The Use of a Complainant's Prior Sexual Activity to Support the Defence of Consent in Sexual Assault Trials:

The Canadian Approach

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It is not unusual in a sexual assault trial in Canada for the accused to argue that consensual sexual contact they had with the complainant, before the alleged offence, is relevant on the issue of whether the complainant consented to the activity that forms the basis for the charge or to the defence of mistaken belief in consent.[1] "Historically, the [Criminal Code of Canada] did not place any specific limits on the admissibility of evidence about a complainant's prior sexual activities or the uses to which that evidence could be put." R. v. Barton, 2019 SCC 33, para. 55 (Can.). As a result, at one time in Canada, "[s]ubjecting the complainant to humiliating or prolonged examination and exploiting assumptions about 'communication, dress, revenge, marriage, prior sexual history, therapy, lack of resistance and delayed disclosure' was commonplace . . . . These tactics shifted the focus away from the accused and essentially put the *complainant* on trial." R. v. Goldfinch, 2019 SCC 38, para. 33 (Can.). This is no longer true.

THE CRIMINAL CODE OF CANADA

The Criminal Code of Canada now "specifically restricts the admissibility of evidence of a complainant's sexual history in a prosecution for sexual assault." R. v. Grant, 2019 BCCA 369, para. 22 (Can.). These restrictions are contained within section 276 of the Criminal Code. In this section and its accompanying provisions, which were enacted in 1992, Canada's Parliament "established substantive rules that prevent evidence of a complainant's sexual activities from being used for improper purposes, backed by procedural requirements designed to enforce these rules." *Barton*, 2019 SCC 33 at para. 58. These limitations are broad in scope and exclusionary in nature. As a result, "[e]vidence of a complainant's past sexual activity is generally not relevant, and therefore generally not admissible in sexual assault trials." R. v. Kennedy, 2020 NLCA 25, para. 55 (Can.). However, there are exceptions to this general prohibition.

In this column, I will set out the process which exists in Canada for determining the admissibility of evidence relating to a complainant's sexual activity that does not involve "the subject-matter of the charge." Criminal Code § 276(2). I will review a recent Supreme Court of Canada decision, *R. v. J.J.*, 2022 SCC 28 (Can.), that has considered these provisions and discuss the manner in which Canadian courts have attempted to strike a balance between the privacy interests of complainants in sexual assault trials against the right of the accused to make full answer and defence. This has been described as balancing "between, on the one hand, admitting evidence of a sexual relationship that may be fundamental to making full answer and defence, and on the other, protecting complainants and the integrity of the trial process from prejudicial reasoning." *Goldfinch*, 2019 SCC 38 at para. 2.

I will commence with the procedural requirements and then turn to the substantive elements. The procedure to be followed in a section 276 application and hearing are set out in sections 278.93 and 278.94 of the Criminal Code.

THE PROCEDURE SET OUT IN SECTIONS 278.93 AND 278.94 OF THE CRIMINAL CODE

The Criminal Code contains a comprehensive framework governing the admissibility of evidence of other sexual activity in relation to certain specified sexual offences. Section 278.93(2) indicates that a section 276 application must be in writing and include "detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial":

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

A TWO-STAGE PROCESS

Section 278.93(4) of the Criminal Code creates a two-stage process for section 276 applications. It states as follows:

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

Footnotes

1. A conviction for the offence of sexual assault requires proof that the accused intentionally touched the complainant in a sexual way, knowing that the complainant was not consenting. *See* R. v. Ewanchuk, [1999] 1 S.C.R. 330 (Can.); *see also* Criminal Code, R.S.C. 1985, c. C-46, § 271 (Can.).

and hold a hearing under section 278.94 to determine whether the evidence is admissible under subsection 276(2) or 278.92(2).

STAGE ONE

In *R. v. J.J.*, the Supreme Court indicated that "[a]t Stage One, the presiding judge reviews the accused's application to determine whether the evidence . . . is capable of being admissible having regard to the threshold tests set out in s. 278.92(2)(a) and (b) and the applicable factors in ss. 276(3) or 278.92(3), depending on the type of evidence." 2022 SCC 28, para. 23 (Can.).

