NEUBERGER & PARTNERS LLP
Toronto Criminal Defence Lawyers

NEWSLETTER: Sexual Assault Law Updates

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Two New Supreme Court Decisions:

New Rules of Evidence and "Stealthing"

The "New Rules" of Evidence

On June 30, 2022, the Supreme Court of Canada ruled in *R. v. J.J.*, 2022 SCC 28 that the Criminal Code amendments brought in by Bill C-51 after the Jian Ghomeshi trial, are constitutional, requiring the defence in sexual assault cases to reveal all "records" in their possession prior to trial.

In attempting to give guidance on whether or not evidence is subject to the section 278.92 regime, the majority said that the evidence must have an expectation of privacy beyond just mere discomfort. Despite emphasizing that "mundane" conversations or documents would not be captured, the determination of what is "core biographical" information remains unclear.

Ultimately, the majority stated that an accused person ought to be able to determine if it is a "record" and, if it's unclear, an application should be brought before a judge.

> [72] When it is unclear whether the evidence is a "record", counsel should err on the side of caution and initiate Stage One of the record screening process. To be clear, under the record screening regime, the accused will be in possession or control of the evidence at issue, and they will know the context in which the evidence arose. For this reason, the accused will be well equipped to discern whether the evidence is a "record" and to make submissions on this point, if need be.

As per *R. v. Barton*, 2019 SCC 33 and *R. v. Goldfinch*, 2019 38, the trial judge is the "gatekeeper" in evidentiary determinations. This is true even where the Crown and Defence agree that something is not captured by the regime.

The *J.J.* decision clarified that complainants do not have standing at Stage One of the application and that the trial judge may limit the complainant's access to the Application Record to preserve the integrity of the trial.

The majority also determined that text messages are not automatically records simply because of the platform of the messages. The assessment should be based on context and content, not on the method used for communication.

Significantly, the J.J. decision confirmed that sexual evidence contained in a record that was subject matter of the charge, previously excluded from section 276, is now captured under the new section 278.92.

Notably the majority began their reasons with statements about the low conviction rates in sexual assault crimes and statistics showing that it is severely under-reported. With numbers of convictions in mind, the majority declared in para 2: “More needs to be done.”

Justice Brown, in his dissent, was the first to mention the risk of wrongful convictions. At para 198, he described the legislation as an “unprecedented and unconstitutional erosion by Parliament of the fair trial rights of the presumptively innocent —– who, it should be borne in mind, will sometimes be *actually* innocent.”

Further, at para 205 Justice Brown poignantly warned:

> Parliament has legislated a formula for wrongful convictions. Indeed, it has all but guaranteed them. Like the Court that decided *Seaboyer*, I would not tolerate that inevitability. And like the regime at issue in *Seaboyer*, the records screening regime ought to be returned to Parliament to be narrowed. Parliament could have achieved its objective in a *Charter*-compliant way.

On further note, In the past, the defence had sometimes brought a motion for directions to avoid revealing documents that would be found not to be a “record.” The *J.J.* decision renders this practice moot by allowing for the complainant to have standing at a motion for directions but not at Stage One of the Application.

Condom Usage and Consent

On July 29, 2022, the Supreme Court ruled in *R. v. Kirkpatrick*, 2022 SCC 33 that sex with a condom and without a condom are distinctly different sexual acts and no consent is given when the condition of a condom is not met.

This decision is said not to overturn the very unpopular decision in *R. v. Hutchinson*. 2014 SCC 19, which said that condom usage was not part of the definition of “sexual activity” or the sexual act agreed to but deception on condom usage could vitiate consent.

The majority in *Kirkpatrick* found that the facts of the case were distinct from *Hutchinson* in that sabotage of a condom was different in nature since the condom, despite being sabotaged, was still used in the agreed upon act.

The majority determined that sex with and without a condom are fundamentaly and qualitatively completely different sexual acts.

> [43] Applying *Hutchinson*'s focus on the "specific physical sex act", condom use may form part of the sexual activity in question because sexual intercourse without a condom is a fundamentally and qualitatively different physical act than sexual intercourse with a condom. To state the obvious, the physical difference is that intercourse without a condom involves direct skin-to-skin contact, while intercourse with a condom involves indirect contact. Indeed, this difference, of a changed physical experience, is put forward by some men to explain why they prefer not to wear a condom [citation removed].

Although a majority decision, in separate reasons, four Justices concurred with the majority on dismissing the appeal but strongly stated that the condom usage should continue to be considered as a form of vitiation of consent by fraud, more consistent with *Hutchinson*.

