Law Society of Ontario | Barreau de l'Ontario

Criminal Law Refresher 2024

CO-CHAIRS

The Honourable Justice Lori Anne Thomas
Ontario Court of Justice

Megan Schwartzentruber
Cooper, Sandler, Shime & Schwartzentruber LLP

May 11, 2024

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CO-CHAIRS: **The Honourable Justice Lori Anne Thomas,**
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Megan Schwartzentruber,
Cooper, Sandler, Shime & Schwartzentruber LLP

May 11, 2024
9:00 a.m. to 1:00 p.m.
Total CPD Hours = 2 h + 15 m Substantive + 1 h 15 m Professionalism
+ 30 m EDI Professionalism

Webcast
Law Society of Ontario

SKU CLE24-00506

Agenda

9:00 a.m. – 9:05 a.m. **Welcome**

The Honourable Justice Lori Anne Thomas,
Ontario Court of Justice

Megan Schwartzentruber,
Cooper, Sandler, Shime & Schwartzentruber LLP

9:05 a.m. – 9:35 a.m.	**Cases to Know for 2024+ and Recent Developments** Tonya Kent, *Tonya Kent Criminal Defence* Breana Vandebeek, *Gorham Vandebeek LLP*
9:35 a.m. – 10:10 a.m.	**Hearsay** (20 m P) The Honourable Justice Brock Jones, *Ontario Court of Justice* Christina Sibian, Guns and Gangs Office, *Ministry of the Attorney General*
10:10 a.m. – 10:35 a.m.	**Understanding Ancillary Orders** (5 m P + 5 m e) Ariel Herscovitch, *Herscovitch Wyszomierska Jeethan Criminal Lawyers* David Spence, *Ministry of the Attorney General*
10:35 a.m. – 10:45 a.m.	**Question and Answer Session**
10:45 a.m. – 11:05 a.m.	**Break**
11:05 a.m. – 11:40 a.m.	**Vulnerable Persons and Sentencing** (15 m P + 15 m e) Daniel Paton, Barrister and Solicitor Emma Rhodes, Barrister and Solicitor
11:40 a.m. – 12:25 p.m.	***Criminal Code* Update: Section 278** (25 m P) SuJung Lee, *Daniel Brown Law LLP* Sarah Repka, *Ministry of the Attorney General* Megan Schwartzentruber, *Cooper, Sandler, Shime & Schwartzentruber LLP*

12:25 p.m. – 12:50 p.m. **Community Justice Centres** (10 m + 10 m)

Moderator: The Honourable Justice Lori Anne Thomas, *Ontario Court of Justice*

Panelist: Dayna Arron, Executive Director, Justice Centres (Criminal Law Division), *Ministry of the Attorney General*

Holly Loubert, Deputy Director, Crown Law Office – Criminal, *Ministry of the Attorney General*

12:50 p.m. – 1:00 p.m. **Question and Answer Session**

1:00 p.m. **Program Ends**

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Criminal Law Refresher 2024

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Criminal Law Refresher 2024

Cases to Know for 2024 (PowerPoint)

Tonya Kent
Tonya Kent Criminal Defence

Breana Vandebeek
Gorham Vandebeek LLP

May 11, 2024

cpd

CRIMINAL LAW REFRESHER

CASES TO KNOW FOR 2024

Tonya Kent

Breana Vandebeek

SUPREME COURT OF CANADA

1. *Rex v Kruk*, 2024 SCC 7

- No rule against "ungrounded common sense assumption"
- Assumptions v. stereotypes v. common sense fact finding

2. *Rex v Bykovets*, 2024 SCC 6

- REP exists in a IP address
- Test for REP discussed and applied

3. *Rex v Brunelle*, 2024 SCC 3

- Standing on a 24(1) extended to individuals beyond those directly prejudiced from the state conduct
- But must be a causal connection between the abusive conduct and the proceedings of the accused

APPELLATE COURT CASES

4. *Rex v TH*, 2024 BCCA 123

- CSO upheld by the BCCA for forced vaginal penetration

5. *Rex v Brar*, 2024 ONCA 254

- 2015 amendments to the partial defence of provocation remain constitution; no violation of section 7 of the *Charter*

6. *Rex v Amin*, 2024 ONCA 237

- Strong language about the risks associated with the admission of bad character evidence and Mr. Big statements

APPELLATE COURT CASES

7. *Rex v Faroughi*, 2024 ONCA 178

- MMS struck down for communicating for the purpose of obtaining consideration for sexual services of a person under the age of 18

8. *Rex v Basso*, 2024 ONCA 166

- MMS for indictable sexual assault on a minor declared unconstitutional

9. *Rex v Edwards*, 2024 ONCA 135

- Police do not need to advise a detainee that they can wait a reasonable time to speak with counsel of choice

SUPERIOR COURT OF JUSTICE

10. *Rex v Shaikh and Tanoli*, 2024 ONSC 774

- Lengthy discussion related to the conditions at the Toronto South Detention Center and *Duncan* credit

ONTARIO COURT OF JUSTICE

11. *Rex v Alhajsalem*, 2023 ONCJ 540

- An example of a successful Simonelli application

Overview

The Law

The constitutional demand to have a bail hearing within 24 hours - same impetus for *habeus corpus*

The Remedy

Obtaining a stay of proceedings and what counsel should do to obtain that remedy

Our Facts

How we won in *R. v. Alhajsalem, 2023 ONCJ 540*

The law

Was the applicant afforded an opportunity to be released at a reasonable time?

***R. v. Zarinchang*, 2010 ONCA 286**

[39] Unreasonably prolonged custody awaiting a bail hearing gives rise to a breach of s. 11(e) of the *Charter*

Antic* and s. 493.1 of the *Code

A justice shall give primary consideration to the release of the accused at the earliest reasonable opportunity

R. v. Villota* (2002), 163 CCC (3d) 507 at para 66, cited with approval in *Zarinchang ONCA

An arrested person should not face the prospect of having to, in effect, make an appointment for his or her bail hearing.

503

The person shall be taken before a justice without unreasonable delay to be **dealt with according to law**

R. v. Poirier, 2016 ONCA 582 at para 58

Compliance with s. 503 is not simply a matter of form. Nor does it matter that the appellant may not likely have been released by a justice of the peace while the bedpan vigil search was being conducted.

516

A justice may adjourn the proceedings but no adjournment shall be for more than **three clear days** except with the consent of the accused.

R. v. Villota (2002), 163 CCC (3d) 507, per Justice Casey Hill

[67] The routine adjournment of bail hearings other than at the request of the prosecutor or the accused (*Code* s. 516(1)), as "not reached" cases, is an entirely unacceptable threat to constitutional rights, a denial of access to justice, and an unnecessary cost to the court system

Remedy

In the circumstances of this application, the legal test for a stay of proceedings is three steps.

R. v. Babos, 2014 SCC 16 at para 32

1. Prejudice that will be manifested, perpetuated or aggravated through the conduct of the trial or its outcome

2. No adequate alternative remedy is available for the prejudice

3. The interests in favour of a stay outweigh the societal interests in a decision on the merits

You will need to show a continuing breach

Hire a court reporter to transcribe a random sampling of days

R v. Simonelli, 2021 ONSC 354 (CanLII), at para 58

Have someone sit in bail court and watch for similar breaches over a 1-2 week period

R. v. Alhajsalem, [2023] O.J. No. 2388

Counsel obtains the transcripts to add as part of the materials when filing the application.

The future

Speak up

Let the record reflect that you are not content with the *status quo*

going past the days that I had given as available dates to have this bail hearing. And frankly the co-accused in this matter – there is a co-accused on the Information, and I understand that the first available date that that person was offered was April 7th. So clearly, this is not just an issue in regards to Mr. Alhajsalem, this is something that has happened for both of the individuals in this matter. And again, I am not going to refuse the date because I can't run a bail hearing in front of Your Worship without being able to do so, but I am placing on record that we are not consenting to this adjournment. I am going to take the April 8th date because there is nothing else that I can do, but I am not accepting that date and I just want to put the court and the Crown on notice that I will be filing a stay application in the circumstances due to the *[indiscernible]* that's taken place. I just wanted to place those comments on record before we move forward.

Fight for your client's right

Hello,

I am available April 8th 2022, however this is not an acceptable adjournment and I will be making my comments on record concerning this matter and making it known if I will be bringing an application for a stay per R v Simonelli.

For the Crown's knowledge, I will put this bail date on record, as this is what I am being offered as the earliest date with my comments re: my availability and my comments on the law on behalf of Mr. Alhajsalem about his right to a bail hearing.

Sincerely,

Tonya Kent
Tonya Kent Criminal Defence
100 - 36 Lombard Street
Toronto, Ontario M5C 2X3
Cell: 416 575 7161
Fax: 416 764 8200

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TAB 2

Criminal Law Refresher 2024

Hearsay
(PowerPoint)

The Honourable Justice Brock Jones
Ontario Court of Justice

Christina Sibian, Guns and Gangs Office
Ministry of the Attorney General

May 11, 2024

cpd

HEARSAY

The Honourable Justice Brock Jones (Toronto)
Christina Sibian, Assistant Crown Attorney (Guns & Gangs Office)

1

Co-Conspirator's Exception to the Hearsay Rule

2

2

Overview

- Applies to the out of court statements or acts of a co conspirator made in furtherance of a conspiracy.
- Common law exception to the hearsay rule:

  (1) presumptively admissible;

  (2) presumed to be necessary and reliable
- The trier of fact must assess the evidence in a three stage analysis established in the seminal decision of *R. v. Carter,* (1982) 1 SCR 938:
  - (1) The trier of fact must find beyond a reasonable doubt on all the evidence that the conspiracy exists;
  - (2) The trier of fact must find that the evidence that is *directly admissible against the accused*, which excludes hearsay statements by co conspirators, proves, on a balance of probabilities that the accused was a member of that conspiracy;
  - (3) The trier of fact may then consider any act or declaration of a co conspirator in furtherance of the conspiracy as evidence against the accused on the issue of the accused's guilt.

3

3

Carter analysis

- Stage 1: All the evidence of the conspiracy including the hearsay the Crown is seeking to admit is elicited to establish the nature and scope of the conspiracy. All that is in issue at this stage is the existence of the conspiracy.
- Stage 2: only the direct evidence of acts and declarations of accused are considered in context of the evidence supporting the conspiracy. The Crown is restricted to the evidence that is directly admissible against the accused.
- Stage 3: The act or declaration must be *in furtherance* of the conspiracy.

4

Carter analysis

- This exception is not limited to conspiracy charges but all substantive offences when there is a common enterprise or common criminal intent or design: see *R. v. N.Y.,* (2012) ONCA 745 at para 88.
- No need for a *voir dire* unless a party raises real and serious concerns about necessity or reliability and a specific evidentiary basis for those concerns under the principled approach: see *R. v. Mapara* (2005) SCC 23 at para 60; *R. v. Nurse,* 2019 ONCA 260.
- Even if the hearsay evidence falls within this common law exception, it must be both necessary and reliable: see *R. v. Starr,* (2000) 2 SCR 144; *R. v. Nurse,* (2019) ONCA 260. The *Carter* analysis provides sufficient circumstantial guarantees of trustworthiness: see *Mapara* at para 24 30

5

5

R. v. McGean, 2019 ONCA 604

- The appellant was convicted of conspiracy to traffic heroin and cocaine along with other related drugs and weapons charges.
- The appellant argued that the trial judge erred in finding that he was a member of the conspiracy to traffic cocaine.
- This decision was an opportunity for the Court of Appeal to endorse the three stage analysis developed in *Carter.*
- In dismissing the appeal, the Court of Appeal held that it was open to the trial judge to find that the appellant's comments to the co conspirator on the intercepted line supported that he was a member of the conspiracy at stage 2.
- The Court of Appeal held there was ample evidence that painted a clear picture of the appellant at the top of an ongoing conspiracy to purchase and distribute cocaine and the trial judge s findings on the ultimate issue of guilt were properly made.

6

6

R. v. Dawkins, 2021 ONCA 113

- Shortly after the arrival of a flight from St. Maarten to Toronto, two bricks of cocaine were found in a men's washroom located before the primary inspection area at Toronto Pearson International Airport. Sixteen bricks were found in the ceiling above the same stall the following day. Video surveillance depicted the appellant and Marvis Samuel entering and leaving the washroom where the cocaine was later discovered. Four of the appellant's and one of Mr. Samuel's fingerprints were found on the packages of cocaine.
- Mr. Samuel plead guilty to conspiracy and was deported from Canada. The appellant was convicted. On appeal, he argued that the jury was erroneously instructed on the use they could make of Mr. Samuel's guilty plea and on the use that could be made of the acts and declarations of alleged co conspirators, including Mr. Samuel's acts and declarations.
- The Court of Appeal found both these errors were made but given the overwhelming Crown case on the importing charge, upheld the conviction by applying the curative proviso.

7

R. v. Dawkins, 2021 ONCA 113

- The Court of Appeal revisited the law of conspiracy.
- Proof of a conspiracy involves three components:

  (1) there was an agreement between two or more persons;

  (2) the purpose of that agreement was to pursue a common unlawful object; and

  (3) the accused was a member of that conspiracy, meaning that he or she had knowledge of the unlawful nature of the agreement and made a voluntary and intentional decision to join the agreement to achieve the common unlawful object
- In this case, the jury was instructed to forgo consideration of the first two elements because Mr. Samuel pleaded guilty to conspiracy. This was an error.
- A co actor s guilty plea is proof of nothing other than that the pleader was arraigned, pleaded guilty to the offence and that there was some evidence to support that plea. It is an actual admission of guilt against the pleader only, not any alleged co actors.

8

R. v. Dawkins, 2021 ONCA 113

- The pleas of guilt or convictions of other alleged co conspirators are not admissible to prove the existence or fact of the conspiracy in a trial of another alleged co conspirator.
- The Court also revisited the *Carter* analysis considering the erroneous *Carter* instruction (the trial judge by passed the first two elements)
- Furthermore, the jury was invited to consider the acts and declarations of other known or probable members of the conspiracy, including Mr. Samuel s, in determining whether the appellant was also a member of that conspiracy. This was an error.
- The Court highlighted that there must be an initial showing of proof, based on the accused's own connection to the alleged conspiracy, before the acts and declarations of alleged co conspirators as his agents can be applied against him.

9

R. v. Dawkins, 2021 ONCA 113

- This rule of fairness ensures that before a Court allows evidence that would not otherwise be admissible against an accused there must be proof of the accused's probable membership in the conspiracy based only on evidence that is directly admissible against the accused: see *R. v. Puddicombe,* 2013 ONCA 506*,* at para 99; *R v Yumnu,* 2010 ONCA 637 aff'd (2012) 3 SCR 777.
- The errors resulted in the jury thinking that Samuel's acts and declarations could be used in determining whether the appellant was also a member of that conspiracy.
- Given the overwhelming evidence, the curative proviso was applied, and the conviction upheld on the importing count. A new trial was ordered on the conspiracy count given the evidence turned on questions of credibility and the Court could not conclude a jury would inevitably convict on that count.

10

R. v. Burgess, 2022 ONCA 577

- Judge alone trial.
- This case arose out of a drug trafficking investigation in Durham dubbed Project Wheeler. The Crown had alleged a cocaine trafficking conspiracy between three co actors.
- The issue was whether the appellant had conspired with any of the co actors to traffic cocaine. The appellant admitted that he was selling marijuana to the other co actors, but he denied selling or agreeing to sell them cocaine.
- The issue was at Stage 2 of the *Carter* analysis since the Crown led evidence of wiretap interceptions to which the appellant was not a party.

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R. v. Burgess, 2022 ONCA 577

- The accused was acquitted of the first count of cocaine trafficking on the basis that the Appellant did not share a mutual criminal objective with the alleged co actors: rather, his objective was to be paid for the drug that he supplied.
- Given the finding that the appellant was not party to a joint criminal enterprise, the judge was precluded from relying on the co actor hearsay wiretap evidence.
- The trial judge did not self instruct on the use to be made of this hearsay evidence.
- The judge s reasons make clear that the verdict could only have been based on the inadmissible co actor s hearsay evidence.
- Conviction appeal allowed and new trial ordered

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R. v. Burgess, 2022 ONCA 577

- The Crown had failed to prove there was a common unlawful goal among Burgess and the other people. Since he was not part of the conspiracy, the trial judge was precluded from resorting to the alleged co conspirator s hearsay evidence against him.
- Had this been a jury trial, the judge would have been required to give a *Carter* instruction.
- This case highlights the importance of judges self instructing on difficult issues like the *Carter* analysis. Here, the trial judge was not permitted to rely on the intercepted communications between two other individuals (Dorsey and MacKean) to convict the appellant. This should have been addressed in the reasons.

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R. v. Cargioli, 2023 ONCA 612

- A group of men attacked and stabbed the victim outside his home. He succumbed to his injuries shortly thereafter. The Crown alleged that there was a plan to rob the victim and that Cargioli recruited the co actors.
- The Crown further alleged that the appellants entered into an agreement to rob the victim and that in furtherance of that agreement, one or more of the appellants stabbed and killed the victim.
- Cargioli entered a guilty plea on the included offence of manslaughter as he admitted he was a party to the plan to rob the victim.
- The Crown did not accept the plea and the jury convicted Cargioli of first degree murder. He appealed.

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R. v. Cargioli, 2023 ONCA 612

- In his reasons, Doherty J. clarifies that step 1 of the *Carter* test is concerned with the existence of an agreement, not the identification of the parties to the agreement: does the evidence support the inference that the agreement exists?
- In this vein, acts or declarations made by alleged parties to an agreement can amount to circumstantial evidence of the existence of the agreement if they make the existence of the agreement more likely.
- This circumstantial evidence is not hearsay if it is used solely to support the inference that an agreement existed: see *Cargioli,* at para 74; *Puddicombe,* at paras 111 14.

