

Advising complainants on their rights: post- JJ

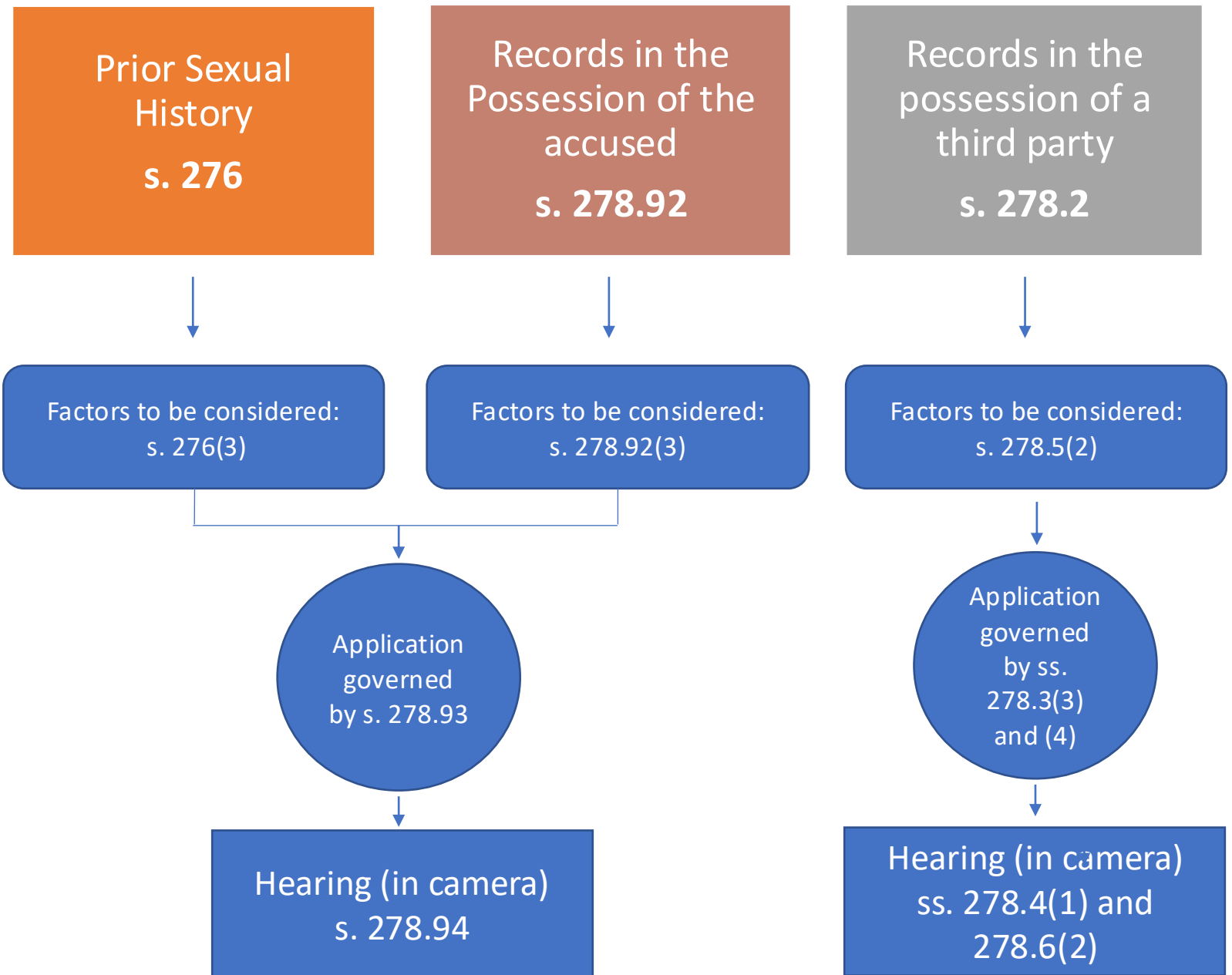
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LITIGATION

Overview

- Overview of legal schemes and history
- Brief review of *R v JJ*, 2022 SCC 28
- What is a record?
- Practice points from the perspective of complainant's counsel
- Emerging Issues

Overview of Existing Schemes



History

1982: original s. 276 scheme enacted; struck down in *Seaboyer*, [1991]
2 SCR 577



1992: Parliament reenacted s. 276; upheld in *Darrach*, 2000 SCC 46

1997: ss. 278.2-278.91 (third-party records); upheld in *Mills*, [1999]
3 SCR 668



Gaps: no procedure governing circumstances where an accused had possession of records for which a complainant has a REP

Records in the Possession of the Accused: s. 278.92

Bill C-51: Parliament's attempt to remove barriers that deterred complainants from coming forward

Scheme engaged: (1) records in possession of accused; and (2) accused intends to adduce those records at trial

Stage 1 inquiry: s. 278.93 – is the evidence “capable of being admissible”

Stage 2 Inquiry: s. 278.94 – test (1) relevant to an issue at trial; and (2) significant probative value that is not outweighed by the danger of prejudice to the proper administration of justice

What does it mean to “adduce”

- The scheme is engaged even if the defence seeks to question the complainant about a record and does not seek to tender the record itself: see *JJ*, paras 76-81
- But not if the accused has independent knowledge of the information: see *JJ*, para. 76

What is a record?

