

Table of Contents

INTRODUCTION	1
Chapter 1 CROWN PREPARATION	
1.1 ASSIGNMENT AND SCHEDULING.....	3
1.1.1 Prompt Assignment of Sexual Assault Cases	3
1.1.2 Scheduling of Court Dates	3
1.2 COMPREHENSIVE REVIEW OF FILE DOCUMENTATION OR MATERIALS	4
1.2.1 Documentation and Evidence	4
(a) Crown Brief; Police Brief	4
(b) Witness Statements	4
(c) Police Notes, Occurrence Reports, etc.	5
(d) Exhibits	5
(e) Forensic Evidence	5
(f) Subpoena	5
(g) Applications	5
(h) Victim Impact Statement	6
1.2.2 Other Considerations	6
(a) Non-Disclosure of Evidence	6
(b) Disclosure of Sensitive Materials	6
(c) Resources	6
1.3 APPROPRIATE CHARGE AND WORDING	6
1.4 REALISTIC PROSPECT OF CONVICTION	7
1.5 DETENTION; JUDICIAL INTERIM RELEASE	7
1.5.1 Detention Orders	7
1.5.2 Conditions of Release	8
1.6 TRIAL ISSUES	9
1.6.1 Complainants with Special Needs	9
1.6.2 Testimonial Aids	9
(a) Support Person or Support Dog	9
(b) Screens and Closed Circuit Television	9

TABLE OF CONTENTS

(c) Video-Recorded Evidence of Children	10
(d) Interpreters	10
1.6.3 Cross-examination by an Unrepresented Accused	10
1.6.4 Expert Evidence	10
1.6.5 Recantation	11
1.6.6 Production of “Third Party Records”	11
1.6.7 Evidence of the Complainant’s Sexual Activity	11
1.7 WITNESS INTERVIEWS: INTERVIEW THE COMPLAINANT	12
1.7.1 Timing and Frequency of Interviews	12
1.7.2 Presence of Third Parties during Interviews	12
1.7.3 Informing the Complainant	13
1.7.4 Complainant Interview Checklists	14
(a) First Interview Checklist	14
(b) Second Interview Checklist	14

Chapter 2
DEFENCE PREPARATION

2.1 INITIAL INTERVIEW OF THE ACCUSED	17
2.1.1 General	17
2.1.2 Determine the Offence(s)	17
2.1.3 Participants	18
2.1.4 Information to Obtain	18
2.1.5 Documents	20
2.1.6 Client Education	21
2.2 OBTAINING DISCLOSURE	22
2.2.1 Sources of Disclosure	22
2.2.2 Motions for Disclosure	23
2.3 WITNESS INTERVIEWS	23
2.4 ORDERING PSYCHIATRIC ASSESSMENTS	24
2.5 DEFENCE EXPERTS	25
2.6 PRELIMINARY INQUIRY	26
2.7 PRE-TRIAL MOTIONS	26
2.8 PREPARATION OF THE ACCUSED AND DEFENCE	26
2.9 PLEADING GUILTY	27