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R. v. Cargioli, 2023 ONCA 612

- Doherty J. distinguished this case from *Dawkins,* because the statements only formed part of the circumstantial evidence to be considered at step one of the *Carter* analysis (not step 2).
- The Court also held that there was no error at stage 2 of the analysis. The conversations about the agreement to rob took place in Mr. Kamal's presence and he continued to drive to the victim's residence after overhearing this discussion. This was direct evidence of his membership in the agreement.

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Adoptive Admissions

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Adoptive Admissions

- An inference of adoption may be drawn based on a person s words, actions, conduct, or demeanor in response to a statement made by another person and heard by the person whose response is being considered.
- Silence in the face of statements made by others, or an equivocal or evasive denial, may also constitute an adoptive admission where the circumstances give rise to a reasonable expectation of reply.
- A cautious approach to adoption by silence should be taken where the failure to respond can be attributed to other reasons. This is of particular importance in situations where the conversation is over text message and there is a reasonable doubt the accused received or read the message that the accused failed to respond to.
- As with any piece of evidence, once the trier of fact accepts that the statement was made in the accused's presence, the trier of fact moves on to determine whether the response constitutes an adoptive admission.

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Adoptive Admissions

- Since a reaction can have different meanings, the jury should consider all the relevant circumstances, including the social context where it may impact the response.
- Where the alleged adoptive conduct is silence in the face of an allegation, the assumption is that the natural reaction of one falsely accused is promptly to deny it.
- If the statement does not actually contain an accusation, the adoptive admission theory can be defeated.
- However, adoptive admissions do not necessarily need to be in response to an accusation and their form is always context specific.

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R. v. Gordon, 2022 ONCA 799

- The 19 year old victim was found dead in his home after suffering multiple stab wounds.
- Gordon was a friend of the victim and his supplier of marihuana.
- It was alleged Gordon killed the victim because of a dispute over drugs.
- Cell phone records and surveillance captured Gordon attending the victim's home on the day of the killing, revealing different clothes were worn on the return route.
- The Crown tendered an alleged adoptive admission by Gordon to a mutual friend, Kaycia Merraro.
- Ms. Merraro had told Gordon that she heard he had killed the victim and Gordon responded saying "Shut up, shut up, shut up and "this was not a conversation to be had on the phone

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R. v. Gordon, 2022 ONCA 799

- At trial, the main issue was identification. The jury returned a guilty verdict. Gordon appealed.
- One of the grounds of appeal was whether the trial judge erred by instructing the jury that they could apply the doctrine of adoptive admissions to Gordon's response to Ms. Merraro when confronted with the rumour that Gordon had killed the victim.
- The Court held that the trial judge did not err in instructing the jury on adoptive admissions.
- It was open to the jury to decide whether Gordon's response when confronted with the rumours amounted to a failure to deny the truth of them, tantamount to an adoptive admission that the rumours were true.
- The Court held that the instruction was fair and live to other plausible explanations for the reaction.

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R. v. Gordon, 2022 ONCA 799

- This decision illustrates that an inference of adoption may be drawn based on a person's words, actions, conduct, or demeanor in response to a statement made by another person in their presence.
- The lack of a denial in the face of an allegation, can lead to the assumption that since the natural reaction of one falsely accused is promptly to deny the accusation, not denying it can be inferred as an admission.
- As with any piece of evidence, once the trier of fact accepts that a statement was made to an accused in their presence, the trier of fact moves on to determine whether the response to the statement constitutes an adoptive admission.

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R. v. Gordon, 2022 ONCA 799

- The decision reinforces that silence in the face of statements made by others, or an equivocal or evasive denial, may also constitute an adoptive admission where the circumstances give rise to a reasonable expectation of reply: *R. v. Beauchamp,* 2015 ONCA 260 at para. 247; *R. v. Robinson,* 2014 ONCA 63 at paras. 48 58.
- The Court also cautions that since a reaction can have different meanings, the jury should consider all the relevant circumstances, including the social context of anti Black racism where it may impact the response: *Gordon, supra* at para. 53; *R. v. Theriault*, 2021 ONCA 517 at paras. 145 146.

23

R. v. Millard, 2023 ONCA 426

- Millard and his co accused Smich, were convicted of the first degree murder of Laura Babcock.
- The Crown tendered substantial circumstantial evidence at trial to support the theory that they cremated the victim's body in an incinerator acquired by Millard.
- One of the pieces of evidence led by the Crown were the "Ashy stone rap lyrics authored by Smich.
- These lyrics referenced the cremation that the Crown alleged were later performed by Smich to Millard in his home.
- Millard recorded the performance on his iPhone and thereafter backed up the recording to his computer where he had also saved the rap lyrics.

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R. v. Millard, 2023 ONCA 426

- At trial, the Crown argued that Millard had adopted the truth of the ashy stone rap lyrics by his conduct: capturing and preserving the ashy stone rap lyrics performed by his co accused to memorialize the victim's murder. He was convicted.
- Millard appealed.
- On appeal, Millard argued that there was insufficient foundation for a finding of adoption by him of those lyrics.
- Millard argued that the trial judge erred by instructing the jury they could use the lyrics as evidence against Millard.
- The Court held that the trial judge did not err in instructing the jury to consider whether Millard adopted the ashy stone rap lyrics as true as there was sufficient circumstantial evidence to support a finding of adoption.

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R. v. Millard, 2023 ONCA 426

- This decision reinforces that juries are entitled to draw reasonable inferences from the circumstances, even in the absence of direct evidence.
- The adoptive admissions exception to the general rule that an out of court statement of an accused cannot be used against a co accused can apply where the accused person adopts as true a statement made by a co accused person in their presence.
- The adoption can occur expressly or by words, action, conduct or demeanor to show the accused inferentially adopted the statement: see *Millard* at para. 91; *Gordon, supra* at para. 49.
- The trial judge performs a gate keeping function with respect to whether an adoptive admission is available on the evidence adduced at trial.
- Once the trial judge determines the inference is available, it is left to the jury to decide whether the inference of adoption should be drawn: see *Millard, supra* at para. 92; *Robinson, supra* at para. 48.

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R. v. N.G. 2024 ONCA 20

- The appellant was convicted of five sexual offences including sexual assault and human trafficking related offences.
- One of the grounds of appeal was in relation to the purported misuse of the contents of a text message which played an essential part in the trial judge's reasons. An individual, Mr. S., was exposed to the nature of the relationship the appellant had with the complainant and asked the appellant if he could now do what he understood the appellant had been doing make money off the complainant's sex work. The appellant responded: "Hey, do your thing"
- The appellant argued that since the individual the appellant was texting was not called as a witness, the trial judge was not entitled to rely on the contents of his text message as it was hearsay.
- The Court of Appeal rejected this ground of appeal. The Court held that where an accused person has engaged in a text conversation with another person, the statements by the accused are admissible as an exception to the hearsay rule.

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R. v. N.G. 2024 ONCA 20

- The statements by the other party to the conversation are generally admissible only as context (to understand what the accused person was saying) and not for the truth of their contents.
- If it is apparent that the accused is adopting the other person's statements, or the factual premises of them, as true, those statements can also be treated as an admission by the accused (at para. 56).
- The trial judge was entitled to find that based on how the appellant responded "Hey, do your thing as well as what he did not say (no expression of surprise, no lack of understanding or disagreement) that the appellant accepted as true the factual premise of the question posed by Mr. S.

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The interplay between necessity & reliability: *R. v. Furey*, 2022 SCC 52

- Furey was convicted of break and enter into a dwelling amongst other offences. The trial judge admitted into evidence the video taped out of court statement given by one of the complainants contemporaneous to the events who had subsequently died of unrelated causes.
- Furey appealed to the Court of Appeal of Newfoundland and Labrador. The Majority allowed the appealed with a dissenting opinion written by Knickle J.A.
- The Crown appealed as of right to the SCC. The SCC allowed the appeal on the basis that the trial judge did not err in admitting the video recorded statement of the declarant on the *voir dire.*
- The Court remarked that although the necessity and reliability standards work in tandem; in certain circumstances, the high reliability of the statement can render its substantive admission necessary. However, the opposite is not true. Reliability does not become more flexible as necessity increases: see *Furey* at para 4.

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The interplay between necessity & reliability: *R. v. Furey*, 2022 SCC 52

- The Court reaffirmed that threshold reliability must be established in every case. This standard remains high to ensure that specific hearsay dangers are alleviated.
- The Court emphasized that the necessity of receiving hearsay evidence is never so great as to defeat threshold reliability under the principled approach.
- Unreliable hearsay evidence compromises trial fairness, heightening the risk of wrongful convictions and undermining the integrity of the trial process as espoused in *R. v. Khelawon,* 2006 SCC 57.
- In this case, the trial judge considered circumstantial guarantees of trustworthiness: the statement was video recorded, taken reasonably contemporaneous with the events and was given to police without hesitation. There was also evidence adduced at trial (DNA, the presence of weapons as alleged, evidence of injuries as alleged, other witness accounts) that sufficiently corroborated the statement. Therefore, the veracity of the statement could be sufficiently tested in the absence of contemporaneous cross examination.

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The relationship between the exceptions: *R. v. MacKinnon*, 2022 ONCA 811

- This case provides a thorough review of the law of hearsay and the relationship between the traditional exceptions and the principled exception.
- This murder case was a case of identification: whether the appellant shot the victims in an early morning shooting.
- MacKinnon appealed his conviction. He claimed the trial judge erred in admitting one of the victims's description of the shooter given to police shortly after he was shot and that the trial judge erred in the instruction given to the jury as to how to treat the statement.
- The Court of Appeal dismissed the appeal finding no errors.

31

The relationship between the exceptions: *R. v. MacKinnon*, 2022 ONCA 811

- There was no dispute that the appellant was at the scene of the crime. Video surveillance and witness statements collectively supported this.
- One of the victims (Taylor) provided the first responding officer with a description of the shooter which matched the other identification evidence of the appellant (wearing a gold chain, shaved head, red shirt, and light skinned black person).
- The trial judge admitted the victim's statement to police under the spontaneous declaration exception to the rule against hearsay. In the alternative, the trial judge admitted the statement under the principled approach to hearsay.

32

The relationship between the exceptions: *R. v. MacKinnon*, 2022 ONCA 811

- The appellant argued that there was insufficient evidence to support its admission for the truth of its contents:
  - no information was provided regarding the circumstances in which it was provided
  - concerns about the victim's sobriety and state of mind given the traumatic event
  - whether or not the victim made assumptions
  - his description of the shooter was that of a man six inches shorter than the appellant
  - His statement was inconsistent with some witness accounts

33

The relationship between the exceptions: *R. v. MacKinnon*, 2022 ONCA 811

- The Court clarified that spontaneous utterances/exclamations as a traditional exception to the hearsay rule are presumptively admissible.
- Only in rare cases' where the indicia of necessity and reliability are lacking, can this type of evidence be excluded: see *Mapara,*
- Even if hearsay evidence does not fall under a traditional exception, it may still be admitted under the principled approach provided the statement is both necessary and sufficiently reliable: see *Khelawon* 2006 SCC 57 at para 2*; Bradshaw* 2017 SCC 35 at para 24.

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The relationship between the exceptions: *R. v. MacKinnon*, 2022 ONCA 811

- Although traditional exceptions and the principled approach are informed by the same reliability considerations, traditional exceptions inherently embody circumstantial indicators of reliability.
- Traditional exceptions and the principled exception also differentiate on the basis that once the requirements of a traditional exception are established, the hearsay statement is admissible absent a 'rare cases' exception.
- In the case of the principled exception, there is no presumption of admissibility which is why the reliability and necessity analysis must be conducted.
- At paragraph 62, the Court lays out a comprehensive framework for determining the admissibility of hearsay evidence as established in *Starr/Mapara.*

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The relationship between the exceptions: *R. v. MacKinnon*, 2022 ONCA 811

- The Court offers guidance on what constitutes a rare case such as circumstances of gross intoxication, highly impaired vision or exceptionally difficult viewing conditions. These cases exacerbate the real possibility of identification inaccuracy affecting the threshold reliability requirement under the principled approach.
- To invoke the 'rare case' exception, the party must point to special features such that the presumptively admissible hearsay evidence does not meet the principled requirements of necessity and reliability.
- 'Rare case' exceptions should not include factors that may give rise to concerns about the declarant's honesty because reliability concerns relating to truthfulness are already captured in the requirements of the traditional hearsay exceptions. Furthermore, weaknesses that go to the ultimate weight to be accorded to the evidence are best left to the jury to decide.

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The relationship between the exceptions: *R. v. MacKinnon*, 2022 ONCA 811

- The Court also reminds that corroborative evidence may provide trial judges with additional evidentiary guarantees of the statement's inherent trustworthiness but is not a prerequisite and the absence of corroborative evidence does not raise a concern about substantive reliability.
- Although the Court went on to consider the principled exception in this case, the Court reaffirmed that trial judges may admit evidence that satisfies a traditional exception without being required to go on to consider compliance with the principled exception. In fact, doing so as Paciocco J. later discusses in concurring reasons would unnecessarily complicate and protract the *voir dire*.
  - In the same vein, Paciocco J.A. also remarked that it is entirely possible for evidence to meet the admissibility standard for a traditional exception but fail to satisfy the principled hearsay exception (for example spontaneous exclamations do not have a necessity component).

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37

THANK YOU

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TAB 3

Criminal Law Refresher 2024

Ancillary Orders (PowerPoint)

Ariel Herscovitch
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Ministry of the Attorney General

May 11, 2024

cpd

Ancillary Orders

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1

DNA Orders

2

DNA Order

- Where an offender is convicted/discharged of an eligible offence, the court may make a DNA order.
- A bodily sample is taken from an offender for forensic DNA analysis.
- The offender's DNA profile is added to the National DNA Databank.

Code s. 487.04 – 487.092

3

Eligible Offences

Categories of Offence

1. Compulsory Primary Designated – the most serious criminal offences where the order is mandatory.

- Murder, manslaughter, attempt murder
- Aggravated assault, assault with weapon/CBH/Choking
- Aggravated sexual assault, sexual assault with weapon/CBH/Choking, sexual assault, sexual interference, child pornography, child luring
- Kidnapping, robbery, extortion, human trafficking (< 18)
- Some historic sexual offences

Code s. 487.04(a) and (c.02), 487.051(1)

4

Eligible Offences

Categories of Offence

2. Presumptive Primary Designated – serious offences where the order is nearly mandatory.

- Piratical acts, hijacking
- Terrorism offences
- Infanticide
- Human trafficking, Material benefits
- Break and enter (dwelling house)
- Historical sexual offences

Code s. 487.04(a.1)-(c.01) and (c.03)-(d), 487.051(2)

5

Eligible Offences

Categories of Offence

3. Secondary Designated – less serious offences where the order is discretionary.

- Unlawfully at large, indecent acts, fail to stop at MVA, criminal harassment, uttering threats, assault, break & enter (non-dwelling), intimidation, arson, drug trafficking, drug importing/exporting.
- Generic – any Code offence that is prosecuted by indictment for which the maximum punishment is imprisonment for 5 years or more.

Code s. 487.04 and 487.051(3)

6

When Deciding

Applicable Tests

- **Presumptive Primary Designated**

The court must make the order unless the offender establishes that the impact of such an order on the privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice to be achieved through the early detection, arrest, and conviction of offenders.

- **Secondary Designated**

Whether it would be in the ***best interest of justice***, having regard to the considerations set out in s. 487.051(3) of the Code.

7

When Deciding

Considerations

- Criminal record of the offender.
- Nature of the offence.
- Circumstances surrounding its commission.
- Impact such an order would have on the offender's privacy and security of the person.

Code s. 487.051(3)

8

Weapons Prohibitions

9

Mandatory Order

Where offender is convicted/discharged of:

i. An indictable offence where **violence** against a person was used, threatened, or attempted and the offender **may be sentenced to 10 years** or more in jail;

ii. An indictable offence in the commission of which **violence** was used, threatened, or attempted **against an intimate partner**, an intimate partner's child/parent, or anyone residing with an intimate partner;

Continued...

10

Mandatory Order

Where offender is convicted/discharged of:

- **Criminal harassment**;
- Enumerated **firearms** offence;
- Enumerated **drug** offence; or
- An offence involving a firearm, prohibited weapon, restricted weapon, etc. **and offender was prohibited from possessing weapons at the time**.

Code s. 109

11

Mandatory Order

The offender will be prohibited from possessing weapons for:

- 10 years (at least) – first offence
- Life – subsequent offence

Code s. 109

12

Mandatory Order

Note – No matter the length of the order, the offender will be prohibited for life from possessing any:

- prohibited firearm
- restricted firearm
- prohibited weapon
- prohibited device
- prohibited ammunition

Code s. 109

13

Discretionary Order

Where offender is convicted/discharged of:

i. An offence not covered by section 109 where violence against a person was used or threatened; or

ii. An offence involving a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition, prohibited ammunition, or an explosive substance, and the offender was not subject to a prohibition at the time.

Code s. 110

14

Discretionary Order

- The offender may be prohibited from possessing weapons for up to 10 years.

- The judge should consider whether it is desirable, in the interests of the safety of the person or of any other person, to make a prohibition order.

Code s. 110

15

Sustenance or Employment

The judge may lift the prohibition order for:

- Sustenance hunting and trapping.
- Employment where the order would constitute a virtual prohibition against employment in the only vocation open to the person.
- Can return to court at any point to request exemption.

