



## NUNAVUT COURT OF JUSTICE

### Practice Directive # 8

#### Procedural Requirements for the filing of 278 Applications in Criminal Matters

The process for Third Party Records Applications in criminal law proceedings in Nunavut is governed by section 278 of the Criminal Code and rule 58 of the Nunavut Criminal Rules of Court.

Failure to abide by the *Rules* and the *Code* results in inefficient use of court time and judicial resources. This practice directive sets out the requirements that govern the scheduling of such hearings. Further, for applications that relate to requests for production of records of child protection proceedings, this directive sets out a procedure for the consent release of such documents if the consent of all parties is obtained.

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#### DISCLOSURE OF THIRD PARTY RECORDS IN CRIMINAL PROCEEDINGS

Unless otherwise ordered by a Judge, applications for third party records under s. 278 of the Criminal Code must comply with the timelines and filing requirements as set out in this Directive.

In the event that a party wishes to initiate an application for third party records under section 278 of the *Criminal Code*, the application must abide by the both the requirements of the *Code*, and the *Criminal Rules of Court* of Nunavut. Such applications are heard in Special Criminal Chambers in advance of a proceeding.

#### ***Required Timelines and for Filing Application and Materials***

All Third Party Records Hearings must be scheduled by the NCJ Trial Coordinator ([ncj.trialcoordinator@gov.nu.ca](mailto:ncj.trialcoordinator@gov.nu.ca)) per Practice Directive 33. When an Accused person wishes to bring a 278 application, the following materials are required:

- a. A Notice of Motion in Form 1 of the Rules of Court setting out the grounds of the application;

- b. An affidavit setting out the particularity of the document(s) sought (per Rule 58);

#### *Facta Requirements*

Each party to the Application is required to file factums that clearly identify the argument of the parties relating to the likely relevance of the documents.

The Applicant's factum must be filed at least 20 calendar days before the hearing of the application.

The Respondent's materials must be filed at least 10 calendar days before the hearing of the application.

#### *Required Documents to Confirm Hearing Date*

The NCJ Trial Coordinator shall assign the hearing a date that will be considered tentative until 14 days before the scheduled date. At that time, the moving party must file a copy of form 8C confirming that the Court has received:

- a. Affidavits of service for all individuals (including minors) requiring notice of the hearing per 278.3. The affidavits must confirm the parties have received:
  - o A copy of the Application
  - o A copy of the 278.4 NCJ Notice of the Right to Counsel (Form 8A)
  - o A copy of the supporting affidavit (per rule 59)
- b. Affidavit(s) of service of a Subpoena in form 16.1 of the Code on the person(s) who has possession or control of the record issued in compliance with Rule 59(2)
- c. Affidavit(s) of service for the Applicant's Factum

If any of the service documents listed above are missing, unless a judge has otherwise ordered an abridgement of service, the application has not met the requirements of 278.3(5) and Rule 59 and the application shall be struck from the list. If struck, the matter shall be scheduled for a Pre-Trial Conference with Crown and Defence.

#### *Matters involving Child Protection Records*

On occasion, counsel acting accused persons in criminal proceedings may wish to obtain child protection records in the hands of the Director of Child and Family Services that they believe are relevant to an issue at trial. The Directors' files are subject to statutory confidentiality by virtue of section 72(2) of the *Child and Family Services Act*.

The application shall be brought in accordance with section 278 of the Code and Rule 58 of the Rules of Court. The affidavit required to accompany the application shall, if possible, should identify what records are sought or the time frame governing the records in question. The Application affidavit should be personally served upon the Director (or the Director's counsel) and all other parties to the proceeding including any minors.

*Procedures where the parties Agree as to the relevance*

If the Accused, the Crown, and the Director agree that the child protection records sought are relevant and necessary and the parties and the Director have signed a consent to the release of the records in the Form 8B attached, with such modifications as may be necessary to address the specifics of an individual file, the party seeking the disclosure of the records shall submit to the court, on the return date of the application, an Order containing the terms set forth in the Consent. If the Court has no concerns with respect to the issuance of the Order, one will issue as a matter of course.

If all parties and the Director are in agreement, the parties may apply for the issuance of an Order through the Registry without the necessity of having to speak to the matter in court.

If the parties or the Director are not in agreement with the production of the records, the matter shall be argued on the return date of the application or whenever it can be scheduled for argument. The application shall be subject to being struck in the same fashion as set out above in this directive if confirmation of service is not filed according to this directive 14 days in advance of the hearing date. To assist the Court, the Director shall provide a summary of the documents in the possession of the Director.

Any Order obtained must be served on the Director's counsel who shall then, as soon as is reasonably possible, provide all parties with a copy of the material sought.

***Pre-Trial Conferences***

Upon the filing of a 278 Application, the NCJ Trial Coordinator may schedule a pre-trial conference with all of the parties. The pre-trial conference judge will inquire about and discuss any matter that may promote a fair and expeditious hearing of the 278 application including, but not limited to:

- (i) the scheduling of the application;
- (ii) the parties' positions as to the existence, availability and relevance of the documents requested, and
- (iii) the materials required to be filed in support of the application.

This Practice Directive comes into effect immediately.

DATED at the City of Iqaluit, Nunavut, this 25<sup>th</sup> day of November 2016.

Mr. Justice N. Sharkey

Madame Justice S. Cooper

Madame Justice B. Tulloch

Mr. Justice P. Bychok