In *R. v. Graham*, 2019 SKCA 63, para. 71 (Can.), the Saskatchewan Court of Appeal held that for such evidence:

> [t]o be capable of admission at the first step . . . an accused person must be able to specifically identify the potential relevance of the evidence. The proposed purpose of the evidence must be identified with sufficient precision to allow the trial judge to apply s. 276(2) and weigh the factors from s. 276(3) . . . . There must be a connection between the evidence and the accused's defence . . . . This is not an onerous obligation at the first stage as it entails only a facial consideration of relevance. Trial judges are required to exercise caution at stage one, and only screen out evidence if it is clearly incapable of admission; but a trial judge has an obligation to determine if the evidence is facially relevant at stage one.

In *R. v. J.J.*, the Supreme Court of Canada considered sections 278.93 and 298.94 of the Criminal Code and indicated that "[t]he legislation does not specify how the Stage One inquiry is to be conducted. In our view, this is a matter left to the discretion of the presiding judge, in accordance with their trial management powers . . . . [T]he presiding judge retains significant discretion to determine the appropriate procedure." 2022 SCC 28 at paras. 27, 90 (Can.). The Supreme Court also indicated in *R. v. J.J.* that in a section 276 application:

> if the judge determines that the proposed evidence is not s. 276 evidence, the application will terminate. If the proposed evidence is s. 276 evidence but the judge concludes that it is not capable of being admissible under s. 276(2) (as directed by s. 278.92(2)(a)), the application will be denied. If the s. 276 evidence is capable of being admissible, the application proceeds to a Stage Two hearing pursuant to s. 278.93(4). *Id* at para. 28.

STAGE TWO

In *R. v. J.J.*, the Supreme Court indicated that at the stage two hearing:

> [T]he presiding judge decides whether the proposed evidence meets the tests for admissibility set out in s. 278.92(2)….For s. 276 evidence applications, the governing conditions are set out in s. 276(2), as directed by s. 278.92(2)(a). This determination is made in accordance with the factors listed in s. 276(3). *Id.* at paras. 30-31.[2]

"[T]he threshold hearing should generally be based solely on the written application."

A SUMMARY OF THE PROCEDURE TO BE FOLLOWED IN A SECTION 276 APPLICATION

In *R. v. McKnight*, 2022 ABCA 251, para. 229 (Can.), the Alberta Court of Appeal summarized the procedure which must be followed in section 276 applications by indicating that

> [w]here an accused seeks to adduce evidence of a complainant's sexual activity that is captured by s 276(2), they must follow the requirements in ss 278.93 and 278.94. The first step involves the accused making a written application under s 278.93 for the court to determine whether "the evidence sought to be adduced is capable of being admissible under subsection 276(2)": s 278.93(4). The procedural requirements include "setting out detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial": s 278.93(2). If successful, the accused proceeds to the second step, an *in camera* evidentiary hearing under s 278.94 where the court determines whether the proposed evidence meets the test for admissibility under s 276(2).

Accordingly, the threshold hearing should generally be based solely on the written application. Evidence concerning a complainant's prior sexual activity is presumptively inadmissible because of section 276(2) of the Criminal Code. As a result, the written section 276 application must contain sufficient information for the application judge to conclude that the evidence sought to be introduced is capable of being admissible under section 276(2).

Having considered the procedure to be followed, it is now time to consider the substantive requirements for the admissibility of a complainant's prior sexual activity. The general prohibition against the admissibility of such evidence in Canada is premised upon avoiding the credibility of complainants in sexual assault trials being attacked by resort to what has been referred to as the "twin myths" or propensity reasoning: a "woman who has consented to sexual activity in the past is more likely to have consented to it on this occasion and, secondly, an unchaste or sexually active woman is less worthy of belief." R. v. Tait, 2021 CM 2009, para. 7 (Can.). As pointed out by the British Columbia Court of Appeal, "[s]ection 276 absolutely prohibits evidence of

2. Participation of the Complainant:

In *R. v. J.J.*, the Supreme Court indicated that the complainant does not have a right to participate in the stage one hearing. The Court held that a "[c]omplainants' participatory rights are specifically attached to Parliament's use of the word 'hearing', which refers to a Stage Two hearing." 2022 SCC 28 at para. 89. This means that the complainant has a right to be present, to be represented by counsel, to make submissions and to present evidence. *See* Criminal Code § 278.94(2)–(3). However, the complainant is not a compellable witness. *See id.* § 278.94(2).