The entire order is not lifted.

Code s. 113

16

Sustenance Hunting and Trapping

R. v. Allooloo, 2010 NWTCA 7:

Hunting or trapping can be used to 'sustain' a family even if the survival or subsistence of the family does not depend on it. Participating in the wage economy or relying partly on non-traditional food sources does not disqualify the applicant from an exemption. The evidence on this record respecting the appellant's sustenance activities was uncontradicted and satisfied the requirements of the section. While there is an evidentiary burden on the person seeking an exemption, the section is not as narrow as the trial judge assumed.

(But see *R. v. Tessier*, [2006] O.J. No. 1477 (C.A.) and *R. v. Conley*, 2010 BCSC 1092, where the court concluded that the prohibition should not be lifted as a matter of convenience or to provide a person with greater economic opportunities, but rather to prevent an injustice.)

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Driving Prohibitions

18

Driving Prohibitions

A judge may impose an order prohibiting an offender from operating a conveyance anywhere in Canada for a prescribed period.

- "Conveyance" = a motor vehicle, a vessel, an aircraft, or railway equipment.
- "Operate" = for motor vehicles, to drive it or have care or control of it.

A prohibition regarding motor vehicles applies only to their operation on a street, road, highway, or any other public place.

Code s. 320.24, 320.11

19

Mandatory Prohibition

Impaired driving offences – s. 320.14-320.15

- Impaired Driving, 80+, Refuse simpliciter

Mandatory driving prohibition imposed for:

- 1st offence – 1 to 3 years
- 2nd offence – 2 to 10 years
- Subsequent offence – 3 years to life

Code s. 320.24(1), (9)

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Discretionary Prohibition

Other driving offences – s. 320.13-320.18

- Dangerous Driving
- Impaired Driving, 80+, Refuse CBH/Death
- Fail to Stop After Accident, Flight From Police
- Drive While Prohibited

Discretionary driving prohibition imposed for:

- Up to **life** – where maximum sentence = life
- Up to **10 years** – where maximum sentence is more than 5 years but less than life
- Up to **3 years** – any other case

Code s. 320.24(4)

21

Notes on Prohibitions

- Prohibitions are in addition to any jail sentence imposed.
- Prohibition orders may be consecutive to orders already in effect.
- Discretionary driving prohibition orders must be reduced to reflect pre-sentence time an offender was prohibited from driving while on bail.

Code s. 320.24(2), (5), and (9)

R. v. Lacasse, 2015 SCC 64 (S.C.C.) at para. 113

22

Ignition Interlock Program

An offender may be allowed to drive during a portion of the driving prohibition if he or she is registered in a provincial ignition interlock program.

- 1st offence – after period fixed by court
- 2nd offence – after 3 months
- Subsequent offence – after 6 months
- The judge may impose longer periods.
- Ontario has an ignition interlock program.

Code s. 320.18(2) and 320.24(10)

23

Victim Fine Surcharge (VFS)

24

Amount

- Subject to the sentencing judge's discretion, the VFS must be imposed for EACH offence for which an offender is convicted or discharged.

- The amount is as follows:
  - **30% of any fine imposed** for the offence, OR if no fine is imposed,
  - **$100** for an offence prosecuted summarily
  - **$200** for an offence prosecuted by indictment

- The court may increase the amount of the VFS if deemed appropriate and the court determines the offender can pay.

Code sections 737(1), (2) and (3)

25

Judge's discretion

- In ***R. v. Boudreault,* 2018 SCC 58**, the Supreme Court declared the prior *mandatory* VFS unconstitutional as it constituted cruel and unusual punishment, and was disproportionate particularly for impoverished, addicted or homeless offenders.

- As a result , the *Code* was amended to allow the sentencing judge to impose a **reduced VFS or no VFS** if:
  - The VFS would cause **undue hardship** to the offender; OR
  - The VFS would be disproportionate to the **gravity of the offence** or the **degree of responsibility of the offender.**

Code section 737(2.1)

26

Purpose

- The VFS "shall be applied for the purposes of providing such **assistance to victims of offences** as the lieutenant governor in council of the province in which the surcharge is imposed may direct from time to time." (*Code* section 737(5))

- In Ontario, the fine goes to Ontario Victim Services, which provides assistance to a number of programs including domestic violence and sexual assault centres, women's shelters, and the Victim/Witness Assistance Program (VWAP)

27

Imprisonment upon default

- Like any fine imposed as part of a sentence, a term of imprisonment "shall be deemed to be imposed in default of payment" of the VFS

- The length of imprisonment (in days) is calculated by the following formula:

$$\frac{\text{(unpaid amount of fine + costs)}}{\text{(Current minimum hourly wage) x 8}}$$

Code sections 737(7), and 734(4) and (5)

28

Section 161 Orders

29

Nature of order

- When an offender is convicted, or conditionally discharged, of an **enumerated offence** against a person **under the age of 16**, the court MAY prohibit the offender from any of the following:
  - (a) attending parks, swimming areas, playgrounds, daycare centres, schools or community centres;
  - (a.1) attending within up to 2 km of the victim's dwelling house or any other place;
  - (b) seeking, obtaining or continuing employment or volunteer work that involves a position of trust towards persons under the age of 16;
  - (c) having contact or communication with persons under 16 unless supervised by a person approved by the court; **OR**
  - (d) using the internet, except in accordance with conditions set by the court.

Code section 161(1)

30

Enumerated offences

- Sexual assault, sexual interference, invitation to sexual touching and other related sexual offences;
- Incest, compelling bestiality;
- Making, possessing or distributing child pornography;
- Child luring, making sexually explicit material available to a child, exposure to a person under 16;
- Human trafficking
- Child abduction
- Obtaining, receiving material benefit from, or procuring sexual services
- Historical offences related to the above

Code section 161(1.1)

31

Duration of Order

- Life OR any shorter duration the "court considers desirable"
- The order begins on the **later** of the date it was made and the date the offender is released from imprisonment for the offence.

Code section 161(2)

32

Variation of Order

- The sentencing judge, OR **if they are unable to act,** any other judge of the same court, may on application by **the offender or the prosecutor**, vary the conditions if it is deemed "**desirable due to changed circumstances".**

Code section 161(3)

33

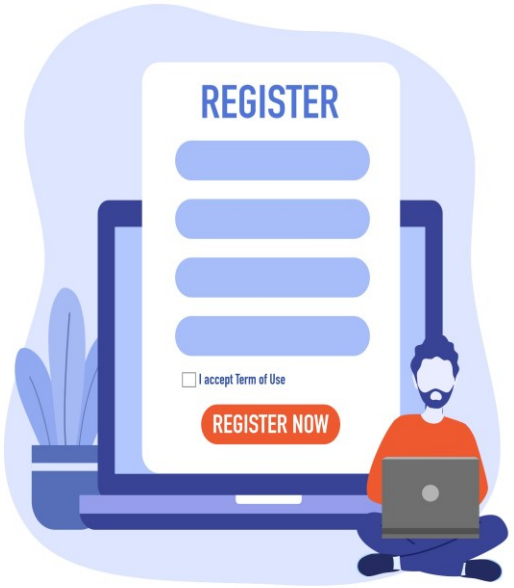
Offence

- Failure to comply with this section is a **hybrid** offence punishable by **up to four years (?)** imprisonment if prosecuted by indictment

Code section 161(4)

34

Sex Offender Information Registration Act (SOIRA)



35

History

- Came into force in 2004
- Modelled after Ontario's *Christopher's Law,* enacted in 2001 following the abduction and murder of an 11-year-old boy by a convicted sex offender
- Maintained by the RCMP
- Under the 2004 law, prosecutors had to apply for the Order, and judges had discretion not to impose it if they believed the impact on the privacy or liberty of the offender was "grossly disproportionate" to the public interest in investigating crimes of a sexual nature

R. v. Ndhlovu, 2022 SCC 38, paras. 31-32

36

2011 Amendments

- **Removed both prosecutorial and judicial discretion** and made registration mandatory when convicted, or found not criminally responsible on account of mental disorder (NCR), of 27 designated offences.
- Required mandatory **lifetime** *SOIRA* registration in all instances where an individual has been convicted of (or found NCR for) more than one designated offence, even at the same time.

R. v. Ndhlovu, 2022 SCC 38, para. 33

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R. v. Ndhlovu, 2022 SCC 38

- Majority declared the following two sections of the *Criminal Code* unconstitutional:
  - 490.012 - Mandatory registration when convicted of designated offences; and
  - 490.013(2.1) - Mandatory lifetime registration for persons convicted of more than one designated offence
- Majority found that both sections were overbroad in violation of section 7, in that they captured "offenders who are not at an increased risk of committing a future sex offence."
- Majority found that "[d]espite [*SOIRA's]* long existence, there is little or no concrete evidence of the extent to which it assists police in the prevention and investigation of sex offences."

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2023 *Criminal Code* amendments in response to *Ndhlovu*

- Designated offences were divided into "primary" and "secondary" offences (section 490.011(1))
- A *SOIRA* Order is **automatic** in cases where (1) the offence is prosecuted by indictment, the offender receives a sentence of 2 years or more, AND the victim of the offence is under 18; OR (2) the offender was previously convicted of a primary offence OR previously ordered to register under *SOIRA*. (section 490.012)
- In other cases, the sentencing judge retains discretion not to impose a *SOIRA* Order if (a) there would be no connection between making of the order and helping police investigate or prevent sexual offences, OR (b) the impact on the privacy or liberty of the person is "grossly disproportionate" to the public interest in protecting society through prevention or investigation of sexual offences (section 490.012(3))

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2023 amendments – Length of *SOIRA* Order

- *SOIRA* Order applies for the following length of time from the day it was made:
  - **10 years** if convicted of (or found NCR for) an offence **prosecuted summarily**, or where the **maximum sentence is 2-5 years imprisonment**;
  - **20 years** if the maximum sentence for the offence is **10 or 14 years**;
  - **Life** if the maximum sentence for the offence is **life imprisonment**.
  - **Life** if the person was **previously convicted of a primary offence** OR was **previously subject to a *SOIRA* Order**.

- To comply with *Ndhlovu,* Parliament added the following clause:
  - If an individual is convicted of (or found NCR for) **two or more designated offence in the same proceeding**, the *SOIRA* Order applies for life IF the Court is satisfied that the "person presents an increased risk of reoffending by committing a crime of a sexual nature."

Code section 490.013

40

Obligations imposed by *SOIRA* – Initial reporting

- Report **in person** to a registration centre **within 7 days** of the order being made, if the offender receives a non-custodial, conditional, or intermittent sentence; or
- Report in person within 7 days of **release from custody** (either due to completion of the sentence or release on bail pending appeal); or
- Report in person within 7 days of **receipt of an absolute or conditional discharge** under Part XX.1 of the *Criminal Code* (NCR accused)

SOIRA section 4(1)

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Obligations imposed by *SOIRA* – Information to be reported

- Name, date of birth, and gender
- Address(es) of primary and secondary residence(s)
- Address of employment or volunteer work, name of employer, and type of work
- Address of educational institution where enrolled
- Telephone number for every place listed above as well as all cell phone (and pager) numbers
- Height, weight and "a description of every physical distinguishing mark that they have"
- Make, model, year, colour and license plate of every motor vehicle they "use regularly"
- Driver's license numbers and passport number from every jurisdiction

SOIRA section 5(1)

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Ongoing reporting obligations

- Within 7 days of:
  - A change of address
  - A change of name
  - A change in employment or volunteer work
  - Receipt of a driver's license or a passport
- At least 14 days in advance of a departure from the person's residence for 7 days or more, including every location they intend to stay within or outside Canada
- Between 11 months to one year after the person last reported

SOIRA sections 4.1, 5.1, 6(1)

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Offence for violation of reporting requirements

- Anyone who fails to comply with a *SOIRA* order OR provides false or misleading information is guilty and offence and liable to:
    - If prosecuted by indictment, a maximum $10,000 fine or two years' imprisonment, or both
    - If prosecuted summarily, a maximum $10,000 fine or two years less a day imprisonment, or both

Code sections 490.031, 490.0311

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Appealing and Terminating *SOIRA* Orders

- 2023 amendments to the *Code* include a right of appeal (section 490.014)
- ***R. v. E.H.*, 2024 ONCA 74** – The Court of Appeal left undecided the issue of whether the right of appeal applies retroactively to *SOIRA* orders made before the new sections came into force*, but found that the accused is entitled to return before the trial judge to correct an erroneous lifetime *SOIRA* order
- A person can apply for termination of a *SOIRA* order **5 years** after it's made (for 10 year orders); 10 years after it's made (**20 year orders**); or **20 years** after it's made (**lifetime orders**). (section 490.015(1))
- A person can also apply for termination if they receive a pardon, record suspension, or absolute discharge (NCR accused) (section 490.015(3))

*The Supreme Court has previously held that rights of appeal are *substantive* rights, not procedural ones (*R. v. Puskas,* [1998] 1 S.C.R. 1207), and that legislation affecting substantive rights generally does not apply retrospectively (*R. v. Dineley*, 2012 SCC 58).

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Food for thought (and EDI considerations…)
SOIRA and the NCR Accused

- Initial reporting occurs *after* the NCR accused receives a conditional **or absolute discharge**.
- An individual can only be found NCR if the Court is satisfied that, due to mental disorder, the accused was "incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong".
- The Ontario Review Board (ORB) may only grant an absolute discharge once it is satisfied that the accused **no longer poses "a significant risk to the safety of the public"**
- So, if the accused was (1) unaware of the nature of their actions at the time due to a mental disorder, and (2) that mental disorder has been treated such that they no longer pose a significant risk to the public, what purpose is achieved by registering persons who receive an absolute discharge? Is there a risk of discrimination against persons with mental disorders?

Designated Offence Tables (DNA and *SOIRA)*

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LIST OF DNA DESIGNATED OFFENCES SECTION 487.04 OF THE CRIMINAL CODE OF CANADA

Primary – Compulsory Sec. 487.04(a)

7(4.1) Offence in relation to sexual offences against children
151 Sexual interference
152 Invitation to sexual touching
153 Sexual exploitation
153.1 Sexual exploitation of person with disability
155 Incest
160(2) Compelling the commission of bestiality 160(3) Bestiality in presence of or by a child
163.1 Child pornography
170 Parent or guardian procuring sexual activity
171.1 Making sexually explicit material available to child
172.1 Luring a child
172.2 Agreement or arrangement – sexual offence against child 173(2) Exposure
235 Murder
236 Manslaughter
239 Attempt to commit murder 244 Discharging firearm with intent
244.1 Causing bodily harm with intent with an air gun or pistol
244.2 Discharging firearm - recklessness
245(a) Administering noxious thing with intent to endanger life or cause bodily harm
246 Overcoming resistance to the commission of an offence
267 Assault with a weapon or assault causing bodily harm
268 Aggravated assault
269 Unlawfully causing bodily harm
270.01 Assaulting peace officer with weapon or causing bodily harm
270.02 Aggravated assault of peace officer
271 Sexual assault
272 Sexual assault with a weapon, threats to a third party or causing bodily harm
273 Aggravated sexual assault
273.3(2) Removal of a child from Canada 279 Kidnapping & forcible confinement
279.011 Trafficking – person under 18 years
279.02(2) Material benefit — trafficking of person under 18 years 279.03(2) Withholding or destroying documents — trafficking of person under 18 years
286.1(2) Obtaining sexual services for consideration from person under 18 years
286.2(2) Material benefit from sexual services provided by

Primary – Presumptive

Sec 487.04(a.1):
75 Piratical acts
76 Hijacking
77 Endangering safety of aircraft or airport
78.1 Seizing control of ship or fixed platform 81(1) Using explosives
82.3 Possession, etc., of nuclear material, radioactive material or device
82.4 Use or alteration of nuclear material, radioactive material or device
82.5 Commission of indictable offence to obtain nuclear material, etc.
82.6 Threats of 82.3, 82.4, and 82.5
83.18 Participation in activity of terrorist group
83.181 Leaving Canada to participate in activity of terrorist group
83.19 Facilitating terrorist activity
83.191 Leaving Canada to facilitate terrorist activity
83.2 Commission of offence for terrorist group
83.201 Leaving Canada to commit offence for terrorist group
83.202 Leaving Canada to commit offence that is terrorist activity
83.21 Instructing to carry out activity for terrorist group
83.22 Instructing to carry out terrorist activity
83.221 Advocating or promoting commission of terrorism offences
83.23 Harbouring or concealing 233 Infanticide
279.01 Trafficking in a person
279.02(1) Material benefit — trafficking
279.03(1) Withholding or destroying documents — trafficking
279.1 Hostage taking
286.2(1) Material benefit from sexual services 286.3(1) Procuring
348(1)(d) Breaking and entering a dwelling-house
423.1 Intimidation of a justice system participant or journalist 431 Attack on premises, residence or transport of internationally protected person
431.1 Attack on premises, accommodation or transport of United Nations or associated personnel 431.2(2) Explosive or other lethal device
467.11 Participation in activities of criminal organization
467.111 Recruitment of members — criminal organization
467.12 Commission of offence for criminal organization

Sec 487.04(c.1) – The Security of Information Act:
6 Approaching, entering, etc., a prohibited place
20(1) Threats or violence
21(1) Harbouring or concealing

Sec. 487.04(d) – Attempt & Conspiracy of Primary Offences:
An attempt or conspiracy to commit an offence referred to in any of paragraphs (a) to (c.03) constitutes a primary presumptive offence (including Primary Compulsory offences).