The minority disagreed with Justice Martin's reasoning, citing *Hutchinson* as ruling that condom use is not part of the Criminal Code's definition of "sexual activity in question." They were concerned with the loss of a "principled and clear line between criminal and non-criminal conduct." The majority focused on "specific facts" when looking at the *ratio* of previous decisions.

Hutchinson was not overturned by the majority, indeed they cite *Hutchinson* on some issues. As such, the *Kirkpatrick* decision narrows itself to being a ruling that sex with and without a condom are qualitatively different acts which require renewed consent.

The differences between the majority and minority reasons were mostly a technical dispute regarding whether consent was vitiated by fraud or never given.

That said, the issues raised by four of the justices that there is a real concern about broadening the definition of sexual activity to cover condom use could result in criminalization of acts that should not attract the "blunt instrument of the criminal law."

Interpreting the *J.J.* Decision

Applying the reasoning in *R. v. J.J.*, 2022 SCC 28, the Alberta Court of Appeal granted bail pending appeal in *R v Bobrosky*, 2022 ABCA 242 as "there may be uncertainty" on the extent that an accused can be cross-examined on his affidavit during a pre-trial application.

J.J. did confirm, in line with the *Darrach* decision, that an accused's evidence on the 278 motion applies to the trial proper. The

cross-examination of the accused on the Affidavit evidence, may be used at trial to undermine credibility of the accused.

More significantly, the Court of Appeal considered the way *J.J.* impacts proximate sexual activity and how to determine what is "subject matter of the charge."

In *R v McKnight*, 2022 ABCA 251, starting at para 253, there is reference to a section of *J.J.* titled "Records of a Sexual Nature (Not Covered by Section 276)" emphasizing the Supreme Court majority in para 67 of *J.J.*:

> For clarity, "subject matter of the charge" refers to the components of the *actus reus* of the specific charge that the Crown must prove at trial. These types of records are likely to engage the complainant's reasonable expectation of privacy under the content and context framework described above.

Given that the Supreme Court has validated that all evidence of a sexual nature is either captured by section 276 or 278.92, the question then becomes whether or not sexual activity that forms the subject matter of the charge is given higher probative value than other, proximate, sexual activity.

The Court of Appeal disagreed with both the Crown and the Defence that proximate sexual activity leading to the alleged assault would form part of the "transaction."

> Not all such evidence is exempt as a category from s 276 because "proximate sexual activity" is not a category of evidence. Sexual activity occurring "at a proximate time" is a relative term and a question of degree. Sexual activity which is "integrally connected" to the alleged offence may come closer to capturing this idea, *however such activity in no way needs to be synonymous with all a complainant's sexual activity with an accused occurring on the same night as the alleged offence*. Whether such sexual activity is *a part of or integrally connected to the specific charge* is highly case-dependent, as it is "necessarily a fact-driven exercise" [emphasis in original].

The *McKnight* case also raised concerns on appeal about the effect of having to reveal defence strategy prior to trial but did not focus on inappropriate cross-examination of the affiant.

Similar Sexual Acts?

Prior to the ruling in *R. v. Kirkpatrick*, 2022 SCC 33, the Alberta Court of Appeal in *R. v. Hay*, 2022 ABCA 246 overturned an acquittal and substituted a conviction where the trial judge believed the accused thought that anal penetration with a finger was a similar sexual act to anal intercourse with a penis.

The accused had argued that a past sexual encounter was relevant because he attempted anal intercourse after the complainant had asked him to insert a finger in her anus on a previous sexual encounter.

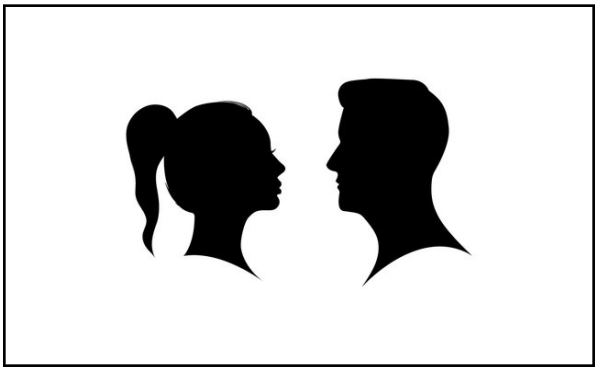
The accused relied on honest but mistaken belief in consent as his sole ground of defence. As part of her findings, which accepted the evidence of the accused, the trial judge stated:

> Mr Hay believed that his finger was not that different from his penis;
>
> o The trial judge stated that "While I accept that a penis is generally larger than a finger, I note that I do not have specific evidence to support or counter the reasonableness of this claim."

