NEUBERGER & PARTNERS LLP
Toronto Criminal Defence Lawyers

NEWSLETTER: Sexual Assault Law Updates

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Ontario No Longer Subject To New Rules

New Rules of Evidence Found Unconstitutional in Ontario

On November 23, 2020, Mr. Justice Akhtar of the Ontario Superior Court, ruled that sections 278.92, 278.94(2) and 278.94(3) were of no force or effect in Ontario. His decision in *R. v. Reddick*, 2020 ONSC 7156 will likely go to the Court of Appeal.

In Ontario the complainant is no longer granted standing at pre-trial hearings and only evidence of a sexual nature requires an advance application. Alberta, Saskatchewan and the Yukon Territories had already ruled s. 278.92 to be unconstitutional but other provinces have upheld the legislation.

To date, the new rules of evidence have not been uniformly applied, with many judges disagreeing on the scope of the legislation, the process to be followed and which evidence qualified as a "record" under 278.1.

In August, during pre-trial applications in *R. v. G.E.* [2020] O.J. No. 4337, Justice Doody had commented "This would not be a complex case but for the complexity imposed by the procedural requirements of the *Code* and some uncertainties created thereby."

That uncertainty will continue to overshadow sexual assault trials until the constitutionality of the new legislation is finally settled by the Supreme Court of Canada.

Most defence lawyers file a motion for directions prior to their applications to determine whether or not the material they possess is considered a record with a reasonable expectation of privacy. In some cases material successfully obtained through a third party records application was then also subjected to a secondary application under 278.92.

In one jury trial, *R. v. E.M.*, 2019 ONSC 6120, a video capturing the subject matter of the charge was deemed admissible under s. 276 but inadmissible under s. 278.92. The new ruling from Justice Akhtar may open up a large number of appeals.

In his decision in *Reddick*, Justice Akhtar was concerned with the blanket exclusion of all evidence unless it is approved through an advance application. HIs ruling also returned the legislation to the guidelines set out in *Reigna v. Darrach* wherein the Crown is expected to consult with the complainant but not to share the full defence material or strategy.

Significantly, Justice Akhtar ruled that the defence had the right to disclosure of the complainant's reaction to the Crown's discussion of defence evidence, which would then be confidential if the complainant was speaking with her own counsel.

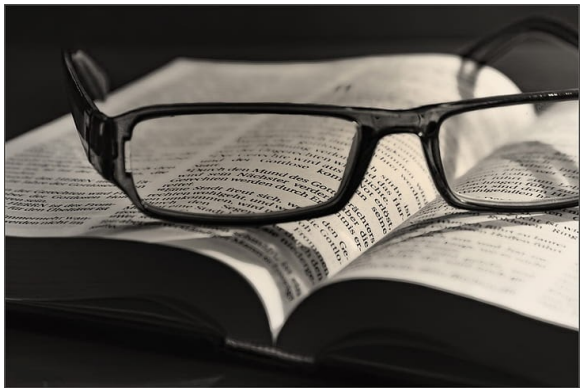
While the Crown argued that the legislation sought to further protect a complainant from "ambush," Justice Akhtar wrote "There is no reason why an accused in possession of these documents should not be able to surprise a witness with them in sexual assault cases when they are able to do so in any other type of offence."

Emphasis was placed on the role of the prosecutor, noting that the legislation could pit the complainant against the Crown, turning the trial into a "tripartite proceeding." Indeed, in some cases the complainant and the Crown have taken different positions on the admissibility of evidence.

Justice Akhtar pointed out that "the Crown owes a duty to an accused person to ensure that they are treated fairly and to exercise its discretion within the proper prosecutorial limits." This includes a duty to withdraw charges which do not have a reasonable prospect of conviction, disclose evidence that damages the Crown's case and to also make admissions of fact that may weaken their case.

A complainant being granted standing at pre-trial hearings undermines the Crown's independence and their fundamental role and duty to provide essential safeguards in our criminal justice system.

The Supreme Court will have an opportunity to speak to the new legislation when they hear *R. v. J.J.*, 2020 BCSC 349 which was granted leave to appeal directly to the Supreme Court of Canada. In that case, Justice Duncan had read down the legislation to remove the seven day notice period. In *Reddick*, Justice Akhtar had rejected that approach finding that it was a "re-write" of the law and would result in significant trial delays.



Supreme Court Decisions

On November 20, 2020, the Supreme Court ruled in *Ontario (Attorney General) v. G*, 2020 SCC 38 that people found not criminally responsible on account of mental disorder (NCRMD) should have the same right to remove themselves from the sex offender registry as those who have been found guilty.

While other offenders could seek removal under certain conditions, those who were found NCRMD did not qualify for removal even after receiving an absolute discharge from a review board.

The ruling declared *Christopher's Law* to be unconstitutional under section 15 of the *Charter*, only as it applied to NCRMD offenders but gave parliament a year to revise the legislation. The section 7 argument was not addressed as another case, *R v Ndhlovu*, 2020 ABCA 307 is currently before the courts challenging the mandatory SOIRA requirement on that ground.

Additionally, in November, the Supreme Court endorsed the dissenting opinions *R. v. Langan*, 2019 BCCA 467, *R. v. Slatter*, 2019 ONCA 807 and *R v Kishayinew*, 2019 SKCA 127.

The most significant of these decisions is *Langan*, which involved permissible uses of prior consistent statements and Crown-led sexual history evidence. In dissent, Chief Justice Bauman did not see a need for the Crown to make an advance application to adduce text messages which reference other sexual activity. In particular, the complainant had expressed that she did *not* want to have sex during an upcoming weekend.