Primary – Historical

Primary – Compulsory Historical

Sec. 487.04(c.02) – Offences prior to December 6, 2014

212(1)(i) Stupefying or overpowering for the purpose of sexual intercourse
212(2) Living on the avails of prostitution of a person under the age of 18
212(2.1) Aggravated offence in relation to living on the avails of prostitution of a person under the age of 18
212(4) Obtaining prostitution of person under age of 18

Primary – Presumptive Historical

Sec. 487.04(b) – Sexual offences prior to January 4, 1983:
144 Rape
145 Attempt to commit rape
146 Sexual intercourse with female under 14 & between 14&16
148 Sexual intercourse with feeble-minded, etc.
149 Indecent assault on female
156 Indecent assault on male
157 Acts of gross indecency
246(1) Assault with intent (if intent is to commit an offence listed above)

Sec. 487.04(c) – Sexual offences prior to January 1, 1988:

146(1) Sexual intercourse with a female under age of 14
146(2) Sexual intercourse with a female between ages of 14&16 153 Sexual intercourse with step-daughter
157 Gross indecency
166 Parent or guardian procuring defilement
167 Householder permitting defilement

Sec. 487.04(c.01) – Sexual offences 1970-1983:

246.1 Sexual assault
246.2 Sexual assault with a weapon, threats to a third party or causing bodily harm
246.3 Aggravated sexual assault

DNA Secondary Designated Offences Generic/Hybrid Sec. 487.04(a) (Criminal Code offences that are prosecuted by indictment for which the maximum punishment is imprisonment for five years or more.)			Secondary Drugs
47 High treason and treason 50 Assisting alien enemy to leave Canada or omitting to prevent treason 51 Intimidating Parliament or legislature 53 Inciting mutiny 56.1*Identity Documents 57(1) Forge or use forged passport 61 Punishment of seditious offences 66(2)* Unlawful assemblies while wearing a mask 68 Proclamation offences 74 Piracy 78 Take weapon or explosive on board 80 Breach duty of care re explosive substances 82(2) Possession in association w criminal organization 83.02 Providing or collection property for terrorist purposes 83.03 Providing, making available, etc., property/services for terrorist 83.04 Using or possessing property for terrorist purposes 83.12* Offences - freezing of property, disclosure, or audit 83.231* Hoax terrorist activity 83.27 Punishment for terrorist activity 85 Use of firearm or imitation in commission of offence 86(a)(ii)* Careless use, storage of firearm (2nd / subsequent offence) 87* Pointing a firearm 88* Possession of weapon for dangerous purpose 90* Carry a concealed weapon 91* Unauthorized possession firearm, etc. 92 Possession of firearm, etc. knowing unauthorized 93* Possession at unauthorized place 94* Unauthorized possession in motor vehicle 95* Possessing of prohibited or restricted firearm with ammunition 96* Possession of weapon obtained by offence 98(1) Break & Entering to steal firearm 98.1 Robbery to steal firearm 99 Weapons trafficking 100 Possession for purpose of weapon trafficking 101* Transfer without authority 102* Making automatic firearm 103 Importing/exporting knowing unauthorized 104* Unauthorized importing/exporting 105* Losing or finding weapons	137 Fabricating evidence 140* Public mischief 160(1)* Bestiality 162* Voyeurism 162.1* Publication, etc., of intimate image without consent 171 Householder permitting sexual activity 215* Duty of persons to provide necessaries 218* Abandoning child 220 Causing death by criminal negligence 238 Killing unborn child in act of birth 240 Accessory after fact to murder 241 Counselling or aiding suicide 241.3* Failure to safeguards re medical dying 241.4* Forgery re medical dying 247(4) (5) Traps related place & BH or Death 248 Interfering with transportation facilities 269.1 Torture 270.1* Disarming a peace officer 282* Abduction in contravention of custody order 283* Abduction 286.4* Advertising sexual services 318 Advocating genocide 320.102* Conversion therapy 320.13(1)* Dangerous operation 320.13(2)* Dangerous operation – bodily harm (BH) 320.13(3) Dangerous operation – death (D) 320.14(1)* Operates while impaired 320.14(2)* Operates while impaired – BH 320.14(3) Operates while impaired – D 320.15(1)* Failure or refusal to comply with demand 320.15(2)* Failure or refusal to comply with demand – BH 320.15(3) Failure or refusal to comply with demand – D 320.16(2)* Failure to stop after accident – BH 320.16(3) Failure to stop after accident – D 320.17* Flight from peace officer 320.18(1)* Operation while prohibited 320.19(1)* Operates while impaired or Failure or refusal to comply with demand 320.19(5)* Dangerous operation and other offences 320.2* Dangerous operation and other offences – BH 320.21 Dangerous operation and other offences – D 333.1(1)* Theft of motor vehicle 336 Criminal breach of trust 342* Theft, forgery, etc or unauthorized use of credit card 342.01* Instruments for forgery or falsifying credit cards	355.5* Trafficking or Possession in property obtained by crime (**See Sec 355.2 and 355.4**) 356* Theft from mail 367* Forgery 368* Uttering forged document 368.1* Forgery instruments 369 Exchequer bill paper, seals, etc 374 Drawing document w/o authority 375 Obtaining, etc based on forged documents 376 Using counterfeit stamp, etc 380(1)(a) Fraud over $5000 380(2) Fraud affecting public market 382.1(2)* Stock tipping 391(1) (2)* Trade secret – prior knowledge 402.2* Identity Theft 403* Personation with intent 418 Selling defective stores to Her Majesty 420* Military stores 422* Criminal breach of contract 423.2(2)* Obstruction or interference with access 425.1* Threats and retaliation against employees 430(2), (3)*, (4.1)*, (4.2)*, (4.11)*, (5)*, (5.1)* Mischief 432(2)* Unauthorized recording for the purpose of sale, etc 433 Arson – disregard for human life 434 Arson – property 434.1 Arson – own property 445* Injuring or endangering other animals 445.01* Killing or injuring certain animals 445.1* Causing unnecessary suffering (Cruelty to Animals) 447* Keeping cockpit 449 Counterfeit money, making 450 Possession, etc of counterfeit money 452 Uttering counterfeit money, etc 455 Clipping & uttering clipped coin 458 Making, having or dealing in instrument for counterfeiting 459 Conveying instruments for coining out of Mint, etc 462.31* Laundering proceeds of crime 462.33(11)* Fail to comply with restraint order 463 Accessory after the fact if by indictment and punishment of predicate is 10 years or more 464 Counsel to commit if by indictment and punishment of predicate is 5 years or more 490.8* Failure to comply with restraint order *** = Represent a hybrid offence that becomes a**	**Sec. 487.04(a.1) – Cannabis Act section (Checkbox (i.01)): (only if prosecuted by indictment and maximum punishment is imprisonment for five years or more)** **9* Distribution and possession for purpose of dist.** 9(5)(a) **10* Selling and possession for purpose of selling** 10(5)(a) **11* Importing and exporting and possession for purpose of exporting** 11(3)(a) **12* Production** 12(9)(a), (10)* **13* Possession, etc., for use in production or distribution of illicit cannabis** 13(2)(a) **14* Use of young person** 14(2)(a) **Sec. 487.04(b) – Controlled Drugs and Substances Act (Checkbox (ii)): (only if prosecuted by indictment and maximum punishment is imprisonment for five years or more)** If the prerequisite is not checked on the DNA Order, the substance must be confirmed. **5* Trafficking in substance and possession for purpose of trafficking** 5(3)(a) 5(3)(b)* **6* Importing and exporting** 6(3)(a), (a.1) 6(3)(b)* **7* Production of substance** 7(2)(a), (a.1) 7(2)(b) (as per Interpretation Act) 7(2)(c)*

DNA Secondary Designated Offences Listed Form 5.04 Checkbox (iii) Sec. 487.04(c) Mode of trial is not relevant		Secondary Form 5.04	*National Defence Act*
145(1) to (11) Escape and being at large without excuse, failure to comply, etc. 146 Permitting or assisting escape 147 Rescue or permit escape 148 Assist prisoner of war to escape 173(1) Indecent acts 264 Criminal harassment 264.1 Uttering threats 266 Assault 270 Assaulting a peace officer 286.1(1) Obtaining sexual services for consideration 320.16(1) Failure to stop after accident 348(1)(e) Breaking and entering a place other than dwellinghouse 349 Being unlawfully in a dwelling-house 423 Intimidation 423.2(1) Intimidation – Health services **Secondary - Listed as of September 19th, 2019:** 52(1) Sabotage 57(3) Possession of a forged passport 62 Offences in relation to military forces 65(2) Riot — concealing identity 70(3) Contravening order made by governor in council 82(1) Explosives, possession without lawful excuse 121(1) Frauds on the government 121(2) Contractor subscribing to election fund 122 Breach of trust by public officer 123(1), (2) Municipal corruption / Influencing 124 Selling or purchasing office 125 Influencing or negotiating appointments or dealings in offices 139(2) Obstructing justice 142 Corruptly taking reward for recovery of goods 144 Prison breach 182 Dead body — neglect to perform duty, improper or indecent interference with 184 Interception of private communication 184.5 Interception of radio-based telephone communications 221 Cause bodily harm by criminal negligence 242 Neglect to obtain assistance in child-birth 247(1),(2),(3) Traps 262 Impeding attempt to save life 280 Abduction of person under 16 281 Abduction of person under 14	293.1 Forced marriage 293.2 Marriage under age of 16 years 300 Publishing defamatory libel known to be false 302 Extortion by libel 334(a) Theft over $5,000 or testamentary instrument (**See Sec. 322-333 except 327**) 338 Fraudulently taking cattle or defacing brand 339(1) Take possession of drift timber, etc. 340 Destroying documents of title 351(2) Disguise with intent 355(a) Possession of property over $5,000 or testamentary instrument 357 Bring into Canada property obtained by crime 362(2)(a) False pretense, property over $5,000 or testamentary instrument 362(3) Obtain credit, etc. by false pretense 363 Obtain execution of valuable security by fraud 377(1) Damaging documents 378 Offences in relation to registers 382 Manipulation of stock exchange 382.1(1) Prohibited insider trading 383 Gaming in stocks or merchandise 384 Broker reducing stock by selling his own account 386 Fraudulent registration of title 394 Fraud in relation to minerals 394.1 Possession of stolen minerals 396 Offences in relation to mines 397 Falsification of books and documents 399 False return by public officer 400 False prospectus 405 Acknowledging instrument in false name 424 Threat against an internationally protected person 424.1 Threat against United Nations or associated personnel 426 Secret commissions 435 Arson for fraudulent purpose 436 Arson by negligence 436.1 Possession incendiary material 438(1) Interfering with saving of a wrecked vessel 439(2) Interfering with a marine signal 441 Occupant injuring building 443 Interfering with international boundary marks, etc. 451 Having clippings, etc. 460 Advertising and dealing in counterfeit money 465(1)(b)(i) and (ii) Conspiracy to prosecute 753.3 Breach of long-term supervision	**Sec. 487.04(e) – Attempt & Conspiracy of Secondary offences (Checkbox (v)):** (i) to commit a Hybrid or CDSA offence referred to in paragraph (a) or (b) must be prosecuted by indictment to qualify (ii) to commit an offence referred to in paragraph (c) to (d.2). **Secondary – Historical Listed** **Mode of trial is not relevant** **Sec. 487.04(d) – Offences prior to July 1, 1990 (Checkbox (iv)):** 433 Arson, attempt & conspiracy included 434 Setting fire to other substance, attempt & conspiracy incl. **Sec. 487.04(d.1) – Offence prior to December 18, 2018 (Checkbox (iv.1)):** 252 Failure to stop at scene of accident **Secondary – Historical Generic/Hybrid** **Sec. 487.04(d.2) - Offences prior to December 18, 2018 only if prosecuted by indictment (Checkbox (i))** 249(2)* Dangerous driving 249(3) Dangerous driving causing bodily harm (CBH) 249(4) Dangerous driving causing death (CD) 249.1(2)* Flight 249.1(4) Flight CBH or CD 249.2 CD by criminal negligence – street racing 249.3 CBH by criminal negligence – street racing 249.4(1)/(2)* Dangerous operation of MV while street racing 249.4(3) Dangerous operation CBH – street racing 249.4(4) Dangerous operation CD – street racing 254(5)* Failure/refusal to provide sample 253/254/255(1)* Impaired driving 253/255(2) Impaired driving CBH 253/255(2.1) Blood concentration ⍰ legal limit – CBH 254/255(2.2) Refusing to provide sample CBH 253/255(3) Impaired driving CD 253/255(3.1) Blood concentration ⍰ legal limit – CD	**Sec. 196.11(b) – Secondary:** 77(a) Violence to person bringing materiel to forces 79 Mutiny w violence 84 Striking a superior officer 87 (b) Violence while in custody 95 Striking a subordinate 107 (a) Endangering a person on aircraft 127 Handling of dangerous substances **Sec. 196.11(c) – Attempt & Conspiracy of Secondary offences:** An attempt to commit or a conspiracy to commit any offence referred to in paragraph (a) or (b).

***SOIRA* – Primary Offences** (Eligible for a mandatory or discretionary SOIRA order pursuant to ss. 490.012(1)-(4))

An attempt or conspiracy to commit any of the primary offences listed below;

Section 7(4.1) – Offence in relation to sexual offences against children;

Section 151 – Sexual interference;

Section 152 – Invitation to sexual touching;

Section 153 – Sexual exploitation;

Section 153.1 – Sexual exploitation of person with disability;

Section 155 – Incest;

Section 160(1) – Bestiality;

Section 160(2) – Compelling the commission of bestiality;

Section 160(3) – Bestiality in presence of or by a child;

Section 162.1 – Distributing an intimate image without consent [newly SOIRA-eligible as of October 26, 2023];

Section 163.1 – Child pornography;

Section 170 – Parent or guardian procuring sexual activity;

Section 171.1 – Making sexually explicit material available to child;

Section 172.1 – Luring a child;

Section 172.2 – Agreement or arrangement to commit sexual offence against child;

Section 173(2) – Exposure;

Section 271 – Sexual assault;

Section 272 – Sexual assault with a weapon, threats to a third party or causing bodily harm;

Section 273 – Aggravated sexual assault;

Section 273.3(2) – Removal of a child from Canada;

Section 279.011 – Trafficking - person under 18 years;

Section 279.02(2) – Material benefit - trafficking of person under 18 years;

Section 279.03(2) – Withholding or destroying documents - trafficking of person under 18 years;

Historical Sexual Offences before January 4, 1983

Section 144 – Rape;

Section 145 – Attempt to commit rape;

Section 149 – Indecent assault on female;

Section 156 – Indecent assault on male; and

Section 246(1) – Assault with intent, if the intent is to commit any of the offences referred to above.

Historical Sexual Offences as enacted by S.C. 1980-81-82-83, s. 19, c. 25

Section 246.1 – Sexual assault;

Section 246.2 – Sexual assault with a weapon, threats to a third party or causing bodily harm; and

Section 246.3 – Aggravated sexual assault.

Historical Sexual Offences before January 1, 1988

Section 146(1) – Sexual intercourse with a female under age of fourteen;

Section 146(2) – Sexual intercourse with a female between ages of fourteen and sixteen;

Section 153 – Sexual intercourse with step-daughter;

Section 157 – Gross indecency;

Section 166 – Parent or guardian procuring defilement; and

Section 167 – Householder permitting defilement.

Historical Sexual Offences before December 6, 2014

Section 212(1)(i) – Stupefying or overpowering for the purpose of sexual intercourse;

Section 212(2) – Living on the avails of prostitution of person under 18 years;

Section 212(2.1) – Aggravated offence in relation to living on the avails of prostitution of person under 18 years; and

Section 212(4) – Prostitution of person under 18 years.

***SOIRA* – Secondary Designated Offences -** Eligible for a mandatory or discretionary SOIRA order only where the Crown proves beyond a reasonable doubt that the offence was committed with the intent of committing a primary offence – see s. 490.012(5)

An attempt or conspiracy to commit any of the secondary offences listed below;

Section 162 – Voyeurism;

Section 173(1) – Indecent acts;

Section 177 – Trespassing at night;

Section 231 – Murder;

Section 234 – Manslaughter;

Section 245(1)(a) – Administering noxious thing with intent to endanger life or cause bodily harm [newly SOIRA-eligible as of October 26, 2023];

Section 245(1)(b) – Administering noxious thing with intent to aggrieve or annoy [newly SOIRA-eligible as of October 26, 2023];

Section 246 – Overcoming resistance to commission of offence;

Section 264 – Criminal harassment;

Section 279 – Kidnapping;

Section 279.01 – Trafficking in persons;

Section 279.02(1) – Material benefit - trafficking;

Section 279.03(1) – Withholding or destroying documents - trafficking;

Section 280 – Abduction of a person under age of sixteen;

Section 281 – Abduction of a person under age of fourteen;

Section 286.1(1) – Obtaining sexual services for consideration;

Section 286.2(1) – Material benefit from sexual services;

Section 286.3(1) – Procuring;

Section 346 – Extortion [newly SOIRA-eligible as of October 26, 2023];

Section 348(1)(d) – Breaking and entering a dwelling house with intent to commit an indictable offence;

Section 348(1)(d) – Breaking and entering a dwelling house and committing an indictable offence;

Section 348(1)(e) – Breaking and entering a place other than a dwelling house with intent to commit an indictable offence; and

Section 348(1)(e) – Breaking and entering a place other than a dwelling house and committing an indictable offence.

