



A Trauma-Informed Approach to Complainant Counsel in Criminal Proceedings: ss. 276 & 278

Colleen Elden
Myrna McCallum
Gloria Ng

May 19, 2020

Webinar hosted by:



This webinar was made possible because of generous funding by the Province of British Columbia.

Outline

- **PART 1:** A trauma-informed practice approach
- **PART 2:** Practical advice for working with survivors of sexual assault in a trauma-informed way
- **PART 3:** A legal overview of ss. 276 and 278 of the *Criminal Code*
- **PART 4:** A practical guide for representing complainants in ss. 276 and 278 matters

PART 1: A trauma-informed practice approach

1. Defining Trauma
2. Understanding the Impact of Trauma on Survivors of Sexual Assault
3. Cultural Humility
4. Vicarious Trauma and the Need for Self-Reflection

PART 1.1: Defining trauma

Some common forms of trauma

1. Trauma from a single traumatic event
 - Sexual assault, loss of a loved one, witnessing violence
2. Trauma caused by repetitive conduct or events
 - Ongoing abuse, intimate partner violence or family violence
3. Developmental trauma
 - Childhood sexual assault, witnessing family violence
4. Historical trauma and intergenerational trauma
 - Results from group-based domination and oppression (e.g. colonialism, genocide, ongoing systemic racism)

PART 1.2: Understanding the impact of trauma on survivors of sexual assault

Sexual assault impacts survivors in different, complex, or surprising ways.

Key considerations regarding responses to trauma

1. Trauma has neurobiological effects
2. Trauma shows up differently among survivors including the conduct of each survivor
3. Trauma can affect recall and communication of traumatic events

PART 1.3: Cultural humility

Goal: To critically examine common unconscious biases which feed myths and stereotypes, question your sources of knowledge, and open your mind to new perspectives

PART 1.4: Vicarious trauma and the need for self-reflection

- **Vicarious Trauma Risk Factors**
 - personal experience with trauma, especially in childhood
 - experience in environments that do not recognize or safeguard against vicarious trauma
 - repeated exposure to traumatic information
- **If at risk for vicarious trauma, self-assess by examining:**
 - your personal triggers;
 - your negative coping patterns; and,
 - your thought processes.

PART 2: Practical advice for working with survivors of sexual assault in a trauma-informed way

1. Setting the stage for your initial meeting
2. The initial meeting
3. The second meeting and tools for trauma-informed interviews
4. Closing the loop

PART 2: Practical advice for working with survivors of sexual assault in a trauma-informed way

1. Setting the stage for your initial meeting

- Prepare the meeting space
- Allot the requisite time for the meeting
- Think about your conduct and how you appear to the client

PART 2: Practical advice for working with survivors of sexual assault in a trauma-informed way

2. 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.

PART 2: Practical advice for working with survivors of sexual assault in a trauma-informed way

2. The initial meeting: Building rapport

- Think about an introduction that is trauma-informed and culturally safe
- What do you want to share about yourself?
- What information do you need about your client?

PART 2: Practical advice for working with survivors of sexual assault in a trauma-informed way

2. The initial meeting: Legal information

- *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 essential that you walk your client through the proceeding

PART 2: Practical advice for working with survivors of sexual assault in a trauma-informed way

2. The initial meeting: Limitations

- Be sure to outline the types of supports that are available to them and to have an honest, transparent conversation about the limitations of the court process

PART 2: Practical advice for working with survivors of sexual assault in a trauma-informed way

2. The initial meeting: Supports

- Be sure to outline the types of supports that are available to them
 - A trauma-informed legal advocate has the names and contact information of support services and organizations readily available.
- Consider inviting a member of a local community-based victim support service to the first meeting, depending on their availability

PART 2: Practical advice for working with survivors of sexual assault in a trauma-informed way

3. The second meeting and tools for trauma-informed interviews

- Be mindful of how you intend to “show up” and the amount of time you have allotted for the interview

PART 2: Practical advice for working with survivors of sexual assault in a trauma-informed way

3. The second meeting and tools for trauma-informed interviews

- Strive to make the client feel like they are driving the interview

PART 2: Practical advice for working with survivors of sexual assault in a trauma-informed way

4. Closing the loop

- Offer updates regarding the client's application and what to expect if the time left in the retainer allows
- Inform your client of how you'll manage their personal information

PART 3: A legal overview of sections 276 and 278 of the Criminal Code

1. Section 276 — Admissibility of the Complainant's Sexual History
2. Section 278 — Production and Use of Complainant Records

