

## NEWSLETTER: Sexual Assault Law Update

February 2025

### Crown-Led Sexual History Evidence is Subject to S. 276



#### Full Answer and Defence Concerns

In the recent decision of *R. v. Avila*, 2025 BCCA 5 the BC Court of Appeal agreed that the Crown should have applied for a *Seaboyer* based *voir dire* before cross-examining the accused on other sexual activity evidence.

The Supreme Court rulings in *R. v. Barton*, 2019 SCC 33, *R. v. Goldfinch*, 2019 SCC 38 and *R. v. R.V.*, 2019 SCC 41 all stated that, regardless of who leads the evidence, the judge is the “gatekeeper” of other sexual history evidence by either party and that the Crown must engage in a *Seaboyer* application before adducing such evidence. Nevertheless, the Crown has quite often been permitted to lead other sexual history evidence on the premise that they are presumed not to be arguing twin myths about the complainant; *R. v. Langan*, 2019 BCCA 467 at para 111.

In the case of *Avila*, which the Court granted a retrial, the accused had been denied his s. 276 Application on the grounds that it was too general, lacking “specific details” and carried too much risk of twin myth reasoning.

The core of the defence Application was that the accused did not have to force sexual activity on the complainant as she was the primary sexual aggressor and they had a “safe word” for ending sexual activity. Upon reopening the 276 application mid-trial the judge allowed for the complainant only to be cross-examined about a safe word. The Court of Appeal agreed that the Application appeared to only be suggesting that because she consented in the past she was more likely to have consented during the subject matter of the charge but that the Crown then sought the same sexual history evidence in cross-examination of the accused.

Suffice it to say that there were a number of times the Crown raised other sexual activity with the appellant, including sexual activity that it characterized as “exotic”, “rough”, and “risky”. The Crown’s cross-examination also canvassed the contents of a voluntary pre-trial statement that the appellant provided to the police in which he discussed the sexual relationship, generally. Earlier in the trial the Crown told the judge that

cross-examination on this statement might elicit evidence of other sexual activity and a *voir dire* may be necessary to address that issue. However, the Crown did not seek a *voir dire* before or during its cross-examination of the appellant.

The defence was denied a mistrial motion after the Crown had been permitted to ask about other sexual history and, in this case, the Crown then proceeded to argue a pattern of recklessness by the accused towards sexual consent while having successfully blocked the accused from cross-examining about a pattern of actions and discussions about consent.

The Crown opposed the appeal on the grounds that they were not using other sexual activity for a prohibited purpose. The Court of Appeal responded to that argument at para 62:

I pause to note, here, that it is not altogether correct to say that the Crown's "intended use" of the evidence of other sexual activity was to "expose inconsistencies" relevant to the jury's assessment of testimonial trustworthiness. That may have been one purpose of leading this evidence. However, another and arguably more dominant purpose, as it emerges from the record, was to use the evidence of other sexual activity to bolster the Crown's theory that the appellant was someone who generally pushed the boundaries with the complainant in their sexual relationship and paid little, if any, attention to her consent. [emphasis in original]

In essence, this decision reconfirms the 2019 Supreme Court decisions governing Crown use of other sexual activity evidence and that double standards should not be applied to defence and Crown over their use of the same evidence.

After opposing the s. 276 applications, Crown counsel should not have elicited the evidence of other sexual activity that it did and, importantly, seek to use that evidence in support of an inference of guilt without first seeking a *Seaboyer voir dire*. Furthermore, as the gatekeeper of the trial and having twice rejected a s. 276 application brought by the defence, the judge should have more closely monitored this aspect of the Crown's cross-examination, stopped it when it began to move into other sexual activity, and canvassed the necessity of a *Seaboyer* inquiry.

Whether or not the Crown would have been permitted to engage in those areas of questioning, the accused was curtailed from exploring those same issues in his cross-examination of the complainant.

The Court of Appeal found that there were a number of detailed aspects about the historical sexual habits between the complainant and accused that he was unable to explore, leaving it open for the Crown to paint a skewed picture of recklessness regarding consent while denying the accused from defending against that characterization at the end of the trial evidence.



### **S. 276 in Sex Trafficking Charges**

In the recent case of *R. v. Gorges*, 2024 ONCA 857 the Ontario Court of Appeal readdressed whether non-enumerated charges require vetting through s. 276 of other sexual history primarily related to sex work done by the complainant during the relevant time frames.

