1 Initial Considerations

I. Crown Perspective

Properly preparing for a sexual offence case begins at the earliest stage of the case and can be integral to a successful prosecution and a positive experience for the victim. Never underestimate how much value exists in early file review and victim contact. These cases involve a serious violation of the victim's sexual integrity, privacy, and dignity, and sexual offending poses a significant risk to public safety. Furthermore, there are unique and complex challenges to sexual offences cases not found in other prosecutions. Therefore, these cases should be handled sensitively and in as timely a manner as possible.

A. Bail Stage

1. Release Considerations

Under the *Criminal Code*,[1] any form of sexual assault is a serious crime of violence. As with other such offences, in most cases, the accused will be held for a show cause hearing. In deciding whether the accused should be released on bail, the police will consider whether there is a continuing concern for the safety of the victim or other potential victims. The justice or judge must specifically consider whether the accused is charged with an offence in which violence was used, threatened, or attempted against an intimate partner. Sexual offences against an intimate partner will also trigger the accused person to show cause why they should not be detained in custody (reverse onus) if they have a prior *conviction* for actual, attempted, or threatened violence against an intimate partner.[2] In some cases of trafficking in persons involving sexual exploitation and pimping cases, a reverse onus may be applicable if the offence was a serious offence alleged to have been committed for the benefit of, at the direction of, or in association with a criminal organization.[3] In most cases, the accused will be held for bail on the secondary grounds (although there may also be primary and/or tertiary ground concerns). The Crown must decide whether to seek detention or whether the accused can be released with an adequate plan in place, possibly involving a surety. If the accused is released, the Crown should consider the following conditions:

- no contact with the victim or the victim's family;
- not to attend within a certain distance of the victim's residence, employment, or school, or anywhere else that the accused knows the victim to be;
- no weapons;

1 RSC 1984, c C-46.

2 See ss 515(3)(b) and 515(6)(b.1) of the *Criminal Code*. "Intimate partner" is defined in s 2 of the *Criminal Code* and includes a current or former spouse, common law partner, or dating partner.

3 *Criminal Code*, s 515(6)(a)(ii).

- non-attendance at place of offence (e.g., workplace, school, or park);
- [if breach of trust] not to work in any position involving children, persons with disabilities, etc.;
- [if child victim] no contact with anyone under 16 years of age; and
- [if child victim] not to attend a place where children would be expected to be (e.g., playground, daycare centre, or elementary school).

The Crown should ensure that the victim has been contacted to inquire whether there are any particular bail conditions requested by the victim that would ensure the victim's safety or whether there is information from other sources that may be of assistance to the Crown's assessment of ongoing danger or the appropriateness of potential sureties. Ideally, the victim should be contacted in advance of the bail hearing so that the Crown has the information needed, and there is no need for an adjournment. If detention is recommended, the Crown may wish to call the investigating officer to provide evidence, since they will be in a position to provide any detail that is not contained in the synopsis or officer's notes and can provide a more fulsome account of the alleged offence and the need for detention.

In preparing for the bail hearing, whether it will be a consent release or a show cause hearing, the Crown should have as much material at its disposal as possible in order to make an informed decision concerning whether an accused should be released and, if so, on what terms. The Crown should try to obtain the following material:

- victim's statement(s)—synopsis of video statement;
- accused's statement, if any;
- police notes;
- Canadian Police Information Centre (CPIC) check, local police check;
- any existing witness statements;
- any existing medical records (e.g., sexual assault evidence kit);
- any prior convictions in which violence was used, threatened, or attempted against any intimate partner; and
- any relevant occurrences from prior offences involving sexual or other violence.

If the accused is detained, the Crown should ensure that it asks for an order under section 516(2) of the *Criminal Code* that the accused abstain from communicating directly or indirectly with the victim or anyone referred to in the order.

2. Publication Ban

At the earliest opportunity, the Crown should seek a publication ban directing that the identity of a victim or a witness, and any information that could disclose the identity of the victim or witness, not be published or transmitted in any way. If the victim

of a sexual offence wants to have their identity known at some future time, the Crown can facilitate such an application to the court. (For more detail, see Chapter 4, Publication Bans, and Chapter 5, Protections for Victims and Witnesses, Section VII, "Publication Ban (Section 486.4).")

Generally speaking, the accused will make an application at the bail hearing under section 517(1) of the *Criminal Code* banning publication of any evidence taken at the bail stage. If this is not done in a sexual offence case, the Crown should do so in order to address the privacy interests and security of the victim, the accused's right to a fair trial, or other issues relating to the administration of justice.

3. Victim Notification

At the completion of the bail hearing, the Crown should ensure that there is a mechanism in place for the victim to be notified of the outcome and, if there is a release, the precise conditions. Specifically, the victim should be notified about a non-communication order (whether the accused is detained or released) and advised to contact police if the accused breaches such an order. The victim should be provided with a copy of the recognizance, which documents the release terms. For courthouses that have a support program for victims and witnesses, or the like, victim notification can be handled through that office.

4. Bail Variations

It is not unusual for defence counsel to seek a bail variation after the accused has been released from custody. Decisions in the bail court are made quickly, and often an accused will agree to a condition simply in order to get released, without considering the ramifications of such an order. Where the request for variation is reasonable and does not compromise the safety of the victim or the public, the Crown should consider the request. However, the Crown should rarely agree to vary a non-communication order, even if the victim requests it, because, in the domestic context, the victim may recant the allegations due to social or financial pressure, fear, stress, etc., and not because the event never occurred. Where a variation is made, the victim should be notified.

If an accused is released from the police station on an undertaking, appearance notice, or promise to appear,[4] an information may not reach the courthouse until shortly before the date on which the accused is to appear in person, which could be weeks down the road. In such a case, the Crown may want to contact the police station in an effort to expedite this process so that a bail variation can take place in a timely fashion. Any variation must be authorized by a judicial officer at the courthouse.

4 *Criminal Code*, s 497, 498, or 499.

B. File Assignment

In sexual offence cases, the file should be assigned to a designated Crown prosecutor as soon as possible and certainly at the early stage of proceedings. Ideally, this Crown prosecutor should retain the file throughout the proceedings. The advantages of having one Crown prosecutor assigned to a sexual offence file include:

- development of a rapport with the investigating officer so that all proper avenues of investigation take place in a timely manner;
- development of a rapport with the victim so that they feel comfortable and confident throughout the process;
- proper knowledge of the file so that the appropriate decisions can be made at an early pre-trial stage (e.g., whether to adduce the accused's statement, whether to bring an application for similar fact evidence, and whether to pursue a testimonial aid);
- knowledge of the relevant sentencing principles, ranges, and ancillary orders so that an appropriate position can be taken in any resolution discussions;
- awareness of myths and stereotypes unique to sexual offence cases that can inadvertently influence credibility assessments;
- no duplication of work; and
- interest and engagement in the file throughout the process.

C. File Review

A thorough review of the file in a sexual offence case is crucial to ensure that all appropriate avenues of investigation have been explored and that the proper charge has been laid. The Crown should make efforts to find time to review the file at the earliest opportunity and to ensure that the police are providing disclosure as soon as possible.

1. Further Investigation

Ultimately, it is up to the police to investigate crime and the Crown to prosecute. Notwithstanding this division of roles, the Crown can be useful in guiding the investigation, in particular in sexual offence cases. Since these cases so often turn on the credibility and reliability of the victim, obtaining evidence that confirms or corroborates aspects of the victim's account can be essential. Upon reviewing the file, the Crown should ensure that all available evidence has been obtained by the police, including:

- A comprehensive videotaped statement by the victim.
- Statements from all witnesses with relevant evidence, including witnesses who may have observed the victim and/or accused before or after the offence (even if they did not witness the offence). For example, evidence of demeanour is

admissible to show the victim's state of mind after the offence,[5] and evidence of intoxication can be relevant to a victim's capacity to consent or to an accused's defence of honest but mistaken belief in consent (for further detail, see Chapter 14, Consent, Section II.C.4.a, "Intoxication"). In addition, the nurse who used the sexual assault evidence kit may be able to describe the condition of the victim shortly after the alleged sexual offence.

