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Criminal Procedure Fundamentals

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Evidence of Prior Sexual Activity in Criminal Cases Involving Sexual Offences

Criminal Procedure Fundamentals

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EVIDENCE OF PRIOR SEXUAL ACTIVITY

Introduction:

Section 276(1) of the *Criminal Code* prohibits admission of evidence of sexual activity of the complainant, other than that which constitutes the offence itself, when it is used to support an inference that the complainant:

- (a) is more likely to have consented to sexual activity that forms the subject matter of the charge; or
- (b) is less worthy of belief.

This is the case whether the activity took place with the accused or anyone else.

These “twin myths”, which this legislative regime was enacted to avoid, are the inappropriate stereotypes that sexually active women exist in a perpetual state of consent and further, that they are of bad character.

It should be noted that this prohibition relates to the “use” of this evidence, not its admissibility. Furthermore, section 276(1) does not prohibit use of evidence of the victim’s other sexual activity other than for inferring consent or finding her to be less credible because of her previous sexual history.

Section 276(2) presumes evidence of prior sexual activity is inadmissible unless certain criteria have been met. These criteria are set out in sections 276(1)(a) to (c), specifically that the evidence:

- (a) is of specific instances of sexual activity;
- (b) is relevant to an issue at trial; and
- (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

The factors a judge must consider in determining admissibility of previous sexual activity are set out in section 276(3), specifically that the judge shall take into account:

- (a) the interests of justice, including the right of the accused to make full answer and defence;
- (b) society’s interest in encouraging the reporting of sexual assault offences;

- (d) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (e) the need to remove from the fact-finding process any discriminatory belief or bias;
- (f) the risk that the evidence will unduly arouse sentiment of prejudice, sympathy or hostility in the jury;
- (g) the potential prejudice to the complainant's personal dignity and right of privacy;
- (h) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- (i) any other factor that the judge, provincial court judge or justice considers relevant.

The Application:

Section 276.1 requires a two-step process when an application to introduce evidence of prior sexual activity is made.

Sexual activity applies to non-consensual sexual activity both with the accused and others.

Section 276(2) states that these rules apply to "proceedings in respect to an offence referred to in subsection (1)", which expands the need for this type of an application beyond merely the trial, thus making an application of this nature necessary before such evidence can be adduced at any stage of the proceedings. Therefore, it applies to bail hearings and preliminary hearings.

The procedures set out in section 276 apply to all offences enumerated by *Criminal Code* section number in subsection 276(1).

Stage One: The Application

The application must be made in writing and must include detailed particulars for the evidence sought to be adduced (section 276.1(2)(a)). Furthermore, the application must show a connection between the accused's defence and the proposed evidence (section 276.1(2)(b)). According to section 276.1(4)(b) this application must be served on the Crown and the clerk of the court at least seven days before the application is considered.

The requirement for detailed particulars requires that an affidavit be filed which must establish a connection between the evidence sought to be adduced and the accused's defence. While the affiant does not necessarily have to be the accused, it must be someone with relevant information