In this case the trial judge declined to apply s. 276 in the form of an Application and only mentioned the issue during her decision without asking for input from the Crown or defence on that issue.

Ultimately, the trial judge disabused herself of any evidence that was submitted regarding sex work being performed by the complainant or that she had previously asked the accused to assist her with sex work for pay and help her recover money from one of her clients who allegedly owed her hundreds of dollars for a transaction.

The accused was alleged to have kidnapped and severely beaten the complainant in an attempt to force her to do sex work for him. Writing for the Court, Justice Favreau determined:

In my view, the trial judge breached the appellant's right to procedural fairness because he was not given an opportunity to address the admissibility and proper use of this evidence after it had been led at trial. In addition, the trial judge erred in disregarding some of the complainant's evidence regarding her work in the sex trade. The appellant relied on this evidence in ways that did not engage the twin myths. Most notably, he relied on this evidence to attack the complainant's credibility by highlighting significant discrepancies in her testimony, especially regarding the appellant's motive for the alleged kidnapping and other offences. The lack of procedural fairness in the manner in which the trial judge ignored this evidence amounts to a miscarriage of justice and therefore this is not an appropriate case for the curative proviso. On this basis, I would allow the appeal.

At the time of the trial decision in *Gorges* the decision of *R. v. A.M.*, 2024 ONCA 661 had not yet been released. The Court of Appeal revisited that decision with the following summary:

In *A.M.*, the court confirmed that s. 276 does not apply categorically to all proceedings where an accused is charged with a sexual service or human trafficking offence but not a listed offence. Rather, whether a listed offence is implicated in the proceeding, and accordingly whether s. 276 applies, must be determined on a case-by-case

basis having regard to the charges, the Crown’s proposed evidence, and whether the defence proposes to lead evidence of a listed offence.

This means that cases which involve human trafficking or sexual services charges need to be carefully scrutinized to address whether or not other sexual history will require a pre-trial application. That decision will primarily revolve around whether or not an enumerated offence is entwined in the narrative or is a secondary, included offence.

In the instance of *Gorges*, the error could have been avoided if the trial judge had expressed concerns about the application of s. 276 prior to the decision in the case. Neither the Crown nor defence had any warning about the judge’s concerns and made written submissions largely focusing on evidence that the trial judge then informed them had been ignored due to s. 276.

The ultimate finding in *Gorges* was that “the complete exclusion of the complainant’s evidence regarding her involvement in the sex trade led to the same mischief as in A.M. because evidence material to the appellant’s defence was improperly disregarded such that he was prevented from making full answer and defence to the charges against him.”

Given that the main allegations against him related to an alleged kidnapping for the purpose of forcing the complainant into doing sex work, it was clearly relevant whether the complainant had previously asked the accused to help her engage in sex work voluntarily.



### **Admission of Video Statements**

In the case of *R v Reves*, 2025 ABCA 5 the Alberta Court of Appeal ordered a new trial in setting aside a conviction for sexual interference after they determined that the trial judge erred in admitting a pre-recorded statement by a child complainant as it was her second statement after some passage of time and the first statement was not properly considered on the application as to the issue of reliability of the second impugned statement. The complainant had provided a statement after disclosing the alleged sexual assault on August 10, 2020. The case was then referred to another police service and a second statement was taken on January 15, 2021 at the Zebra Centre in Edmonton (the “Zebra statement”).

As is common, child complainants are often spared having to recount all the details of their allegations by admitting their prior video statement under s. 715.1 of the *Code*.

In this case, at trial Crown Counsel did not seek to have the first statement admitted under s. 715.1, advising the trial judge it did not meet the criteria for admission “in terms of the manner in which the interview was conducted”. The second statement “relied on [the first statement] heavily” which included many leading questions. The Court made the

following observation about the unique aspects of this appeal:

Canadian jurisprudence on the effect of a previous statement in an application under s 715.1 is scarce; however, the appellant's counsel directed the Court to two relevant cases, *R v Wiebe*, 2016 MBPC 55, and *R v DMD*, 2019 BCSC 1027. Although neither is binding on this Court, they are instructive and assist in understanding the problem with the approach the trial judge took in considering the effect of the first statement. We note that no jurisprudence on this issue was provided to the trial judge.

