A toolkit for navigating section 276 and 278 *Criminal Code* matters as complainant counsel in criminal proceedings

By Myrna McCallum and Gloria Ng

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WEST COAST LEAF

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This report is one of the outcomes of a law reform project by West Coast LEAF and the YWCA Metro Vancouver called *Dismantling the Barriers to Reporting Sexual Assault*. It is also grounded in the expertise shared by those who collaborated in the *We Are Here: Women's Experiences of the Barriers to Reporting Sexual Assault* report.

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Introduction

THE DISCLOSURE OF PRIVATE RECORDS can be a devastating intrusion into the lives of survivors[1] of sexual assault[2]. In fact, many scholars have identified third party record production applications as a key time in the criminal justice process when survivors of sexual assault experience re-traumatization.[3] Not only is the request for production of the complainant's personal records often rife with gendered stereotypes about the "perfect victim", it is also one of the main parts of the criminal justice process where stereotypes are relied on to undermine the survivor's credibility and reliability.[4] There is also a broader social cost to third party production applications: unnecessary production of confidential records can act to deter survivors from reporting sexual assault or accessing support services. Dr. Lise Gotell has described this tension as follows:

> *In order to seek formal recognition of the harm and violation of sexual assault, a woman must report. In order to recover from the injury of this intense trauma, she must seek therapy. Both of these necessities involve telling one's story. In law, the story must be linear, coherent and non-contradictory in order to be heard. In therapy, the narrative rules are not structured. …* Contradictions are expected, *empowerment is intended, and the process is designed to help a victim reassert a feeling of control over herself and her environment' … There is a wealth of evidence to suggest that reporting and therapy became two mutually exclusive options as a direct result of O'Connor's liberalized disclosure regime.*[5]

When Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act* (*Bill C-51*) came into force on December 13, 2018, it amended several sections of the *Criminal Code of Canada*[6] with respect to the admissibility of evidence concerning prior sexual activity of the complainant in a sexual offence trial and the rules around the production of third party records. Notably, Bill C-51 legislated the right of complainants to be represented by counsel in these types of proceedings (often termed "rape shield proceedings").

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1 We use the terms "survivor" throughout this report to refer to people who have been sexually assaulted. We recognize, however, that not everybody who has experienced sexual assault identifies as a "survivor." Some people may identify more with the term "victim" others may not wish to place labels on themselves. We also use the term "complainant" when speaking about survivors in the context of the criminal trial process.

2 We use the term "sexual assault" throughout this toolkit to capture a wide range of sexual contact without consent. We use the term "sexual assault offences" when speaking about sexual assault in the context of criminal trials.

3 Lise Gotell, "Colonization Through Dislcosure: Confidential Records, Sexual Assault Complainants and Canadian Law", Social & Legal Studies 10.3; 315–346.

4 See generally ibid.

5 Ibid at 329-30.

6 RSC, 1985, c C-46.

Parliament's recognition of complainants' right to representation in rape shield proceedings is a significant step in the acknowledgement of their right to be heard in applications that often strike at the very core of their intimate and personal information. It is also a recognition that despite the fact that the rape shield provisions have been considered by the Supreme Court of Canada ("SCC") and in courts across the nation since *R. v. Seaboyer* [7] and *R. v. Darrach*[8] were decided in 2001 and 2000 respectively, experience has shown that myths and stereotypes remain pervasive and persistent in sexual offence trials and prosecutions.

The aim of this toolkit is to provide guidance to lawyers representing complainants in section 276 and section 278 *Criminal Code* matters. This area of law is complex and ever-evolving. It is not only essential that complainant's counsel understand the law and its evolution but also that they understand the myths and stereotypes that various cases and legislative amendments have attempted to address, and the role that trauma plays in the criminal justice process. Accordingly, there are four parts to this toolkit:

PART 1: A trauma-informed practice approach sets out a brief overview of trauma and its many effects on survivors of sexual assault. This part also discusses how working with survivors of sexual assault may subject lawyers to risk of vicarious trauma and further provides an introduction to practing cultural humility when working with survivors.

Part 2: Practical advice for working with survivors of sexual assault in a trauma-informed way sets out guidance for preparing for meetings with your client and conducting trauma-informed interviews.

Part 3: A legal overview of sections 276 and 278 of the Criminal Code outlines the legal evolution of the law surrounding the admissibility of evidence of the complainant's sexual activity and the production of third-party records. It includes information on how the courts have rejected arguments that rely on the "Twin Myths" of sexual assault.

Part 4: A practical guide for representing complainant's counsel in section 276 and section 278 matters provides practical advice for lawyers who are undertaking these files including the nature of legal aid retainers, the type of information that should be sought by counsel, and procedural best practices in communicating with the Crown.

This toolkit is intended to provide an introduction to the topics of trauma-informed practice and matters arising under sections 276 and 278. It does not provide legal advice. It is essential that you continue to pursue additional learning to ensure your practice is trauma-informed, culturally safe, and legally sound.

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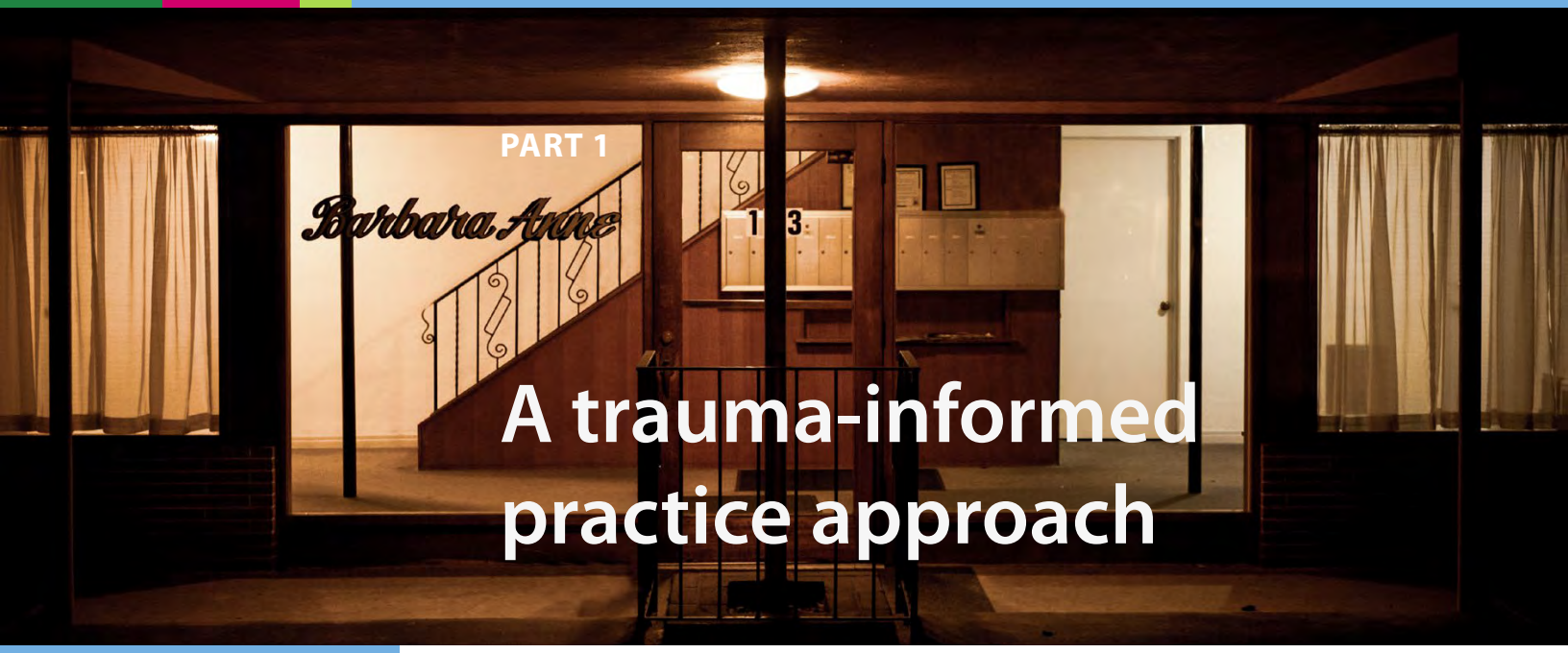
7 [1991] 2 SCR 577. [*Criminal Code*]
8 [2000] 2 SCR 443.



PART 1

A trauma-informed practice approach

"Sexual assault is an experience of trauma, and trauma has a neurobiological impact — that is, it affects our brains and our nervous systems. For this reason, it is imperative that those working within the criminal justice system understand the impact of trauma on victims of sexual assault so they can process sexual assault cases more effectively and hear evidence in these cases fairly and impartially."

AN EFFECTIVE AND ETHICAL LEGAL ADVOCATE is one who is practicing in a trauma-informed and culturally safe way. This is a professional responsibility we owe to our clients to ensure that we are effectively representing them and, in the process, doing no harm. This approach is critical since we are likely appearing in our client's life at a time when they are most in need of effective legal representation. Moreover, trauma-informed practice aligns with your professional obligation to further the administration of justice. Understanding the impact of trauma on a survivor of sexual assault can help you identify myths and stereotypes that undermine the fact-finding mission of the criminal justice process.

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DEFINING TRAUMA

While there remains work to be done in accurately defining trauma, in general terms, trauma can be defined as an experience or sequence of experiences that can severely impact a person's ability to cope with the circumstances with which they are faced.[10]

9 Haskell, Lori and Melanie Randall, "Impact of Trauma on Adult Sexual Assault Victims: What the Criminal Justice System Needs to Know" Department of Justice (1 January 2019) online: <https://ssrn.com/abstract=3417763 or http://dx.doi.org/10.2139/ssrn.3417763>. [*Impacts of Trauma*]

10 Emily Arthus et al, "Trauma-Informed Practice Guide" BC Provincial Mental Health and Substance Use Planning Council (May 2013) online: <http://bccewh.bc.ca/wp-content/uploads/2012/05/2013_TIP-Guide.pdf>.

Some common forms of trauma include:[11]

1. **TRAUMA FROM A SINGLE TRAUMATIC EVENT.** This type of trauma can include an intense experience of violence, such as sexual assault, a significant loss of a loved one, or witnessing of violence.

2. **TRAUMA CAUSED BY REPETITIVE CONDUCT OR EVENTS.** This type of trauma can include ongoing violence or abuse, such as intimate partner or family violence, and tends to involve an element of domination or control.

3. **DEVELOPMENTAL TRAUMA.** This type of trauma is caused by an event or repetitive conduct experienced early on in a person's life, such as childhood sexual assault or witnessing family violence.