- Photographs of the scene.
- Video surveillance of the offence or a period of time leading up to it, if the offence took place in a public or commercial institution (e.g., a nightclub). Keep in mind that surveillance videos are often overwritten after a week or a month, so time is of the essence. Furthermore, the police should ensure that there is an identified witness who will be able to authenticate the surveillance equipment in question in order to confirm that it is in proper working order, and thereby ensure the accuracy of the digital information (i.e., time and date stamp).
- Medical records relating to the incident, assuming the victim has signed a proper informed waiver.
- If the offence involves the ingestion of drugs, seizure of the glass or vessel used by the victim to drink (for forensic testing).
- Relevant communications (email, text, and social media posts) that can be provided by the victim on consent or that are publicly available.
- Relevant information on phone and Internet Protocol (IP) records, etc., which could be obtained through a production order or a warrant.
- If the offence is historical, photos of the location of the assault, the victim, and the offender from the relevant time frame.

2. Review of the Charging Document

In screening a file, the Crown should review an information carefully to ensure that the proper charge was laid by the police and the counts are properly worded.

a. The Wording of an Information

If an offence occurred on a particular date, and the Crown has evidence to prove that exact date, then an information can be worded to reflect one date. However, if it is unclear or uncertain when an offence took place, the information should cover as broad a time frame as possible (keeping in mind that for the Crown to proceed summarily, an information must be laid within 12 months of the time of the offence).[6]

5 See *R v JV*, 2007 ONCA 194; *R v James*, 2014 SCC 5; *R v Manning*, 2014 CanLII 2886, 345 Nfld & PEIR 13 (Prov Ct).

6 A six-month limitation period still applies for offences committed before September 19, 2019 unless the Crown and defence agree to waive the limitation period. See s 315 of the *Criminal Code*, as amended by Bill C-75.

An information should refer to the general jurisdiction (e.g., the City of Toronto) where the offence took place, rather than a particular address, even if the address is known. Where multiple offences have taken place, the Crown may wish to amend an information to reflect one or two ongoing offences (each of which includes multiple incidents) so as to simplify the fact-finding task for the trier of fact. This may be applicable in cases of historical ongoing abuse, and since the Crown will be proceeding by indictment, the maximum sentence available may be sufficient to cover a finding of guilt for all proven incidents. The Crown should ensure that the maximum sentence available is sufficient to address the needs of deterrence and denunciation, if a conviction results. Where the Crown proceeds summarily, the maximum sentence will be two years less a day for most hybrid sexual offences, but the summary maximum for section 271 (sexual assault) where the victim is 16 years of age or over is 18 months. Where the Crown proceeds by indictment, the maximum sentence for section 271 (sexual assault) where the victim is 16 years of age or over is ten years. For most other sexual offences, the maximum sentence is 14 years or life (see Appendix 16.1, Sentencing in Sexual Offence Cases: Available Sentences and Ancillary Orders). Where the Crown proceeds by indictment, the imposition of the maximum sentence will be exceptional; however, it should be guided by a proper application of the principles of sentencing, as well as the responsibility of the offender.[7]

b. Proper Charge(s) on an Information

In most cases of sexual assault (where the victim is 16 years of age or over), a charge of section 271 (sexual assault) is laid. The screening Crown should assess the facts and consider whether there is evidence that warrants a charge under section 272 (sexual assault causing bodily harm, sexual assault with a weapon, sexual assault causing threats to a third party, gang sexual assault, or choking).[8] For example, if a sexual assault takes place and one accused commits the act and one stands by and guards the door, both should be charged with section 272 on the basis of gang sexual assault (as parties to the offence). If there is evidence of bodily harm, including pregnancy or significant psychological harm,[9] a charge under section 272 is appropriate. However, since a charge of section 272 is eligible for a preliminary hearing, whereas a charge of

7 *R v Cheddesingh* (2002), 60 OR (3d) 721, 168 CCC (3d) 310 (CA), aff'd 2004 SCC 16; *R v LM*, 2008 SCC 31.

8 *Criminal Code*, s 272(1)(c.1).

9 In *R v McCraw*, [1991] 3 SCR 72 at 85, 66 CCC (3d) 517, the Court held that the psychological trauma suffered by rape victims is well documented and that to ignore the fact that rape frequently results in serious psychological harm to the victim would be "a retrograde step, contrary to any concept of sensitivity in the application of the law." *McCraw* involved a threat to commit rape, but the finding that serious bodily harm includes psychological harm applies not only to the threat of rape or sexual assault but also to the act itself: *R v Young* (1998), 159 Nfld & PEIR 136, [1998] NJ No 15 (QL) at paras 17-19 (CA).

section 271 (where the victim is 16 years of age or over) is not, the Crown may want to consider whether it is in the interests of justice to proceed with a charge of section 271 and rely on aggravating factors (e.g., bodily harm, gang sexual assault, or weapon use) on sentencing.

In addition to the sexual assault charge, the Crown should consider whether other charges are appropriate given the facts of the case, including, for example:

- section 246 (overcoming resistance by choking, suffocating, or strangling, or administering a stupefying or overpowering drug);
- section 264 (criminal harassment);
- section 264.1 (threats);
- section 279(2) (unlawful confinement);
- section 279.01 (human trafficking);
- section 348 (break and enter); and
- section 172.1 (child luring).

Where the victim is under 16 years of age, a charge of sexual assault should be laid in addition to a charge of sexual interference (s 151), invitation to sexual touching (s 152), or, in the case of a 16- or 17-year-old victim, sexual exploitation (s 153). Sexual assault is an offence of general intent and may be easier to prove if the specific intent of sexual gratification cannot be proven. Assault is an included offence of sexual assault but not of sexual interference. In addition, an offence under section 271, 272, or 273 is an enumerated "serious personal injury offence" under section 752 of the *Criminal Code* and therefore would more easily meet the dangerous offender criteria under section 753(1)(b) than would sexual interference (s 151) under section 753(1)(a).[10] Generally, the conduct underlying sections 151 and 271 will be the same. Where both charges are laid for the same act and there is a finding of guilt, and no proceedings under section 753 are contemplated, the Crown may want to ask the court to stay the charge of section 271 as per *Kienapple v R*[11] and have the conviction registered under section 151. Since section 151 by definition involves sexual offending on a child, the police, Crown, and court in a future prosecution will know immediately from the record that the accused has a history of sexually offending against children. Some courts in Ontario have determined that sexual interference is the appropriate charge upon which to register a conviction since it is a more precise and complete explanation of the crime committed and includes recognition that the victim was a child.[12] It should be noted that where the Crown proceeds summarily, the mandatory

10 But see *R v RD*, 2017 ONSC 5258 at para 35, where the Court disagreed with such reasoning and denied the Crown's request on this basis.

11 [1975] 1 SCR 729, 15 CCC (2d) 524.

12 See *R v RD*, *supra* note 10 at paras 16-22; *R v Hussein*, 2017 ONSC 4202; *R v FL*, 2016 ONSC 1215; *R v FC*, 2016 ONSC 6059.

minimum sentence for a conviction under section 151 is 90 days, whereas the mandatory minimum sentence for a conviction under section 271 (where the victim is under 16 years of age) is six months. Some mandatory minimums have been held to be unconstitutional; see Chapter 16, Sentencing, Section II.A, "Mandatory Minimums and Statutory Maximums."

If the Crown proceeds by indictment and the trial is by judge and jury, the Crown should consider culling the indictment and eliminating duplicate charges so as not to confuse the jury or risk inconsistent verdicts. The Ontario Court of Appeal has cautioned against jury trials becoming unnecessarily confusing and has suggested that where it is inevitable that one count would inevitably be stayed based on *Kienapple*, the Crown should not proceed on both counts.[13] In most child sexual abuse cases, the facts underlying a charge of section 151 or 271 are the same, and there is generally no reason to proceed to trial on both, in particular in front of a jury. If the Crown is uncertain as to whether it can prove that the victim was under 16, or that the touching was for a sexual purpose, it should proceed to trial on a charge under section 271.