The second statement of the child (Zebra statement) was taken five months after the first and both involved leading questions. Further, the Court of Appeal determined:

However, the first statement would have been an important piece of evidence in assessing the threshold reliability of the Zebra statement. It played a prominent role in how the detective who took the Zebra statement conducted the interview, and it is clear from the Zebra statement that the detective used the information from the first statement to form the basis of many of the questions he put to the complainant. A number of the questions were leading or included suggestions to the complainant. Some went to the heart of the allegations, most notably: when and how the appellant allegedly wrapped his arms

around the complainant; that the complainant had a dream she was being raped; that the appellant was "fingering" and licking the complainant; and that he tried to pull her clothes off.

The Alberta Court of Appeal determined that the instructions to the jury were inadequate to sufficiently attenuate the risk of over-emphasis and further did not equip the jury with the law they needed to know how to properly assess the complainant's evidence.

The Court of Appeal additionally found that the jury instructions on motive to fabricate vs. proven absence of motive to fabricate the allegations were inadequate. For example, the instructions failed to include a warning to the jury that the absence of evidence that the complainant had a motive to fabricate did not equate to evidence she was telling the truth. Further, there was no instruction that raising the possibility of fabrication does not shift the burden of proof to the accused and require him to either demonstrate the complainant had a motive to fabricate or to explain why she made the allegation.



### **Assessing Subjective Consent**

In *R. v. Blanco*, 2025 ONSC 297 Justice London-Weinstein ordered a new trial after determining the trial judge failed to grapple with the complainant’s testimony about subjective consent.

In this case the complainant, when asked by the Crown how she felt about the sexual activity at the time said she felt “relaxed and very sleepy.” She further stated that at the time she “thought that it felt nice and that [she] was very tired.” The complainant also said she did not report the alleged assault right away because she thought it was “fine.”

The trial judge concluded that no consent was given by the complainant without grappling with the evidence from the complainant about her subjective consent at the time. While there was a question in this case as to whether or not the accused used a position of authority which vitiated consent, the trial judge found that the authority was used to overcome expressed non-consent without explaining how the determination of non-consent was arrived at.



### **The Problems With Memory**

In December 2024 the Alberta Court of Appeal granted a retrial in *R v SLB*, 2024 ABCA 412 on the bases that the trial judge reached an unreasonable verdict without any explanation that provided a meaningful basis for appellate review; failed to consider the inconsistencies between the complainant’s testimony and those of a Crown witness; and the trial judge unreasonably relied upon on a momentary lapse in memory in respect of the date thirty years prior to find that the appellant lacked reliability.

In this case the trial judge completely rejected the accused’s testimony for the sole reason that he failed to remember the precise year that he moved thirty years prior and that he could not remember which dwellings they rented at the time. The Court of Appeal reiterated that “it is important to remember that where an accused takes the stand and gives evidence, that evidence need not prove anything. A witness’s evidence need not be believed to raise a reasonable doubt.”

In comparison, the complainant was confronted with material differences in her allegations between her police statement and trial testimony that the judge failed to grapple with.

For example, the complainant testified at trial that the accused had engaged in specific acts during digital penetration that were absent from her police statement. Additionally, it was pointed out that the complainant did not mention digital penetration at all until asked by the officer later in her statement if she had been touched. Though she had not alleged this in her first recounting of events, the complainant then incorporated the suggestion into her allegations.

Even though these inconsistencies went to the core of the allegations against the accused the trial judge declared them to be “minor” while using absence of memory from the accused on peripheral details to undermine the whole of his other evidence.

To complicate the issues even further, the trial judge stated that there was reasonable doubt whether the accused had touched the complainant with his mouth or fingers but the reasons did not explain why or how that reasonable doubt did not factor into the decision to convict.

Cases regarding child evidence can be very complicated in regard to credibility but this case is an important reminder of the burden of proof and the requirement to grapple with and properly explain the findings of fact.



## Other Cases To Watch

*Dustin Kinamore v. His Majesty the King* SCC  
File# 40964

Whether or not Crown led sexual history required a pre-trial application or *voir dire*.

*His Majesty the King v. Soon Hyong Kwon* SCC  
File#41322

Substitution of acquittal after conviction overturned due to errors about myths and stereotypes.

*Celine Loyer, et al. v. His Majesty the King*  
File # 41610

Whether or not “body memories” are legitimate memories of sexual assault.

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