The messages were primarily related to making travel arrangements and when they would be meeting. As such, the evidence was not considered to be captured by section 276 of the Criminal Code as they did not discuss any specific prior, consensual sexual encounter.

The Supreme Court did not clarify or expand on the "narrative as circumstantial evidence" exception for prior consistent statements.

The *Slatter* decision endorsed the dissent of Justice Pepall, who found the trial judge gave sufficient reasons for accepting the reliability of the complainant's testimony. The case garnered a large number of intervenors who were concerned about the barriers faced by complainants with mental disabilities.

The decision in *Kishayinew* endorsed Justice Tholl's view that circumstantial evidence can compensate for testimony which contains inconsistencies or segments of blackout due to intoxication.

Decisions have been reserved in the appeals of *R. v. G.F.*, 2019 ONCA 493, *R. v. R.V.*, 2019 ONCA 664 and a constitutional challenge in *R. v. C.P.*, 2019 ONCA 85.

The Decision to Testify

On November 19, 2020, in *R. v. D.A.,* 2020 ONCA 738, a new trial was ordered after it was determined that the accused had not been given a meaningful opportunity to testify in his own defence.

Justice Pardu agreed with appellate counsel that "ineffective assistance of counsel can be

established by demonstrating that trial counsel either made the decision not to call the appellant or failed to provide advice to the appellant regarding testifying."

The court unanimously ruled that the decision to testify must be left with the accused and that defence counsel have an obligation to meaningfully discuss that choice with the accused.

In the case of *D.A.*, there were no compelling reasons why the accused was vulnerable to cross-examination and the discussion about whether or not the accused would testify took place after only a few minutes of whispered conversation between counsel and the accused while in front of the jury.

The Court of Appeal was convinced that the accused had wanted to testify during his trial and would have done so if the trial lawyer had not made the decisions for him. The level of experience of the prosecutor should only be a factor in how to assist the accused in preparation before testifying.

While there may be some cases where the accused is vulnerable due to past convictions or inculpatory statements, in this case there was no compelling reason why counsel should have discouraged his testimony.

Nervousness over testifying is natural and should be addressed by preparation and an advance discussion about the advantages and disadvantages of testifying. Nevertheless, this important decision should always remain with the accused and in many sexual assault trials the failure of an accused to testify can be fatal to the defence.

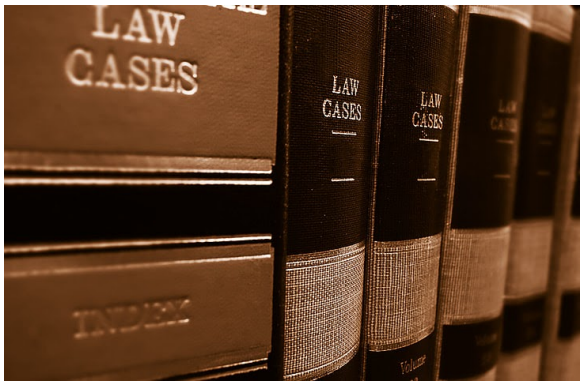
More Mandatory Minimums Rejected As Unconstitutional

Two mandatory minimum sentences have been determined unconstitutional by the Ontario Court of Appeal.

In *R. v. Joseph*, 2020 ONCA 733 the unanimous court disagreed with the trial judge on a number of issues but confirmed that the mandatory sentences required under sections 286.2(2) (receiving a financial benefit from sexual services provided by a minor) and 163.1(2) (making child pornography) were of no force or effect.

Of the many changes made to the *Criminal Code* in Bills C-51 and C-75 to reflect court decisions, the mandatory minimum sentencing requirements remain in place where not struck down by previous challenges.

Primarily, the successful challenges show that sentencing should remain at the discretion of judges who have heard the facts of a case and are better placed to determine the proper deterrence in a given situation.



Section 276 Does Not Apply To Non-enumerated Offences

In October 2020, Ontario Superior Court Justice Stribopoulos maintained that section 276 was not engaged in trials on charges which are non-enumerated offences.

R. v. Williams, 2020 ONSC 6347 declined to follow the ruling of Justice Dennison in *R. v. M.D.*, 2020 ONSC 951. Observing that "judges are not free to make significant changes to the common law or changes that circumvent the legislative choices made by Parliament," Justice Stribopoulos found that the legislation had been intentional and not the result of an oversight.

Though the Supreme Court decision in *R. v. Barton*, 2019 SCC 33 "extended the reach" of *Seaboyer* guidelines it did not go so far as to include new categories of offences. Justice Stribopoulos determined that charges connected to sexual services were likely to engage evidence of other sexual history by the nature of the charge and that the evidence should remain subject only to the normal rules of evidence to determine the probative value.

Other Cases To Watch

R. v. Delmas, 2020 ABCA 152, SCC Case #39163
Issues: Stereotypes about male accused, lack of *voir dire* on Crown-led evidence

R. v. W.M., 2020 ONCA 236, SCC Case #39114
Issue: Whether or not misapprehension of evidence played a critical role in a conviction.

R. v. Cortes Rivera, 2020 ABCA 76, SCC Case #39084
Issue: The appropriate remedy when a judge improperly restricted cross-examination and the defence abided by that ruling.

R v Ndhlovu, 2020 ABCA 307, granted ability to appeal under s. 40 of the *Supreme Court Act*
Issue: Constitutional challenge to mandatory lifetime SOIRA compliance after multiple convictions.

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