4. **HISTORICAL TRAUMA AND INTERGENERATIONAL TRAUMA.** Historical trauma is a type of trauma that is caused as a result of group-based domination, violence, and oppression, such as colonialism, genocide, and ongoing racism, that spans generations. *Intergenerational trauma* is one element of historical trauma and refers to the effects that can be experienced by people who live with survivors of trauma, including family members and loved ones of survivors of the residential school system and other colonial systems. People who experience intergenerational trauma may share some of the same mechanisms and patterns of the generation of family or friends who experienced the trauma.

UNDERSTANDING THE IMPACT OF TRAUMA ON SURVIVORS OF SEXUAL ASSAULT

Sexual assault impacts survivors in different and complex ways. Sometimes, the response a survivor may have or actions they may take may be surprising. For this reason, it is necessary to understand the impact that trauma has on survivors of sexual assault. In particular, you should understand the following:

TRAUMA HAS NEUROBIOLOGICAL EFFECTS. Counsel working with trauma survivors must become educated in the basic neurobiological effects of trauma as they may present in survivors of sexual assault.

> For a detailed overview of the neurobiological effects of trauma and the application of these principles to your practice, please see: Haskell, Lori and Randall, Melanie, *Impact of Trauma on Adult Sexual Assault Victims: What the Criminal Justice System Needs to Know*.

Sexual assault impacts survivors in different and complex ways. Sometimes, the response a survivor may have or actions they may take may be surprising. For this reason, it is necessary to understand the impact that trauma has on survivors of sexual assault.

11 See generally *ibid* at 6.

TRAUMA SHOWS UP DIFFERENTLY AMONG SURVIVORS INCLUDING THE CONDUCT OF EACH SURVIVOR. There is no one-size fits all expression of trauma. Survivors of sexual assault will exhibit diverse and complex behaviours as a result of the trauma they have experienced. Some survivors will present teary-eyed or frightened while others may present as angry, anxious or unresponsive. Some survivors of trauma may feel that they are in immediate danger even though no danger is present or imminent and their traumatic event occurred a long time ago. Other common signs of trauma include:[12]

- expressions of fear, irritability or angst;
- hypervigilance or a need for control;
- tendencies to minimize or deny the abuse;
- aloofness and detachment;
- frequent and steep emotional highs and lows;
- expressions of shame and self-blame; and,
- expressions of betrayal.

TRAUMA CAN AFFECT RECALL AND COMMUNICATION OF TRAUMATIC EVENTS. While there is not one set way in which survivors remember traumatic events, there are some commonalities in recall that are useful for justice system actors to understand. These include:[13]

- Some elements of the events in question may be remembered in great detail and for long periods of time whereas others may be completely inaccessible to the survivor;
- Some survivors may have difficulty recalling events in a linear way and only be able to recall fragmented elements of the events;
- Survivors may have to rely on smells, images, and sounds to recall events. This means that the information they provide about sensory or emotional memories is an important, yet often overlooked, part of a survivor's story and testimony;
- Some survivors may not have any memory of some elements of the events in question including details relating to time, location or space the events occurred in, and portions of the events surrounding the abuse; and,
- Survivors report omitting more information when being rushed or being interviewed by people who are appearing impatient, unfriendly or curt.

12 HL Littleton et al, "Rape Acknowledgment and Postassault Experiences: How Acknowledgment Status Relates to Disclosure, Coping, Worldview, and Reactions Received From Others" Violence and Victims" *Violence Victim* 21(6) (2010); 761-78.

13 See generally *Impact of Trauma*, *supra* note 9.

While lawyers are not equipped to provide counselling services to clients, you should be attuned to the signs of trauma so as to be able to effectively support your client by adapting your practice approach and identifying opportunities for accommodating your client's needs throughout the criminal justice process. Survivors of sexual assault report high rates of re-traumatization by the justice system. Practicing in a trauma-informed way can help you ensure that you are not contributing to the harm the justice system can cause.

CULTURAL HUMILITY

Before taking on the work of advocating for survivors of sexual assault, counsel should understand that they are not an expert on the experiences of survivors. The experts are the survivors themselves.

In listening to the lived experiences of survivors of sexual assault, especially those whose experiences may have been erased by the legal system — particularly Indigenous and racialized women and survivors who are trans, Two Spirit, gender non-binary, gender non-conforming, who have a disability, or who are engaging in sex work — legal advocates will become better aware of the barriers and challenges members of these groups experience in accessing justice.

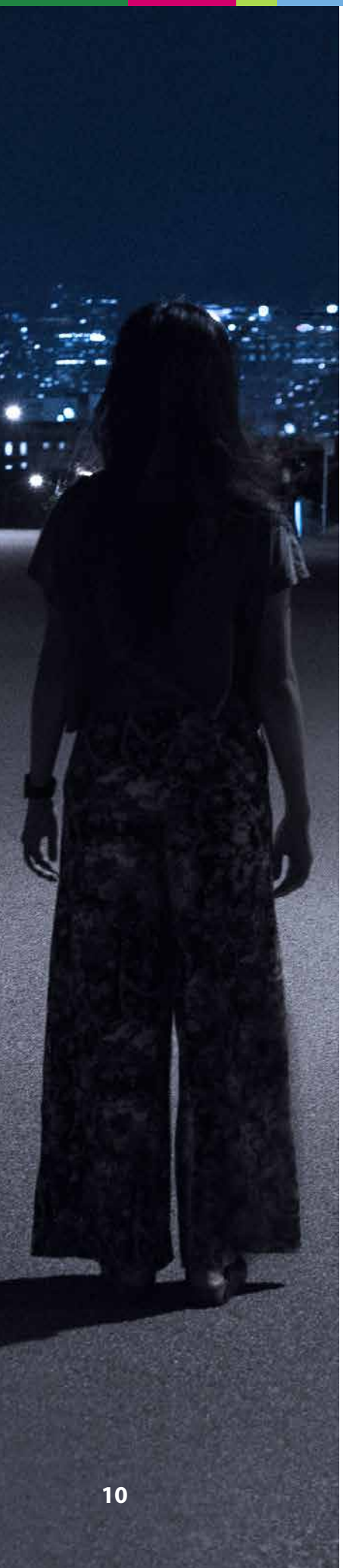
The lawyer as listener or learner will begin to understand the historical or systemic inequalities many survivors from these communities have lived with as a result of inherent injustices within the policing, corrections, and court systems. Accordingly, you should make efforts to inquire and inform yourself of your client's lived experiences and personal as well as collective histories with sexual assault and the criminal justice system. In doing so, you acknowledge them as the expert and yourself as the learner.

Cultural humility will encourage you to critically examine common unconscious biases which feed myths and stereotypes, question your sources of knowledge, and open your mind to new perspectives.

Though you are their lawyer and may be working diligently to represent their interests, you are also a representative of the justice system. Because of their own lived experience or perceptions of justice system actors, survivors may have little trust or confidence in lawyers' abilities to understand their circumstances and effectively represent them.[14] Accordingly, consider the strategies you might employ to gain your client's trust. For example, you may need to be more patient, empathetic, silent, transparent or flexible than you are accustomed. You may need to validate your client's lived experience and acknowledge their reality that the criminal justice system has been anything but just for some communities.

Cultural humility will encourage you to critically examine common unconscious biases which feed myths and stereotypes, question your sources of knowledge, and open your mind to new perspectives.

14 Alana Prochuk, "We Are Here: Women's Experiences of the Barriers to Reporting Sexual Assault" *West Coast LEAF* (November 2018) online: <http://www.westcoastleaf.org/wp-content/uploads/2018/10/West-Coast-Leaf-dismantling-web-final.pdf>.



VICARIOUS TRAUMA AND THE NEED FOR SELF-REFLECTION

As counsel representing survivors of sexual offences, you should also be aware of the potential that you may experience vicarious trauma, as a result of the unintentional, conscious or unconscious preoccupation with the lived experiences or traumas of your client(s). Vicarious trauma is distinct from "burnout" and cannot be remedied by taking days off or going on a vacation. Vicarious trauma can have a significant impact on you as counsel and can negatively impact your personal and professional relationships.

Some studies have shown that people may be at higher risk of developing vicarious trauma if:

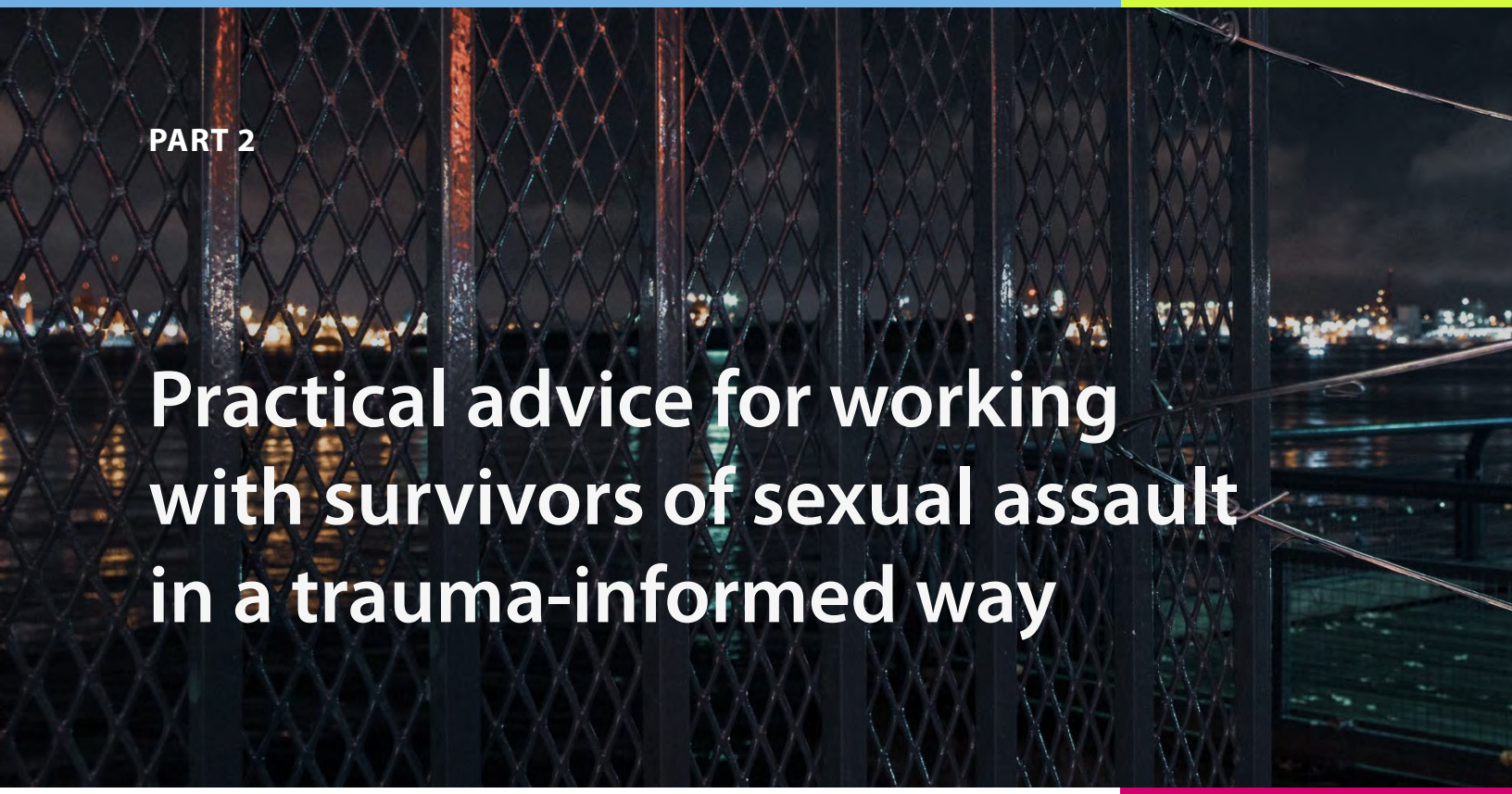
- they have a personal experience with trauma, especially in childhood;
- they work in an environment that does not recognize or safeguard against vicarious trauma; and,
- they are repeatedly exposed to traumatic information.