3. Election

The Crown's decision to proceed summarily or by indictment can have a significant impact on the outcome of the case and the experience of the victim. While certain sexual offences must be prosecuted by indictment, as is the case, for example, where an information is laid outside of 12 months or for straight indictable offences (e.g., ss 272 and 273), most offences involve a charge under section 271 (sexual assault), which is a hybrid offence, leaving the Crown with the discretion of proceeding summarily or by indictment. Where the Crown proceeds summarily, a sentence of 18 months is available in relation to an offence of sexual assault on a victim over 16 years of age, and a sentence of two years less a day is available in relation to an offence of sexual assault on a victim under 16 years of age.[14] If the Crown wants a sentence in excess of that which is statutorily allowed, it should proceed by indictment. Where a hybrid offence is charged along with a straight indictable offence (e.g., ss 246, 272, 273, 279.01, and 348), the Crown should elect by indictment on the hybrid offence.

In considering whether to elect summarily or by indictment on a charge of sexual assault, the Crown should consider the following factors:

- the seriousness of the offence and whether the Crown should seek a penitentiary sentence;

13 *R v RV*, 2019 ONCA 664 at paras 146-47.

14 Where the victim is under 16 years of age, the maximum sentence where the Crown proceeds summarily used to be 18 months. In Bill C-26, assented to on June 18, 2015, this was increased to two years less a day: see SC 2015, c 23, s 14.

- assuming the offence is eligible for a preliminary hearing, the impact on the victim of having to testify at both a preliminary inquiry and trial;
- any time-to-trial institutional delay that could affect a trial within a reasonable amount of time as guaranteed by section 11(b) of the *Canadian Charter of Rights and Freedoms*;[15]
- the likelihood of obtaining approval for a direct indictment (see Chapter 6, Preparing for the Preliminary Inquiry);
- the circumstances of the offender (e.g., similar offences, position of trust/authority to the victim, and criminal record);
- the circumstances of the offence (e.g., protracted offence or physical/emotional harm to the victim);
- the strength of the Crown's case;
- whether a long-term or dangerous offender application should be brought (not available if the Crown proceeds summarily); and
- whether a conditional sentence (available for an offence against an adult victim where the Crown proceeds summarily) would offend the public interest and compromise victim and public safety.

D. Assessment of Reasonable Prospect of Conviction and Public Interest

The role of the Crown is to vigorously pursue provable charges while protecting individuals from serious repercussions of a criminal charge when there is no reasonable prospect of conviction. Even where there is a reasonable prospect of conviction, the Crown must consider whether it is in the public interest to discontinue the prosecution.[16] This screening obligation should be ongoing throughout the proceedings.

1. Reasonable Prospect of Conviction

The Crown should objectively assess whether there is a reasonable prospect of conviction (RPC) in a case before proceeding.[17] This is a higher test than that which

15 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the Charter]. See *R v Jordan*, 2016 SCC 27: trials by summary conviction should be completed within 18 months, and trials by indictment should be completed within 30 months (including those that proceed by direct indictment). See *R v Bulhosen*, 2019 ONCA 600, where an accused schedules a preliminary inquiry and, prior to the inquiry commencing, the accused re-elects to be tried in the provincial court (with the consent of the Crown); the 18-month presumptive ceiling applies: see *R v Shaikh*, 2019 ONCA 895.

16 The Crown should refer to its respective policy manual and any directive concerning sexual offences; for example, some provinces may require manager approval prior to discontinuing a prosecution for a sexual assault.

17 *Reasonable prospect of conviction* is the standard in Ontario that dictates whether a prosecution should proceed. Other provinces will have a similar test. The standard will vary from province

amounts to a *prima facie* case but does not mean that a conviction is more *likely*. Rather, it means that a guilty verdict by a judge or properly instructed jury would not be unreasonable on the evidence. This determination should precede the question of whether the prosecution is in the public interest.

The test for RPC involves a limited assessment of credibility based on objective factors, an assessment of the admissibility of evidence, and a consideration of likely defences. The Crown should be careful not to put too much scrutiny on the *credibility* of the victim in determining RPC, since credibility is ultimately a finding for the trier of fact. Furthermore, the Crown should try to set aside personal views about the demeanour of the witness or whether the victim will be disbelieved, unless those views are based on objective facts. However, it is proper for the Crown to consider the *reliability* of a victim's evidence. Witnesses can be credible, in that they believe what they are saying, but unreliable in their accounts. The Crown should take the following factors into account in assessing the reliability of the victim:

- a past record of false complaints (i.e., complaints that have been proven to be false or acknowledged to have been fabricated);
- any findings of guilt for offences of dishonesty;
- any alcohol or prescribed or non-prescribed drugs taken at the time of the offence that could affect memory, perception, observation, or judgment;
- motive to fabricate;
- opportunity to observe/recall;
- age and development of the victim;
- internal inconsistencies in the victim's evidence on material facts;
- victim's evidence is contradicted by extraneous evidence;
- incontrovertible alibi evidence;
- victim's evidence is corroborated by other evidence; and
- admission or confession by the accused.

The Crown's role is not to make final determinations of credibility whenever there is a conflict in the evidence but to determine whether there is a reasonable basis for accepting the victim's credibility after applying prosecutorial judgment to the objective indicators in the case.

Where a victim is reluctant to proceed, a face-to-face meeting can sometimes dispel any anxiety. Furthermore, the Crown should meet with a victim first before making any final determination about whether the victim's evidence is reasonably capable of being believed. It may be that internal inconsistencies can be explained or what appears to be a motive to fabricate may have been misunderstood. The Crown should

to province. For example, the test in British Columbia and Alberta is reasonable *likelihood* of conviction.

also consider whether any further investigation that may have a bearing on the assessment of RPC is warranted.

The Crown should take a trauma-informed approach in assessing RPC. Trauma may affect the behaviour of a victim and/or a victim's ability to recall details, and this should not necessarily affect credibility (see Chapter 9, Expert Evidence, Section III.F, "Victim's Neurological and Behavioural Response to Trauma").

The Crown should ensure that improper myths and stereotypes do not influence an assessment of RPC. Some common myths are that:

- women are to blame for sexual violence because of the way they dress, how much they drank, and whether they put themselves in a situation where rape could occur;
- there is a higher rate of false reporting by victims of sexual assault than for other types of assault;[18]
- there is a "normal" or "right" way for a victim to behave after they have been sexually assaulted;[19]
- true victims fight back;[20]
- a person who has been sexually violated should be able to give a clear and comprehensive chronology of what occurred;[21] and
- confirmatory evidence is required in a sexual assault case where the victim is heavily intoxicated and/or suffers memory gaps.[22]

2. Public Interest

Even when there is an RPC, the Crown may wish to discontinue a prosecution where it is not in the public interest. A victim may not want to proceed with a prosecution for a variety of reasons (e.g., testifying would cause undue trauma, there are other priorities in the victim's life, there is social pressure, and going through with the case would be counterproductive to the victim's healing). It is important for the Crown to take the victim's feelings into account, but ultimately, the Crown must make the decision based on what is in the overall public interest. Generally speaking, the Crown should not force a victim to proceed against their will. However, the Crown should

18 In *R v AG*, 2000 SCC 17 at para 3, the Supreme Court of Canada stated that it had "rejected the notion that complainants in sexual assault cases have a higher tendency than other complainants to fabricate stories based on 'ulterior motives' and are therefore less worthy of belief. Neither the law, nor judicial experience, nor social science research *supports this generalization*" (emphasis added).

19 See Chapter 9, Expert Evidence, Section III.F, "Victim's Neurological and Behavioural Response to Trauma."

20 *Ibid*.