> **"What if the parties consent to evidence of other sexual activity being introduced?"**

a complainant's sexual history only if it is used to support one of two general inferences." R. v. T.W.W., 2022 BCCA 312, para. 52 (Can.). Thus, evidence of a complainant's other sexual activity will not be admissible if it solely being introduced to "to provide context for other evidence, to amplify the narrative." R. v. O.F., 2022 ONCA 679, para. 53 (Can.). It is not admissible for this purpose because "[s]exual evidence of a generalized nature risks invoking the line of twin-myth reasoning that because the complainant had previously consented to sexual activity in the past (the 'context'), she was more likely to have consented to the sexual activity at issue." *Id.* at para. 51.

THE TRIAL JUDGE'S RESPONSIBILITY

What if the parties consent to evidence of other sexual activity being introduced?

In *R. v. R.K.K.*, the British Columbia Court of Appeal indicated that it is the trial judge who "must rule on the admissibility of the evidence relevant to s. 276. As 'the ultimate evidentiary gatekeepers', trial judges 'have a duty to vigilantly assess and exclude inadmissible evidence regardless of the positions taken (or not taken) by counsel.'" 2022 BCCA 17, para. 7 (Can.) (first quoting R. v. Goldfinch, 2019 SCC 38, para. 75 (Can.); then quoting R. v. A.L., 2020 BCCA 18, para. 150 (Can.)). Thus, it has been pointed out that trial judges:

> [H]ave a responsibility to ensure the proper application and enforcement of the legal rules created to protect sexual assault complainants….While trial judges must be very careful not to intercede in a manner that compromises the accused's right of cross-examination, or raises the appearance of any bias, attempts to introduce prior sexual activity evidence without the court's approval under section 276 is clearly a context in which judicial intervention is both necessary and appropriate.[3]

In *R. v. C.L.*, 2022 NLCA 53, para. 44 (Can.), the complainant was cross-examined, without a section 276 hearing being held, concerning "Snapchat communication she had with C.L. some months prior to the alleged assault. C.L. had suggested that the two get together for sexual activity." The Court of Appeal for Newfoundland and Labrador concluded that:

> [T]he trial judge made an error of law by admitting this evidence without conducting a hearing. The content of this communication meets the definition of 'sexual activity'—in this case proposing a meeting for a sexual purpose. The hearing procedure to determine the admissibility of this type [of] evidence, under the section 276 regime, is mandatory. *Id.* at para. 47.

The test for admissibility of other sexual activity is set out in section 276(1) of the Criminal Code.

SECTION 276(1) OF THE CRIMINAL CODE

Criminal Code § 276(1) states as follows:

> In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
>
> (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
>
> (b) is less worthy of belief.

In *R. v. Way*, 2022 ABCA 1, para. 65 (Can.), the Alberta Court of Appeal indicated that section 276 was designed to prevent "the truth-seeking process" being distorted by evidence "raising the 'twin myths.'" In *R. v. Goldfinch*, the Supreme Court of Canada indicated that:

> Our system of justice strives to protect the ability of triers of fact to get at the truth. In cases of sexual assault, evidence of a complainant's prior sexual history — if relied upon to suggest that the complainant was more likely to have consented to the sexual activity in question or is generally less worthy of belief — undermines this truth-seeking function and threatens the equality, privacy and security rights of complainants. 2019 SCC 38, para. 1 (Can.).

THE TWIN MYTHS

What are the twin myths? Sections 276(1)(a) and (b) set them out. They have been more fully described by the Supreme Court of Canada in the following manner:

> Consider the first myth: that a complainant's prior sexual activity may support an inference of consent in a particular instance. Rejection of this myth — and its link to relationships — is intimately connected to the modern understanding of consent. Until 1983, the fact that an accused was married to a complainant was sufficient to legitimize sexual assault; indeed, rape was defined as non-consensual sexual intercourse between a man and "a female person who is not his wife" (*Criminal Code*, R.S.C. 1970, c. C-34, s. 143). Today, an accused may no longer argue that consent was implied by a relationship: contemporaneous, affirmatively communicated consent must be given for each and every sexual act . . . . Today, not only does no mean no, but only yes means yes. Nothing less than positive affirmation is required.