In Kirkpatrick, the majority specifically notes that touching with a finger and a penis are completely different sexual acts, requiring renewed inquiry into consent. Kirkpatrick at para 44:

> Similarly, consent to a form of touching may depend on what is being used to touch the body because the law appreciates there is a physical difference between being touched by a digit, penis, sex toy or other object.

Ultimately, the Court of Appeal found that the trial judge focused too much on the accused's belief in consent, ignoring the lack of reasonable steps. A mistake of law is not a defence to sexual assault.



Competing Testimony in Honest But Mistaken Belief Cases

In *R. v. K.Q.*, an unreported Ontario Court of Justice decision on May 12, 2022, Justice Ghosh acquitted the accused after finding that the complainant downplayed the extent of her "mixed signals" she was giving.

This was a case in which the defence conceded the lack of consent to touching a colleague's breast during a night of drinking. The question was only if the accused had reasonably misinterpreted the complainant's actions.

In regards to the defence of honest but mistaken belief, where each party has a different recollection as to the events, Justice Ghosh noted:

> Witnesses on both sides of sexual assault complaints can be both sincere and oblivious to the reasonable and subtler intricacies of sexually charged platonic relationships.

The complainant's admission that she gave the accused "mixed signals" in itself could be enough to evoke an air of reality to the defence.

K.Q. importantly confirms that the defence of honest but mistaken belief in communicated consent can be advanced in circumstances of competing factual narratives of the sexual conduct in question.

Issues of credibility in relation to the factual matrix of events does not preclude this defence from being successful.

Uneven Scrutiny As a Ground of Appeal

The BC Court of Appeal granted a new trial in *R. v. M.P.H.*, 2022 BCCA 216 after finding that the trial judge employed uneven scrutiny to the evidence of the Crown and Defence.

The appellate court noted "that it is an error of law to take a more forgiving approach to the evidence of the Crown than the defence."

Referencing *R. v. G.F.*, 2021 SCC 20:

> [44] As noted by the Crown, in *G.F.*, the majority judgement expresses "serious reservations" about whether "uneven scrutiny" is a "helpful analytical tool to demonstrate error in credibility findings." The majority appears to be concerned that "uneven scrutiny" focusses "on methodology and presumes that the testimony of different witnesses necessarily deserves parallel or symmetrical analysis" rather than "on whether there is reversible error in the trial judge's credibility findings": *G.F.* at para. 100. The majority then points out that appeal decisions that have accepted uneven scrutiny arguments (including *Roth*) involved specific errors in the trial judge's credibility assessment: *G.F.* at para. 100.

Uneven scrutiny is usually combined with other errors before appellate intervention is warranted. In this case, there were stereotypes about proper parenting and misapprehension of evidence relating to the complainant's memory.

One of the issues was that the judge accepted the subjective feelings of the child witnesses regarding the nature of their "time out" punishments. This was something the accused could not testify about, given it was the children's own perception of the nature of the punishment.

The Court of Appeal also found that the judge relied on personal views of parental standards and assumptions about proportional parental methods of discipline.

Finally, the child's evidence at trial was that he had no memory of sexual abuse at the time of an earlier statement but the trial judge dismissed the lack of disclosure as the child just not having turned his mind to it at the time.

Reasonable Expectation of Privacy

The decision in a pre-trial evidentiary decision in *R. v. Khan*, 2022 ONCJ 294 was published on the same day the Supreme Court released the *J.J.* decision and follows their guidelines exactly.

The decision was published after the trial to protect the integrity of the trial evidence, which ultimately were found to not be records with an expectation of privacy.

The evidence consisted of Instagram private messages which, although some contained sensitive content about drug trafficking, did not contain information which struck at anyone's "intimate biographical core."

The defence records remained sealed after the Stage One determination. The decision refers to *R. v. Marakah*, 2017 SCC 59 to determine the limits on expectation of privacy when the recipient chooses to disclose the messages later on.

Other Cases To Watch

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

D.R. v. Her Majesty the Queen SCC File # 40039
Whether or not a judge used stereotypes or drew proper inferences about credibility.

Her Majesty the Queen v. S.S. SCC File # 40147
A child complainant's police statement was admitted into evidence without any ability to cross-examine as the child was fragile.

R. v. Christopher James Kruk SCC file #40095
Crown granted leave to appeal. Conviction overturned based on the trial judge using stereotypes about what a woman would "know"

Contributors:
Joseph A. Neuberger, LL.B, LL.M., C.S.
Diana Davison, Legal Researcher