If you are at risk for vicarious trauma, consider doing a self-assessment which critically examines:

- your personal triggers;
- your negative coping patterns; and,
- your thought processes.

Once you have recognized that you may be experiencing vicarious trauma or are at risk of vicarious trauma, create a self-care plan which you employ before, during, and after working with cases that may give rise to vicarious trauma.

Your self-care plan could involve enlisting the services of a mental health professional or instituting debriefing sessions in your workplace. Consider creating a ritual, ceremony or practice after each heavy file or day which allows for a few intentional minutes to acknowledge the traumatizing content you witnessed and how it impacted you. As lawyers we must all be intentional to release the traumas of others, this is how we safeguard our mental health so we can do our work for many years to come.



PART 2

Practical advice for working with survivors of sexual assault in a trauma-informed way

SETTING THE STAGE FOR YOUR INITIAL MEETING

As stated earlier, not all survivors of sexual assault present as teary-eyed or fearful. Some present as angry, suspicious or skeptical. A survivor may also appear stable, flat, disinterested or even indifferent. Nevertheless, behind this appearance there may be an individual who is experiencing trauma. In other words, what you see in your client may not be an accurate reflection of your client's emotional or mental state.

Accordingly, a trauma-informed approach should be taken in all interviews with your clients regardless of whether they appear unfazed, strong, resilient or indifferent.

In this section, we highlight some effective strategies for building trust with your client and practicing in a trauma-informed way. These may seem intuitive at first, but they require some pre-meeting preparation and intentional self-assessment.

Preparing the meeting space

In consideration of your client's personal safety or privacy concerns you should check-in with them first over the phone or via email to ask if there is a preferred meeting place or if they have any accommodation needs that must be met. If you will be offering your law office or courthouse as a meeting space, ensure that these are safe and accessible spaces for your client.

A trauma-informed approach should be taken in all interviews with your clients regardless of whether they appear unfazed, strong, resilient or indifferent.

Where possible, visit the meeting room in advance of your introductory interview. Examine the layout of the room, the brightness of the lights, the imagery on the walls (or lack thereof), the comfort level of the chairs, and any self-soothing or distracting items that may be on the table. Consider some of the following questions:

- Does this space meet your client's accessibility needs? Are there gender neutral bathrooms? Are there barriers to accessing the space such as steps or narrow entrances? Make sure to communicate the accessibility options and limitations to your clients before the meeting.
- What can you alter or accommodate to help create a more soothing and safe space?
- How can you arrange the table and chairs in a way to create a more comfortable and less formal seating arrangement?
- What sort of objects or items are you placing on the table? Are there any distraction tools available for the client to use (i.e stress balls, pens, note-pads)? Can binders and folders be moved so as not to create a barrier between you and your client?

PRACTICE TIP: Consider doing an accessibility audit of your space and your practice. You can start by doing one free of charge by researching and using online toolkits.

Allotting the requisite time

As lawyers, we often work long hours and have limited time to dedicate to files. This is particularly so if you are receiving limited legal aid hours for a complicated file. It can be quite difficult to balance your workload and the duty of care you owe to your clients. However, it is essential that you consider the impact that time limitations may have on your client's and your ability to build mutual trust. The following practice tips can support you with ensuring trauma-informed practice is followed where you are necessarily limited in the time you can devote to files.

Show up prepared for your meeting with the client. In addition to ensuring that you have all the information you need for the meeting, make sure you have a clear and precise purpose for the meeting. In part 4, we provide guidance on the type of information you will need to receive to prepare for meeting your client.

Set the meeting agenda in a trauma-informed way. Cultural humility requires legal advocates to create spaces for their clients to have a say in the process within which they are partaking. Ideally, the client should have a say about what will be discussed at the first meeting. Give the client the opportunity to provide input on the meeting agenda. Once you have received their input, develop a clear agenda for the meeting and do your best not to deviate especially if you have shared the meeting agenda with your client.

Set realistic timeframes and expectations. Due to the impacts of trauma on attention, memory and cognition, it may be necessary to repeat questions and instructions to ensure the client's comprehension. Accordingly, it is important that you set aside enough time to get through the agenda items.

Consider the words or phrases you will employ to maintain good boundaries and keep your client focused. A good practice is to set expectations early on in the meeting. Let the client know that they can ask for a break at any time or interrupt to ask a question. Assure them that if the meeting ends before they are able to provide you all of the information they think is necessary for you to know, you will make an effort to get this information. Let them know that you may have to end the meeting before you have covered all of the information, but this is not because all the information they are providing is not important.

Do your best not to transfer your angst about the time limitations to your client. While it is important to have a clock in the room, you should never check your phone or email during meetings with your client. This conduct may undermine trust and lead the client to believe you do not think their case is important. Ideally, let the client know that you may be looking at the clock throughout the meeting but that is only to ensure you are on track with the meeting agenda.

Preparing yourself for the meeting

Meetings with a lawyer can be particularly difficult for survivors of sexual assault. You are representing clients who are dealing with a highly traumatic event in their lives which may be a trigger for other traumas previously experienced. They may have had to meet with many justice-sector representatives before you and may have had to relive the moment of their assault many times in unfamiliar and unfriendly spaces. It is critical that you remain mindful of how you approach your client. You want to be disarming, relatable and relaxed as well as less formal so your client feels comfortable and safe in your presence. Consider asking yourself the following questions:

It is critical that you remain mindful of how you approach your client. You want to be disarming, relatable and relaxed as well as less formal so your client feels comfortable and safe in your presence.

What will you wear for the first interview? If this is your first interview and you do not have to be in court on the same day, ask yourself whether you need to wear a suit and carry a large court bag. There are many different ways we, as lawyers, establish distance from our clients — from our choice of attire, tone, and body language to the work items we bring into the room.

What are you carrying in your hands? Where do you position yourself in the room? Consciously or subconsciously, lawyers will often carry or position themselves in a way that communicates that we are the authority or the expert. We may also place our work items or tools on the table to establish an impersonal or transactional exchange. You need to be mindful of how you "show up" and the tools you bring to your meetings and the message they send to your clients. Avoid seating yourself at the head of the table or opposite your client. Allow your client to decide where you both sit.

Meetings with a lawyer can be particularly difficult for survivors of sexual assault. You are representing clients who are dealing with a highly traumatic event in their lives which may be a trigger for other traumas previously experienced.

How would you describe your body language? What message might your body language send? Remain mindful of your body language; keep your arms down and palms open (even if this is not a natural position for you). In the alternative, if your client appears resistant, skeptical or suspicious, seat yourself at a reasonable distance but not opposite them.

How would you describe your tone? Are you paying attention to the social cues your client is sending? Begin a casual conversation by asking general open-ended questions about them, unrelated to the matter at hand. Gauge their tone, body language, and level of eye contact. Then, adapt your voice, body language, and eye contact to match theirs. This technique is called "mirroring" and it can help establish a feeling of connection between two parties. At all times, follow your client's lead.

How will you prepare to address any communication-related accessibility needs? Prior to the meeting you should ask your client if there are any communication or other accessibility needs that you may help them meet. During meetings, speak clearly, in plain language, and do not block your mouth. Continue to assess whether communication aids, including translation services, may be needed.

How will you ensure you are using accessible, safe, and up-to-date terminology? Do your research! Figure out what terms are appropriate to use and do your best to keep up to date on the language that communities and survivors are using. If you use the wrong term, apologize and do your best to amend your terminology. Avoid using gendered language or language that erases non-binary folks (e.g. "ladies and gentlemen").

How do you typically respond to grief, anger, silence, rage and confrontation? Demonstrating that you are willing to serve as a witness to the emotional experiences of your client may go a long way in helping you establish connection, trust, and a sense of safety. If you have an aversion to the uncomfortable emotions of others to the extent that you prefer to end meetings and reconvene at a "less emotional" time, consider what strategies you can employ to help you sit in the uncomfortable pain of your client. If the emotional expression appears to be significant and all-consuming, stop, ask your client what they need, and, if available, seek support.

THE INITIAL MEETING

The first meeting with your client is an opportunity for them to develop a sense of safety with you as their legal advocate and by extension within the court process itself. It is also your opportunity to get to know your client and their needs.

Ideally, your initial meeting with your client should include:

- introductions;
- information about your precise role and limitations;
- information about the court process including accommodation options available to witnesses;
- an honest conversation about their expectations and possible outcomes; and,
- an opportunity for you to connect your client with community supports.

PRACTICE TIP: Be prepared for the possibility that your client may need more than one "initial" or preliminary meeting before you can interview them on their experience. Flexibility, adaptability and planning for this likelihood on the part of counsel are elements of a trauma-informed approach.

Introductions

Introductions are an important part of the first meeting and should be approached with the intention of building a relationship of trust with your client. When first meeting your client, try to be less formal in your introduction and offer a small piece of personal information about yourself; for example, something interesting about your practice area or why you like your job.

Here are some suggestions for engaging with your client in a relational manner:

1. Share your pronouns and where you are from.
2. Share something about your legal practice, such as how long you have been practicing.
3. Ask your client how they want you to refer to them.
4. Ask your client what they need from you. You may want to ask them again whether their accessibility needs are met and to let you know if they need any accommodation.
5. Let the client know that they are driving the process and that you are happy to take a break whenever they need it.

Information about your role

If at your first meeting you feel that your client is in the frame of mind to be able to proceed into a more in-depth meeting, you should explain your role in this application and why you have been appointed by legal aid.