3. *See* Elaine Craig, *Judging Sexual Assault Trials: Systemic Failure in the Case of Regina v. Bassam Al-Rawi*, 95 Can. Bar. Rev. 180, 203 (2017).

Consider also the second myth: that previous sexual activity renders a complainant less worthy of belief or, by extension, of full protection of the law . . . . [W]hile sexual activity generally carries less stigma than it once did, complainants continue to be treated as less deserving of belief based on their previous sexual conduct. 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 . . . . Finally, the suggestion that sexual assault is less harmful to those who are sexually active or in relationships is simply wrong. R. v. Goldfinch, 2019 SCC 38, paras. 44–45 (Can.).

Recently, in *R. v. R.K.K.*, 2022 BCCA 17, para. 5 (Can.), the British Columbia Court of Appeal noted that "the twin myths of sexual assault, 'have no place in a rational and just system of law'.... Section 276 set out to eradicate these myths in criminal trials." However, even if the prior sexual activity is not being used to support either of the twin myth inferences it is still not admissible. To be admissible, the evidence must be "relevant to an issue at trial" and it must have "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice." R. v. Tait, 2021 CM 2009, para. 8 (Can.).

In *R. v. Hay*, 2022 ABCA 246, para. 10 (Can.), the Alberta Court of Appeal indicated that section 276 is designed to govern the admissibility of other sexual activity by preventing such evidence being adduced "where it fuels propensity reasoning" :

Section 276(1) of the *Criminal Code* prohibits the use of prior sexual activity where it fuels propensity reasoning. The legislative framework governing the admissibility of prior sexual activity addresses the twin myths that continue to linger in the legal landscape of sexual assault: that a complainant's sexual experience means they are more likely to have consented to the sexual activity that forms the subject matter of the charge or are less worthy of belief.

Finally, in *R. v. J.J.*, the Supreme Court pointed out that "a key purpose of s. 276 is to prevent the accused from adducing evidence that engages the 'twin myths' about sexual offence complainants: that complainants are more likely to have consented or are less worthy of belief by reason of past sexual activity that they engaged in." 2022 SCC 28, para. 132 (Can.).

Having established the basis for the exclusionary rule, when will evidence of other sexual activity be admissible?

THE TEST FOR ADMISSIBILITY

Section 276(2) of the Criminal Code sets out the test for admissibility. It indicates that:

"[W]hen will evidence of other sexual activity be admissible?"

[E]vidence shall not be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines . . . that the evidence:

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

(b) is relevant to an issue at trial; and
(c) is of specific instances of sexual activity; and

(d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.[4]

In *R. v. Sanclemente*, 2021 ONCA 906, para. 52 (Can.), the Ontario Court of Appeal suggested that section 276(2) "is primarily, but not exclusively exclusionary." The Court of Appeal indicated that this section permits:

the admission of evidence of the complainant's extrinsic sexual activity provided the evidence proposed for admission satisfies the conditions precedent imposed by the subsection.…To engage the inclusionary exception, the evidence must be of specific instances of sexual activity relevant to an issue at trial. It must not be adduced to support an inference prohibited by the exclusionary rule of s. 276(1) and have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. In determining whether the evidence will be received, the trial judge must consider the factors in s. 276(3). *Id.*

R. V. GOLDFINCH

In *R. v. Goldfinch*, the Supreme Court held that a section 276 application:

requires the accused to positively identify a use of the proposed evidence that does not invoke twin-myth reasoning. In other words, relevance is the key which unlocks the evidentiary bar, allowing a judge to consider the s. 276(3) factors and to decide whether to admit the evidence. Bare assertions that such evidence will be relevant to context,

4. A judge who considers a section 276 application has a duty to provide reasons. Section 278.94(4) of the Criminal Code indicates that the application judge, after reaching a conclusion on admissibility, must provide reasons that comply with the following requirements:
(a) if not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;
(b) the reasons must state the factors referred to in subsection 276(3) or 278.92(3) that affected the determination; and
(c) if all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.