- Is it a “record” within the meaning of s. 278.1? If it is not a “record”, then the scheme is not engaged.
- If it is a “record”, does it contain evidence of other sexual history (ie. 276 evidence), including sexual communications (s. 276(4))? If yes (both a record and 276 evidence), then it should be treated as 276 evidence: *J.J.*, para. 34
- If a “record” but not other sexual history, has appropriate notice been provided?
- Can truncate the notice period if in the “interests of justice”: *J.J.*, paras. 86, para. 190
- General rule is that pre-trial applications should be heard pre-trial but frequently these issues are litigated mid-trial
- Mid-trial applications should not be the norm: *J.J.*, paras. 85-86

What is the definition of a “record”

- s. 278.1: “any form of record that contains personal information for which there is a reasonable expectation of privacy”
 - “reflect societal understandings about the fundamental right to be free from unwanted intrusion into our personal lives” (see: *JJ*, para. 57).
- Two categories: enumerated types of records and non-enumerated
 - Enumerated (s. 278.1): medical, psychiatric, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries etc.
 - Must proceed with an application regardless of the content
 - Non-enumerated: “contains information of an intimate or highly personal nature that is integral to the complainant’s overall physical, psychological or emotional well-being”
- Motion for direction: held *in camera*; defence not required to reveal the documents; summary of information will likely be required to make argument

What is a “record”?

ss. 278.92 to 278.94

- If “record” falls within an enumerated category, accused must proceed with application, regardless of the specific content of the record: *JJ*, para. 39
- Non-enumerated records require a fact-specific analysis to determine whether the record “contains personal information for which there is a reasonable expectation of privacy”

What is a “record” cont.

- The sensitivity of the information is the focus, not the medium by which the information was shared: *JJ*, para. 49
- Analysis is on both the content and context of the record
- Not content-neutral, unlike s. 8 of the *Charter*: *JJ*, paras. 48-49, 54
- If the information in a non-enumerated record is similar to what would be contained in an enumerated record, this is a useful indicator that the record raises significant privacy interests and should be subject to the record screening scheme: *JJ*, para. 55
- Type of information that impacts dignity could include (without limitation): discussions regarding mental health diagnoses, suicidal ideation, prior physical or sexual abuse, substance abuse, or involvement in the child welfare system: *JJ*, para. 55

Is there an REP in text messages?

- It depends – there may be an REP in some text messages, but not others
- Fact-specific; not categorical
- Post-*JJ*, see: *R. v Niemiec*, 2022 ONSC 5549; *R v KD*, 2022 ONSC 6105; *R v. KML.*, 2022 ABKB, 710; *R. v. JD.*, 2022 ONCJ 544; *R v. C.T.*, 2023 ONCJ 124; *R v GG*, 2023 PESC 16; *R v DM*, 2022 ONSC 6699 (affidavits are records); *R v TW*, 2024 BCPC 245 (affidavits not records)

Standing

- Complainants (and their counsel) are not parties
- Standing is limited to the issue of admissibility
- Pre-trial applications for which complainant's counsel does not have standing may impact position on records applications

Practice Points: presumptive inadmissibility vs. relevance

- Don't assume you need to oppose every application
- You might consent to an application for the purposes of production but not for the purposes of admission
- Providing an express waiver for one purpose does not mean it is waived for all purposes
- The complainant's interests may be best served by admission of the records

Practice Points: meeting with vulnerable clients

- Trauma-informed approach: go slow; take breaks; schedule enough time; take time to explain your role and the judicial process
- Consider how much information to provide to the complainant to get proper instructions; providing the application itself might open the complainant up to allegations of fabrication and taint
- Retainer is limited

Emerging Issues

- The scheme does not apply to the Crown's use of records: see *JJ* paras. 73-75
- The scheme applies to records obtained via *O'Connor* or s. 278.1 third party *Mills* applications
- Privacy interests engaged over production vs. admission are different: see *JJ*, para. 50
- S. 278.92-278.94 is about admissibility and use
- Inadvertent disclosure by the Crown to the defence

Questions?