on this ground.

The level of privacy attributed to CAS records remains dependent on the nature of the investigation and the length of the CAS involvement. The general consensus is that stage one of a third party records application should be met when there is evidence that the complainants gave statements about the subject matter of the charges but the probative value must be high to outweigh the privacy interests and succeed at stage two.

In *S.S.S.*, the trial judge was also found to have improperly bolstered the complainant's credibility by incorrectly determining that there was a proven absence of motive for the complainant to fabricate the allegation. It was the combination of those two errors that resulted in the retrial.



Legalizing Prostitution. Again!

The current anti-prostitution laws under s. 286 of the Criminal Code are winding their way up the Ontario Court of Appeal for the first time since the Supreme Court tossed out the former legislation in *Canada (Attorney General) v. Bedford*, 2013 SCC 72 (CanLII), [2013] 3 SCR 1101.

The Ontario Court of Justice found the new legislation unconstitutional in *R. v. Anwar*, 2020 ONCJ 103 and Superior Court of Ontario's Justice Sutherland reached the same conclusion for different reasons in *R. v. N.S.*, 2021 ONSC 1628.

Meanwhile, the Canadian Alliance for Sex Work Law Reform has launched a civil suit challenging all of the s. 286 legislation as it pertains to adults. One of the litigants in that case was also a co-accused in the successful *Anwar* challenge.

The Alliance, which is comprised of 25 leading sex workers rights groups, asked for a variety of

relief as an intervenor in the *N.S.* Crown appeal.

On September 7, 2021 the Ontario Court of Appeal ruled that the group could intervene in both the Crown application for a stay of Justice Sutherland's section 52(1) declaration that the legislation is of no force or effect and the appeal of the decision. The Criminal Lawyers Association was also granted intervenor status in the motion for a stay.

The Alliance had also requested "an order suspending the hearing of the appeal in this matter until such time that an application that the Group Intervenors have lodged in the Superior Court of Justice has been adjudicated upon."

If denied that order, the group requested that they "be permitted to introduce fresh evidence on the stay and participate fully in cross-examinations on that application."

The basis of these requests were that the Alliance argued the record in *N.S.* was "woefully inadequate."

The constitutional challenge in *N.S.* was based entirely on hypothetical scenarios submitted by the defence. In comparison, the *Anwar* case relied directly on the specific circumstances of the accused and numerous experts were called by both the defence and Crown to testify at the hearing.

The Alliance was noted as having filed over 2000 pages in their own application and a "condensed version" of over 600 pages in the *N.S.* motion. The Court of Appeal ruled that they could only submit 15 pages as intervenors.

Too Much Complainant Control

While there has been much lobbying to grant complainants more rights and access to information about the prosecution of sexual assault charges, one prosecutor recently found out there is a limit to how much control can be granted to a complainant.

In *R. v. Strybosch*, 2021 ONSC 6109 the Crown had agreed to withdraw charges for a peace bond and then withdrew that agreement after the accused had already begun the agreed upon therapy sessions as part of the deal.

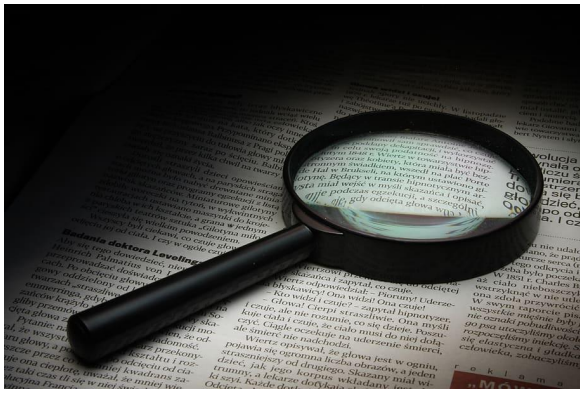
The complainant had made an audio recording of her meeting with the prosecutor in which the complainant claimed her accusation had been misapprehended. The recording showed that the prosecutor believed there was no prospect of conviction but agreed to renew the prosecution to give the complainant closure.

Justice Goodman granted a stay of proceedings finding that the complainant "by her own admission, intimated a desire to use the public prosecution as a means of advancing her own agenda, namely, to

confront the accused with the allegations in front of his family, irrespective of whether there was any prospect of proving such allegations beyond a reasonable doubt."

Specifically, it was determined that "the applicant has established that the Crown attorney improperly repudiated the agreement based on the direction or instance of the complainant. The prosecution has engaged in conduct that is offensive to societal notions of fair play and decency, and proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system."

If the complainant had not surreptitiously recorded her meeting with the Crown it is unknown if this injustice would have come to light. As it was, the prosecutor attempted to heavily redact the transcript of the conversation before turning it over to the defence.



Zooming In On Demeanour

There has been much debate about whether or not trials conducted over Zoom compromise the ability of a judge to make proper credibility assessments.

Presence in a courtroom not only lends more gravity to the proceedings but, as one judge recently found, it can also affect the judge's view of a complainant's entire demeanour.

In *R v. B.G.*, 2021 ONSC 6248, Justice Harris noted a dramatic change in the complainant when, due to technical difficulties, she had to change from testifying from home to giving evidence at the Crown's office.

"It has been observed that credibility can be better assessed on Zoom because the witness faces the camera straight on, as opposed to the profile view that a judge has of witnesses in a courtroom [citation removed]. While that is true, there are also major observational deficits in assessing credibility over video. This trial highlighted several aspects."

In particular, Justice Harris found that the ability to assess demeanour is affected by the lighting, framing the camera too close and the angle or sharpness of other aesthetic features.

While demeanour is only one factor in credibility assessments everything affecting credibility becomes important in sexual assault cases which often hinge on nothing but the testimony of a complainant with no corroborating evidence.

In the case of *B.G.* there was significant other evidence that the allegations were retributive for the accused ending their marriage, including the complainant's claim to not have known about other legal action being taken against the accused on her behalf in another country. Nevertheless, the decision gives reason to be cautious about how Zoom trials are conducted.

No Such Thing As "Unreasonable Acquittal"

Just as the Supreme Court has limited appeals of convictions claiming uneven scrutiny, the Ontario Court of Appeal has confirmed that the Crown is also limited in making similar arguments when appealing an acquittal.

In *R. v. E.B.*, 2021 ONCA 635, Justice Zarnett wrote: "As the Supreme Court of Canada has held, caution must be taken not to create a ground of appeal of "unreasonable acquittal" by seizing on perceived deficiencies in a trial judge's reasons for acquittal."

While the Crown believed their case had been strong enough with supporting DNA evidence, the Crown is not permitted to use an appeal to retry their case.

Appeals of acquittals remain strictly limited. Nevertheless, the accused in this case had to defend his acquittal despite the obvious deficiencies in the Crown's grounds of appeal.

Other Cases To Watch

R. v. J.J, 2020 BCSC 349 SCC File # 39133
It's finally here. This decision will give continuity and important guidance across Canada on how to interpret the new legislation from Bill C-51 if it is deemed to be constitutional. It is likely that the decision won't be rendered until 2022.

R. v. Kirkpatrick, 2020 BCCA 136 SCC File # 39287
This case will be looking at the correct interpretation of the Supreme Court decision in *Hutchinson* as it relates to consent being dependent on condom usage. The lower court was also split on whether failure to use a condom was a form of fraud. There are numerous intervenors in this case.

R. v. Ndhlovu, 2020 ABCA 307 SCC File # 39360
Whether or not mandatory SOIRA order is unconstitutional. There are numerous intervenors in this case.

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