Law Society of Ontario | Barreau de l'Ontario

TAB 4

Criminal Law Refresher 2024

Helpful Resources

Emma Rhodes
Barrister and Solicitor

May 11, 2024

Helpful Resources

Emma Rhodes, Barrister and Solicitor

R. v. D.B., 2008 SCC 25 (CanLII), [2008] 2 SCR 3, <https://canlii.ca/t/1wxc8>

R. v. T.(J.), 2013 ONCJ 397 (CanLII), <https://canlii.ca/t/fzqss>,

Law Society of Ontario | Barreau de l'Ontario

TAB 5

Criminal Law Refresher 2024

Criminal Code Update: Section 278

SuJung Lee
Daniel Brown Law LLP

Sarah Repka
Ministry of the Attorney General

Megan Schwartzentruber
Cooper, Sandler, Shime & Schwartzentruber LLP

May 11, 2024

cpd

Third-Party Records 101:
Practical Considerations from Defence Perspective

SuJung Lee
Daniel Brown Law LLP

1. When should I bring an application?

a. Scenarios where you may consider production of records (non-exhaustive)

- Complainant's evidence has undergone material change over time – intervening records can shed light on why evidence has changed (e.g. influence from counselling, from talking with friends), or can have potential impeachment value
  - *R v Batte,* [2000] OJ No 2184 (CA) at paras. 72, 76
  - *R v MacArthur,* 2014 ONSC 5583 at paras. 25-26
  - *R v Kapila,* 2020 ONSC 6541 at para. 27

- Historical cases, where there is an earlier written record of the factual account of the allegations
  - *R v Sanichar (HPS),* [2012] OJ No 748
  - *R v Gilberds,* 2014 ONSC 2213 at paras. 53-54
  - *R v GJS,* 2007 ABQB 757 at paras. 22-25
  - *R v Carosella,* [1997] 1 SCR 80 at paras. 41-44

- The records may disclose a motive or explanation for why a complainant would fabricate – e.g. e.g. financial gain, animus towards the accused, etc
  - *R v JK,* 2015 ABPC211
  - *R v LF,* [2006] OJ No 172 (Sup Ct)
  - *R v JD* [2009] OJ No 4572
  - *R v RL,* [2012] ONSC 1401

b. What is a "record?" (Threshold consideration)

278.1 For the purposes of sections 278.2 to 278.92, ***record*** means 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.**

See also *R v JJ,* [2022] SCJ No 28, 2022 SCC 28

- **First vs. Third-party records -** Is the material something the Crown ought to disclose as part of their *Stinchcombe* obligations, or will you need to bring a defence production application? You may want to consider bringing a MFD or a *Pascal* motion to determine if the 278 regime applies at all: see *Pascal,* 2020 ONCA 287 at para. 107. Particularly where the records were created by and in the possession of police:

    - Prior occurrence reports between the accused and the same complainant, where you believe this history is relevant to the present allegations (*R v LL,* 2021 ONSC 3337; *R v Veeder,* 2019 MBQB 146)
    - Witness statement in another investigation where the witness discusses the allegations in your case (*R v AJ,* 2023 ONSC 3420)

2. How should I schedule the application?

a. Pre-trial or mid-trial?

- Do you have a sufficient evidentiary record to bring an application in advance of trial?
    - Do you know who the recordholder is to even subpoena? Are there possibly multiple recordholders, with multiple types of records?

    - Do you have enough information to limit the scope of the records that you're seeking? E.g. if you're seeking medical records that go back for years, what is the relevant time period that can help narrow down the records sought?

    - Do you know whether the information in the records would be sufficiently detailed such that they would be of any help at all? E.g. if you're seeking counselling records, has the complainant provided details to the counsellor about the allegations beyond general reference to the allegations? How, if at all, did engaging in counselling assist the complainant in recalling more details?

- If your client does not qualify for a preliminary inquiry, you may have to bring the application mid-trial as opposed to in advance of trial

b. Judicial Pre-Trial Advocacy

- Where you simply don't have the benefit of all of this information, prepare to advocate as early as possible the importance of scheduling a mid-trial application – and why the schedule is appropriate and necessary

- Defence is entitled to rely on Crown disclosure, defence witnesses, and cross-examination of Crown witnesses at **both** the preliminary inquiry **and** trial in order to support an application under s. 278

- *R v Mills,* [1999] 3 SCR 668 at para. 135
- *R v E(B),* 2002 CanLII 23582 (Ont CA) at paras. 40, 62
- *R v Lakis* (unreported – provided in materials) at paras. 9-11, 15-17

- Make it clear that the reason you're asking for a mid-trial application is **to avoid** accusations of a fishing expedition. Explain what your good-faith basis for seeking the records are, what more information you would need at trial to bridge the gap in evidence, and that forcing defence to bring a too-expeditious application will benefit no one

c. The Schedule

- Sections 278.3-278.5(1) sets out a two-stage process, with at least 60 days of notice to all parties before stage 1

  Stage 1: TJ determines whether records should go to court for review. To order a record produced to the Court, defence must satisfy a 2-part test:
  (1) whether the record is *likely relevant* to an issue at trial or to the competence of a witness to testify; *and*
  (2) the production of the record is necessary in the interests of justice

  Stage 2: After review of the records, TJ determines whether records should be disclosed to A. Same test as in stage 1, except that now court has the benefit of having reviewed records to make this assessment

- In some jurisdictions (e.g. Newmarket), court will want to schedule a record-deposit date in advance of stage 1 – where all the parties and recordholders physically bring a copy of the records to the court, sealed, so as to ensure the records are in court
  - Otherwise, records can be subpoenaed directly to the stage 1 date

- Leave time between Stage 1 and Stage 2. Be realistic when scheduling the time between the two stages – you'll want to give enough time for judge to review the records, and write a judgment

- Leave time between Stage 2 and the remainder of trial dates. If it is ultimately decided that records will be produced to defence, then you want to schedule enough time between stage 2 and the start of trial to be able to digest the records and incorporate it into your defence

- "Stage 3" admissibility hearing. If you intend to rely on the records produced, you will also need to schedule an admissibility hearing under ss. 278.93-94. Though this hearing also technically proceeds in two stages, judges may truncate this into a single day
  - Practically speaking, if the judge has decided to produce the record to defence, then the judge would already have decided that the record is relevant to an issue at trial and in the interests of justice to disclose to defence. Parties may argue about residual issues regarding any limitation to the records if admitted at trial

3. How do I prepare the application?

a. Laying the Evidentiary Foundation

- *R v EB,* 57 OR (3d) 741 (CA)*:* Either at prelim or at trial, defence is entitled to ask "properly limited questions that would not result in a description of the actual contents of the record" (para. 62) – i.e. questions about the circumstances and general nature of the records in question
    - E.g. records about journal writings
    - Were the entries dated and chronological?
    - Physical descriptions of the diary
    - Do the writings still exist?
    - Whether entries would reveal the day-to-day schedule of the complainant, and her feelings about the day etc

  See also: *Prosecuting and Defending Sexual Offence Cases,* Second Edition, Brown and Witkin, edited by Greenspan and Rondinelli (Toronto: Emond Publishing, 2020) Chapter 11, pp. 315-317 for further guidance on permissible questions for cross-examination

b. Application materials

- Use the written application as the first opportunity to let the judge know what the defence theory of the case is, and why the information in the records you're seeking will likely advance that theory and undermine the Crown's case

- A robust application record is extremely important to overcome accusations of a fishing-expedition argument or that defence is relying on bare assertions of relevance unsupported by case-specific evidence. Specificity is key.

    - Provide a detailed info & belief affidavit regarding the disclosure and relevant preliminary inquiry evidence (if applicable) that tells the judge why defence theory is grounded in the evidence

    - If your theory is that the record may disclose a prior inconsistent statement, point to other instances where the witness's evidence has already undergone a material change over time, and in what circumstances; if your theory is that the record may disclose collusion on the part of witnesses, point to specific portions of statements that underpins your suspicions of collusion

    - You may decide to tender an affidavit from your client, particularly if there is no other affiant who can tender important evidence to buttress your application – though this is something you'll want to carefully consider with your client

- **Caveat** – these applications are being disclosed to potential witnesses at trial and their lawyers. You don't want to include too much information or impeachment materials (e.g. transcripts) that may consciously or unconsciously influence evidence down the road.

c. Subpoena and Service

278.3 (5) The accused shall serve the application on the prosecutor, on the person who has possession or control of the record, on the complainant or witness, as the case may be, and on any other person to whom, to the knowledge of the accused, the record relates, at least 60 days before the hearing referred to in subsection 278.4(1) or any shorter interval that the judge may allow in the interests of justice. The accused shall also serve a subpoena issued under Part XXII in Form 16.1 on the person who has possession or control of the record at the same time as the application is served.

- Unlike in an admissibility hearing, the recordholders and all involved witnesses have standing at **both stages** of the production hearing to make arguments about why the records should or should not be produced to the court and accused

- **Subpoenas** - Subpoenas can be issued by a JP or a judge. Give yourself some room before the 60-day mark to get the subpoenas issued. In order to get subpoenas issued by the court, you'll have to have all your application materials ready to support the issuance
    - If the recordholder is an institution, figure out in advance who the best person is to address the subpoena. Do they have a specific legal department that handles these requests? Or is this a small business where there's a trusty administrative assistant? Call ahead and take down their contact information

- **Once issued,** make sure to serve the subpoena and the materials on all involved parties pursuant to regular rules of service. File an affidavit of service
    - **Recordholders -** Personal service is recommended – that way, you know who to contact if records don't show up in court. If the recordholder reaches out to you directly with additional information or questions, maintain a record of your communications (e.g. e-mail) and notify the court and other parties as necessary. Make it clear to the recordholder that you are not allowed to see any of the requested records directly or discuss their contents

    - **Witnesses -** you can either ask Crown to receive service on behalf of complainant and other Crown witnesses, or if you know who the witness's counsel is, then through their counsel

Additional materials: see attached precedent subpoena and Form 1 Notice of Application (OCJ) for illustration (precedent, with names and information redacted)

SUBPOENA TO A WITNESS IN THE CASE OF PROCEEDINGS IN RESPECT OF AN OFFENCE REFERRED TO IN SUBSECTION 278.2(1) OF THE *CRIMINAL CODE*
ASSIGNATION À UN TÉMOIN DANS LES CAS DES POURSUITES POUR UNE INFRACTION VISÉE AU PARAGRAPHE 278.2(1) DU CODE CRIMINEL

CANADA
PROVINCE OF ONTARIO
PROVINCE DE L'ONTARIO

Form / *Formule* 16.1
Subsections / *Paragraphes* 278.3(5) and / *et* 699(7)
of the *Criminal Code* / *du* Code criminel

Toronto (Region / *Région*)

To / *À* **Recordholder Inc**

of / *de* **ABC Street, Suite 200, Toronto, Ontario ABC 123**
(address / *adresse*) (occupation / *profession*)

WHEREAS **John Doe** of **Toronto, ON**
ATTENDU QUE *de*

has been charged that **Sexual Assault, s. 271 CCC**
a été inculpé(e) d'avoir (state offence as in the information / *indiquer l'infraction comme dans la dénonciation*)

and it has been made to appear that you are likely to give material evidence for **the defence / la défense** ;
et qu'on a donné à entendre que vous êtes probablement en état de rendre un témoignage essentiel pour (the prosecution or the defence / *la poursuite ou la défense*)

THIS IS THEREFORE to command you to attend before **the Ontario Court of Justice** ,
À CES CAUSES, *les présentes ont pour objet de vous enjoindre de comparaître devant* (set out court or justice / *indiquer le tribunal ou le juge*)

on **Wednesday** the **22** day of **November** , yr. **2023** , at **9:30** o'clock in
le *jour de* *an* *à* *heures*

the **fore** noon, at **The Ontario Court of Justice, 10 Armoury Street, Toronto, Ontario**
de *midi, à(au)*

to give evidence concerning the said charge, and to bring with you anything in your possession or under your control
pour témoigner au sujet de ladite inculpation et d'apporter avec vous toutes choses en votre possession ou sous votre contrôle

that relates to the said charge, and more particularly the following: / *qui se rattachent à ladite inculpation, et en particulier les suivantes :*
(specify any documents, objects or other things required / *indiquer les documents, les objets ou autres choses requises*)

All records relating to Jane Doe, in possession of Recordholder Inc, between March 3, 2022 and March 30, 2022 made in the course of counselling sessions conducted with Ms. Therapist, including all handwritten notes, and typed reports.

TAKE NOTE

You are only required to bring the things specified above to the court on the date and at the time indicated, and you are not required to provide the things specified to any person or to discuss their contents with any person unless and until ordered by the court to do so.

If anything specified above is a "record" as defined in section 278.1 of the *Criminal Code*, it may be subject to a determination by the court in accordance with sections 278.1 to 278.91 of the *Criminal Code* as to whether and to what extent it should be produced.

If anything specified above is a "record" as defined in section 278.1 of the *Criminal Code*, the production of which is governed by sections 278.1 to 278.91 of the *Criminal Code*, this subpoena must be accompanied by a copy of an application for the production of the record made pursuant to section 278.3 of the *Criminal Code*, and you will have an opportunity to make submissions to the court concerning the production of the record.

If anything specified above is a "record" as defined in section 278.1 of the *Criminal Code*, the production of which is governed by sections 278.1 to 278.91 of the *Criminal Code*, you are not required to bring it with you until a determination is made in accordance with those sections as to whether and to what extent it should be produced.

As defined in section 278.1 of the *Criminal Code*, "record" means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes, without limiting the generality of the foregoing, 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.

VEUILLEZ NOTER

Cette assignation ne vous oblige qu'à apporter ces choses au tribunal à l'heure et à la date mentionnées ci-dessus. Vous n'êtes pas tenu(e) de les remettre à quiconque ni d'en discuter le contenu avec quiconque tant que le tribunal ne vous a pas ordonné de le faire.

Si des choses constituent des dossiers au sens de l'article 278.1 du Code criminel*, elles pourraient, en vertu des articles 278.1 à 278.91 du* Code criminel*, faire l'objet d'une décision du tribunal quant à la question de savoir si elles devraient être communiquées et quant à la mesure où elles devraient l'être.*

Si des choses constituent des dossiers, au sens de l'article 278.1 du Code criminel*, dont la communication est régie par les articles 278.1 à 278.91 du* Code criminel*, cette assignation doit être accompagnée d'une copie d'une demande de communication des dossiers formulée selon l'article 278.3 du* Code criminel *et vous aurez la possibilité de présenter des arguments au tribunal quant à cette communication.*

Si des choses constituent des dossiers, au sens de l'article 278.1 du Code criminel*, dont la communication est régie par les articles 278.1 à 278.91 du* Code criminel*, vous n'êtes pas tenu(e) de les apporter avec vous avant qu'une décision soit rendue, en vertu de ces articles, quant à la question de savoir si elles devraient être communiquées et quant à la mesure où elles devraient l'être.*

Selon l'article 278.1 du Code criminel*, « dossier » s'entend de toute forme de document contenant des renseignements personnels pour lesquels il existe une attente raisonnable en matière de protection de la vie privée, notamment : le dossier médical, psychiatrique ou thérapeutique, le dossier tenu par les services d'aide à l'enfance, les services sociaux ou les services de consultation, le dossier relatif aux antécédents professionnels et à l'adoption, le journal intime et le document contenant des renseignements personnels et protégé par une autre loi fédérale ou une loi provinciale. N'est pas visé par la présente définition le dossier qui est produit par un responsable de l'enquête ou de la poursuite relativement à l'infraction qui fait l'objet de la procédure.*

Dated this _____ day of _____ , 20 _____
Fait ce jour de

at the / *à(au)* _____ of / *de* _____

in the Province of Ontario. / *dans la province de l'Ontario.*

_____
Judge / *Juge*

AFFIDAVIT OF SERVICE
AFFIDAVIT DE SIGNIFICATION

CANADA
PROVINCE OF ONTARIO
PROVINCE DE L'ONTARIO

I, _____ ,
Je soussigné(e),

a peace officer, make oath and say that I did on the
un agent de la paix, déclare sous serment que le

_____ (Region / *Région*)

_____ day of _____ , yr. _____ ,
jour de *an*

serve _____
j'ai signifié à

the witness named in the attached subpoena with a true copy of the subpoena,
le témoin nommé dans l'assignation ci-jointe une copie conforme de l'assignation,

in the manner indicated below, namely:
de la manière suivante, à savoir :

(check one / *cocher l'une des cases*)

☐ by delivering it to him/her personally;
en la lui remettant personnellement;

☐ by leaving it for him/her at his/her usual place of abode with
en la remettant pour lui/elle à son domicile habituel à

_____ , an inmate thereof who appeared
un occupant des lieux qui a

to be at least sixteen years of age, because the witness could not
manifestement seize ans révolus, parce que le témoin ne pouvait être

conveniently be found;
commodément trouvé;

and at the time making service, I showed _____
et au moment de la signification, j'ai montré à

the original copy of the subpoena.
la copie originale de l'assignation.