It is important at the outset to explain the parameters of your retainer in terms that are clear and easy to understand while being careful not to come across as dismissive or indifferent. It is just as important to identify what work you will be doing as it is to identify what work you are not able to do. Confirm that you are not able to provide them with legal advice on the trial, potential evidence that may come to light at trial from your review of the brief or how to conduct themselves during direct and cross-examination. Again, keep in mind that you may be their first point of contact in the criminal process, so it is common for clients to have a lot of questions that you may not be able — or it would be inappropriate — for you to answer.

It is important that the client understand that your role as complainant counsel is separate from the role of Crown counsel or a victim support worker. Explain to the client the nature and extent of solicitor-client privilege and the protections that this privilege affords the client. Be sure to clearly state that you are their lawyer and you represent them.

Information about the process and any accommodations that may be available to them

It is essential that you walk your client through the proceeding and the types of supports that are available to them. Ideally, if your client has not already testified, see if you can arrange a visit of the courtroom prior to the proceeding date. If this is not possible, draw out on a sheet of paper the seating plan for the courtroom walking the client through the role of each participant.

You will want to explain in plain language the rules of admissibility pertaining to the application being brought by the defence and then review the various legal positions your client can take. This will entail reviewing the Notice of Application ("NOA") and the accused's affidavit with the client so that they can understand the purported reason for the application. Then you will need to explain that as their counsel, you can oppose the application and make submissions before the judge as to why the application ought to be dismissed. You also need to tell the client that the hearing will be held *in camera* and that they have the right to attend and watch the application unfold but that they are not compellable as a witness.

You will also need to explain that they have a right to waive the hearing but, in doing so, take care to not come across as if you are dissuading your client from opposing the application.

PRACTICE TIP: A common question or concern from clients at this point is whether or not opposing the defence's application will reflect negatively upon their credibility or their case. It is important to remind them that the court and Parliament recognize that they have a right to assert privacy interests over this type of evidence and that opposing the application will not negatively affect their case or the judge's assessment of them as a witness.

At your first meeting, you may realize that your client would benefit from accommodation when testifying. You should describe the options that are available to your client and, if they express interest in receiving accommodation, you should immediately connect with Crown counsel to request they make an application to the court for accommodation.[15] Alternatively, you may determine that the presence of a support person or community-based support worker in court is necessary for the client's safety.

An honest conversation about expectations

Transparency and honesty are critical in establishing credibility and trust in your commitment to your client. Remind yourself to have an honest conversation with your client about the limitations of the court process and the possibility that the outcome they wish to see may not meet their needs or expectations. It may be necessary to acknowledge the failures of the legal system and the harms it has been known to perpetuate against survivors of sexual assault and, more specifically, Indigenous and racialized survivors and survivors who are trans, Two Spirit, gender non-binary and gender non-conforming or those who have a disability or who engage in sex work.

You should also prepare the complainant for the various ways the judge may rule. Most importantly, prepare the complainant for the possibility that the judge may disagree with you as complainant's counsel and order production of records. It is also possible that a judge may partially agree with you as complainant's counsel and order that some records be disclosed, but not all. Assure them that you will update them on the result if they choose not to attend personally and that you will explain the judge's ruling to them in detail. If Crown counsel has not informed them of the option, let them know that they can also have a community-based support worker attend with them or in their stead at the application.

Supporting your client in setting up a circle of supports

Ask your client the sort of outcome for which they are hoping. For example, if your client tells you that they want to feel whole again or they want to feel safe again, make clear that the court process may not deliver on these desired outcomes.

PRACTICE TIP: A trauma-informed legal advocate has the names and contact information of support services and organizations readily available.

It is a good practice to be prepared with recommendations or referrals to other professionals who may help meet the client's needs such as counselling services, support groups, spiritual services or access to other legal service providers where other legal issues surface.

15 *Criminal Code, supra* note 6 at ss. 486.1(2)-486.2(2).

Depending on the availability of victim support services in your area, the initial meeting with your client may also be your first opportunity to connect them with community-based victim support services. These are resources that are often under-utilized by lawyers yet critical, especially if counsel cannot attend the first meeting in person or is unable to be readily available to the survivor due to a heavy caseload.

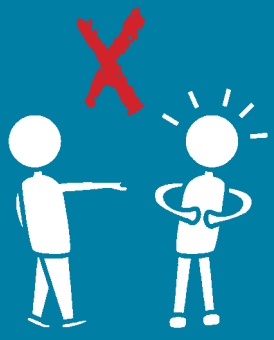
PRACTICE TIP: Lawyers advocating for survivors of sexual assault should strongly consider developing partnerships with community-based victim support workers to ensure a trauma-informed and survivor-centred experience throughout the court process.

THE SECOND MEETING AND TOOLS FOR TRAUMA-INFORMED INTERVIEWS

Building upon the steps to establish a respectful and trusting relationship with your client at the introductory meeting, remain mindful of how you intend to "show up" and the amount of time you have allotted for the interview. Be very clear about the information you require from your client to enable you to do your job. Do not deviate from your purpose and be prepared to keep your client focused on providing essential information. Furthermore, be prepared to provide information about steps taken or applications made in the interim, referrals to other professionals (if necessary), and any other follow up responses or answers your client may be expecting to hear from you.

Inform your client that you do not want to put them in a position where they have to repeat their experience more than once and therefore you will not interrupt them unless absolutely necessary and you will not ask any additional questions than are absolutely needed. Let them know that you may also have to ask clarifying questions after they share their story with you.

Allow your client to set the tone for the interview. Begin by asking your client open-ended questions with few to no interruptions. If they are getting off track, allow them some time to get back on track as this mechanism may be important for their ability to recall the events in questions or cope with the intensity of the questioning.



Always use non-accusatory language to clarify a response:

> *"Please describe for me what you were thinking or feeling when you decided to do X" "help me understand why you perceived X as safe/scary".*

Avoid accusatory questions to clarify a response:

> *"I don't understand why you decided to do X"*
>
> *"X doesn't appear safe/scary, so why did you…".*

If you are taking notes throughout the interview, allow your client an opportunity to review them and add any additional clarifying remarks or corrections. Finally, encourage your client to debrief with their community support worker.

Boundary-setting

Should you find that your client is deflecting or deviating from the narrative, you should remind them of your role, its limitations, and the amount of time you have for the interview. If they begin to raise other legal issues, let them know they are speaking about a different legal matter and advise that, at the end of the meeting, you will provide them with a referral to another lawyer or alternative service provider who may be able to assist them. Be clear that you have a specific purpose and it does not include providing advice on other legal matters.

Should your client intend to use the time you have scheduled for your interview with them to criticize the legal system or speak about unrelated issues, begin by validating their feelings then remind them of your role in the process. Further remind them of the purpose for your meeting and let them know that you are trying to bring their attention back to the matters in question because you want the best result for their case. You may ultimately want to suggest that you reschedule the meeting.

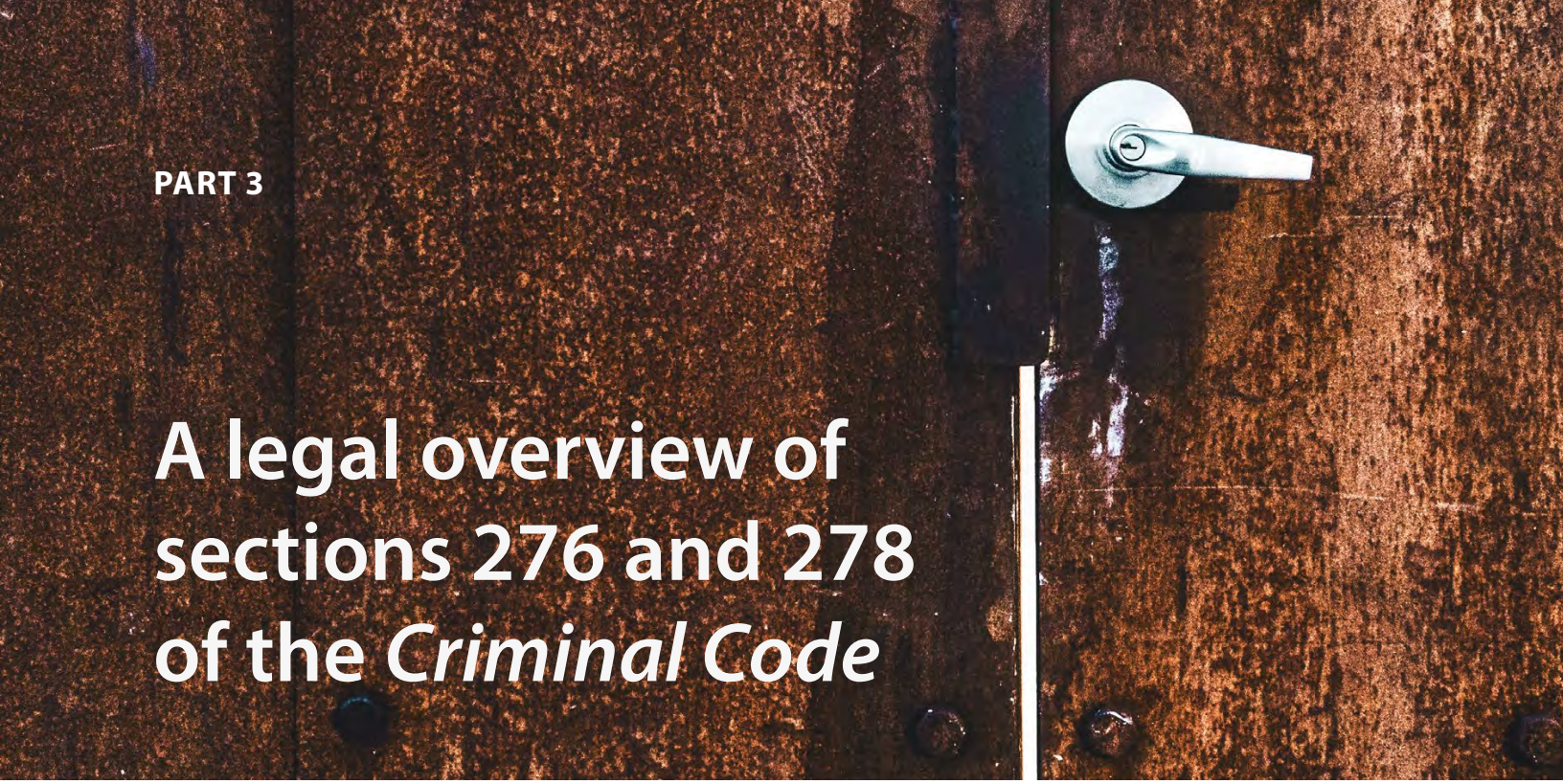
For example, you may state, "We have scheduled 90 minutes for our interview today which I unfortunately cannot extend and we are now 30 minutes in. I am sensing that you are preoccupied with other important matters on which I am unable to advise. If you are feeling unable to discuss the matter at hand, we should schedule another time to meet. In the meantime, I can refer you elsewhere to help address those other matters."