21 *Ibid*.

22 *R v Demedeiros*, 2019 SCC 11, aff'g 2018 ABCA 241.

consider whether the victim's evidence can be adduced without their testimony by, for example, filing the victim's video statement under section 540(7) at a preliminary hearing, seeking a direct indictment and thereby eliminating a preliminary hearing altogether (see Chapter 6, Preparing for the Preliminary Inquiry), or making an application to adduce hearsay evidence (see Chapter 7, Evidentiary Issues, Section II, "Hearsay Evidence").

The Crown should be sure to meet with the victim prior to making a decision to discontinue a case. Sometimes, all that is needed is appropriate support and a boost of confidence. Holding introductory meetings well ahead of the preliminary hearing or trial is recommended for sexual offence cases, where anxiety runs high. The victim should also be advised about the use of testimonial aids (e.g., the option to give testimony behind a screen or via closed-circuit television [see Chapter 5, Protections for Victims and Witnesses, Section IV, "Testifying Without Seeing the Accused (Section 486.2)"]) as a way to ease anxiety about testifying and seeing the accused. Furthermore, the victim should be told about protections under section 276 (other sexual history), section 278.1 (third-party records), and section 278.92 (private records in the hands of the accused) of the *Criminal Code* (see Chapter 11, Production of Third-Party Records: Section 278.3; Chapter 12, Cross-Examination on Private Records: Section 278.92; and Chapter 13, Evidence of Other Sexual Activity: Section 276), and, while a victim may be initially reluctant to proceed, they may gain strength over time.

Over and above the victim's interests, there may be other compelling factors in favour of a prosecution (e.g., past similar sexual offences by the accused or a recanting or reluctant domestic victim who requires protection of the state).

E. Disclosure

1. Sensitive Material

Cases of sexual violence may well contain disclosure that is of a highly sensitive nature. Care must be taken by the Crown to ensure that this disclosure is not distributed improperly or without the appropriate redactions and undertakings.

Any information that reveals personal identifiers of the victim (e.g., address, phone number, or workplace) should be redacted unless it is central to the case and necessary for full answer and defence.

Disclosure that contains sensitive material, such as a victim's videotaped statement that describes the sexual offence, should not be given out without an undertaking to be signed by counsel. The undertaking should specify that the disclosure is for use in the particular named case and should be destroyed or returned to the Crown's office upon completion of the case and expiry of the appeal period. In cases that involve highly sensitive digital images (e.g., photographs of sexual activity), the Crown should consider disclosing these on a password-protected USB key, along

with having counsel sign an undertaking. The disclosure should not be distributed to anyone outside the defence team, with the exception of a retained expert. For cases involving an unrepresented accused, a copy of the videotaped statement (or any digital images) should not be provided to the accused, but arrangements should be made for the accused to attend the police station, Crown's office, or victim witness's office to view the disclosure. If the accused is in custody, arrangements should be made for the accused to view the disclosure while in police custody.

Disclosure that contains images of child pornography or other graphic images should generally not be given out. Rather, counsel and the accused should be given an opportunity to view the material at the police station, Crown's office, or victim witness's office, along with the provision of appropriate police supervision if the accused is in custody. In cases where it is necessary to give out some or all of the disclosure to counsel, the Crown may provide counsel with a secure read-only hard drive that can be connected to a computer without causing modification to the data, or may, if available, provide a separate laptop or other device that is preloaded with the disclosure and is not modifiable. The device should be returned to the Crown at the end of the proceedings.

F. Victim Contact

Sexual offence cases should be assigned early in the process so that a Crown prosecutor can make early contact with the victim. It is difficult for a victim to build up the courage to attend the police station and provide a statement, and then not to hear anything for many months until the court date. Early and ongoing meetings between the Crown and victim can answer common questions and ease any anxiety. In jurisdictions where a victim/witness assistance program exists, the Crown should liaise with the victim/witness worker at the earliest opportunity to make arrangements for a meeting. At any meeting with the victim, there should be an officer present. This is important for two reasons. First, if there is ever an allegation that the Crown tried to improperly influence the witness, it is necessary that a third party be present to testify as to what transpired. Second, if the witness discloses new information during the meeting, the officer should be taking notes, and those notes should promptly be disclosed to the accused.

Ideally, the Crown will meet with the victim early on in the process as a form of "meet and greet." Subsequently, meetings should be held to discuss procedure, evidence, and outcomes. Crown prosecutors should use their discretion in determining how many meetings with a victim are necessary, but the minimum should be two (one early on and one shortly before the victim's testimony).

Topics that should be covered by the Crown with a victim are outlined in Table 1.1.

TABLE 1.1 Topics for Crown to Discuss with Victim

TOPIC	DISCUSSION POINTS	TIMING OF VICTIM MEETING
Process and timelines	• What will happen from the time of the charge to disposition—pre-trial meetings, setting date, prelim/trial, judgment, sentencing (if applicable), and victim impact statement (VIS) • Time estimates—time to trial, during trial, and time to disposition • Meetings with Crown—how many, when, and topics discussed	Prior to preliminary hearing or trial date being set
Role of various players	• Crown (not the victim's lawyer) • Victim's lawyer (not a party, unless the case involves a third-party records application) • Defence counsel (not a bad person, just representing the accused who has a right to representation) • Clerk (assists the judge, maintains the exhibits, and reads out the charging documents) • Reporter (records the evidence in the event of an appeal or for review of judge, counsel, or the public) • Security officers (necessary if accused is in custody)	No later than one week before trial or preliminary hearing and ideally at introductory meeting
Layout of courtroom	• Where each party will sit • Witness box • Accused's position (in custody versus out of custody) • Jury box	No later than one week before trial or preliminary hearing and ideally at introductory meeting
Difference between preliminary hearing and trial	• Different functions • Possible section 540(7) application by Crown • Use of preliminary hearing transcript for impeachment purposes at trial	No later than one week before trial or preliminary hearing and ideally at introductory meeting

(*Continued on next page.*)

TABLE 1.1 Topics for Crown to Discuss with Victim (continued)

TOPIC	DISCUSSION POINTS	TIMING OF VICTIM MEETING
Difference between direct and cross-examination	• Open-ended questions in direct examination (who, what, where, when, and how) • Direct, suggestible questions in cross-examination • Only right answer in all cases is the truth	No later than one week before trial or preliminary hearing
Special needs or accommodations for the witness	• Young child in need of care • Wheelchair access • Other physical needs • Amplifier for voice • Young witnesses—bathroom breaks and earlier lunch break	No later than one week before trial or preliminary hearing
Testimonial aids	• Support person should be someone at arm's length from prosecution (not a witness or involved party) • Availability of CCTV or screen • Availability of facilities in courthouse • Pre-trial application • Factors in section 486.1 • Ruling of the court on application for testimonial aids	Prior to trial or preliminary hearing date being set
Victim Impact Statement (if finding of guilt)	• Proper form to fill out • Assistance by victim/witness assistance program, if available • Availability of testimonial aids to deliver VIS, if being read to judge	After finding of guilt and no earlier than after testimony is complete
Restitution	• Available upon finding of guilt • Expenses incurred as a result of the offence • Keep original receipts • Discretionary—no promises	Introductory meeting (so that receipts can be retained)
Social media	• Information posted on social media can be obtained or questioned by defence	Introductory meeting

TABLE 1.1 Topics for Crown to Discuss with Victim (concluded)

TOPIC	DISCUSSION POINTS	TIMING OF VICTIM MEETING
Crown disclosure	• Any information that is not privileged or irrelevant must be disclosed by Crown to defence • Certain privileges exist—third-party records for which there is a reasonable expectation of privacy and other sexual history information	Introductory meeting
Evidence	• Any obvious inconsistencies—let the witness know they may be asked about these • Any discrepancies that do not make sense • Anything that requires further elaboration • Discussion about the need to use exact terms to describe body parts and sexual acts, etc.	Far enough in advance of trial or preliminary hearing that, if there is further disclosure, it will not lead to a successful adjournment request

The Crown should also be sure to meet with the victim before making a decision whether to resolve or withdraw a charge and certainly to let the victim know in person the reasons for such a decision. The victim has the right to participate under the *Canadian Victims Bill of Rights*,[23] and this includes the right to convey their views about decisions to be made by appropriate authorities in the criminal justice system, and the right to have those views considered. This does not mean that the victim drives the decision—the Crown has the role of minister of justice in the case. But the victim's views should, at a minimum, be considered. Moreover, the victim must be informed of any such resolution agreement, and the court has an obligation to inquire of the Crown whether reasonable steps were taken to inform the victim of the agreement.[24]

II. Defence Perspective*

Proper defence of a sexual offence allegation begins at the earliest stages of a case. Decisions must be made immediately. In an ideal world, defence counsel would get

23 SC 2015, c 13, s 2.

24 *Criminal Code*, ss 606(4.1), (4.2).