Sworn before me this _____
Assermenté devant moi ce

day of _____ , 20 _____
jour de

_____
Signature of Deponent / *Signature du(de la) déposant(e)*

at _____
à(au)

in the Province of Ontario / *dans la province de l'Ontario*

P.C. No. _____ Div. _____
C.P. N° *Div.*

_____
Commissioner for Taking Affidavits / *Commissaire aux affidavits*

Form / *Formule* 1
APPLICATION
DEMANDE

ONTARIO COURT OF JUSTICE
COUR DE JUSTICE DE L'ONTARIO

Toronto
Region / *Région*

(Rule 2.1, *Criminal Rules of the Ontario Court of Justice*)
(Règle 2.1, Règles de procédure en matière criminelle de la Cour de justice de l'Ontario*)*

Court File No. (if known)
N° du dossier de la cour (s'il est connu)

BETWEEN: / *ENTRE*

HIS MAJESTY THE KING / *SA MAJESTÉ LE ROI*

- and / *et* -

JOHN DOE
(defendant(s) / *défendeur(s)*)

1. APPLICATION HEARING DATE AND LOCATION
DATE ET LIEU DE L'AUDIENCE SUR LA DEMANDE

Application hearing date: **November 22, 2023**
Date de l'audience sur la demande

Time **9:30 a.m.**
Heure

Courtroom number: **1**
Numéro de la salle d'audience

Court address: **10 Armoury Street, Toronto**
Adresse de la Cour

2. LIST CHARGES
LISTE DES ACCUSATIONS

Charge Information / *Renseignements sur les accusations*			
Description of Charge *Description de l'accusation*	**Sect. No.** *Article n°*	**Next Court Date** *Prochaine date d'audience*	**Type of Appearance (e,g. trial date, set date, pre-trial meeting, etc.)** *Type de comparution (p. ex., date de procès, établissement d'une date, conférence préparatoire au procès, etc.)*
Sexual Assault	**271**	**October 3, 2023**	**Trial Confirmation**

3. NAME OF APPLICANT
NOM DE L'AUTEUR DE LA DEMANDE

John Doe

4. CHECK ONE OF THE TWO BOXES BELOW:
COCHEZ LA CASE QUI CONVIENT CI-DESSOUS

☐ I am appearing in person. My address, fax or email for service is as follows:
Je comparais en personne. Mon adresse, mon numéro de télécopieur ou mon adresse électronique aux fins de signification sont les suivants :

☒ I have a legal representative who will be appearing. The address, fax or email for service of my legal representative is as follows:
J'ai un représentant juridique qui sera présent. L'adresse, le numéro de télécopieur ou l'adresse électronique de mon représentant juridique aux fins de signification sont les suivants :

SuJung Lee
Daniel Brown Law LLP
103 Church Street, Suite 400
Toronto, ON M5C 2G3
E-mail: lee@danielbrownlaw
Phone: 416-297-7200 ext. 107

5. CONCISE STATEMENT OF THE SUBJECT OF APPLICATION
BRÈVE DÉCLARATION DE L'OBJET DE LA DEMANDE

(Briefly state why you are bringing the Application. For example, "This is an application for an order adjourning the trial"; "This is an application for an order requiring the Crown to disclose specified documents"; or "This is an application for an order staying the charge for delay.")
(Expliquez brièvement pourquoi vous déposez la demande. Par exemple : « Il s'agit d'une demande d'ordonnance d'ajournement du procès. », « Il s'agit d'une demande d'ordonnance exigeant de la Couronne qu'elle divulgue les documents précisés. », ou « Il s'agit d'une demande d'ordonnance d'annulation de l'accusation pour cause de retard. »)

This is an Application for an Order that the following records be produced pursuant to s. 278.3 of the Criminal Code:

-All records relating to Jane Doe, in possession of Recordholder Inc, at ABC Street, Suite 200, Toronto, Ontario ABC 123, between the period of March 3 - 30, 2022 made in the course of counselling sessions conducted with therapist Ms. Therapist, including all handwritten notes, and typed reports (the "Records").

6. GROUNDS TO BE ARGUED IN SUPPORT OF THE APPLICATION
MOTIFS QUI SERONT INVOQUÉS À L'APPUI DE LA DEMANDE

(Briefly list the grounds you rely on in support of this Application. For example, "I require an adjournment because I am scheduled to have a medical operation the day the trial is scheduled to start"; "The disclosure provided by the Crown does not include the police notes taken at the scene"; or "There has been unreasonable delay since the laying of the charge that has caused me prejudice.")
(Énumérez brièvement les motifs que vous invoquez à l'appui de la demande. Par exemple : « J'ai besoin d'un ajournement parce que je dois subir une intervention médicale le jour prévu pour le début du procès. », « Les documents divulgués par la Couronne ne contiennent pas les notes de la police prises sur les lieux. » ou « Un retard excessif a suivi le dépôt des accusations qui m'a causé un préjudice. »)

The Records specified above meet the requirements for production set out in s. 278.5(1) and s. 278.7(1) of the Criminal Code, and the Supreme Court of Canada's decision in R v Mills, [1993] 3 SCR 668. The Records are likely relevant to an issue at trial and their production is necessary in the interests of justice. The privacy interests that the complainant may have in the Records are outweighed by the right of the accused to make full answer and defence.

7. DETAILED STATEMENT OF THE SPECIFIC FACTUAL BASIS FOR THE APPLICATION
DÉCLARATION DÉTAILLÉE DES FAITS PRÉCIS SUR LESQUELS SE FONDE LA DEMANDE

1. The Applicant is charged with one count of sexual assault pursuant to section 271 of the Criminal Code against the complainant, Jane Doe. The complainant alleges that the Applicant engaged in sexual intercourse with her on the night of March 2, 2022 when she did not have the capacity to consent.

2. The Applicant and complainant met at a bar in Toronto on the night of March 2, 2022. Later that night, the two took a cab ride to the complainant's house and engaged in sexual intercourse. Three weeks later, the complainant reported this incident to police, alleging that she had no memory of her night with the Applicant and that she must have been too intoxicated to consent.

3. Other civilian witnesses provided conflicting evidence to police. In the immediate aftermath of the alleged incident, the complainant confided to her friend, Best Friend, of a distinct memory she had of her sexual encounter with the Applicant, in which she described being home in bed with him and asking her about contraception. In addition, another friend of the complainant, the bartender at the Social, and the cab driver reported observing the complainant as not significantly intoxicated that night.

4. Between March 2 and 22, 2022, the complainant spoke to numerous friends, her parents and her therapist about this incident, all of whom encouraged her to report a sexual assault to police. The complainant's therapist at the time was Ms. Therapist, who practiced through Recordholder Inc.

5. Key issues at the Applicant's trial will be consent, incapacity, and an honest but mistaken belief in communicated consent.

6. The Applicant asserts two bases for the likely relevance of the Records:

(a) The Records precede the complainant's report to police, and therefore represent the most contemporaneous written account of the alleged incident. They are likely to include additional details regarding what the complainant remembers in her encounter with the Applicant. Given the conflicting memories she has already reported to friends and police, the counselling records with Ms. Therapist is likely to shed light on the complainant's most immediate perception and recollection of her encounter with the Applicant, and reveal other details that the complainant either forgot or omitted to police; and

(b) The Records will reveal how the complainant's memory and perception of her encounter with the Applicant were influenced by her conversations with others, including her therapist.

8. INDICATE BELOW OTHER MATERIALS OR EVIDENCE YOU WILL RELY ON IN THE APPLICATION
INDIQUEZ CI-DESSOUS D'AUTRES DOCUMENTS OU PREUVES QUE VOUS ALLEZ INVOQUER DANS LA DEMANDE

☐ Transcripts (Transcripts required to determine the application must be filed with this application.)
Transcriptions (Les transcriptions exigées pour prendre une décision sur la demande doivent être déposées avec la demande.)

☒ Brief statement of legal argument
Bref exposé des arguments juridiques

☒ Affidavit(s) (List below)
Affidavits (Énumérez ci-dessous)
Affidavit of Associate, sworn on September 15, 2023

☒ Case law or legislation (Relevant passages should be indicated on materials. Well-known precedents do not need to be filed. Only materials that will be referred to in submissions to the Court should be filed.)
Jurisprudence ou lois. (Les passages pertinents doivent être indiqués dans les documents. Les arrêts bien connus ne doivent pas être déposés. Il ne faut déposer que les documents qui seront mentionnés dans les observations au tribunal.)

☐ Agreed statement of facts
Exposé conjoint des faits

☐ Oral testimony (List witnesses to be called at hearing of application)
Témoignage oral (Liste des témoins qui seront appelés à témoigner à l'audience sur la demande)

☐ Other (Please specify)
Autre (Veuillez préciser)

September 15, 2023
(Date)

Signature of Applicant or Legal Representative / *Signature de l'auteur de la demande ou de son représentant juridique*

To: **Crown Attorney Office, Toronto**
À : (Name of Respondent or legal representative / *Nom de l'intimé ou de son représentant juridique*)

assigned.crown@ontario.ca
(Address/fax/email for service / *Adresse, numéro de télécopie ou adresse électronique aux fins de signification*)

NOTE: Rule 2.1 requires that the application be served on all opposing parties and on any other affected parties.
NOTA : La règle 2.1 exige que la demande soit signifiée à toutes les parties adverses et aux autres parties concernées.

W A R N I N G

The court hearing this matter directs that the following notice be attached to the file:

A non-publication and non-broadcast order in this proceeding has been issued under subsection 486.4(1) of the *Criminal Code.* This subsection and subsection 486.6(1) of the *Criminal Code,* which is concerned with the consequence of failure to comply with an order made under subsection 486.4(1), read as follows:

> **486.4 Order restricting publication — sexual offences.** — (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (*a*) any of the following offences:
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1,172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (*b*) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph *(a)*.
>
> (2) **MANDATORY ORDER ON APPLICATION** — In proceedings in respect of the offences referred to in paragraph (1)(*a*) or (*b*), the presiding judge or justice shall
>
> (*a*) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
>
> (*b*) on application made by the victim, the prosecutor or any such witness, make the order.
>
> **. . .**
>
> **486.6 OFFENCE** — (1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

ONTARIO COURT OF JUSTICE

DATE: 2023 06 13
COURT FILE No.: 4810 998 21 70000270

B E T W E E N :

HIS MAJESTY THE KING

Respondent

— AND —

ABDALLAH LAKIS

Applicant

Before Justice Lori Anne Thomas
Heard on May 5, 2023
Oral Reasons for Ruling released on May 11, 2023

Sujung Lee, Daniel Brown, & Teodora Pasca ..... counsel for the Applicant
Jackson Foreman..... counsel for the Respondent

L. Thomas J.:

[1] The Applicant Accused is charged with one count of sexual assault. The Defence brought a motion for directions for the timing of an anticipated third-party record application. The Defence proposed they will possibly bring the application mid-trial, during the complainant's evidence. The Crown submitted that the complainant is not a compellable witness, and it would be contrary to the interest of justice to let the Defence use evidence at trial for the foundation of a mid-trial section 278.3 application.

[2] During the judicial pretrial, the Defence advised that they have a good-faith basis for believing that they will have the foundation to bring a third-party records application after the cross-examination of the complainant. The application would focus on the complainant's use of prescribed drugs. As such, the trial was scheduled to accommodate that mid-trial basis and the Defence was advised to seek direction from the trial judge.

[3] The Crown opposed the Defence cross-examining the complainant to obtain information for a third-party record application and submitted that this case should not have a mid-trial third-party record application. However, both the Crown and Defence

agreed that more evidence or information was needed to bring a non-frivolous third-party record application before the trial.

[4] The Defence disclosed they had sought an expert opinion on whether the combination of drugs and alcohol would affect the complainant's memory. They have been advised that the known prescription drug might have affected the complainant's reliability, depending on other unknown factors, including length of use.

[5] The Defence had some information on the complainant's prescription, non-prescription drug use, and alcohol intake on the day through disclosure and text messages. However, the Defence did not have the names of the doctors, pharmacies or a detailed list of other prescription or non-prescription drugs. Furthermore, they had no information on the length of use of the substances. The Crown was not prepared to obtain all the answers the Defence needed in order to bring a well-founded application.

The Law

[6] When it comes to s. 278.3 applications, the Court must weigh the interests of the accused to make full answer and defence against the privacy interests of the complainant or witness. As such, it follows that there is no automatic entitlement to access private records of the witnesses. However, "where the information contained in a record directly bears on the right to make full answer and defence, privacy rights must yield to the need to avoid convicting the innocent." See *R. v. Mills*, [1999] 3 SCR 668, at para. 94.

[7] The Defence must have an evidentiary basis for bringing a third-party application that the records sought will likely be relevant to an issue at trial or the witness' reliability or credibility. The necessity of an evidentiary foundation is to avoid violating the witness' privacy rights for a fishing expedition.

[8] In *R. v. E.B*, 2002 CanLII 23582 (ON CA), the Court of Appeal outlined the law on using cross-examination to establish the evidentiary foundation of "likely relevance". At para. 33, the court reiterated paragraph 135 in *Mills*:

> … This [evidentiary] basis can be established through Crown disclosure, defence witnesses, *the cross-examination of Crown witnesses at both the preliminary hearing and the trial*, and expert evidence. [Emphasis added in *E.B.]*[1]

[9] The Court emphasized the use of cross-examination to establish a foundation for a third-party record application not only during the preliminary hearing *but also during the trial*. Furthermore, the Court made no distinction between the complainant and other Crown witnesses.

[10] In a review of *E.B.* and the Supreme Court cases, there was no distinction between eliciting evidence during cross-examination at trial versus a preliminary inquiry.

[1] See also, *R. v. O'Connor,* [1995] 4 S.C.R. 411, at para. 146

[11] The Crown Respondent relied upon *R. v. J.J.*, 2022 SCC 28, at para. 86, to submit that mid-trial applications should be exceptional; further, the Supreme Court instructed the Defence to bring third-party applications like this in advance. However, the difference is that the *J.J.* involved the applications of the admissibility of records in the possession of the defence under s. 278.92. Nothing in *J.J.* refutes *Mills* or *O'Connor*'s stance that evidence elicited during the trial's cross-examination can form the evidentiary foundation for a third-party record application.

[12] Further, the Crown relied on an unreported Ruling in *R. v. Karimzadeh-Bangi*[2]. In that case, The Honourable Justice E. Rondinelli noted that the Defence had all the information for the foundation for the application. That was not present here. In this case, the Defence laid a basis for the potential application. Still, they required further information to support a third-party application, such as the identification of record holders and the length of prescription and non-prescription drug use.

[13] Moreover, the *Karimzadeh-Bangi* Ruling was short, at just over one page, and did not outline the facts relevant for comparison. Yet, Justice Rondinelli noted that further information might arise during the complainant's testimony, and the Court may revisit the issue.

[14] The Defence has demonstrated there is a good faith basis that a potential third-party record application would likely be brought during the trial. Further, the Defence was not unnecessarily attempting to delay the trial with a mid-trial application. Instead, the Defence properly notified the Crown and the Court of the potential mid-trial application to ensure the trial was scheduled accordingly.[3]

[15] The Crown's position that the Defence cannot ask questions relevant to establish a foundation for a third-party application is not supported by the case law. Furthermore, the questions regarding drug and alcohol use and the combined effect on the witness' perception or memory would be typical for either the Defence or the Crown, as a minister of justice, to explore to establish or exclude any potential issues of reliability of the complainant. This would not be limited to prescriptions but any substances altering a person's perceptions or memory and consequently the witness' reliability.

[16] In establishing the foundation for a third-party record, the Defence cannot cross the boundary by eliciting the private content of those records. As such, the Defence was permitted to cross-examine the complainant on the information of her prescribed and non-prescribed drug use related to her reliability, including drugs ingested, length of use and, if applicable dosage, medical prescribers and pharmacies that dispensed the prescriptions.

[17] In addition, the Defence was permitted to determine during cross-examination if other third-party record information that would be relevant to credibility and reliability existed. A guideline on permissible examination questions can be found in *Prosecuting*

[2] *R. v. Karimzadeh-Bangi* (6 March 2018) Toronto, OCJ
[3] See *R. v. Jordan,* 2016 SCC 27, at paras. 86 and 138 for the Defence obligation to work with the courts in planning and scheduling applications before setting the trial dates.

and Defending Sexual Offence Cases, Second Edition, Brown and Witkin, edited Greenspan and Rondinelli (Toronto: Emond Publishing, 2020) Chapter 11, pp. 315-317.

Decision rendered on May 11, 2023

Reasons Released on June 13, 2023

Signed: Justice Lori Anne Thomas

Criminal Law Refresher – May 11, 2024

Third Party Records – Dos and Don'ts for the Crown and Counsel for the Complainant/Witness

By Megan Schwartzentruber and Sarah Repka

Do/Don't	Why
Do consider whether records obtained by the police are third party records that should not be disclosed to the accused without a waiver.	Some records may have been provided by the complainant (or witness) to the police but properly fall within the third party record (278) regime and cannot be disclosed by the Crown to the defence without a waiver or court order. The Crown must notify defence that it is in possession of such a record.
Do consider whether there are any other parties to whom the record relates that need to be notified of the application.	S. 278.3(6) provides that the judge may order that the application be served on any person to whom the judge considers the record may relate.
Do take efforts to inform and obtain an order for counsel for the party to whom the record relates (complainant or witness) once it becomes known that an application may be brought.	Prompt attention to the issue of counsel for the complainant/witness will ensure that counsel is available for any dates selected and that the hearing is not delayed.
Do canvass the issue of waiver of the complainant/witnesses' privacy interest of the record with counsel for the complainant/witness.	The narrowing of issues or avoidance of proceedings will streamline the case. Complainants have access to four free hours of legal advice which can assist on the issue of waiver: https://www.ontario.ca/page/independent-legal-advice-survivors-sexual-assault
Don't conflate disclosure with admissibility.	A complainant's waiver of disclosure of a record to the accused does not mean they are waiving all privacy rights in relation to the record or admitting the admissibility of the record at trial.
Do ensure the subpoena for records is returnable to court on a day prior to the Stage 1 hearing.	This ensures that the records are provided to counsel for the person to whom the record relates so that counsel can provide meaningful submissions at Stage 1 and so that the hearing does not need to be delayed.