TABLE OF CONTENTS

Chapter 3
ELEMENTS OF THE OFFENCES

3.1 DETERMINING THE OFFENCE(S)	29
3.1.1 Elements of Sexual Assault	29
(a) Sexual Assault Level 1: S. 271	29
(i) What Constitutes Sexual Assault?	29
(ii) Must the Crown Proceed by Indictment?	32
(b) Sexual Assault Level 2: Sexual Assaults Involving Weapons, Threats, Bodily Harm: S. 272	32
(i) What Constitutes Sexual Assault Level 2?	32
(ii) Must the Crown Proceed by Indictment?	33
(c) Sexual Assault Level 3: Aggravated Sexual Assault: S. 273	33
(i) What Constitutes Sexual Assault Level 3?	33
(ii) Must the Crown Proceed by Indictment?	34
3.1.2 Elements of Sexual Interference: S. 151	34
(a) What Constitutes Sexual Interference?	34
(b) Must the Crown Proceed by Indictment?	35
3.1.3 Elements of Invitation to Sexual Touching: S. 152	35
(a) What Constitutes Invitation to Sexual Touching?	35
(b) Must the Crown Proceed by Indictment?	37
3.1.4 Elements of Sexual Exploitation: S. 153	37
(a) What Constitutes Sexual Exploitation?	37
(b) Must the Crown Proceed by Indictment?	39
3.1.5 Elements of Sexual Exploitation of Person with Disability: S. 153.1	39
(a) What Constitutes the Offence?	39
(b) Must the Crown Proceed by Indictment?	40
3.1.6 Elements of Child Luring: S. 172.1	40
(a) What Constitutes Child Luring?	40
(b) Must the Crown Proceed by Indictment?	42
3.1.7 Elements of Indecent Act: S. 173(1)	42
(a) What Constitutes an Indecent Act?	42
(b) Must the Crown Proceed by Indictment?	43
3.1.8 Elements of Incest: S. 155	43
(a) What Constitutes Incest?	43

TABLE OF CONTENTS

(b) Must the Crown Proceed by Indictment? 44
3.2 RELEVANT JURY INSTRUCTIONS 44

Chapter 4
HUMAN TRAFFICKING

4.1 INTERNATIONAL RESPONSE TO HUMAN TRAFFICKING 47
4.2 THE EXPLOITATION OF OTHERS 47
4.3 FOUR SPECIFIC *CRIMINAL CODE* OFFENCES 48
 4.3.1 Trafficking in Persons: Offences Under the *Criminal Code* . . . 48
 (a) Trafficking in Adult Persons: S. 279.01 48
 (b) Trafficking of a Person Under the Age of 18 Years:
 S. 279.011 49
 (c) Receiving a Financial or Other Material Benefit — Adult
 Victim: S. 279.02(1) 50
 (d) Withholding or Destroying Documents: S. 279.03 51
4.4 MEANING OF “EXPLOITATION” FOR THE PURPOSES OF
SS. 279.01(1), 279.011(1) 51
 4.4.1 The Relationship Between S. 279.04 and SS. 279.01, 279.011 . . . 52
 4.4.2 Acts Committed for the Purpose of Exploitation or Facilitation . . 53
 4.4.3 The Essential Elements for the Offence of Human Trafficking . . 53
 4.4.4 The Exercise of Control, Direction or Influence 54
4.5 SEXUAL OFFENCES AGAINST CHILDREN COMMITTED
OUTSIDE CANADA: S. 7(4.1) 55
4.6 SPECIFIC OFFENCE UNDER THE *IMMIGRATION AND REFUGEE*
PROTECTION ACT 56

Chapter 5
HISTORICAL SEXUAL ASSAULT PROSECUTIONS

5.1 BACKGROUND 59
5.2 RELEVANT STATUTORY AMENDMENTS TO THE *CRIMINAL*
CODE 59
 5.2.1 1983 *Criminal Code* Amendments 59
 5.2.2 Historic Sexual Offences 60
 (a) Rape 60
 (b) Attempted Rape 61
 (c) Indecent Assault on Female 61

TABLE OF CONTENTS

(d) Incest	62
(e) Indecent Assault on Male	63
(f) Gross Indecency	64
(g) Buggery or Bestiality	65
5.2.3 Constitutional Challenges	65
5.2.4 1988 <i>Criminal Code</i> Amendments	65
5.3 RETROSPECTIVE APPLICATION OF PROCEDURAL AND EVIDENTIARY RULES	67
5.3.1 Assessment of Credibility and Reliability	67
(a) Focus on the Disclosure Process	68
(b) Adults Testifying as to Childhood Events	68
(c) Prior Consistent Statements	69
(d) Recent Fabrication	69
(e) Recent Complaint	70
(f) Narrative	70
5.4 DISCLOSURE ISSUES	71
5.4.1 Pre-Charge Delay	71
5.4.2 Lost or Destroyed Evidence; Absence of Witnesses	72
5.4.3 The Applicability of S. 278 of the <i>Criminal Code</i>	73