PART 3: A legal overview of sections 276 and 278 of the Criminal Code

1. Section 276 — Admissibility of the Complainant's Sexual History

- Formerly known as the “rape shield” provisions
- Evidence of the complainant's previous sexual activity is presumptively inadmissible

PART 3: A legal overview of sections 276 and 278 of the Criminal Code

Section 276(2) - The Test for Admissibility

- Pursuant to section 276(2) of the *Code*, the accused must prove that the proposed evidence:
 - is being adduced for a purpose other than the “twin myths”;
 - is relevant to an issue at trial;
 - is of specific instances of sexual activity; and
 - has significant probative value that is not substantially outweighed by its prejudicial effect

PART 3: A legal overview of sections 276 and 278 of the Criminal Code

Section 276(3) - Relevant Factors

- Pursuant to section 276(3), the court must take into account 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.

PART 3: A legal overview of sections 276 and 278 of the Criminal Code

2. Section 278 — Production and Use of Complainant Records

- Sections 278.5 to 278.7 of the *Code* set out the two-stage process for production of the complainant's records:
 - At the first stage, the question is whether the record should be produced to the trial judge (for his or her review)
 - At the second stage, the question is whether, and to what extent, the record should be disclosed to the accused

PART 3: A legal overview of sections 276 and 278 of the Criminal Code

Section 278 — The First Stage

- At the first stage, the accused must show:
 - the application has been brought in accordance with the procedural requirements set out in section 278.3(2) to 278.3(6) of the *Code*;
 - the record sought is likely relevant to an issue at trial or to the competence of a witness to testify; and
 - the production of the record is necessary in the interests of justice
- The accused is not entitled to rely on the bare assertions contained in section 278.3(4) of the *Code* to establish likely relevance
- If likely relevance is established, the court must go on to consider “the salutary and deleterious effects” of production, with reference to the factors listed in section 278.5(2) of the *Code*

PART 3: A legal overview of sections 276 and 278 of the Criminal Code

Section 278 — The Second Stage

- At the second stage, the question is: should the record, or part of the record, be disclosed to the accused. And, if so, what if any conditions should be imposed?
- After reviewing the records privately, the court must again consider the factors listed in section 278.5(2) of the *Code*
- The court may order production of the records, if the court is satisfied that the record is likely relevant to an issue at trial or to the competence of a witness to testify and that production is necessary in the interests of justice.
- If court orders production, the court may impose conditions under section 278.7(3) of the *Code*

PART 3: A legal overview of sections 276 and 278 of the Criminal Code

Section 278 — Recent Amendments

- Section 278 was amended in December 2018
- Significant changes are:
 - Amending section 278.3(5) to increase the notice period that the prosecutor, complainant, record-holder and other interested parties receive in relation to applications to produce third-party records from 14 to 60 days.
 - The creation of a new process in section 278.92 for determining the admissibility of complainants' private records in the hands of the accused.

PART 3: A legal overview of sections 276 and 278 of the Criminal Code

Section 278 — Production and Use of Complainant Records: Constitutionality

- Courts have ruled differently regarding ss. 278.93 & 278.94
- *R v JJ*, 2020 BCSC 29: 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.
- *R v ARS*, [2019] OJ No 4705: 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

PART 3: A legal overview of sections 276 and 278 of the Criminal Code

Section 278 — Key Takeaways

1. Keep an eye on the “insufficient grounds” contained in section 278.3(4)
2. Make comprehensive submissions on the factors contained in section 278.5(2)
3. Be aware of the publication ban contained in section 278.9(1)

PART 4: A practical guide for representing complainants in section 276 and 278 matters

1. Information about your legal aid retainer
2. Accessing the necessary information
3. Communicating with Crown counsel

PART 4: A practical guide for representing complainants in section 276 and 278 matters

1. Information about your legal aid retainer

- Discuss the potential application dates with Legal Services Society and Crown counsel before accepting the contract to ensure your availability
- Assess the nature and extent of the application to ensure you're comfortable in your abilities

PART 4: A practical guide for representing complainants in section 276 and 278 matters

2. Accessing the necessary information

- Obtain a copy of the Notice of Application and supporting materials
- Seek, at minimum, the Report to Crown Counsel's Narrative ("RCCN")
- Assess what documents defence counsel is seeking and if this is reasonable
- Decide if you will cross-examine the accused
- Consider consulting with defence counsel at this point

PART 4: A practical guide for representing complainants in section 276 and 278 matters

3. Communicating with Crown counsel

- Maintain dialogue with Crown counsel and assess if they're planning on opposing the defence application
- Consider the possibility of having a joint book of authorities



Thank you!

Questions?