In communicating this message, you are being honest and clear about the limitations of your role and you are allowing your client to determine how they would like to utilize their limited amount of time with you. This gesture further reminds your client that they are in control over this piece of the process and you will not force them to provide information before they are prepared to do so. Moreover, honesty, transparency and boundary-setting are critical components of a trauma-informed practice and they can help build trust between you and your client.

CLOSING THE LOOP

Should there be sufficient funding and time to allow you to attend subsequent meetings or teleconferences with your client, you may want to use this time as an opportunity to keep them informed on the status of the application, when a ruling might be expected, and, of course, update them on the outcome of the application.

You may also want to set aside some of your retainer time to close the loop on your solicitor-client relationship. You should provide information on how you will retain and account for their personal information. You may also use this opportunity to validate your client's courage and cooperation. Conclude the interview by thanking your client and encouraging them to continue accessing the services offered by their community-based support worker.



PART 3

A legal overview of sections 276 and 278 of the *Criminal Code*

AFTER HAVING INFORMED YOURSELF of the ways in which a trauma-informed practice can be incorporated in your representation of the complainant, you will need to begin to assess the nature of the application you have been appointed to argue on the complainant's behalf. Prior to dissecting the nuts and bolts of the application, it is important to understand the legislative background including how and why sections 276 and 278 were enacted by the Parliament of Canada.

SECTION 276 — ADMISSIBILITY OF EVIDENCE CONCERNING "EXTRINSIC SEXUAL ACTIVITY"

Commonly referred to the as the "rape shield" provisions, subsections 276 to 276.5 impose limitations on the introduction of evidence by the accused of the complainant's sexual history. While there is a presumption that evidence "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"[16] is inadmissible, the accused can bring an application before the trial judge to determine the admissibility of this type of evidence.

Prior to Bill C-51, section 276(2) of the *Criminal Code* prohibited an accused from leading sexual activity evidence unless the evidence:

a) was of specific instances of sexual activity;

b) was relevant to an issue at trial; and

c) had significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

16 *Ibid* at ss. 276(1)-(2).

THE 'TWIN MYTHS" AND BILL C-51 AMENDMENTS

Bill C-51 amended section 276(2) by adding a new subsection that codified the already impermissible reasoning of the "twin myths". It directs the court to determine that the evidence is not being led to support an inference "that, by reason of the sexual nature of that activity, the complainant is more likely to have consented to the sexual activity that forms the subject matter of the charge or [that the complainant is therefore] less worthy of belief".[17]

DEFINITION: The "Twin Myths" refer to the falsely held belief that evidence of prior sexual activity can make the complainant either less credible or more likely to have consented to the sexual activity in question. The current limitations on the admissibility of sexual activity evidence are meant to protect the truth-finding function of the court from these gendered myths.

The newly added sections 278.93 and 278.94 replaced sections 276.1 and 276.2, respectively. The amendments set out a two-step process that defence counsel must follow when seeking to introduce sexual activity evidence. First, the defence must make an application to hold a hearing.[18] If the application satisfies the specified criteria and is granted by the court, then an admissibility hearing will be held to determine whether the sexual activity evidence may be admitted at trial.[19]

The case of *R v JSS20* is demonstrative of how myths and stereotypes can easily entangle themselves into legal reasoning. The accused in *JSS* was charged with two counts of sexual assault against his former spouse; specifically, forced anal intercourse (among other offences) on two occasions. At trial, the accused sought, and was successful, in its application to adduce evidence of prior sexual activity — namely, the couple's previous history of consensual anal intercourse:

> *Without attempting the impossible task of defining the sexual mores of a jury, it seems obvious that anal intercourse between heterosexual couples, while not necessarily outside of the mainstream, is sufficiently close to its boundaries that some jurors might see it as an act that a woman would not necessarily willingly engage in — analogous to the practice of bondage in the B.B. decision or to the sexual relationship between partners of different ages in* Temertzoglou. *This would artificially buttress Ms. H.'s descriptions of the incidents as violent and non-consensual, which is a burden that should properly be borne solely by the credibility of those descriptions.*

17 *Ibid* at ss. 276(2)(a).
18 *Ibid* at ss. 278.93.
19 *Ibid* at 278.94.
20 [2014] BCJ No 3375.

> In addition, the two incidents described by her would emerge as if from nowhere and, without the context of Mr. S.'s position that this was a positive consensual activity between them in the past, I can see jurors assessing his credibility more harshly and/or hers more favourably than might really be justified by their actual evidence.[21]

Professor Elaine Craig, in her article, *Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions,*[22] was highly critical of the result of the court in *JSS*. Professor Craig wrote:

> [The trial judge] *reasoned that unless the jurors were given evidence that the complainant was a heterosexual woman who would consent to anal intercourse, the defence of consent would not be fairly assessed. In other words, the jurors could not properly assess the credibility of the complainant's assertion that the anal intercourse forming the subject matter of the charges was non-consensual unless they were made aware of the fact that the complainant, unlike most heterosexual women, had a history of consenting to anal intercourse. The evidence of the complainant's other sexual activity admitted in* JSS *does not meet the standard for pattern of conduct evidence articulated in* Seaboyer. ... *When applying the standard for pattern of conduct evidence, judges should be careful not to assess the sexual activity at issue based on their personally-held views about what constitutes so called "mainstream" sexual activity. Judicial assumptions as to whether an objective, outside observer would consider a particular sexual act highly unusual are equally problematic. In fact, this type of evidence should only be admitted in these circumstances to rebut the Crown's inference that the sexual act is so unusual no one would engage in it consensually.*[23]

In *R v Goldfinch*[24], the SCC, citing Professor Craig's analysis, similarly disapproved of the reasoning in *JSS*:

> *The notion that some complainants "invite" assault and, by inference, do not deserve protection persists both inside and outside our courtrooms ... . This is implicit in the continued struggle to exclude inaccurate assumptions about what constitutes "typical" or "unusual" activity within a given relationship.*[25]

The above passages demonstrate a reinvigoration of the need to eliminate impermissible reasoning and assumptions grounded in myths and stereotypes from the adjudication of sexual assault offences in the courtroom. It is not for the defence, Crown, or the court to engage in speculation of how trauma may impact the behaviours of a survivor of sexual assault. Nor is it appropriate to

"When applying the standard for pattern of conduct evidence, judges should be careful not to assess the sexual activity at issue based on their personally-held views about what constitutes so called "mainstream" sexual activity. Judicial assumptions as to whether an objective, outside observer would consider a particular sexual act highly unusual are equally problematic."

21 Ibid at paras 39-40.
22 Can Bar Rev 94 (2016); 45.
23 *Ibid* at 69.
24 2019 SCC 38.
25 *Ibid* at pp 45.

make assumptions on what would constitute normal sexual behaviour within a relationship. As Justice Cory set out in *R v Osolin*[26]:

> *The reasons in* Seaboyer *make it clear that eliciting evidence from a complainant for the purpose of encouraging inferences pertaining to consent or the credibility of rape victims which are based on groundless myths and fantasized stereotypes is improper. A number of rape myths have in the past improperly formed the background for considering evidentiary issues in sexual assault trials. These include the false concepts that: women cannot be raped against their will; only "bad girls" are raped; anyone not clearly of "good character" is more likely to have consented.*

While section 276 only applies to defence applications, the SCC noted in *R v Barton* that the common law process in *Seaboyer* applies to the Crown when leading sexual activity evidence.[27] The Victim Services and Crime Prevention Division of the Ministry of Public Safety and Solicitor General ("Victim Services"), has expanded their legal aid coverage to also provide for complainant representation in these circumstances.

It is not for the defence, Crown, or the court to engage in speculation of how trauma may impact the behaviours of a survivor of sexual assault. Nor is it appropriate to make assumptions on what would constitute normal sexual behaviour within a relationship.

SECTION 278 — PRODUCTION AND USE OF COMPLAINANT RECORDS

Section 278 of the *Criminal Code* governs the use by an accused person of information contained in private records in the hands of third parties. A 'record' is defined in section 278.1 as:

> *...**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.* [***Emphasis added***]

The scheme in the *Criminal Code* sets out a two-stage process for the production and use of private records:

> At the first stage, the defence must apply to a judge for an order requiring a record holder to produce a complainant's private records to the judge for review following a hearing.

26 [1993] 4 SCR 595.
27 2019 SCC 33 at para 80.

At the second stage, the judge will rule on whether the record will be produced to the accused.

Bill C-51 did not significantly change the existing section 278 framework other than amending section 278.3(5) which sets the notice period that the prosecutor, complainant, record-holder and other interested parties receive in relation to applications to produce third-party records. The notice period has been increased from 14 to 60 days prior to a hearing being held to determine whether the record-holder will be required to produce the record to the judge for review.

PRACTICE TIP: In determining the possibility of production of records to the accused, the judge may decide that certain redactions and vetting need to be applied to the document in question. As complainant counsel, if your hours permit, it is ideal to review the redactions and vetting to ensure that any production ordered by the judge is compliant with the judge's order so that the complainant's privacy is protected.

The most significant change that Bill C-51 brought to the third-party records regime was the creation of a new process in section 278.92 for determining the admissibility of complainants' private records in the hands of the accused. It is worth noting that this section is subject to a great deal of debate as defence counsel see it as a breach of the fundamental rights guaranteed to an accused under the *Charter of Rights and Freedoms*[28], in that it requires the defence to disclose elements of its case to the Crown and the complainant, eliminating the possibility of impeaching the complainant by surprise in cross-examination.

The factors a judge must take into account in determining admissibility are enumerated in s. 278.92(3) which include considerations of the accused's right to make full answer and defence as well as the right of the complainant to personal security and full protection and benefit of the law.

Akin to applications brought under section 276, these applications are governed by the process described in subsections 278.93 and 278.94 wherein the complainant is entitled to be represented and participate but is not compellable to testify. These provisions also set out a seven days' notice requirement for the application to be filed with the court and provided to the Crown. The section also provides for an exception to the seven days' notice requirement by providing that the notice can be "any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice".[29]

Section 278.95 contains a comprehensive ban on publication and transmission of the contents of the application, evidence taken, information given or representations made at a hearing and reasons for judgment. It will often be the case that, for you to be able to effectively carry out your role, there will be some sharing of information about the application between you,

28 Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11. [*Charter*]
29 *Criminal Code, supra* note 6 at ss 278.93(4).