* *This section was authored by Adam Weisberg.*

to speak to the potential client prior to the client attending the police station or being arrested. As soon as possible, defence counsel conducting a sexual offence case must make important decisions about how to locate and preserve evidence from potential witnesses or on social media. This part of the chapter will review some of the initial considerations for counsel who intend to act on behalf of a person accused of a sexual offence.

A. Initial Contact

Counsel's initial contact may occur prior to the client having surrendered to the police, during arrest, or soon after the client is released. Each stage engages different considerations for defence counsel. When the client makes contact pre-surrender or calls from the police station, there are particular steps to take.

1. Contact Prior to Surrender

In a sexual offence case, it is common for an accused person to receive notice that they are being sought by the police prior to arrest. The complaint may occur hours, days, or even years after the events in question. In many cases, the suspect is made aware that a complaint is forthcoming even before the allegation has been presented to police for investigation. Time limitations do not apply to sexual offence allegations.

Should a client contact counsel prior to surrendering, counsel should take the following steps:

1. Determine from the client whether they are aware of an ongoing police investigation into the allegation(s) in question.
2. If the police have already contacted the client, obtain the investigating officer's contact information from the client.
3. If possible, always meet with the client at your office before their surrender. This provides an important tactical advantage because there will be an opportunity to discuss issues related to the client's surrender, arrest, and detention. These discussions should include advice about the client's right to remain silent upon arrest and the authority (or lack of authority) of the police to collect evidence at the station without judicial authorization, including bodily samples, dental impressions, DNA left on discarded food or tissue, and other evidence. This meeting will also give counsel an opportunity to identify and preserve evidence even before charges are formally laid. This advice is discussed in greater detail below.
4. Consult with the client to determine some basic information relevant to issues surrounding bail or release from the police station. Find out about the client's job, address, citizenship, and prior criminal history (if any).
5. Prepare the client to agree to release or bail conditions that may include non-association clauses with the victim and other potential witnesses. If the allegation involves a child, the client should be prepared to accept conditions that

limit contact with children (potentially including family members) and limit attendance at places frequently visited by children, including schools, parks, and community centres.[25]

6. Recommend to clients that when they surrender to police the only thing they should bring to the station is one piece of government-issued photo identification (i.e., no jewellery, belts, electronics, etc.). Clients should be advised that their cellphones and other electronic devices brought to the station may be seized by the police upon arrest and later searched for evidence related to the offence, including texts, social media accounts, photographs, and videos, etc.
7. Contact the investigating officer and arrange for a surrender time and date. Find out as much detail as possible from the investigating officer with respect to the allegations and charges that will be laid. Refrain from revealing to the officer anything the client has said about the case that may be covered by solicitor–client privilege without the client's instruction to do so but this conversation may be a valuable opportunity to obtain information about the nature of the allegations and learn about what evidence the police have already collected to support the claims.
8. Once in contact with the investigating officer, try to determine whether the client will be held for a bail hearing or released from the station on an undertaking with conditions. This is the time to advocate for the release of the client from the station on their behalf, since their efforts to surrender demonstrate that the client is being responsible in hiring a lawyer to assist in addressing the charges without delay. Positive efforts to surrender at an early opportunity also establish that the client is not likely a flight risk.

2. The Arrest Call

If a client calls from the police station, having just been arrested, counsel should take the following steps:

1. Acquire the client's full name, date of birth, and regular address.
2. Ask to speak with the charging officer to determine what charges the client is facing. Attempt to get an oral synopsis of the allegations. Take detailed notes of this call, and date and timestamp those notes.
3. Attempt to negotiate the client's release from the station if it is appropriate. Factors weighing in favour of securing a release from the police station with conditions on an undertaking pursuant to sections 498 or 499 of the *Criminal Code* may include the following:
   a. The client has no criminal record or has a dated and/or unrelated record.
   b. The client is ordinarily resident in Ontario.

25 See e.g. *Criminal Code*, s 810.1(3.02), which stipulates the terms for a list of common bail restrictions imposed in sexual offence cases involving child victims.

   c. The allegations do not involve vaginal or anal penetration.
   d. The complaint is historical.
   e. The offence does not involve a child.
4. Explain the options for bail and acquire contact information for all potential sureties.
5. Make an assessment of whether the client will need counsel to represent them at the bail hearing.
6. If counsel will not be attending a bail hearing, request that the client get in contact once released and ensure that the client has counsel's contact number.
7. Explain to the client their right to remain silent:
   a. The client should understand that any statement made will only be used in court if it does not help the client. Exculpatory statements are not normally admissible in court for the defence.[26] Except in limited circumstances,[27] an exculpatory statement can only be led by the Crown and would be done to either impeach the credibility of the client's testimony at trial or otherwise demonstrate that it contains provable lies.
   b. The client must also understand the necessity to continually assert their right to silence with respect to every question asked by police and that police have the right to continue to ask questions even after the client has asserted their right to silence.[28]
   c. Explain to the client what is meant by "a statement." Many laypersons will think they have given a statement only if they see the officer writing down their words or if they are videotaped or audiotaped during the course of a formal interview. The client must understand that *any communication* between the client and police while in custody is considered a statement that may be used against the client at trial.
   d. Clients should understand that, even if they believe they are innocent and feel that they have nothing to hide, their current situation is likely nerve-wracking and stressful, and they could accidentally misstate the truth in a way that hurts them later at trial. Even exposing what the client's defence at trial might be gives the Crown a potential advantage in preparing the case and making other tactical decisions regarding which witnesses to call and what evidence to present.

26 *Regina v Campbell* (1977), 17 OR (2d) 673, 1 CR (3d) 309 (CA).

27 An accused's spontaneous out-of-court statement made upon arrest or when first confronted with an accusation is an exception to the general rule excluding prior consistent statements and can be led by the accused as evidence of the reaction of the accused to the accusation and as proof of consistency, provided that the accused took the stand and exposed themself to cross-examination. See *R v Edgar*, 2010 ONCA 529 at para 72.

28 *R v Singh*, 2007 SCC 48 at para 42.

e. The client must understand that silence in response to police questions cannot be used against them at trial as evidence of guilt.
f. Clients should understand that, if they intend to remain silent, they should not answer or engage in *any* conversation with the officers about their case. This is a very awkward thing to do to another person. Counsel should practise asking the client mock questions and engaging the client in small talk to see whether the client can remain silent.
g. To remain silent, the client should not say anything and not acknowledge any allegations or small talk. Some lawyers recommend saying "on advice of counsel, I wish to remain silent" or "I'm remaining silent." Complete silence is generally more effective at ending questioning.
h. At the end of the call, the client should come to the conclusion, on their own, that giving a statement at the police station is a very poor idea and will likely have numerous downsides for the client's case.

8. Tell the client that it is not mandatory to volunteer DNA samples or dental impressions. If the client is presented with a warrant to secure forensic evidence, the client should ask to speak to counsel again for further advice.
9. Explain to the client that discarding tissues or eating food could leave behind DNA that may be collected by the police and used as evidence against the client at trial.
10. Contact the client's family members, if necessary, and notify them of the arrest and whether they need to attend court or the police station.