"These ... decisions reflect the balancing that Canadian trial judges must engage in in applying section 276 of the Criminal Code."

narrative or credibility cannot satisfy s. 276. 2019 SCC 38, para. 5 (Can.).

In *Goldfinch*, the accused was allowed to "to introduce evidence that he and the complainant were 'friends with benefits.'" *Id.* at para. 3. At his trial, he testified as "to the frequency of his previous sexual interactions with the complainant, characterizing the evening [of the alleged offence] as 'typical' or 'routine', indicating he had 'had her many times', and stating that 'when we're together, [sex] was expected, I guess, from both.'" *Id.* at para. 21.

In concluding that this evidence did not meet section 276's requirements for admissibility, the Supreme Court indicated that it:

> served no purpose other than to support the inference that because the complainant had consented in the past, she was more likely to have consented on the night in question. It was therefore barred by s. 276(1). Nor could it satisfy the conditions of admissibility under s. 276(2). While the sexual aspect of the relationship was evidence of 'specific instances of sexual activity,' it was not 'relevant to an issue at trial.' *Id.* at para. 4.

R. V. R.V.

Subsequently, in *R. v. R.V.*, 2019 SCC 41, para. 47 (Can.), the Supreme Court indicated that:

> [b]road exploratory questioning is never permitted under s. 276. Open-ended cross-examination concerning a complainant's sexual history clearly raises the spectre of the impermissible uses of evidence that the provision was intended to eliminate….[T]he accused [must] identify 'specific instances of sexual activity' to avoid unnecessary incursions into the sexual life of the complainant. *Id.* at para. 47.

In *R. v. R.V.*, the complainant testified that she was a virgin at the time she was sexually assaulted by the accused and that as a result of the sexual assault, she became pregnant. 2019 SCC 41 at para. 4. 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." *Id.* The accused "sought to question the complainant as to whether anyone else could have caused the pregnancy," but the trial judge refused to allow him to do so, holding that such cross-examination offended section 276 of the Criminal Code. *Id.* at paras. 4–5.

The Supreme Court concluded that the trial judge erred. It held that because the Crown "intended to rely on evidence of the pregnancy to establish the *actus reus*" of the offence, "the ability to cross-examine the complainant was fundamental to [the accused's] right to make full answer and defence." *Id.* at para. 7. However, the Court also indicated "[t]he accused's right to make full answer and defence must be balanced with other interests protected in s. 276(3). Here, balancing those interests would have required any cross-examination to be narrow in scope." *Id.* at para. 8.

These two Supreme Court decisions reflect the balancing that Canadian trial judges must engage in in applying section 276 of the Criminal Code. In *R. v. R.V.*, the evidence the accused sought to introduce was clearly relevant because of the manner in which the Crown presented its case. In addition, the questioning proposed was not based upon either of the twin myths. In contrast, the questioning sought by the accused in *Goldfinch* had little relevance. In addition, it was firmly based upon pursuing the myth that prior consent equals present consent. This led to its exclusion because it was irrelevant. It was irrelevant because in Canada "consent" is defined in section 273.1(1) of the Criminal Code as "the voluntary agreement of the complainant to engage in the sexual activity in question." It has been held that this "consent must exist at the time the sexual activity in question occurs." R. v. Barton, 2019 SCC 33, para. 88 (Can.).

THE PROHIBITION IS NOT LIMITED TO PRIOR SEXUAL ACTIVITY

In *R. v. McKnight*, the Alberta Court of Appeal pointed out that the:

> [Section] 276 legislative regime is most often associated with evidence of 'prior sexual activity' or 'prior sexual history'—that is, evidence of a complainant's sexual activity before the alleged offence in question takes place. It also applies to sexual activity of a complainant that takes place after the alleged offence as well as sexual activity which is 'ongoing' in the form of evidence of a sexual relationship between the complainant and the accused at the time of the alleged offence. 2022 ABCA 251, para. 230 (Can.).