Crown counsel and/or the Legal Services Society ("LSS"). On a case by case basis, you may be required to explain to the complainant that any discussions you have with Crown counsel and/or LSS are aimed at ensuring you can effectively carry out your role as their counsel. It may also be helpful to explain to the complainant that the ban on publication and transmission is aimed at protecting the complainant's privacy by preventing members of the public, including the media, from sitting in the courtroom gallery.

Recent consideration of the constitutionality of s. 278.92

In *R v JJ30*, the British Columbia Supreme Court recently held that the requirement set out in section 278.92 to apply on seven days' notice for an admissibility hearing breached an accused's fair trial rights protected under section 7 of the Charter. The Court was critical of the notice requirement because it compels disclosure of defence evidence and strategy before a complainant has completed examination-in-chief thereby undermining the accused's right to make full answer and defence.

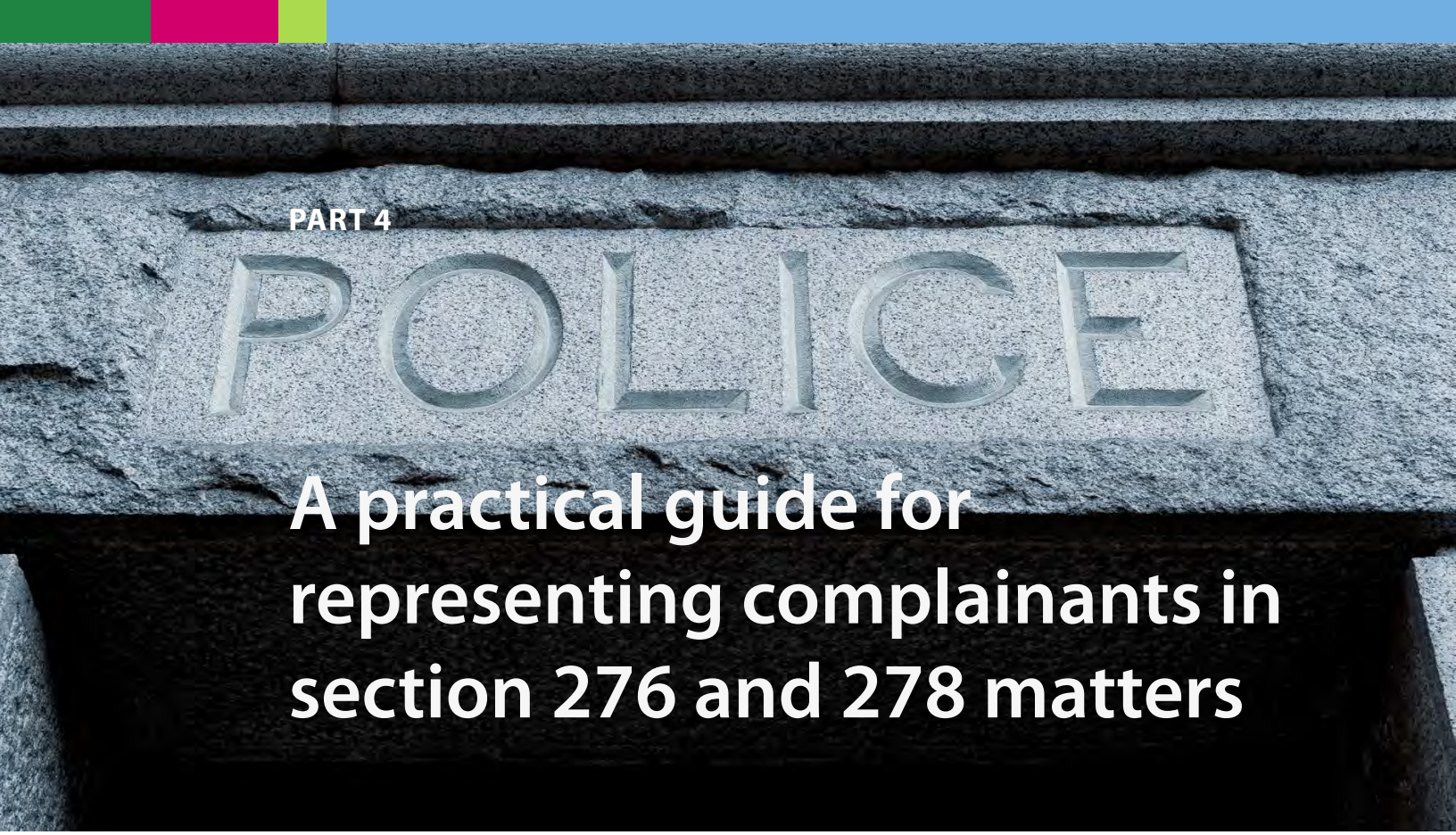
By contrast, in *R v ARS31*, the Ontario Court of Justice concluded that sections 278.93 and 278.94 do not contravene sections 7 and 11(d) of the *Charter* so long as one interprets section 278.93 as permitting applications to be brought during the cross-examination of the complainant. In essence, so long as one interprets the seven-day notice requirement to be a suggestion, as opposed to a requirement, defence counsel can bring their application *after* the complainant has either testified in direct examination or has been taken through cross-examination. As a result, the element of surprise is still preserved and the provision does not contravene an accused's *Charter* rights.

There has been criticism[32] of the Ontario Court of Justice's interpretation in *ARS* with some judges finding that the Court seems to advocate for a bifurcation of the process and, arguably, an interpretation of the legislation that defeats the spirit and intent of the amendments brought in by Bill C-51. For example, the court in *R v MS*[33] said:

If the 7 days notice requirement stipulated in the *Criminal Code* means that the defence can bring their application at the close of the complainant's evidence then what is the point in the stipulation of 7 days? Realistically this would mean that many sexual assault trials would take place on a bifurcated basis. First the complainant would testify in-chief. Then the application would be brought. And then the application would be heard and decided at stage one. At that point, the trial would be adjourned to facilitate the complainant's right to obtain counsel. The trial would then resume at some later point with a stage 2 hearing. Then, once that is argued and decided, the trial will continue. This is unmanageable and not at all what Parliament intended.[34]

30 2020 BCSC 29.
31 [2019] OJ No 4705.
32 There has been no appellate treatment of ARS to date.
33 [2019] OJ No 4866.
34 *Ibid* at para 97.

In *R v JJ*, the British Columbia Supreme Court has, as of the toolkit publication date, yet to hear argument on whether or not the impugned legislation can still be saved under section 1 of the *Charter*. As such, the constitutionality of this provision has yet to be decided in British Columbia. Counsel acting for the complainant will need to alert the application judge to this ruling and the status of future arguments to be brought and heard before the trial judge in *JJ*. A judge hearing an application being brought under section 278.92 may choose to wait for an outcome in *JJ* before embarking on a hearing of their own.



PART 4

A practical guide for representing complainants in section 276 and 278 matters

THE ROLE OF COMPLAINANT'S COUNSEL IN THE APPLICATION PROCESS

Armed with an understanding of the purpose and aims of the legislation, you should now turn your mind to preparing for the application by familiarizing yourself with the application, meeting with the complainant, and then conducting the application.

Information about your legal aid retainer

Funding for representation of complainants in the criminal process is provided through an agreement between the LSS and Victim Services. The authority for that funding derives from section 3 of the Victims of Crime Act35. The contract between LSS and Victim Services sets out coverage criteria for different types of applications. For the applications covered in this toolkit (i.e. those arising in the context of sexual assault offences), coverage is automatic for complainants (as well as witnesses); meaning that they do not need to meet legal aid financial eligibility criteria. Currently, the basic contract for complainant representation provides a default of ten general preparation hours, actual court attendance hours, and all reasonable disbursements per the LSS tariffs. If the application proves more complex from the outset or as the application proceeds, LSS has discretion to supplement the hours at counsel's request but must obtain prior approval from Victim Services.

35 RSBC 1996 c 478.

In most cases, Crown counsel initiates the process of retaining complainant's counsel by submitting a request to LSS on the complainant's behalf (in some cases the complainant may apply directly to LSS). The British Columbia Prosecution Service has an issued practice bulletin to all Crown counsel setting out guidelines on how to contact LSS criminal law staff at the Vancouver Regional Centre and what information to provide. This includes names of parties, the nature of the application, personal details and contact information of the complainant, and scheduled or tentative application dates.

Once LSS criminal law staff review a new request from Crown counsel, they will contact counsel who practice in the particular court location to check their interest and availability. In selecting counsel, LSS tries to ensure that counsel has the requisite experience in criminal law and, ideally, with these types of applications, LSS will also take into account any particular needs the complainant may have.

Prior to accepting the contract from LSS, it is a good idea to have a discussion between yourself, LSS, and Crown counsel about the dates on which the application will be heard to ensure availability. Once you have confirmed your availability, prior to accepting the contract, you may wish to find out a little more about the nature and extent of the application to determine if you feel comfortable in your abilities to accept the appointment. Once you confirm you are willing and available to take on the file, and free of any conflicts, LSS will issue a contract.

Accessing the necessary information

The starting point is to obtain a copy of the NOA and supporting materials. Generally, Crown counsel assigned to the trial matter can provide this to you. Ideally, you would receive the application materials within a few days of being appointed by LSS and well in advance of the application. However, in some cases, if the application has been brought mid-trial, it will be provided to you immediately.

It is now well-established that it is vital for complainant's counsel to thoroughly review these materials.[36] If it is a defence application, once you are connected with Crown counsel, this should begin the dialogue with Crown counsel to determine what position the prosecution will take at the application. From past experiences, Crown counsel has taken no position; opposed the application; or is sometimes the party bringing the application. As complainant's counsel, you should attempt to seek access to, at minimum, the Report to Crown Counsel Narrative ("RCCN"). Ideally, having copies of the complainant's statement is also helpful.

Armed with an understanding of the purpose and aims of the legislation, you should now turn your mind to preparing for the application by familiarizing yourself with the application, meeting with the complainant, and then conducting the application.

36 See e.g. *R v Boyle*, [2019] OJ No 155 at paras 32-35, 42.

PRACTICE TIP: A note of caution about seeking disclosure material from the Crown is that there is no unified policy among Crown counsel as to whether or not complainant's counsel should have a copy of the RCNN or the complainant's statement(s). Past experience has shown that some Crown counsel agree that these items of disclosure are essential to complainant's counsel being able to carry out their role while others are staunchly opposed to providing any disclosure materials. Some diplomacy and negotiation may be involved when seeking these materials from the Crown. You should not be afraid to advocate on behalf of your client — the complainant — in explaining that it is difficult to respond to the application in a contextual/factual vacuum. You will have to exercise your discretion in deciding whether or not you feel able to carry out your role if you are not provided disclosure and whether it is necessary to seek the same from the judge at the application.