3. Post-Arrest Contact

Once the solicitor–client relationship is established, it is important to secure the following information as soon as possible:

- the offence charged (obtain a copy of the information at the earliest opportunity and identify the elements of the offence);
- the full "legal" name of the client;
- the name under which the client is charged;
- verification of the client's identity through photo identification (and make copies for records);
- residential contact information for the client, including address, email, and active phone number (it is often beneficial to obtain two contact numbers);
- address and phone number of the client's place of employment;
- the date and time of the client's next court appearance;
- the location of the court where the appearance will occur; and
- copies of any documents in the client's possession, including a Promise to Appear, bail recognizance, and any other disclosure.

Bail or release conditions that prohibit association between the victim and the accused are commonly imposed in sexual offence cases and are particular to charges in these cases. Defence counsel should be sure that the accused understands what compliance with these conditions entails. Counsel should also make detailed notes of this conversation to retain for filing requirements, even if the relationship does not progress any further beyond the consultation stage.

B. First Interview About the Allegations

It may be unwise in the initial stages to ask the accused for their version of the circumstances of the offence before reviewing the client's disclosure or knowing the details of the allegations. Many lawyers will recommend confining the inquiry at this stage to obtaining antecedents, including:

- full name;
- age, birthdate, and birthplace;
- present residence, whether owned or rented, etc.;
- past addresses and how long at each;
- present employment status, name of employer, position held, etc.;
- employment history;
- marital status, length of marriage, etc.;
- immediate family—names, ages, sex, etc.;
- other relatives;
- friends and other roots in the community;
- education;
- special training;
- clubs, social and religious affiliations, etc.;
- criminal record;
- psychiatric history;
- other outstanding charges;
- summary of financial position; and
- health problems.

The decision to ask clients for their version of events at the initial interview is a tactical and personal decision based on counsel's comfort level, which must be assessed individually to determine how much information counsel wishes to obtain at this stage. Some lawyers will obtain a detailed account of the client's version of events at the initial interview to assist them in obtaining evidence and in developing a strategy during the initial stages of the retainer.

At this first client interview, counsel will at least want to determine whether there are any witnesses that should be contacted.

In historical allegations of a sexual offence, it often makes sense to wait for disclosure before asking the client for their version of events. The client may not know exactly which incidents the victim is describing or the specific time frame of the allegations, making it difficult to know what to focus on during the interview. There is likely no downside to waiting for initial disclosure before proceeding with an interview in the case of historical allegations because any evidence that could be lost if not immediately pursued is likely already lost given the dated nature of the complaint.

C. Client Interview Participants

It is unwise for the client to have family or friends present during client interviews where confidential matters are discussed. Conversations had with the client in the presence of third parties are not protected by solicitor–client privilege; rather, they render the parties to the discussions potential witnesses against the client at trial. It is recommended to always speak to the client about confidential subjects in private. Counsel should not rely on family members to act as translators. If translation assistance is needed, retain a professional because a translator will be covered by solicitor–client privilege.

D. Things to Accomplish Before the Client Leaves the Initial Meeting

Prior to the conclusion of the initial meeting, counsel should ensure that the following is accomplished:

- Prepare a retainer agreement that outlines the nature of the legal representation of the client. Explain any limits, such as if counsel is only representing the client for the purposes of a bail hearing, pre-trial appearances, preliminary hearing, or trial.
- Prepare a designation of counsel if counsel intends to appear in court on behalf of the client.
- Make copies of all disclosure the client received from the police.
- Review the conditions of release and make sure the client understands what each condition means. Explain to the client that breaching the conditions may lead to a criminal charge, conviction, and term of imprisonment.
- Canvass the client on whether they possess any correspondence or communications with or from the victim. A copy of the client's personal calendar or diary during the relevant time period can also assist in constructing a timeline of events. Travel documents or employment records may also be useful. Photographs or videos may also be of assistance to demonstrate the nature of the past relationship.

- Ask what the client knows about the victim's background and mental health history. If the victim is someone close to the client, they may even be in possession of documentation about the victim's mental health history.
- Ask the client to sign a release form authorizing access to the client's medical records, since these may also be useful.
- Canvass the client on whether there is a need to hire a private investigator to take witness statements, locate witnesses, or investigate aspects of the case that may assist with the client's defence.

E. Client Education

Counsel should provide the client with a general outline of the elements of the offence, potential issues, and available defences during the initial interview. It is also important to explain the process and court procedure. The disclosure process and the Crown's decision to proceed summarily or by indictment must be explained. Counsel should also explain preliminary inquiries and trials to the client, as well as the possible modes of election for trial. You may wish to discuss the potential for pre-trial applications, including those brought pursuant to sections 276 and 278 of the *Criminal Code*, if relevant to the allegations.

It is important to explain to clients that they should not discuss their charges, the allegations, or the facts behind the allegations with anyone but their counsel. This includes speaking to therapists or doctors. It is crucial for clients to understand that their words can be used against them in court.

Another reason why it is important for clients not to discuss their case is that it can raise allegations of witness collusion if a client happens to discuss the case with another witness.

F. Preserving Evidence

In sexual offence cases involving recent allegations, there may be evidence not obtained by the police that counsel can preserve, and that could be essential to a successful defence.

1. Video Surveillance

Counsel will need to discuss the circumstances of the client's contact with the victim to determine whether locating and securing surveillance footage might assist in the client's defence. In some instances, there may be video surveillance that proves to be inconsistent with the victim's version of events, hurting the victim's credibility or reliability. Most commercial surveillance is erased every 7 to 30 days if no request for preservation is made.

Counsel should contact the owners of the surveillance that they wish to secure and make arrangements to obtain these videos. It is also prudent to prepare affidavits

to address issues of authenticity and continuity when such disclosure is obtained. In many cases, the owners of the surveillance will be cooperative and provide counsel with the surveillance to avoid the inconvenience of attending court under subpoena at a later date. It is a tactical advantage to obtain this disclosure without the Crown's knowledge. If counsel has to subpoena the surveillance footage, the Crown prosecutor will know of its existence and likely be provided a copy of the evidence. Consideration should be given to who will secure and maintain continuity over the seized surveillance on behalf of the defence. Counsel should refrain from participating in this process to avoid the potential of becoming a witness, which may force them to be removed as counsel at trial.

2. Voicemails, Texts, Emails, Social Media, Etc.

Of particular importance to many sexual offence cases is the preservation of voicemails, texts, emails, call records, and social media conversations between the client and the victim or the victim and others discussing the events that gave rise to the criminal allegations. This evidence may be in the possession of the client or other witnesses. Counsel should stress to the client the importance of preserving this evidence and should immediately obtain copies of the evidence from the client to preserve for trial. Many clients will be upset by the allegation of a sexual offence and, without thinking of their trial strategy, will instinctively erase all past contact with the victim. It is possible to recover this data with a forensic examination of the electronic device, though some or all the evidence may be lost once deleted by the user.

The victim or other potential witnesses may have discussed the case or the events surrounding the allegations on social media. An Internet search of a witness's name can yield a wealth of potentially relevant information in the public domain that can be used as evidence at trial. Since many platforms encourage integration with other platforms—for example, X (formerly known as "Twitter") and Instagram feeds are often synced with a Facebook account—finding an open profile on one platform can lead to the discovery of content on others.

Where the witness's social media accounts are private, counsel may be able to obtain access if the client has a friend with access to the witness's profile. Counsel should not impersonate someone or create a fake account to obtain access to someone's private social media profile because that is contrary to counsel's ethical obligations. Nor should counsel encourage anyone else to engage in such conduct.