SECTION 276 IS LIMITED TO SEXUAL ACTIVITY THAT FORMS THE "SUBJECT-MATTER" OF THE CHARGE

In *McKnight*, the Alberta Court of Appeal also pointed out that section 276 "does not apply to sexual activity of a complainant that 'forms the subject-matter of the charge' . . . . Section 276 is thus restricted in its application to so-called 'other sexual activity', namely a complainant's sexual activity 'other than the sexual activity that forms the subject-matter of the charge.'" 2022 ABCA 251 at para. 231 (quoting Criminal Code § 276(2)).

What does the phrase sexual activity that "forms the subject-matter of the charge" mean?

In *McKnight*, the accused was charged with thirteen sexual offences involving thirteen complainants. 2022 ABCA 251 at para. 1. He sought to introduce evidence of "sexual acts involving the complainants on the Indictment . . . which occurred very close in time and prior to the sexual activity that the Crown is alleging constitutes criminal conduct." *Id.* at para. 233.

The Court of Appeal suggested that "the distinction between 'past sexual activity' and 'the sexual activity that forms the subject-matter of the charge' can be 'difficult to parse.'" *Id.* at para. 251. It held that to "fall within the scope of 'sexual activity that forms the subject-matter of the charge' in s 276(2) . . . the 'sexual activity' must be part of the specific factual events of which the offence is a component." *Id.* at para. 254. The Alberta Court of

Appeal also indicated that sexual activity which is "integrally connected" to the alleged offence "in no way needs to be synonymous with all a complainant's sexual activity with an accused occurring on the same night as the alleged offence." *Id*. at 258 (emphasis omitted). Finally, the Court of Appeal noted that:

> Where sexual activity that is consensual (as alleged or agreed to by the Crown) is found by the trial judge to be part of the same interaction as conduct alleged to constitute an offence, it is frequently relevant to (though never determinative of) an issue at trial. In this way, it stands apart from the kind of sexual history evidence of a complainant that s 276 was designed to address. *Id.* at para. 262.

THE FACTORS TO BE CONSIDERED

Section 276(3) of the Criminal Code sets out the following as factors to be considered in determining if evidence of other sexual activity is admissible:

> (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account
>
> (a) the interests of justice, including the right of the accused to make a full answer and defence;
>
> (b) society's interest in encouraging the reporting of sexual assault offences;
>
> (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
>
> (d) the need to remove from the fact-finding process any discriminatory belief or bias;
>
> (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
>
> (f) the potential prejudice to the complainant's personal dignity and right of privacy;
>
> (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
>
> (h) any other factor that the judge, provincial court judge or justice considers relevant.

In *R. v. Ravelo-Corvo*, 2022 BCCA 19, para. 34 (Can.), the British Columbia Court of Appeal held that "[s]ection 276(2) expressly requires all four conditions for admissibility enumerated in paragraphs (a) to (d) to be met, and s. 276(3) expressly requires judges to take the enumerated factors into account in determining admissibility under s. 276(2)." The Court of Appeal indicated that:

> the factors in s. 276(3) must be taken into account in assessing all of the requirements in s. 276(2)….[a]s the analysis required to assess relevance is closely connected to that required to assess probative value, the mandatory requirement in s. 276(3) to take the enumerated factors into account ensures that the legitimate purpose of any admissible evidence of prior sexual activity "is identified and weighed against countervailing consideration." *Id.* at paras. 34-40 (internal citation omitted).

"'Bare assertions that the evidence will be relevant to an issue ... will not satisfy s 276.'"

In *R. v. J.J.*, the Supreme Court held that "[f]or s. 276 evidence applications, the governing conditions are set out in s. 276(2), as directed by s. 278.92(2)(a). This determination is made in accordance with the factors listed in s. 276(3)." 2022 SCC 28, para. 31 (Can.).

RELEVANCE

One of the factors that a section 276 application judge must consider is the relevance of the proposed evidence to "an issue at trial." The Alberta Court of Appeal has suggested that "[r]elevance is the key to the analytical framework. Bare assertions that the evidence will be relevant to an issue at trial or relevant to context, narrative, or credibility will not satisfy s 276." *R. v. Hay*, 2022 ABCA 246, para. 11 (Can.).