Access to these materials is important because it helps you be as informed as possible when providing legal advice to the complainant but also so that you may be in a position to advocate properly for your client; this is especially true if you are going to be opposing the application. If you are able to explain to the judge that there are alternative sources of information within the disclosure material that the defence or Crown can rely on rather than seeking access to the evidence/materials in question, it can be a very effective argument in neutralizing the applicant's argument that the evidence or material is crucial to their defence.

You may also wish to consult with defence counsel at this early juncture. These amendments are quite new and the criminal bar as a whole is still adjusting and adapting to the changes. If you have had an opportunity to review the application materials and/or the disclosure prior to speaking to defence counsel, there may be an opportunity to narrow the scope of the issues at the application.

For example, in an application under s. 278 for medical records, is the defence truly seeking all of the complainant's medical records?

Is it more likely that the records are grounded in a specific timeframe or a specific type of medical record?

Or, do you have concerns about the sufficiency of the NOA or the affidavit that has been filed in support of the NOA?

You may wish to raise these points with defence counsel as opposed to raising it on the day set aside for the application so that court time is not wasted.

As complainant counsel, you are entitled to cross-examine the accused on the accompanying affidavit to the NOA. Crown counsel, of course, also has a right to do so. As set out in the SCC's decision in R v *Darrach*, the right to cross-examination is not unlimited:

> *… cross-examination must be "confined to what is necessary to determine . . . whether the proposed evidence is admissible" ((1998), 1998 CanLII 1648 (ON CA), 38 O.R. (3d) 1, at p. 21). The voir dire is not a forum for unfair questioning of the accused; the trial judge controls the hearing to meet the statutory goals, which include protecting the rights of the accused in s. 276(3).*[37]

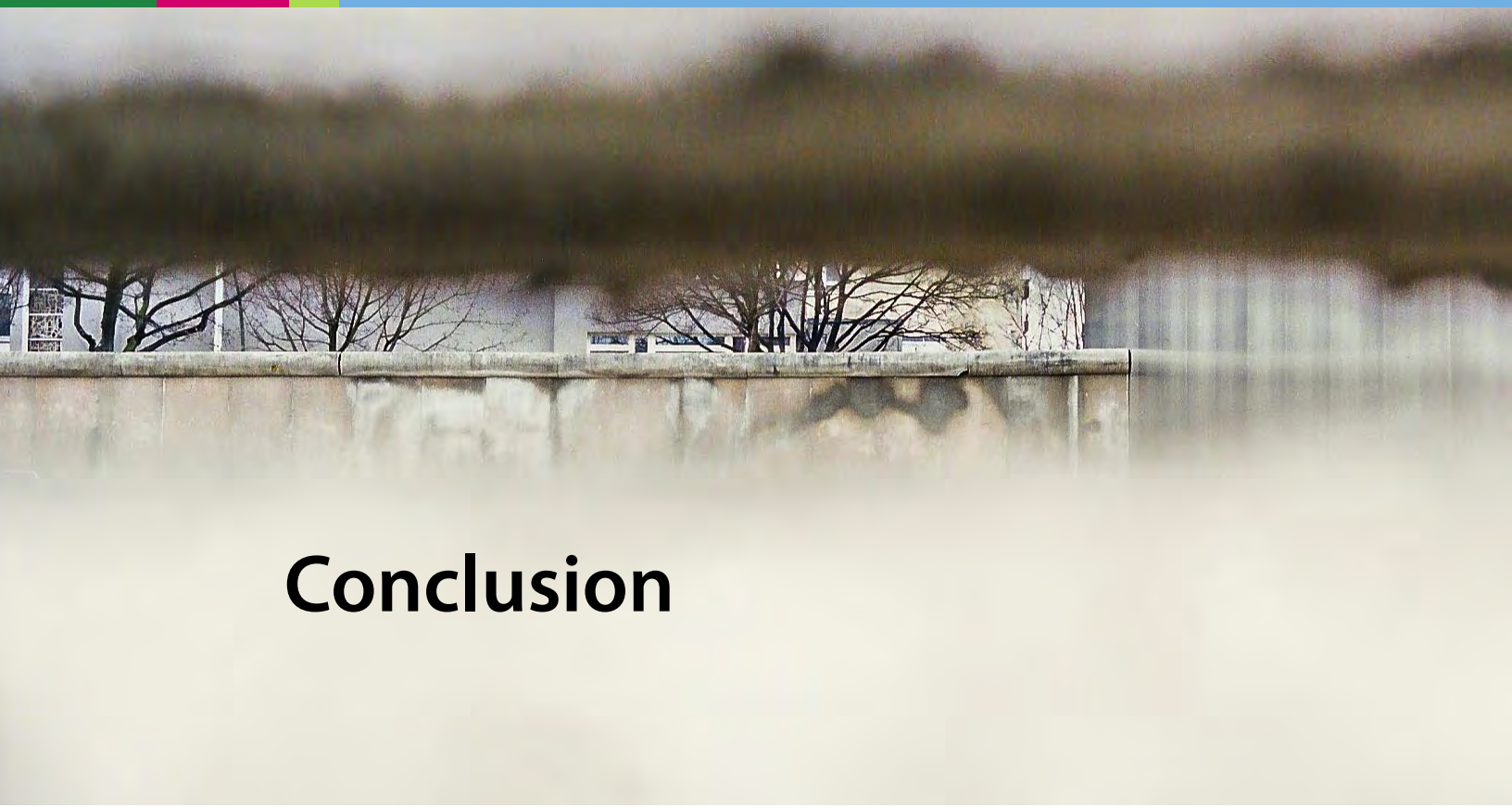
Should you feel that the affidavit is insufficient in terms of setting out a permissible basis for the application to be granted, you may decide that it is necessary to cross-examine the accused. This decision, however, should not be made without consulting Crown counsel who are often more knowledgeable about the facts underlying the case. You will want to take care to ensure you are not undertaking a cross-examination that is duplicating the Crown's cross-examination of the accused.[38]

Finally, you will also want to consult with other lawyers who have served as complainant's counsel for shared experiences and resources. There may be unreported cases or newly published cases that you are unaware of that may be of assistance once you have received instructions from the complainant and you have formulated a position. You will want to review those cases prior to meeting with the complainant as well.

Communicating with Crown counsel

The applicant, typically defence counsel but sometimes Crown counsel, will present their arguments first. For defence applications, you should ensure that you have had discussions with Crown counsel before the application date to determine if they are taking a position. If the Crown and complainant's counsel are opposing the defence application, it makes sense for the Crown to present their arguments before the complainant as they have the benefit of knowing the factual foundation of the case. Responding as complainant's counsel without any factual foundation can be difficult and frustrating because you are left with suppositions and hypotheticals. If Crown counsel and complainant's counsel are joined in their positions, you may also find it helpful to canvas the potential of having a joint book of authorities to present to the court.

37 Supra note 8 at pp 64.
38 see e.g. *R v Boyle* 2019 ONCJ 253.



Conclusion

SEXUAL OFFENCE TRIALS AND APPLICATIONS arising under sections 276 and 278 are complex and require counsel to show a deep familiarity with the law as well as an understanding of the social context within which the law exists and has evolved. The aim of this toolkit is to integrate trauma-informed and culturally safe practices with legal information. The central message in this toolkit is that, as complainant's counsel, you will only be able to effectively and competently represent your client if you are informed in both the law and trauma-informed practice.

This toolkit is intended only to provide guidance on how to develop your practice in this challenging area of law. It remains essential for you to access additional knowledge and learning to regularly improve upon your legal practice. This is particularly important as the law continues to evolve and the courts begin to consider the implications of the changes introduced by Bill C-51.

APPENDIX A: ADDITIONAL CASE LAW AND RESOURCES

This part of the toolkit sets out a non-comprehensive list of case law and secondary resources complainants' counsel can rely on to further develop their knowledge. The opinions provided within these sources do not necessarily reflect those of West Coast LEAF. Please use at your own discretion.

Complainant's counsel should, at minimum, be familiar with the following categories of evidence and requisite leading case law:

Access to the Defence's Application Materials

R v ARS, [2019] O.J. No. 6275

In the context of an application pursuant to s. 276, Justice Breen ordered that complainant's counsel be provided with a "complete copy of the defence application record and the respondent's factum (and authorities if required)." Complainant's counsel was ordered to only inform the witness of the specifics of the extrinsic sexual activity sought to be admitted by the defence and the extent to which the defence seeks to elicit the details of such activity. However, complainant counsel was not to discuss the fact of the activity, or the circumstances in which it was reported.

R v Boyle [2019] O.J. No. 155

Justice Doody found that Parliament, when it granted the right to complainants to appear and make submissions at the hearing, did so for procedural fairness reasons and in recognition that a complainant's rights and interests could be affected by the decision being made by the judge. The Court held that the legislation must be interpreted in a manner consistent with Parliament's purpose:

In order to be able to make meaningful submissions, the complainant must be able to learn what evidence is proposed to be admitted, the purported relevance of that evidence, and the evidence relied upon to support its admissibility. Without that information, the complainant would be unable to make meaningful submissions. To hold otherwise would be incompatible with the object of the enactment. It would, to a significant extent, defeat its purpose.

Section 276 — "Twin-Myths" and Bare Assertion to "Context"

R v Barton 2019 SCC 33

An applicant may frame the evidence they are seeking in a section 276 application as being relevant to their defence of honest but mistaken belief in communicated consent. As complainant counsel, it is important to assess whether or not the purported reason as stated by the applicant holds true. It is insufficient to say that the complainant consented because they had consented before — that is the very reasoning process prohibited by s. 276. If your assessment of the application is that it only engages the twin-myth reasoning then you may consider challenging whether or not the first stage of the application — the threshold stage — is met. An application that seemingly only refers to impermissible reasoning, such as the complainant engaged in sexual activity with the accused before and that is therefore relevant to the issue of consent, ought to be challenged at the threshold stage.

When assessing an application seeking to tender evidence of prior sexual history in the context of a defence of honest but mistaken belief in communicated consent, it is important to remember that consent must exist *at the time* the sexual encounter in question takes place. In order to succeed in advancing the defence of honest but mistaken belief in consent, the accused must have honestly believed that the "complainant actually communicated consent, whether by words or conduct" (para. 88). *Barton* makes it clear that consent cannot be "implied by a relationship: contemporaneous, affirmatively communicated

consent must be given for each and every sexual act" (paras. 91-92). (See also *R. v. Goldfinch*, 2019 SCC 38, para. 44).

The defence may not rely on the "false logic that the complainant's prior sexual activities, by reason of their sexual nature, made her more likely to have consented to the sexual activity in question, and on this basis he believed she consented. This is the first of the "twin myths", which is prohibited under s. 276(1)(a) of the Code" (paras. 93-94).