Do attend the JPT prepared to discuss the third party record issue substantively and procedurally.	Third party records can cause delays at trial if the hearings are not properly scheduled. In some cases, more time will be needed after (and between) the hearing dates to ensure the parties can properly prepare for trial.
Don't provide a copy of the entire application record to the complainant/witness.	The complainant/witness does not need to (and should not) receive the entire application record; only the portions which they need to review in order to provide informed instructions to counsel or the Crown regarding waiver or their position on the application. Providing the entire application record to the complainant/witness could open them up to questioning by the defence at trial.
Do discuss the application in advance of the hearing dates with all parties.	To see if there are records or portions thereof that can be conceded or abandoned to narrow issues and truncate proceedings.
Do consider whether portions of the record should be redacted.	In some cases, parts of the record may not be relevant to issues at trial or responsive to the application. If so, you may ask the judge to redact those portions of the record from that which will be disclosed to the accused.
Don't forget about balancing!	Even where the records have some likely relevance, the judge must also consider whether the disclosure of the records is "necessary in the interests of justice" (s. 278.5(1)(c)). In other words, the judge must weigh the accused's right to full answer and defence against the complainant/witness's rights of equality, privacy and personal security. Where the likely relevance is low but the prejudice to the person whose privacy is at risk is high, the judge may refuse to produce the record.

Law Society of Ontario | Barreau de l'Ontario

TAB 6

Criminal Law Refresher 2024

Overview of Ontario's Justice Centres (PowerPoint)

Dayna Arron, Executive Director, Justice Centres (Criminal Law Division)
Ministry of the Attorney General

Holly Loubert, Deputy Director, Crown Law Office – Criminal
Ministry of the Attorney General

May 11, 2024

cpd

Overview of Ontario's Justice Centres

Law Society of Ontario: Criminal Law Refresher 2024

May 11, 2024

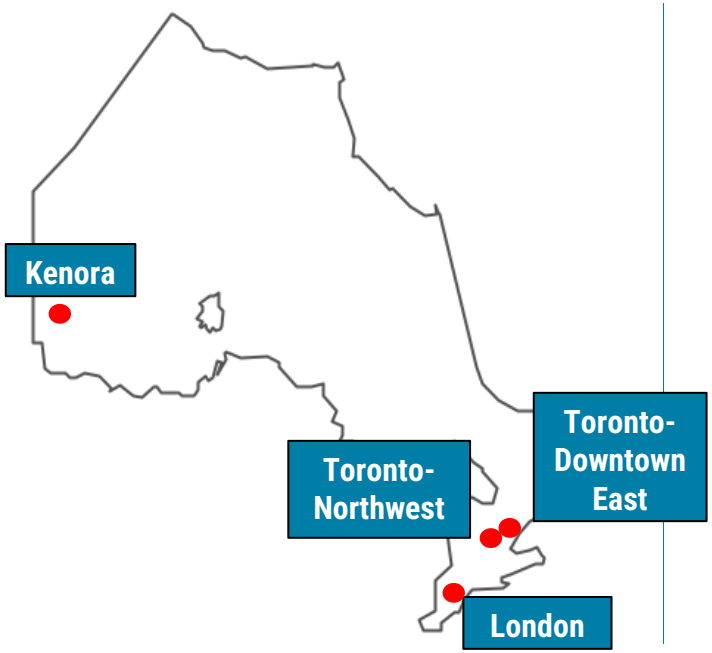
Presentation by: Dayna Arron, Executive Director Justice Centres
Holly Loubert, Deputy Director, CLO-Criminal

Justice Centres
Ministry of the Attorney General

Ontario

Background

- Ontario is **improving the community justice interface** by introducing the province's first Justice Centres.
- As of September 2020, the province began implementing a **new community court model** which increases access to justice and targets the factors underlying criminal behaviour.
- This initiative is currently taking place in four locations across the province: Toronto Northwest, Toronto Downtown East, London, and Kenora.
- The model draws from **innovative community justice practices around the world**, while addressing the unique needs of these distinct communities.
- Justice Centres move justice out of the traditional courtroom and into a community setting. These Centres bring together justice, health, employment, education and social services to **address the root causes of crime, break the cycle of offending, and improve public safety and community well-being**.



Justice Centres
Ministry of the Attorney General

Ontario

What is Ontario's Approach to Community Justice Centres?

- Introduced in over 80 communities around the world, Community Justice Centres **move justice out of the traditional courtroom and into a community setting**. These Centres bring together justice, health, employment, education and social services to address the root causes of crime, break the cycle of offending, and improve public safety and community well-being.

- **Tailored to the unique needs of local communities**, these centres co-locate justice facilities (e.g. courtrooms) with front-end supports (e.g. primary healthcare, mental health supports), prevention services (e.g. employment and skills training) and community re-integration supports (e.g. peer counselling)

- The Community Justice Centre model **improves outcomes for offenders, victims and communities** by holding individuals accountable for their offences while connecting them to services that reduce the risk of re-offending. Central to the approach is a commitment to better support victims and communities harmed by crime.

- Ontario is taking a **whole-of-government approach** to Community Justice Centres so as to promote cross-sector collaboration and multi-agency supports for common clients in order to address the intersecting risk factors that lead to chronic offending, as well as to support improved capacity, coordination and integration with other provincial service systems and sectors, such as health, social services, and housing.

Justice Centres – International Evidence

The Justice Centre model is a **proven best practice in over 80 communities** across the globe, with demonstrated results:

- ✓ Reduced recidivism rates
- ✓ Improved public safety and community well-being
- ✓ Reduced over-reliance on incarceration
- ✓ Increased confidence and trust in the justice system

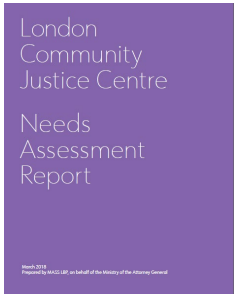
Independent evaluations of Justice Centre models demonstrate local, coordinated, and multi-agency responses are required to **achieve long-term and sustainable reductions in crime**. Ontario's Justice Centres will continue to be informed by lessons learned and best practices from around the world to **break the cycle of offending** and create sustainable community-driven pathways to protect public safety.

Initiative	Description	Results Achieved
Outcomes from Justice Centres Around the World		
Neighbourhood Justice Centre (NJC) (Yarra, Australia)	The NJC is a **multijurisdictional court** that provides services to victims, defendants, civil litigants, and the local community. The NJC works with local Yarra residents and organizations to help **prevent and reduce crime, improve public safety and increase confidence in, and access to, the justice system.** Combines a court with a variety of treatment and support services such as **mediation, legal advice, financial and housing support, counselling and mental health services**.	• **25% reduction in reoffending** compared to other Magistrate Courts; • Offenders are **3 times less likely** to breach Community Corrections Orders; • Breach rates for intervention orders are **28-47% lower** than state-wide average.
Red Hook Community Justice Center (Brooklyn, New York)	Winner of **multiple national awards for innovation**, the Red Hook Justice Center houses a courtroom in which a single judge hears cases that under ordinary circumstances would go to three different courts – civil, family, and criminal. The tools at the judge's disposal include **community restitution projects, short-term psycho-educational groups, and long-term treatment**. Beyond the courtroom, the Justice Centre offers an array of unconventional programs that work to improve both public safety and trust in justice.	• **35% reduction** in the number of offenders receiving jail sentences; • Adult offenders were **10% less likely** to commit new crimes than similar offenders in a traditional court; • Young offenders were **20% less likely** to re-offend; • **$4,756 in savings** per defendant, and a total of $**15M in avoided victimization costs**.

Ontario's Community Needs Assessments Findings

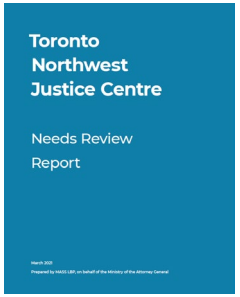
London

Many young adults (18-24) in London are falling through the cracks once they age out of child protection or social and educational service supports.



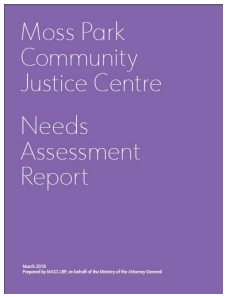
Toronto Northwest (TNW)

Communities in Toronto's Northwest experience gun crime and violence that often involves youth/young adults and is driven by complex, intersecting risk factors.



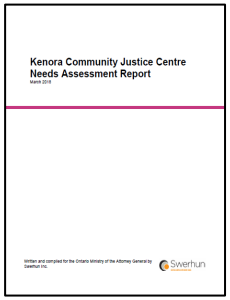
Toronto Downtown East (DTE)

Toronto's Downtown East community is home to some of the most challenging public safety issues and hardest-to-reach populations in the City of Toronto, many of whom are struggling at the intersection of poverty, homelessness/under-housing, and mental health and/or addictions challenges.



Kenora

Indigenous people are overrepresented as victims and/or survivors of crime, accused persons and offenders in Kenora. These individuals often face challenges rooted in forced re-location, assimilative laws and policies, involvement in the child welfare system, systemic racism and inter-generational trauma.

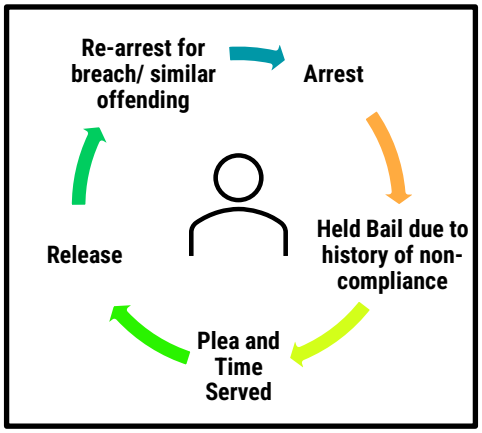


The criminal justice system in Ontario **struggles to address the high needs of vulnerable and marginalized individuals repeatedly cycling through the system.** The justice system is currently unequipped to use entry into the criminal justice system as an opportunity to address the underlying contributing factors of criminal behaviour. Many vulnerable offenders are falling through the cracks.

Toronto Downtown East: Context for Action

Legal Imperative For Action:

- An average of **77% of individuals charged in the DTE 51 Division are held for bail** (compared to 39% provincial average) and of those, **63% have bail granted** (*MAG Recovery Report, 2021)*
- In 2023, accused from 51 Division had an **average of 4.5 active cases,** including a high percentage of individuals of "No Fixed Address".
- In 2022, **nearly half (49%)** of cases received by College Park were Crimes Against Property and Administration of Justice cases which are DTE JC eligible *(ICON, 2022).*
- While **41%** of all cases received by College Park were Crimes Against the Person, **44%** of those cases involve **common assault and/or utter threats** which are also DTE JC eligible *(ICON, 2022)*



Toronto Downtown East: Focus on Community Health

Launched May 2021 on a 1 day/week model, the DTE Justice Centre has processed **almost 1800 cases** to date and is a **hybrid justice-and-health-centre** that seeks to prevent the **most complex and high-needs clients** at the intersection of **poverty, homelessness, mental health, substance use and social isolation** from cycling through the justice system with **on-site psychiatric, primary care, and developmental disability supports.**

DTE Features Through Community Collaboration

- **Case management and care coordination provided by Sound Times,** a 100% survivor staffed outreach org. based in the DTE
- **Enhanced access to on-site primary care and psychiatric services provided by Inner City Health Associates**, the largest homeless health organization in Canada
- **Enhanced community case management services** tailored to meet the needs of individuals living with **developmental disabilities and autism spectrum disorder provided by Surrey Place**
- **Collaborative bail planning** aided by Embedded 51 Division Crown to ensure fastest possible release with most appropriate conditions

Additional Features Since Launch

- **Supported access to virtual JC proceedings** in a safe, inclusive community space, at Sound Times
- **Accelerated Direct Release Initiative** operating in collaboration with the **51 Division Embedded Crown** to reduce remand populations and prevent unnecessary bail hearings
- **Dedicated In-Court Housing Worker** to focus on getting participants "housing-ready" and connecting them to emergency housing where available

Early Outcomes:

- **100% of First Appearances** at the DTE Justice Centre are scheduled to occur within **1 week** of eligibility assessment
- **100%** of individuals meet with a **Community Case Manager** and receive a multi-sectoral **Intake Assessment**
- 98% of active DTE JC participants have **identified housing, mental health and/or substance use/misuse needs**
- Each JC client in the DTE receives an average of **6 referrals to services and supports** based on need
- **77% of individuals** who successfully participated in the JC model **demonstrated some level of desistance**

Toronto Northwest: Focus on Community Violence

Launched in May 2021, the Toronto Northwest (TNW) is a response to community violence and gun crime that is aimed at addressing the impact of the intersection of **poverty and criminal justice** on **youth and particularly racialized youth (aged 12-17).**

Processing **over 1,000 youth OCJ cases**, the TNW aims to meet underlying need, break the cycle of offending and address the ongoing systemic problem of the **overrepresentation of young Black and racialized offenders** by providing youth with enhanced opportunities to improve social and economic futures by **re-connecting with education, developing life skills, improving family relationships, and addressing mental health and substance abuse concerns.**

Enhanced First Appearance Court: Accelerated release and access to disclosure, and faster connection to dedicated duty counsel before first appearance for all TNW out-of-custody cases. Youth stream into the JC for an Intake Interview and rapid connection to community supports, including cases proceeding to trial or resolution at OCJ-T.

Enhanced Youth Robbery/Youth Resolution Court: Eligible out-of-custody youth are judicially case managed and work with a Community Case Manager to develop an Individualized Plan designed to provide cross-sector, wrap-around services. This individualized, wrap-around approach strives to address risk factors that can lead to offending, victimization and recidivism.

Additional TNW Model Features and Early Outcomes

- **Accelerated Direct Release Initiative** results in youth attending their **First Appearance within 21 days** of police contact (~60-80% faster than at 2201 Finch Courthouse).
  - Most cases at the TNW JC are **completed in an average of 19 weeks** (~12 weeks faster than at OCJ-T).
- Access to specialized **Education Advocate** dedicated to re-connecting youth with school and training, interrupting the 'school-to-prison pipeline'.
  - **71% of youth referred to the Education Advocate improved their educational status** (i.e. registered for school, admitted back after expulsion, etc.)
- **Rapid access to mental health & addictions supports** as well as psychometric assessments (e.g. s. 34 Youth Justice Assessments) to address underlying needs.
- **New and innovative culturally-relevant programming** designed to foster a strong and positive sense of racial identity and fill existing programming gaps for Black youth.
  - TNW JC Case Managers referred youth to **55 unique agencies** which provide supports/services based on need.

Context for Action

Youth robbery cases are the most common offence received at OCJ-T (more than 1 in every 5 youth cases vs 1 in every 11 youth cases in Ontario) *(ICON, 2022).*

67% of the TNW's population identified as a visible minority (vs. 51% for the City) and 20% identified as Black *(TNW Needs Review 2020).*

TNW JC Participant Pathways

Released by TPS
(Divisions 12, 22, 23, 31, 32, 33)

Youth Resolving Cases at JC

Enhanced First Appearance Court

Duty Counsel

Opportunity for Accused to engage Duty Counsel prior to First Appearance at JC

Intake Interview & Needs Identification

- One-on-one Intake Interview with Community Case Managers to;
- Identify highest-risk young adults who would benefit from a further Needs Assessment (e.g. s. 34, cognitive, academic assessment;
- Identify areas of need

(e.g. education, mental health, addictions, social relationships)

TNW Satellite Justice Centre

Justice Services

- Safe and supported access to technology to attend Virtual JC Court Proceedings in community.
- Judicial Case Management appearances at Judge's discretion up to resolution
- Case Conferences

Community Case Management Team

- Needs-based referrals to culturally-relevant programming for Racialized and Black youth
- Cognitive/Academic Assessment, s. 34 Reports ordered (as needed)
- Rapid connection to community-based supports to address needs identified during Intake Interview

Wrap-Around Services & Tailored Programming

- ✓ Community Case Management & systems navigation supports
- ✓ Education Advocacy and reconnection to school
- ✓ Forensic Psychiatric Services
- ✓ Employment counselling and resume building
- ✓ Family supports, including crisis management
- ✓ Culturally-relevant mentorship

Tailored, Culturally Relevant Programming

- ✓ Unique programming for Black and racialized youth, including youth charged with robbery and interpersonal violence.

Service Referral Options & Recommendations Sent to Counsel

Crown Pre-Trial

Individual Plan

For Participants with cases remaining in the Justice Centre until resolution, Case Managers will work with the Participant, Duty/Defense Counsel and the JC Crown to develop an Individual Plan detailing individualized referrals and programming. Each Individual Plan is reviewed and approved by the Participant, their lawyer and the JC Crown.

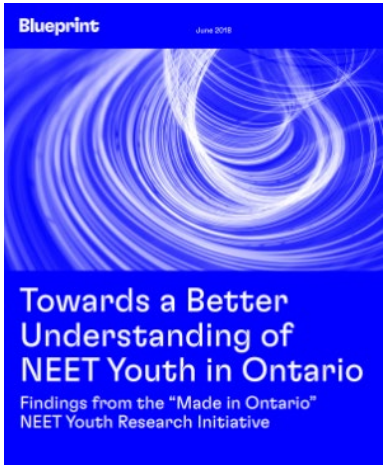
Day 0-21	Days 22 - 60	Days 61-200+
Enhanced First Appearance Court		
	Enhanced Resolution Court	Tailored Programming for Highest-Risk Youth

Police Contact & Release · Virtual First Appearance · Intake Interview · Needs-Based Referrals · Judicial Case Management · Disposition at Justice Centre Court

London: Context for Action

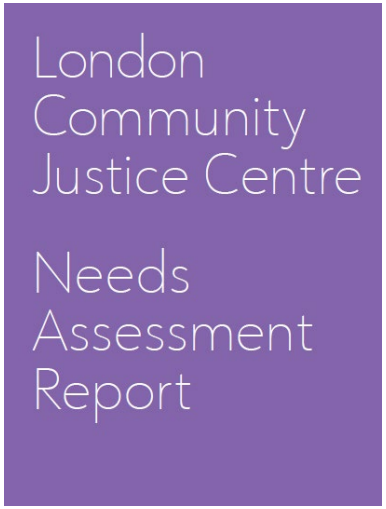
Recognizing NEET Youth

- Ontario-based research showed young people in Ontario who were disconnected from both school and work were less likely to succeed in adulthood, and more likely to come into contact with the criminal justice system. Further, London had a disproportionately large number of these young adults, known as **"NEET" youth or youth "not in employment, education or training** *(Blueprint ADE, 2017)*.