Unauthorized access to social media does not automatically render the evidence inadmissible at trial. In at least two cases in Canada, courts have admitted Facebook messages accessed by a spouse without permission from the account holder.[29] Furthermore, section 700.1 of the *Criminal Code* permits counsel to subpoena a person to attend court and bring with them anything they have in their

29 *S(MN) v S(JT)*, 2009 BCSC 661; *Rossi v Spanier*, 2014 ONSC 4984.

possession that is related to the subject of the proceedings, including cellphone and social media records.

Counsel will have to advise the client that certain items may be subject to the private records regime outlined in section 278.92 of the *Criminal Code*, depending on whether the items are considered "records" pursuant to section 278.1. Given that these legislative changes are still in their infancy, counsel may want to advise their clients about the potential for constitutional challenges to these provisions. See Chapter 12, Cross-Examination on Private Records: Section 278.92.

Social media posts that are not in the client's possession, and not obtainable by the client, may be subpoenaed from the complainant or other record holder. The Crown or individual to whom the account relates may, however, assert a reasonable expectation of privacy over the social media posts, claiming that the posts are "private records" and force the defence to comply with section 278.3 of the *Criminal Code*. In response, counsel may be able to make strong arguments about the expectation of privacy being diminished due to the activity and the account's privacy settings. See Chapter 11, Production of Third-Party Records: Section 278.3.

G. Obtaining Disclosure

Immediately after being retained, counsel should request full disclosure from the Crown Attorney's office.

A disclosure request may include any or all of the following:

- all occurrence, supplementary, arrest, and other reports or electronically stored information prepared or maintained by any police agency;
- any 911 recordings or police communications relevant to the charges;
- all police notebooks, rough notes, or other written, documentary, or electronically stored information generated by or on behalf of the Crown;
- all signed or unsigned writings of any person spoken to by, or on behalf of, the Crown, including all drafts thereof;
- all digital audio recordings and/or video recordings and transcriptions thereof, including any video or audio recording that captures the arrest, detention, booking, or questioning of the client, and any video or audio interviews of other potential witnesses;
- any surveillance video seized from the scene of the alleged crime;
- all Centre of Forensic Sciences communications, submission forms, records, or reports, or the same generated by other forensics institutions;
- all hospital/medical communications, records, or reports created during the investigation;[30]

30 For sexual offences, defence counsel may wish to specifically request forensic evidence relevant to the charge, such as the results of a rape kit or other physical examination records, if known.

- all photographic materials and all diagrams, charts, or drawings;
- all electronic or documentary information of any kind in the possession of the Crown or police, with respect to any prior police contacts of any civilian investigated or spoken to during this investigation, whether or not it is the intention of the Crown to call any such person as a witness; and
- all information, electronic or otherwise, including records or documents of any kind, in the possession of the police or any police agency, with respect to the investigation by any police or civilian agency, of any police officer involved in this investigation, whether or not it is the intention of the Crown to call any such police officer as a witness.

A police officer's notes should be legible and fully disclose any anticipated evidence to be provided by the officer in question. If the notes are illegible or incomplete, a transcription of the notes or a supplementary statement of the officer's anticipated evidence should be requested. Defence counsel may also want to alert the Crown that if the Crown has possession of any information that may be of interest to the defence, but has chosen not to disclose it, the Crown should advise the defence of its existence and of the Crown's reasons for refusing to disclose. This allows an application to be made to the trial judge, if appropriate, for a determination as to the reasonableness of the Crown's decision not to disclose the information.

In all cases, the Crown must disclose to the defence all relevant information in its possession or control,[31] unless the information in question is clearly irrelevant, protected by a recognized form of privilege, or protected by statute. Relevant information means any information that could assist the prosecution or defence,[32] whether it is inculpatory or exculpatory.[33]

It is important to consider the appropriate avenue to request and access disclosure, since there are at least four applicable disclosure regimes in cases involving the prosecution of sexual offences: the *Stinchcombe* regime,[34] for the fruits of the investigation; the *Mills* regime,[35] for third-party "records" falling within the definition of section 278.1 in sexual offence and related prosecutions; the *McNeil* regime,[36] which extends the first-party (*Stinchcombe*) disclosure regime for police disciplinary records

31 *R v Chaplin*, [1995] 1 SCR 727, 96 CCC (3d) 225.

32 *R v Stinchcombe*, [1991] 3 SCR 326, 68 CCC (3d) 1; *R v O'Connor*, [1995] 4 SCR 411, 103 CCC (3d) 1.

33 *R v Stinchcombe*, *ibid*; *R v O'Connor*, *ibid* at para 29. See also *McTaggart v Ontario*, [2000] OTC 855 (Sup Ct J), additional reasons at 2001 CarswellOnt 1503 (Sup Ct J), where exculpatory photo identification was not disclosed, resulting in a series of prosecutions for armed robbery, ultimately resulting in acquittal and withdrawals.

34 *R v Stinchcombe*, *supra* note 32.

35 *R v Mills*, [1999] 3 SCR 668, 139 CCC (3d) 321.

36 *R v McNeil*, 2009 SCC 3.

and other relevant records that the Crown must try to retrieve from other government departments once the defence alerts the Crown to their existence; and the *Quesnelle* regime,[37] for police occurrence reports in sexual offence and related prosecutions.[38]

Counsel should determine early on which disclosure regime applies to which items of disclosure being sought in order to comply with notice and other procedural requirements. Furthermore, the decision to bring various disclosure applications may also inform the client's decision to proceed directly to a provincial court trial or to have a preliminary inquiry where the Crown proceeds by indictment. Early requests for disclosure and diligent follow-up with the prosecution will assist defence counsel in their preparation and potentially create a more fulsome record for future applications.

If a disclosure request is denied, counsel should submit an application to a Superior Court judge pursuant to section 7 of the Charter or to the trial judge for a review of the Crown's decision on the basis of *Stinchcombe*.

H. Witness Interviews

Early attempts should be made to identify, locate, and contact prospective defence witnesses who may be in a position to provide information about the accused or the offence. Counsel should consider whether a third party, such as another lawyer or a private investigator, should conduct the interview in the event that the Crown calls these witnesses for its case in chief. Using someone else to conduct the interview will ensure that counsel avoids the potential of becoming a witness in the case. It is not unheard of for counsel to meet with a witness only to learn later that the witness has changed their evidence in court. Using a third party to conduct the witness interview eliminates the possibility that counsel might have to withdraw from the case in order to testify on behalf of the defence about the statement change and the circumstances surrounding the taking of the initial statement. Counsel should also consider whether witness statements should be sworn by a commissioner of oaths and recorded to ensure accuracy and honesty.

I. Psychiatric Assessments

If a client consents to a psychiatric assessment, a forensic psychiatrist or other similar expert should be retained directly by counsel and not through the client. By proceeding this way, privilege can attach to the assessment and its results, and the Crown will be barred from cross-examining the expert on certain points.[39] Counsel should meet with any defence experts well in advance to discuss the scope of the assessment and other potentially relevant issues that counsel may want to explore. See Chapter 9, Expert Evidence, for an outline on what a defence expert can assist in proving.

37 *R v Quesnelle*, 2014 SCC 46.
38 *R v Gebrekirstos*, 2013 ONCJ 265 at para 6.
39 *Smith v Jones*, [1999] 1 SCR 455, 132 CCC (3d) 225.

J. Mode of Trial and Preliminary Inquiry

When the Crown elects to proceed by indictment, counsel should discuss with the client the pros and cons of a trial by judge alone and a trial by jury. Deciding the mode of trial is clearly the client's choice. Counsel must be prepared, however, to give detailed advice and guidance to an accused about their choice of election with respect to mode of trial. Most clients will choose the mode of trial based solely on counsel's advice and preference. This advice can only be given after a thorough review of the disclosure. Election advice requires a multifaceted and contextual analysis of the case in which counsel must consider the specific facts of the case, the reputations of potential judges in the jurisdiction, racial issues, socio-economic issues, timing, and whether the client will likely testify.[40]

Clients who want a trial to be completed as quickly as possible may lean toward a trial in provincial court since such trials have an 18-month presumptive ceiling for delay pursuant to section 11(b) of the Charter. The unavailability of a preliminary inquiry for many sexual offences makes a judge-alone trial in the Superior Court of Justice less appealing when a client is concerned about delay.[41]

If the client wishes to elect judge and jury in the Superior Court, counsel will also have to consider the likelihood that the Crown attorney will consent to a re-election to judge alone when providing advice to their client on election. It is usually helpful to get input from other defence lawyer colleagues (in the jurisdiction) before finalizing any advice to the client on election of mode of trial.