R v Goldfinch 2019 SCC 38

The SCC in *Goldfinch* dealt with the issue of whether evidence of a "friends with benefits" relationship between the accused and the complainant was admissible at trial. The case provides guidance on section 276 applications and how one is to assess the relevance and admissibility of evidence of a prior sexual relationship.

The Court explains the need for specificity in order to prohibit irrelevant and sweeping inquiries into a complainant's past but also so that the application judge may make the proper assessment in terms of relevance and probative value. (paras. 53-54). In terms of relevance, the Court cautioned against reliance on arguments that "disguise" themselves with general references to "credibility, context, and narrative". (paras. 56-57).

The majority of the court did note that evidence of a prior sexual relationship can be relevant in circumstances where the defence of honest but mistaken belief is at issue, or there are prior inconsistent statements about sexual activity (para. 62) but stated that one must still assess the proposed evidence through the 'probative value' versus 'prejudicial effects' lens. In fact, the decision of the court in *Goldfinch* emphasizes the importance of assessing whether the probative value of the evidence outweighs its prejudicial effect:

Balancing the s. 276(3) factors ultimately depends on the nature of the evidence being adduced and the factual matrix of the case. It will depend, in part, on how important the evidence is to the accused's right to make full answer and defence. For example, the relative value of sexual history evidence will be significantly reduced if the accused can advance a particular theory *without* referring to that history. In contrast, where that evidence directly implicates the accused's ability to raise a reasonable doubt, the evidence is obviously fundamental to full answer and defence. (para. 69)

With the above passage, complainant counsel can emphasize to the application judge that the court must assess if the accused is able to advance a particular theory *without* having to resort to the introduction of the evidence of a prior sexual history. Note that, to make this argument, you will need to have some familiarity with the evidence in the case or Crown counsel will have to address this point.

R v TAH [2019] BCJ No. 1802

This British Columbia Supreme Court decision sets out a good overview of the law surrounding section 276 applications. The defence wished to cross-examine the complainant to establish that consensual anal intercourse was an established aspect of the couple's sexual relations. The defence claimed this evidence was relevant to: (1) dispel the notion that this type of sexual activity had never occurred before; (2) rebut the suggestion the act was punitive in nature; and (3) provide a full picture of their relationship.

The court, in dismissing the application, held that the proposed cross-examination would invoke impermissible "twin-myth" reasoning, was irrelevant to an issue at trial (the Crown was not suggesting the sexual act was punitive), and the words "full picture" was tantamount to the "bare assertions" denounced in *Goldfinch* that such evidence will be "relevant to context, narrative or credibility".

WHAT CONSTITUTES A "RECORD" UNDER SECTION 278

R v RMR, [2019] BC. No 1442

Justice MacNaughton held that it was too "simplistic" to conclude that a complainant has waived any privacy interest over a text message sent to an accused. The court concluded that the complainant's expectation of privacy was not waived for "all purposes": the complainant "would not expect that her text exchanges would be disclosed by R.M.R. publicly, or posted to the internet, or sent to a potential employer, or, for that matter, used to impeach her credibility on matters that are not relevant to the charge in question" (para. 33).

After reviewing the debates held in the Senate, the court was satisfied that the amendments contemplated text message communications between an accused and a complainant. The court also went on to state that the examples of records set out in section 278.1 does not limit the type of records contemplated and that the analysis of whether or not a document is a record is to be decided "in the context of the privacy interests in a specific case" (para. 37).

This case is helpful for parties in section 278 applications when looking to what constitutes a record and if faced with an argument by defence counsel that the records they possess are not enumerated in the legislation and therefore do not engage the section.

ADDITIONAL LEGAL AUTHORITIES

Apart from those noted above, there are a number of other significant legal authorities of which complainant's counsel should be aware for their general principles or for their specific guidance on the factual matrix of the application:

Section 276 case law

R v RV, [2019] SCJ No 41

R v RV, provides a more recent review by the SCC of the section 276 regime. The court found that the accused's application in this case ought to have been allowed given the complainant testified that she was a virgin at the time of the assault and the Crown introduced evidence of her subsequent pregnancy and the approximate date of conception to support the complainant's testimony that she was sexually assaulted by the accused. The court found that the presumption of innocence requires that the accused be permitted to test such "critical, corroborating physical evidence" before it can be relied on to support a finding of guilt.

At first blush, this case may seem unhelpful to complainant's counsel, but it can be used to distinguish the factual circumstances you may find in the application before you. One can argue that *RV* is a unique case because it was the *Crown* who introduced and relied on the prior sexual history of the complainant to prove its case — under such narrow circumstances, evidence that is otherwise impermissible was allowed.

R v Langan, [2019] BCJ No 2450

Though in obiter, the Court of Appeal discussed, in paragraphs 63–68, the error made by the court below in failing to assess the admissibility of the text message evidence given that the text messages concerned the prior relationship between the complainant and the appellant and that the relationship had an implicit sexual component.

R v Hanna, [2018] BCJ No 2930

In *R v Hanna*, Crown and defence failed to address the admissibility of section 276 evidence that was elicited from the complainant on cross-examination. The court held that an application ought to have been brought by the defence in the proper form, prior to launching into a line of questioning in cross-examination that engaged section 276.

R v R(H) 2016 ONSC 6085

The Ontario Superior Court of Justice in *R(H)* dismissed the accused's application at the threshold stage for failing to show that the probative value of the proposed prior sexual conduct evidence was not substantially outweighed by its prejudicial effect. The court criticized the defence in seeking to tender evidence that would perpetuate myth and preconceptions about sexual orientation such that "a gay or lesbian complainant, unlike a heterosexual complainant, could almost always be examined on prior sexual conduct". The other element of prejudice that flowed from the defence's application was that it sought to tender evidence that was a "variation on the debunked twin myths to say that if the Complainant and the accused were ..., 'friends with benefits', then the benefits are more likely to have been consensually extended on the occasion in question.

Section 278 case law

R v Mills [1999] 3 SCR 668

R v Mills is a leading case from the SCC on the constitutionality and purpose of the section 278 regime. The Court concludes that section 278 does not infringe sections 7, 8 or 11(d) of the *Charter.*

R v Batte [2000] OJ No 2184

In *R v Batte*, the Ontario Court of Appeal dismissed an appeal by Batte of his conviction based on the ground that the trial judge erred in declining to order production of the complainants' therapeutic records. The Court found there was no evidence that the therapeutic records of the complainants had any direct relevance to the question of whether or not Batte committed the sexual assaults. The trial judge applied the appropriate test in deciding not to order disclosure of the records. The mere assertion that a record was relevant to credibility was insufficient.

R v MH [2005] BCJ No 1830

In *R v MH*, the British Columbia Court of Appeal confirmed that an accused who seeks production of a section 278 record bears the threshold burden of establishing that the material is likely relevant to an issue at trial and that production is necessary in the interests of justice. In the case at bar, there was no error from the trial judge that the records sought by the accused were not "likely relevant to an issue at trial."

R v Akumu [2016] BCJ No 2950

In *R v Akumu*, the British Columbia Supreme Court provides a detailed overview of the section 278 regime. The defence in this case had requested that the Court examine the records to determine relevance. The Court noted that it is not the proper role of the Court to determine relevance, rather, it is the defence who must establish likely relevance with case specific evidentiary foundation before production to the court is ordered. The Court also discusses the factors in determining whether or not production is necessary in the interests of justice.

Constitutional Challenges

R v AC, [2019] OJ No 3721

R v AC is a decision of the Ontario Supreme Court of Justice upholding the constitutionality of sections 278.94(2) and (3).

SECONDARY RESOURCES

Papers and Webinars

Gwendoline Allison and Prof. Janine Benedet, "Pre-Trial Applications in Sexual Assault Trials", 17 October 2019, https://www.cbabc.org/Sections-and-Community/Criminal-Justice-Vancouver/Resources/Minutes/2019/Pre-Trial-Applications-on-Sex-Assault-Trials.

Madam Justice J. Winteringham, Gloria Ng and Emmet Duncan, "Pre-Trial Applications in Sexual Assault Trials – Part II", November 19, 2019, https://www.cbabc.org/Sections-and-Community/Criminal-Justice-Vancouver/Resources/Minutes/2019/Pre-Trial-Applications-on-Sex-Assault-Trials-Par.

Carey Morgan, "Bill C-51: The Changing Landscape of s.276 and s.278", paper prepared for the CBA Criminal Justice Conference, April 6, 2019.

Matthew Stacey, "Disclosure of Third Party Records in Sexual Assault Cases", November 17, 2018, paper prepared for the CLEBC conference, Prosecution and Defence of Sexual Offences 2018.

Giuseppe Batista, "Applying for Third Party Records", paper prepared for the 2018 National Criminal Law Program.

Lesley Ruzicka, "Evidentiary Use of Third Party Records", paper prepared for the 2018 National Criminal Law Program.

Judge Hugh Harradence, Saskatchewan Provincial Court, "Prior Sexual History – Section 276 of the Criminal Code", paper prepared for the 2018 National Criminal Law Program.

Legal Aid Ontario resources

LSS-contracted lawyers can review the index of archived papers available in the Legal Aid Ontario LAW portal and submit a request form to an LSS staff member to request a copy of the paper from LAO. Indices and archived papers are available here: https://www.legalaid.on.ca/lawyers-legal-professionals/lao-law/

See especially:

Third Party Records — Sexual Offences (2 Feb 2018; 108 pages)

Third Party Records (26 Sep 2006; 104 pages)

Prior Sexual Conduct (12 Aug 2019; 139 pages)

The Application of ss.276 and 278.1-278.9 to Historic Offences (20 Oct 2011; 10 pages)

Prior Sexual Conduct Evidence to Show Motive to Fabricate (22 Aug 2012; 16 pages)

Is Flirtatious Behaviour "Sexual Activity" Captured by s.276? (25Jan2018; 5 pages)

Prior Sexual Conduct: Text Message Evidence and Mistaken Belief in Consent (29Jul2018)

Early Case Law Discussing the 2018 Amendments to ss.276-278.97 (29Jul2019; 9 pages)

Plain language resources

Information for victims of crimes about their role in third-party records matters can be found on the Government of Canada website at: https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/

See Especially:

Canada. Department of Justice. Third-Party Records in Sexual Offence Cases. Fact Sheet 1: The Victim's Role in Applications for Third-Party Records

Canada. Department of Justice. Third-Party Records in Sexual Offence Cases. Fact Sheet 2: Having a Lawyer for Third-Party Records Hearings

Canada. Department of Justice. The Record-Holder's Role in Applications for Third-Party Records. Fact Sheet 3: The Victim's Role in Applications for Third-Party Records

West Coast LEAF is an incorporated BC non-profit society and federally registered charity. West Coast LEAF promotes gender equality and human rights through equality rights litigation, law and policy reform, and public legal education in British Columbia.

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