Chapter 6

CONSENT AND MISTAKEN BELIEF IN CONSENT DEFENCES

6.1 CONSENT	75
6.1.1 What is Consent?	75
6.1.2 What is Excluded from the Definition of Consent?	76
6.1.3 Offences for Which Consent is Not a Defence	78
6.1.4 Practical Considerations	80
6.2 MISTAKEN BELIEF IN CONSENT	80
6.2.1 When is the Defence Available?	81
6.2.2 Practical Considerations	83
6.3 MISTAKEN BELIEF IN AGE	83
6.3.1 When is the Defence Available?	84
(a) Sexual Interference; Invitation to Sexual Touching; Sexual Assault	84

TABLE OF CONTENTS

(b) Sexual Exploitation and Other Sexual Offences against
Children under 18 84

(c) Luring and Related Offences 84

(d) “All Reasonable Steps” and “Reasonable Steps” 85

6.3.2 Practical Considerations 86

6.4 RELEVANT JURY INSTRUCTIONS 86

Chapter 7
SEXUAL HISTORY OF THE COMPLAINANT:
THE S. 276 APPLICATION

7.1 BASIS FOR APPLICATION TO ADMIT EVIDENCE OF OTHER
SEXUAL ACTIVITY 87

7.1.1 General Exclusionary Rule 87

7.1.2 When Will Evidence of Other Sexual Activity be Excluded
Under S. 276(1)? 87

7.1.3 If the Evidence Would be Barred Under S. 276(1), Can the
Exception in S. 276(2) be Invoked? 88

7.1.4 Evidence Admissible Under the S. 276(2) Exception 89

7.1.5 Evidence Not Admissible Under the S. 276(2) Exception 90

7.2 APPLICATION PROCEDURE 92

7.2.1 Step I: The Application for a Hearing: S. 276.1 92

7.2.2 Step II: The Hearing: S. 276.2 93

7.2.3 Appeal 95

7.2.4 Evidence Tendered in Relation to Complainant’s Credibility 95

7.3 RELEVANT JURY INSTRUCTIONS 95

Chapter 8
MOTIONS FOR PRODUCTION

8.1 GENERAL 97

8.2 STATUTORY REGIME 97

8.2.1 Two-Stage Procedure 97

(a) General 97

(b) First Stage 98

(c) Second Stage 99

8.2.2 Procedural Notes 100

(a) Defence 100

TABLE OF CONTENTS

(b) Trial Judge	101
(c) Complainant/Witness or Record Holder	102
8.3 COMMON LAW REGIME	102
8.3.1 General	102
8.3.2 Two-Stage Procedure	102
8.4 POLICE DISCIPLINARY RECORDS	103
8.5 OTHER RECORDS	104
8.6 PRODUCTION DOES NOT EQUATE TO ADMISSIBILITY	104

Chapter 9
ISSUES ARISING AT TRIAL

9.1 PUBLICATION BANS	105
9.1.1 <i>Criminal Code</i> Publication Bans	105
(a) Available upon Defence Request	105
(b) Available upon Crown Request	106
(c) To Protect the Complainant and Others	106
9.1.2 Publication Allowed	108
9.1.3 Publication Ban of Accused's Name	108
9.1.4 Young Offenders	108
9.1.5 Common Law Jurisdiction	109
9.2 AVOIDING IMPERMISSIBLE REASONING BASED ON MYTHS AND STEREOTYPES	110
9.3 CREDIBILITY AND THE BURDEN OF PROOF	110
9.3.1 Proper Instruction	111
9.3.2 "No Corroboration" Requirement	112
9.3.3 Effect of Error	113
9.4 RELEVANT JURY INSTRUCTIONS	113

Chapter 10
EVIDENCE OF CHILDREN AND PERSONS WITH DISABILITIES

10.1 COMPETENCE (SS. 16-16.1 <i>CANADA EVIDENCE ACT</i>)	115
10.1.1 Person Under 14	115
10.1.2 Witness 14 or Older Whose Mental Capacity is Challenged	116
10.1.3 Procedure on the Inquiry	117