Focus on Emerging Adults

- Emerging adults are **overrepresented in the criminal justice system and underserviced within it.** International research has recognized that young adults have many of the same challenges as youth, including continuing brain development, decreased emotion regulation and maturity, as well as high education, training and social support needs. Yet, as youth (12-17) transition to the adult system, they no longer have the same access to specialized services that often wrap-around youth.
- For example, many 18-24 year olds in London continue to experience poor outcomes across systems, including criminal justice. Nearly **one in every five** adult cases in London involve offenders aged 18-24 years old (*ICON, 2022*). In the same year, nearly **30%** of the caseload at the London CMHA Crisis Centre were youth aged 16-24 (1,300 youth interventions) and 1/3 of individuals in their transitional housing program were young adults aged 18-24 *(CMHATV, 2021)*.



Creating a London Justice Centre Model

- In collaboration with the local JC Working Group and community partners, the London Justice Centre provides targeted, cross-sector supports to emerging adults. With appropriate safeguards, these services help young adults avoid and exit the criminal justice system with dispositions designed to address factors contributing to recidivism.

Ontario

London: Focus on Young Adults

Launched in September 2020, the London Justice Centre provides targeted supports for **young adults aged 18-24**. Processing more than **1,750 cases** related to young adults, the London JC addresses the unique needs of emerging adults and **prioritizes meaningful connections to skills and job training programs, education supports as well as mental health and addictions services** to help participants avoid and exit the adult criminal justice system.

London Justice Centre Model Features

- **Accelerated JC Direct Release Initiative** ensures all out-of-custody accused aged 18-24 have their first appearance within 4 weeks of police contact (vs ~6 weeks at the London Courthouse).
    - The majority of participants have **received disclosure, consulted with (duty) counsel,** completed a **Needs Assessment** and created an **Individualized Plan prior to** their **First Appearance.**
- The JC runs out of **Youth Opportunities Unlimited**, a well-established local youth hub, and all participants are guided through the JC by a **Justice Navigator** and receive needs-based referrals to community services, including job training at a social enterprise, through **dedicated cross-sector Community Case Management Teams** provided by the CMHA and St. Leonard's Community Services.

Early Outcomes

- In its first year, the London JC has resulted **in 1,800 days of jail,** >5,000 days of reporting probation, and **>700 court appearances** avoided.
- Most cases at the London JC are **completed in ~5 appearances** and **in less than 12 weeks**.
- **Nearly 100% of London JC participants received services/supports** relating to employment, mental health, addictions, housing, and/or education.
    - **67%** of London JC participants who received referrals to employment training reported an **improvement in employment status** upon completing their matter at the JC.
    - **84%** of London JC participants with **mental health needs** received mental health and/or addictions supports through the Justice Centre. **The Majority of these Participants (56%) improved their mental health** ~90 days after entering the Justice Centre and continue to benefit from after-care supports.

I find this court process to be very personal and be able to be one on one. **I believe this justice program is made for helping deal with your charges instead of other court processes I've attended they don't care what happens.**

This process has changed a lot in my life, I've been pushed to do things that I haven't been able to do **like getting a doctor, getting into the employment office, and getting my last credit in high school**.

London JC Participant (2022)

Canadian Mental Health Association

YOUTH OPPORTUNITIES UNLIMITED

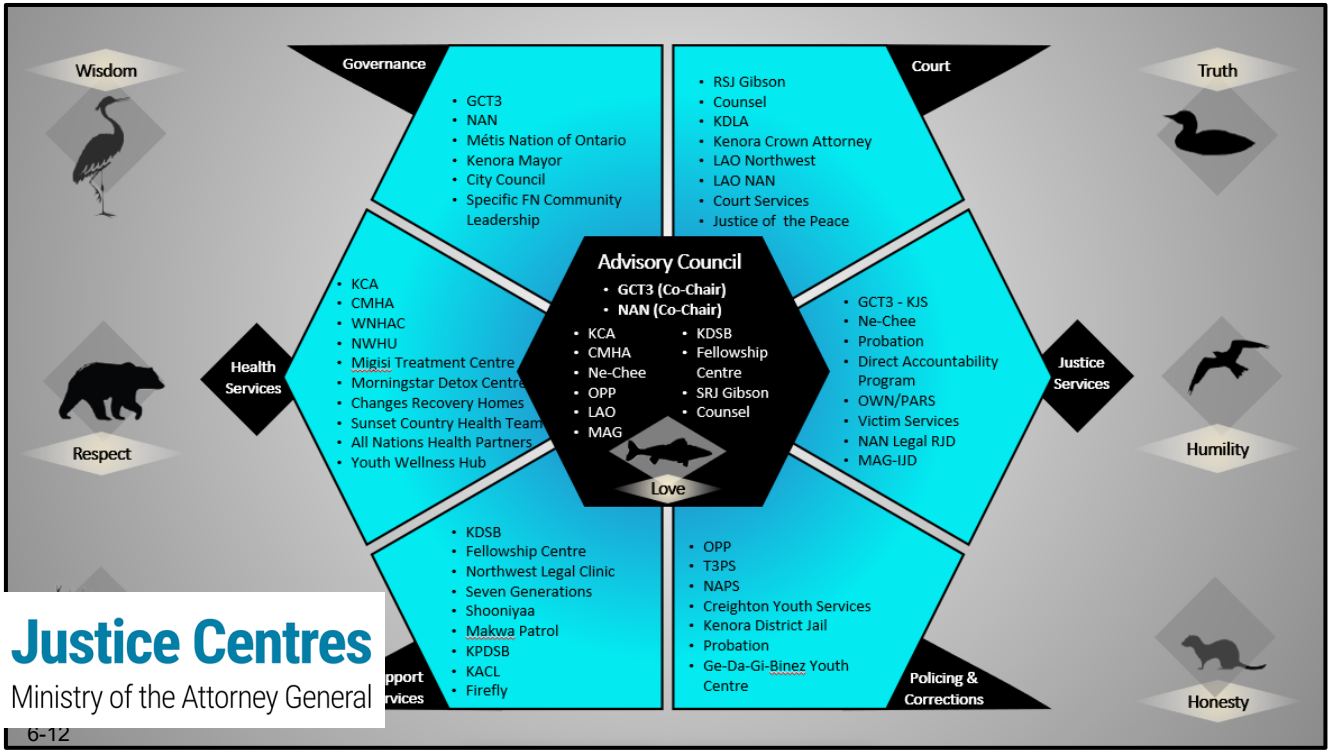
St.Leonard's community services LONDON & REGION

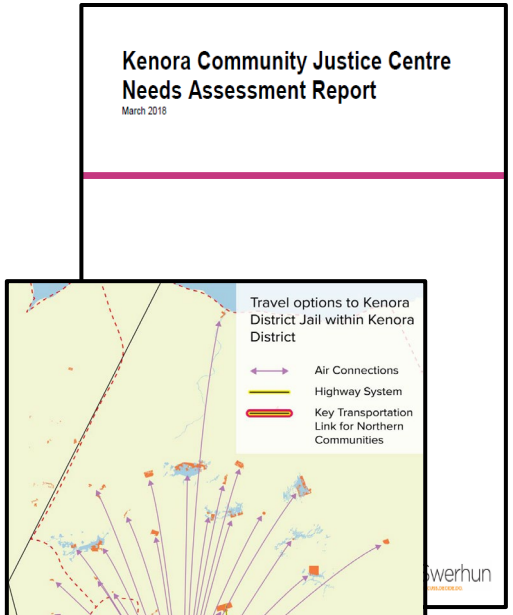
Kenora Justice Centre: Context For Action & Broad Engagement

In collaboration with the **Ontario Court of Justice**, the Ministry's work is guided by the **Kenora JC Advisory Council and Circles,** which launched in 2020 and is supported through a broad engagement structure based on the Anishinaabe clan model and includes participation by **Indigenous leadership** from **Grand Council Treaty#3** and **Nishnawbe Aski Nation, Elders** as well as multi-sector service providers, the judiciary and local representatives working in justice, health, housing, education and social services community organizations based in Kenora.

Context for Action

- Indigenous people are overrepresented as victims, accused persons and offenders in Kenora, Ontario. Indigenous people involved with the criminal justice system often face challenges rooted in forced relocation, loss of culture, involvement in the child welfare system, systemic discrimination, racism, and sexual abuse.
  - Each of these factors can inform how an Indigenous person may experience the justice system, particularly in the context of the Kenora region.
  - Indigenous people consistently represent over 90% of the Kenora jail population (vs 13.4% provincial average).





Justice Centres
Ministry of the Attorney General

Kenora: A Focus on Indigenous Overrepresentation and Healing

Launched in February 2023, the Kenora Justice Centre model implements a **continuum of criminal and Indigenous restorative justice processes**, focusing on **healing and the restoration of relationships** while simultaneously **encouraging a sense of autonomy** in the criminal process for all cases involving **youth and young adults (aged 12 to 24).** Processing **over 450 cases** through a **holistic and flexible approach**, the Kenora Justice Centre provides **accessible pathways to existing Indigenous-led services and culturally-relevant multi-sector supports** that wrap-around participants to **address underlying root issues** and provide meaningful opportunities for growth and success, including support for Indigenous women and girls who have experienced or witnessed trauma and/or violence.

Kenora Justice Centre Model Features

- Prioritizes and accelerates the **use of diversion, reduces overreliance on short, sharp dispositions in favour of community-based solutions**, and improved opportunities for discharge planning and transitional and supportive housing.
- Work with local Elders and Traditional Knowledge Keepers to incorporate their active involvement in the court process and access to community members about traditional healing practices. **To date, there has not been a sitting of the Kenora Justice Centre court without an Elder or Traditional Knowledge Keeper present.**
- The Kenora Justice Centre Team worked in collaboration with Indigenous leadership, the Ontario Court of Justice, Elders and Traditional Knowledge Keepers, inter-Ministerial partners, local police services, as well as cross-sector community organizations to **thoughtfully design a space that provides on-site resources and serves a wide spectrum of community needs.**

Early Outcomes

- **100%** of Justice Centre participants have their disclosure and Crown Screening form available on their First Appearance.
- **100%** of OCJ court proceedings at the JC have included an Elder/Knowledge Keeper presiding.
- **83%** of cases at the JC had a **Community Healing Discussion** and/or a **Sentencing Circle.**
- **88%** of youth and young adults met with a community-based Circle of Care Case Manager to conduct a Wellness Intake and create a Circle of Care Plan tailored **to address underlying root causes** that have brought them into the criminal justice system.
- Within 12 months of operation, **only 7 youth and young adults** who have completed their matters through the Kenora Justice Centre have **re-entered the criminal justice system**.

Ne-Chee Friendship Centre

Canadian Mental Health Association Kenora

KDSB

Ga naa na ga da waa ba dang: A Space In Community

The OCJ & JC Team worked in collaboration with Kenora Chiefs Advisory, Grand Council Treaty #3, Nishnawbe Aski Nation, Indigenous Elders and Traditional Knowledge Keepers, partner Ministries (IAO, SOLGEN and MOH), Ontario Provincial Police and Treaty #3 Police, LAO/local CLA, as well as cross-sector community organizations to thoughtfully design a space that provides on-site resources and serves a wide spectrum of community needs as part of the Kenora Justice Centre model.






The space includes a courtroom, secure waiting areas, judicial/counsel offices, Circle of Care Case Management offices, Elder/Cultural room, as well as dedicated space for education, housing and social service navigation.
Other areas of the Kenora Justice Centre include:

- **The Community Room** available to community for use as both a meeting and activity space. This room is used to host [illegible] as well as activities such as beading or ribbon skirt making.
- **[illegible]y Room** provides community members who lack reliable technology [illegible]tate virtual attendance at medical appointments, etc.
- **[illegible]ns** provide welcoming and useful workspaces for community partners.

Appendix A: DTE Participant Pathway

Direct Release | **Bail** | **Traversal** | **Court & Community**

Legal Advice

Opportunity for accused to consult with duty counsel

Embedded 51D Crown

- Provides advice to TPS on whether new arrests should be directly released to the JC
- Liaises with dedicated JC Sound Times Worker.

Dedicated JC Community Case Managers

- Needs assessment and service planning
- Access to clinical care and service coordination
- In-person access to Sound Times for virtual court access and group support

JC Crown & CP Bail Vetter

- Work collaboratively to identify eligible clients held for bail & facilitate quick release

Needs Assessment

Sound Times | SURREY PLACE

DTE Courthouse Processes

Justice Services

- Participants' charges are individually and judicially case managed from first appearance to disposition
- Continuous judicial case management allows for effective participation
- Dedicated duty counsel is available to all participants
- Dedicated VWAP is available to provide enhanced victim supports
- Virtual access to JC Court is available via Sound Times

Needs-Based Individualized Support Plans

- Sound Times/Surrey Place case managers work with the participant, duty/defense counsel and the JC Crown to develop a needs-based plan that 'meets people where they're at'
- The DTE adopts a step-by-step approach to individualized rehabilitative plans: realistic expectations, adaptability and low-barrier access are key

Case Management Services, On-Site Supports & Referrals

- Community Case Managers offer in-house, on-site supports and make referrals to trauma-informed, community-based supports to address needs identified during the Intake Assessment

Crown Pre-Trial

Rapid Access to Primary Care Before First JC Court Date

Primary Care & Wrap-Around Services

Specialized Community Clinical Care

✓ Accelerated access to psychiatry, mental health care, primary care, and substance use supports

ICHA | SURREY PLACE | Sound Times | TORONTO

Wrap-Around Services & Supports

✓ Case Management & Systems Navigation
✓ Housing Navigation
✓ On-site Income Support & Taxes
✓ On-site ID Replacement & Banking Support
✓ On-site social support network

Appendix B: London Justice Centre - Participant Pathways

All files related to 18-24 year olds screened by Justice Centre Crown along with victim input. Eligible cases proceed to First Appearance at the Justice Centre within **4 weeks.**

1

Eligible 18-24 Year-Olds

Legal Advice, Screening Assessment

Option to attend **specialized courts** (e.g. therapeutic court, Gladue, etc.)

Virtual Justice Centre Court

2

Legal Aid Ontario / Aide juridique Ontario

Criminal Lawyers' Association

Participation Report

- Post-Charge Diversion;
- Guilty Plea; or
- Elect to set trial date while receiving supports

Virtual and In-Person Community Service Portal

3

St.Leonard's community services London & Region

Canadian Mental Health Association

- Individual Plan
- Needs-based service provision

Needs-Based Referrals

Procedural Safeguards & Culturally-Relevant Wrap-Around Services

4

- ✓ Restorative Justice Programming
- ✓ Short term intervention and counselling services
- ✓ Arts-based intervention programming
- ✓ Housing Navigation Services
- ✓ Probation Services, remote reporting at Justice Centre;
- ✓ Basic Needs Services including phone and internet access, clothing and food, hygiene supplies
- ✓ Social Service Navigation
- ✓ Legal Advice
- ✓ Reintegration Services for individuals with mental health challenges
- ✓ Housing placements
- ✓ Cross-sector Transition Plans from Care
- ✓ Updating, digital/virtual accountability measures for individuals;
- ✓ Social Enterprise Training.

Canadian Mental Health Association

ATLOHSA Family Healing Services

St.Leonard's community services London & Region

Youth Opportunities Unlimited

JohnHoward Society of Ontario

Southwest Ontario Aboriginal Health Access Centre

Ministry of Children, Community & Social Services

Ontario

Ministry of the Solicitor General

1 To streamline our efforts...

- Screening, triage and risk-assessment of caseload
- Standardized Intake Assessment
- Outreach to counsel/duty counsel
- Eligible caseload prioritization

2 To facilitate remote access...

- Virtual platform for remote access from home
- Secure, safe access to technology onsite at YOU to remotely attend Justice Centre

3 To coordinate services...

- Integrated Individual Plan developed
- Participation Agreement to complete Accountability Measures
- Community-based supports

4 To address risk factors...

- Referrals to community based and onsite social services
- Integrated community supports with terms of Conditional Sentence and/or Probation Order

Appendix C - Kenora Justice Centre Pathways - All Participants

OCJ JC Cases
Police Contact

- **Youth (12-17)**
- **Young Adults (18-24)**

Victims/Survivors

- Community members harmed by an offence

Community
No Police Contact

- Inclusive Access

Wellness Intake with Community Circle of Care Case Manager at JC

- Identification of strengths, needs, and assets to inform individualized plans
- Elder & Anishinaabemowin Interpreter on-site
- Culturally relevant victim supports/services

Court Appearances at Justice Centre

- First Appearances
- Diversion, Peace Bonds & Guilty Pleas
- Bail Variations & Processes
- Judicial Case Management
- Community Healing Discussions
- Sentencing & Sentencing Circles

Reconnection to Land, Culture and Community

Through a **multi-sector holistic lens**, the Justice Centre focuses on restoring and reconnecting individuals and families with **services, community, land and culture.**