

LEAF Fact Sheet
A.S. v. H.M.Q.: Private records in sexual assault trials

What’s the background?

During sexual assault trials, the defence may sometimes want to use private records related to the complainant as part of their case.

What’s a record?

- Something that contains personal information for which there is a reasonable expectation of privacy
- Potential examples: therapy or counselling records, child welfare records, diaries or journals, photographs, text messages

Why does the use of records matter?

- Complainants are deeply impacted by the presentation of their intimate records during a public trial
- Sexual assault disproportionately impacts those who face systemic discrimination based on Indigeneity, race, disability, and poverty – and their lives are more likely to have been heavily documented

When does the defence get to use these records?

Judges decide whether or not the defence can use these records.

Two main factors impact how they decide, and who gets to participate in the decision-making process:

1. The nature of the records – are they about sexual activity, or non-sexual?
2. Who has the records – is it the accused, or a third party?

Before 2018, the rules limited complainant knowledge and participation where the accused had the records:

| What’s going on? | Who has the record? | Is the record sexual or non-sexual? | Does the complainant get to know? | Can the complainant do anything about it? |
|---|---|--|---|--|
| The accused wants to get access to records related to the complainant | A third party (e.g., a therapist, a doctor, a child welfare agency) | Either | Yes – the defence has to tell the complainant they want access to the records | Yes – the complainant can make submissions to the court about whether the accused should get access to the records |

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|--|-------------|------------|--|---|
| The accused wants to cross-examine the complainant on other sexual activity | The accused | Sexual | Yes, but indirectly – the defence has to tell the Crown, who then tells the complainant | Yes, but indirectly – the complainant can express her concerns to the Crown, but she cannot make submissions to the court |
| The accused wants to cross-examine the complainant on private records not related to sexual activity | The accused | Non-sexual | No – the accused can surprise the complainant with the records while she is being cross-examined | No – the complainant is not allowed to talk to the Crown during cross-examination, and she cannot make submissions to the court |

This had a lot of negative impacts:

- Complainants faced ambush on the stand with deeply personal and private records
- Complainants often lacked meaningful access to counsel
- Complainants did not have the ability to make submissions to the court if the accused had possession of the records already
- Complainants' *Charter* rights to equality, privacy, dignity, and personal security were not adequately protected
- Sexual assault survivors had legitimate fears of re-traumatization by criminal justice system
- System contributed to the underreporting of sexual offences

In 2018, Parliament enacted Bill C-51 and the “records screening regime”, which covers both sexual and non-sexual records in the accused’s possession.

1. Admissibility hearing
 - The judge has to hold an admissibility hearing to decide if the accused can use the records in the trial
2. Equality rights
 - At that hearing, the judge has to apply a specific legal test and consider specific factors, including factors supporting the equality rights of complainants
3. Complainant participation
 - Complainants have the right to participate at these hearings
4. Access to counsel
 - Complainants have the right to access their own lawyer to help them, and the judge has to tell them that they have this right

What's going on in the case?

A.S. is a constitutional challenge to this records screening regime. The accused wanted to use private records related to the complainant in his sexual assault trial. He argued that the regime violated his Charter rights.

The trial judge in A.S. decided the regime was unconstitutional. On October 5 and 6, 2021, the Supreme Court will hear the case, along with another case on the same issue (*R. v. J.J.*). The Court will ultimately decide whether the regime can continue or not.

You can watch a live webcast of the hearing on [the Supreme Court's website](#).

How is LEAF involved?

LEAF is intervening in the case to argue that the regime is constitutional, as it enhances the equality rights of complainants while respecting the accused's right to full answer and defence.

LEAF will also argue that that complainant participation needs to be meaningful, which requires that complainants have:

1. Notice
 - Enough notice that the defence wants to use the record
2. Access
 - Seeing the application the defence files with the court
3. Attendance
 - The right to attend the admissibility hearing
4. A voice
 - The right to make submissions at the admissibility hearing
5. Contributions
 - The right to cross-examine witnesses at the admissibility hearing or call evidence, if needed
6. Counsel
 - The right to counsel to provide help throughout the process

Media contacts

Kat Owens
Project Director, LEAF
416-543-3509
k.owens@leaf.ca

Kelley Bryan
Counsel to LEAF, PBP Lawyers
647-490-4197
kbryan@pbplawyers.com

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