TABLE OF CONTENTS

10.2 USE OF A SCREEN OR CLOSED CIRCUIT TELEVISION
(S. 486.2(1) *CRIMINAL CODE*) 118

 10.2.1 Criteria for Order 119

 10.2.2 Procedure on Discretionary Application 120

 (a) Judge’s Role 120

 (b) Evidentiary Basis 121

 10.2.3 Jury Instruction 121

10.3 SUPPORT PERSON FOR WITNESS (S. 486.1 *CRIMINAL CODE*) . 122

10.4 VIDEO-RECORDED EVIDENCE (SS. 715.1-715.2 *CRIMINAL
CODE*) 123

 10.4.1 Criteria for Order 123

 10.4.2 Procedure 125

 10.4.3 Jury Instruction 127

10.5 ACCUSED NOT TO PERSONNALLY CROSS-EXAMINE WITNESS
(S. 486.3 *CRIMINAL CODE*) 127

10.6 RELEVANT JURY INSTRUCTIONS 128

**Chapter 11
CHILD WITNESSES**

11.1 ADVICE FOR COUNSEL 129

 11.1.1 Preparing a Child Witness to Testify in Court 129

 (a) Before the Meetings/Interviews 129

 (b) During the Meetings/Interviews 129

 (c) During and After the Trial 130

 11.1.2 Questioning a Child Witness 131

 (a) General 131

 (b) Direct Examination 131

 (c) Cross-Examination 131

11.2 USE OF HEARSAY EVIDENCE 132

 11.2.1 Criteria for Use 132

 (a) Out-of-Court Statement, Child Not Called 132

 (b) Out-of-Court Statement, Child Called as Witness 134

 (c) *Voir Dire* 134

 11.2.2 Jury Instruction 134

11.3 PRIOR INCONSISTENT STATEMENT FOR ITS TRUTH 135

TABLE OF CONTENTS

11.3.1 Criteria for Use	135
11.3.2 Procedure	136
11.3.3 Jury Instruction	137
11.4 ASSESSMENT OF EVIDENCE OF CHILDREN	137
11.5 EXPERT TESTIMONY	139
11.6 RELEVANT JURY INSTRUCTIONS	139

**Chapter 12
EXPERT WITNESSES**

12.1 WHEN CAN EXPERT EVIDENCE BE CALLED?	141
12.2 DEALING WITH THE CROWN'S EXPERT WITNESS	143
12.3 MANNER OF GIVING EXPERT EVIDENCE	144
12.4 COMMON TOPICS OF CROWN EXPERT OPINION EVIDENCE	145
12.4.1 Complainant's Capacity to Consent to Sexual Activity	145
12.4.2 Behavioural Characteristics of Abused Children	146
12.4.3 Delayed Disclosure	146
12.4.4 Child Sexual Abuse Accommodation Syndrome	147
12.4.5 Expert Evidence on the Ultimate Issue	148
12.5 USE OF EXPERT EVIDENCE BY THE DEFENCE	148
12.6 DEALING WITH THE DEFENCE EXPERT WITNESS	148
12.7 COMMON TOPICS OF DEFENCE EXPERT EVIDENCE	150
12.7.1 Aberrant Personality Profile	150
12.7.2 False Memory Syndrome	150
12.8 RELEVANT JURY INSTRUCTIONS	153

**Chapter 13
SENTENCING**

13.1 PREPARATION FOR SENTENCING	155
13.1.1 Crown Preparation	155
13.1.2 Defence Preparation	156
13.2 THE LAW	157
13.3 CONSTITUTIONALITY OF MANDATORY MINIMUM SENTENCES	158
13.4 CONDITIONAL SENTENCE OF IMPRISONMENT	160