Similarly in *R. v. O.F.*, the Ontario Court of Appeal pointed out that that evidence of a complainant's sexual activity "will only be admissible where the accused demonstrates that the evidence relates to a legitimate aspect of his defence and is integral to his ability to make full answer and defence." 2022 ONCA 679, para. 52 (Can.). The court explained:

> To do so, the accused must be able to identify specific evidence that is relevant to an issue at trial and has significant probative value that is not substantially outweighed by prejudice to the proper administration of justice: s. 276(2) of the *Criminal Code*. There must be an explicit link between the evidence sought to be tendered and specific facts or issues relating to the accused's defence. *Id.*

In *O.F.*, the accused sought to introduce evidence "that on several occasions before the incident . . . the complainant flirted and made physical contact that suggested she was sexually interested in him." 2022 ONCA 679 at para. 1. In upholding the trial judge's decision rejecting the admissibility of this evidence, the Ontario Court of Appeal wrote that "evidence of prior sexual activity [will] rarely be relevant to the issue of consent, as consent is determined subjectively from the complainant's perspective at the time the sexual acts in question occurred. The prior flirting and physical contact was not relevant to consent." *Id.* at para. 55.

A SUMMARY

In summary, when an accused person applies pursuant to section 276 of the Criminal Code to introduce evidence of a complainant's other sexual activity, the following principles apply:

(1) the judge must rule on the admissibility of the evidence, even if counsel consent to its admission;
(2) such applications should be heard at the pre-trial stage, though they can be renewed at the trial;
(3) evidence of a complainant's prior sexual activity is generally not relevant and therefore presumptively inadmissible;
(4) to be admissible, the accused must not seek to have the trial judge draw an inference from the evidence that a complainant who has consented to sexual activity in the past is more likely to have consented to it on the occasion of the alleged offence or that a sexually active complainant is less worthy of belief (the "twin myths");
(5) if the evidence is not being introduced for such a purpose, to be admissible it must still:

-be relevant to an issue at trial;
-relate to a specific instances of sexual activity and not general sexual activity; and
-have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice;

(6) the application to introduce the prior sexual activity, must:

-be made in writing;
-set out detailed particulars of the evidence that the accused seeks to adduce; and
-describe the relevance of that evidence to an issue at trial;

(7) the procedure involves a two-step process: a threshold test and an admissibility test (but two separate hearings or applications are not necessary);
(8) before the admissibility of the evidence can be considered, the threshold hearing (section 278.93) requires the application judge to conclude that:

-the application complies with the procedural requirements in section 276(2); and that
-the proposed evidence is capable of being admissible under subsection 276(2);

(9) in determining if the application passes the threshold test, the application judge shall generally only consider the written application (a facial examination);
(10) if the application passes the threshold test, in the second stage (section 278.94), the application judge must determine if the evidence is admissible. At this stage, the judge can consider viva voce evidence;
(11) in determining whether the proposed evidence is admissible, the application judge must consider the following factors:

(a) the interests of justice, including the right of the accused to make a full answer and defence;
(b) society's interest in encouraging the reporting of sexual assault offences;
(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
(d) the need to remove from the fact-finding process any discriminatory belief or bias;
(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
(f) the potential prejudice to the complainant's personal dignity and right of privacy;
(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
(h) any other factor that the judge, provincial court judge or justice considers relevant;

(12) the complainant is not a compellable witness at either hearing;
(13) the complainant's right to appear at the proceeding, make submissions, and be represented by counsel, applies at the second stage only;
(14) the application judge must provide reasons as set out in section 278.94(4);
(15) these reasons shall not be transmitted or published unless the application judge, in compliance with section 278.95, orders that their decision may be published; and
(16) the public is to be excluded at the hearing of the application.

CONCLUSION

As we have seen, section 276 of the Criminal Code creates a process and substantive rules governing the admissibility of a complainant's sexual activity other than sexual activity that forms the subject-matter of the alleged offence. The prohibition is exclusionary in nature and requires the accused to establish both relevance and that the evidence is not aimed at propensity reasoning. It is clear that Canadian judges have a responsibility to carefully scrutinize any attempt to introduce evidence of a complainant's sexual activity that does form the subject-matter of the offence to ensure that the complainants' privacy and dignity are respected.

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