Counsel will have to determine whether a preliminary inquiry is available as a result of *Criminal Code* amendments that came into force on September 19, 2019.

40 In *R v LL*, 2023 ONCA 52, the Court found that delay was not attributable to the defence where the defence was waiting on disclosure of occurrence reports related to the interactions between the complainant and accused leading up to the complainant's allegation of sexual assault as well as the accused's statement related to those occurrences.

41 In *R v Bulhosen*, *supra* note 15, the Court considered whether the 18-month presumptive ceiling should apply for Crown-preferred indictments. The Court held that the 30-month ceiling still applied, largely on the basis that the Supreme Court in *R v Jordan*, *supra* note 15, did not speak to a one-step or two-step proceeding or suggest that different rules applied where an indictment is preferred. The distinction in *Jordan* was between trial in the Provincial Court versus in the Superior Court. The Court in *Bulhosen* also noted that in *R v Cody*, 2017 SCC 31, the Supreme Court did not adopt the submission of the intervener, the Criminal Lawyers Association, that there should be an exception to the 30-month ceiling when cases have proceeded in the Superior Court without a preliminary inquiry. This suggests that if a preliminary inquiry is not available for *any* reason, not just because the Crown directed an indictment, the 30-month ceiling would apply. However, the Court's analysis fails to recognize that in *Jordan*, the majority of the Supreme Court held that the 30-month ceiling would also apply to cases going to trial in the provincial court after a preliminary inquiry (at para 41). This reasoning suggests that the key factor in determining the appropriate ceiling (18 months or 30 months) turns on whether a preliminary inquiry was had or was available rather than at which level of court the trial is conducted. For now, this issue remains unresolved.

Most sexual offences prosecuted by indictment no longer allow for a preliminary inquiry. Sexual assault under section 271 where the complainant is 16 years of age or older no longer qualifies for a preliminary inquiry. The Court of Appeal for Ontario has held that pursuant to section 536(4) of the *Criminal Code*, only offences punishable by 14 years or more of imprisonment at the time the offence was alleged to have been committed allow for preliminary inquiries to be requested.[42] However, the Court of Appeal of Quebec drew a different conclusion: the right to a preliminary inquiry depends on its availability on the date of the offence, not the date the charge was laid or the date the election was made.[43] On June 1, 2023, the Supreme Court granted leave to appeal the Court of Appeal of Quebec's decision and thus this division between provincial appellate courts will likely soon be resolved.[44] Counsel must look at each offence charged in the information and check the *Criminal Code* for that relevant time period to ascertain the punishments for each offence in order to determine available elections as to mode of trial and the availability of a preliminary inquiry.

Where a defendant is accused of sexual assault against an "intimate partner," as defined in section 2 of the *Criminal Code*, and has a prior indictable conviction against an intimate partner (s 718.3(8)), the maximum sentence increases from 10 years to 14 years. In such circumstances, this change in jeopardy ought to trigger the availability of a preliminary hearing. Counsel should, however, be prepared to distinguish the reasoning in *R v Windebank*.[45]

Most offences prosecuted by indictment that involve minors as complainants still allow for preliminary inquiries, such as with sexual assault if the complainant is under the age of 16 years (s 271), sexual interference (s 151), invitation to sexual touching (s 152), and sexual exploitation (s 153). Defence counsel ought to carefully consider the usefulness of a preliminary inquiry when the offence involves a very young complainant. Impeachments with a preliminary inquiry transcript, especially with regard to peripheral matters such as time and place, tend to be underwhelming and difficult to properly conduct with young children. Counsel may opt to completely forego

42 See *R v SS*, 2021 ONCA 479 at paras 15-16, leave to appeal dismissed *SS v Her Majesty the Queen*, 2021 CanLII 129760 (SCC).

43 *Archambault c R*, 2022 QCCA 1170 at paras 37-39.

44 *His Majesty the King v Agénor Archambault*, 2023 CanLII 46739 (SCC).

45 2021 ONCA 157. In *R v Windebank*, the Court considered whether an accused facing possible indefinite detention where the Crown is seeking a dangerous offender designation would be entitled to a preliminary hearing where the offence charged was not itself eligible for a preliminary hearing. The Court held that the accused was not charged with an offence punishable by 14 years or more of punishment. Dangerous offender proceedings are separate and apart from proceedings leading to a conviction. The issue of s 718.3(8) was raised by the interveners in *Windebank*. The Court refused to rule on the issue as it was outside the scope of the appeal. As such, counsel are still free to argue that the section related to intimate partner violence increasing the penalty to 14 years triggers the availability of a preliminary hearing.

the preliminary inquiry or seek to examine at the preliminary inquiry only secondary witnesses—such as parents—that may impact the credibility of a small child.

Counsel should be mindful of the timing of the alleged offences and whether the offence triggers a preliminary hearing. Prior to July 17, 2015, the maximum penalty for sexual assault of a person under the age of 16 years (s 271) and sexual interference (s 151) was ten years' imprisonment. Appeal courts across the country have come to different conclusions on eligibility for a preliminary hearing for persons charged with one of these two offences alleged to have occurred prior to July 17, 2015 and where the accused was charged after September 19, 2019. In Ontario, the Court of Appeal has ruled that there is no entitlement to a preliminary hearing.[46] In Quebec, their Court of Appeal has ruled that the offences are eligible for a preliminary hearing.[47] The Supreme Court of Canada denied leave for the Ontario case but has now granted leave for the Quebec case.

Counsel should be mindful of the newly amended powers of a justice in sections 537(1)(i) and 537(1.01) that codify the authority of inquiry justices to regulate and control the preliminary inquiry in an expeditious fashion. Counsel will need to make tactical decisions about how much or how little of their potential defence to disclose in order to satisfy the preliminary inquiry justice that the witnesses being called and the lines of questioning are justified and relevant. The decision to request or not request a preliminary inquiry is unique in each case and will present its own issues for consideration by defence counsel.

If a preliminary hearing is available, counsel will need to consider whether a preliminary inquiry would be helpful, whether to contest committal for trial at the preliminary inquiry hearing, if held, and whether the client will, or should, testify at trial.

Unless identity is in issue, most preliminary inquiries for sexual offences will result in an order for committal at trial, given that the preliminary inquiry judge cannot assess the credibility of a victim asserting that they were sexually assaulted. The preliminary inquiry may serve other functions beyond deciding the issue of committal, such as providing counsel with an opportunity to test the credibility or reliability of Crown witnesses in advance of trial. The hearing can also be used to lay the evidentiary foundation for further disclosure requests or applications for the production of third-party records, including therapeutic records. This strategy is discussed in greater detail in Chapter 6, Preparing for the Preliminary Inquiry.

46 In *R v SS*, *supra* note 42 (leave to appeal refused, *SS v Her Majesty the Queen*, *supra* note 42), the Court was asked to consider whether accused persons charged with sexual assault of a person under 16 years of age or sexual interference alleged to have occurred prior to July 17, 2015 are eligible for a preliminary hearing. The Court held that because the maximum penalty faced by the accused was only ten years, the accused was not entitled to a preliminary hearing.

47 In *Archambault c R*, *supra* note 43 (leave to appeal granted, *His Majesty the King v Agénor Archambault*, *supra* note 44), the Court held that that entitlement to a preliminary hearing is established by the state of the law at the time of the alleged offence, not at the time that the accused requests the preliminary hearing.