TABLE OF CONTENTS

13.4.1 Availability	160
(a) Judge’s Role	161
(b) Conditions	161
13.4.2 Procedural Considerations	161
13.5 SPECIAL CONSIDERATIONS	162
13.5.1 Parole Eligibility	162
13.5.2 Dangerous Offenders	162
13.5.3 Long-Term Offenders	163
13.5.4 DNA Samples for Data Banking	163
(a) Mandatory Orders	163
(b) Discretionary Orders	164
(c) Retrospective Offenders	164
(d) Retroactive Offenders	165
(e) Practical Considerations	165
13.5.5 Sex Offender Information Registry (<i>SOIRA</i> Orders)	165
(a) National Sex Offender Registry: Amendments to the <i>Criminal Code</i>	165
(b) DNA Order is <i>Mandatory</i> Whenever <i>SOIRA</i> is Made	172
(c) Failure to Make a Mandatory <i>SOIRA</i> Order or DNA Order	174
(d) Resolution Discussions and Agreements	174
(e) Restrospectivity or Prospectivity of <i>SOIRA</i> Order	174
(f) Absolute and Conditional Discharges	174
(g) Failure to Comply with <i>SOIRA</i> Order	175
(h) Right of Appeal	175
13.5.6 <i>Charter</i> S. 11(i) Test for Punishment	176
13.5.7 Section 161 Orders	176
13.5.8 Sexual Offender Risk Assessments	177
13.6 POST-SENTENCE REPRESENTATION	178

APPENDICES

APPENDIX A: Current Legislation	179
<i>Criminal Code</i> , R.S.C. 1985, c. C-46 (excerpts)	179
<i>Canada Evidence Act</i> , R.S.C. 1985, c. C-5 (excerpts)	251
<i>Youth Criminal Justice Act</i> , S.C. 2002, c. 1 (excerpts)	253

TABLE OF CONTENTS

APPENDIX B: Previous Legislation	257
Offence Provisions	257
Procedural and Evidentiary Provisions	271
APPENDIX C: Offences by Date Chart	285
APPENDIX D: Relevant Ontario Specimen Jury Instructions	291
Final 16 Testimony of Accused (The <i>W. (D.)</i> Instruction)	291
Final 19-A Expert Opinion Evidence (General Instruction)	294
Final 19-B Expert Opinion Evidence (Conflict in Opinions)	299
Final 25-C Prior Inconsistent Statements of Non-Accused Witness as Substantive Evidence (<i>R. v. B. (K.G.) Instruction</i>)	300
Final 29-A Evidence of Children Under Fourteen (General Instructions)	303
Final 29-B Evidence of Children (Obstructed View or Sequestered Testimony) (<i>Code</i> , S. 486(2.1))	306
Final 29-C Evidence of Children (Videotaped Complaint) (<i>Code</i> , S. 715.1)	307
Final 29-D Evidence of Children (Appointment of Cross-Examining Counsel) (<i>Code</i> , S. 486.3)	311
Final 29-E Evidence of Children (Support Person) (<i>Code</i> , S. 486.1)	312
Final 35-A Statements of Declarant Not Called as Witness (Admissible Hearsay)	313
Final 38 Evidence of Other Sexual Activity (<i>Code</i> , Ss. 276; 276.4)	316
Final 62 Alibi	317
Final 65-B Consent (Sexual Assault) (<i>Code</i> , S. 273.1(1))	320
Final 65-D Mistaken Belief in (Apprehended) Consent (<i>Code</i> , S. 273.2)	328
Final 151 Sexual Interference (<i>Code</i> , S. 151)	332
Final 152 Invitation to Sexual Touching (<i>Code</i> , S. 152)	336
Final 153-A Sexual Exploitation (<i>Code</i> , S. 153(1)(a))	341
Final 153-B Sexual Exploitation (<i>Code</i> , S. 153(1)(b))	349
Final 155 Incest (<i>Code</i> , S. 155)	355
Final 271 Sexual Assault (<i>Code</i> , S. 271)	359
Final 272-A Sexual Assault with a Weapon (<i>Code</i> , S. 272(1)(a))	368
Final 272-B Sexual Assault Threatening Bodily Harm (<i>Code</i> , S. 272(1)(b))	376

TABLE OF CONTENTS

Final 272-C Sexual Assault Causing Bodily Harm (<i>Code</i> , S. 272(1)(c))	382
Final 273 Aggravated Sexual Assault (<i>Code</i> , S. 273)	392
INDEX	403