

## NEWSLETTER: Sexual Assault Law Update

November 2025

### Kinamore and New Rules Regarding Crown-Led Evidence



#### Revisiting Crown-Led Evidence Of Other Sexual History

The Supreme Court, in July 2025, clarified that the Crown cannot lead other sexual history of a complainant to bolster the claim that it was less likely for the complainant to have consented or that the complainant is more worthy of belief.

The decision, *R. v. Kinamore*, 2025 SCC 19 revisited prior rulings of *Barton*, *Goldfinch* and *R.V.* from 2019 that Crown-led evidence must be subjected to pre-trial motions and prescribed a parallel process to the new legislation under s. 278.92 that requires the defence to bring pre-trial motions in a two stage application process.

Though Crown-led evidence is not specifically legislated by parliament to be subjected to a pre-trial motion, this decision enacted common

law procedural requirements consistent with both *R. v. Seaboyer*; *R. v. Gayme*, 1991 CanLII 76 (SCC), [1991] 2 SCR 577 and the new legislation enacted by parliament in Bill C-51 related to s. 278.92 and s. 276 by requiring parity in the mode of pre-trial applications.

Historically, the Crown was permitted to lead other sexual history evidence, or evidence of lack of sexual activity, without being subjected to the same standards as the defence. Primarily this exception existed because the Crown was leading the evidence to make the complainant more worthy of belief and/or less likely to have consented.

The *Kinamore* decision aptly notes that such Crown-led evidence is simply the inverse of the core “twin myths” and creates an unfair trial for the accused. As stated at paragraph 74:

Inverse twin-myth reasoning is fundamentally rooted in discriminatory ideas about the “ideal victim” of sexual assaults (*Mazzuca*, at p. 170). As L’Heureux-Dubé J. explained in *Seaboyer* (dissenting, but not on this point), the categorization of women as virgins or “madonnas” has long influenced police, jurors, and judges to

perceive those sexual assault complainants as “ideal” victims and thus worthy of belief (pp. 652-56). These notions of the “ideal victim” have the effect of reinforcing the harmful idea that sexually active complainants who fall outside of this paradigm are not entitled to the law’s protection (see M. Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming” (2010), 22 *C.J.W.L.* 397, at p. 414). This Court cannot condone any party evoking myths and stereotypes about sexual assault complainants. Permitting a party to do so would further entrench these discriminatory beliefs in our criminal justice system and, by extension, distort the truth-seeking function of trials.

More specifically, the *Kinamore* decision notes that evidence related to virginity cannot be used to bolster the complainant’s claim of being less likely to have consented solely for that reason. As stated at paragraph 65 of *Kinamore*:

The text of s. 276 provides an initial basis for holding that sexual inactivity evidence engages the screening regime. While it is true that the statutory provisions refer to “sexual activity”, Parliament has recently clarified the meaning of the term in s. 276(4), stating that it “includes any communication made for a sexual

purpose or whose content is of a sexual nature”. In my view, this provision contemplates that all evidence of a complainant’s sexual history, including sexual inactivity evidence, will be captured. By encompassing communications whose “content is of a sexual nature”, this definition includes any communication from the complainant in which sex is a topic of conversation. This expansive definition is inclusive of prior communications in which a complainant discusses their virginity or indicates their sexual disinterest.

The decision also addressed advanced communications of attitudes sex in the future including not wanting to engage in sexual activity, and positively cites *R. v. Reimer*, 2024 ONCA 519 on this issue to confirm that prior communications related to sexual intentions may be relevant for either the defence or prosecution but that the Crown must also bring an application in advance of trial to determine the limits on how those communications can be used.

Since the *Kinamore* decision was delivered, many trials have been underway without the reciprocal obligations of the Crown in place, primarily because the Crown was assumed to not be leading evidence of a twin myth. The *Kinamore* decision has now clarified that the Crown may not lead reverse twin myth evidence to bolster their case and must ground their evidence in permissible reasoning.

Specifically, in *Kinamore* at paragraphs 71-72 the Supreme Court notes:

This case presents this Court with another form of sexual history evidence that is capable of evoking other myths and stereotypes about sexual assault complainants. Sexual inactivity evidence may evoke inverse twin-myth reasoning. A complainant's sexual inactivity can be used as a form of character evidence that invites the trier of fact to conclude that, because the complainant has been sexually inactive, (1) they have a propensity to not consent and therefore were less likely to have consented to the sexual activity that forms the subject matter of the charge; and (2) they are more worthy of belief.

What makes this form of myth-based reasoning distinctive is that it has the effect of bolstering a complainant's testimony at the expense of the accused. Consequently, this reasoning is more likely to be evoked by the Crown rather than the defence. Crown counsel at trial did so in this case. During closing submissions, Crown counsel explicitly referred to the complainant's virginity as a consideration that suggested that Mr. Kinamore's version of events was implausible (*A.R.*, at p. 262)

The Supreme Court recognized that this "inverse" reasoning reinforces the belief that sexually promiscuous complainants are more likely to have consented and, though the evidence may be admissible for the same, circumstantial reasons in a pretrial application, it is not permissible solely to suggest the complainant was less likely to have consented or more worthy of belief.

While this decision has a high impact on upcoming trials and trials that were already underway when the decision was issued there will be some adjustment period required to adapt to the new requirements on the Crown for pretrial applications.

Ideally, the defence can and should identify potential Crown-led evidence in their own applications and blend their pretrial applications with Crown-led evidence in a *Seaboyer/Kinamore* application.

The Supreme Court specifically identified at paragraph 43 that Crown-led evidence of sexual history should "mirror" the defence application in regard to the two step process and that Crown-led evidence of a sexual nature (including lack of sexual activity) should be announced to the defence in advance to assist them in identifying the issues that need to be addressed in their own pretrial applications.

In particular, the decision states at paragraph 47 that "it is best practice for the parties' applications to be considered at the same time." Though this is considered to be ideal, it

may not often be the practice and it is in the best interest of the defence to continue to address anticipated Crown-led sexual history evidence. They further state:

Not only does this approach mitigate delay, but it also ensures that a judge has a complete understanding of how all of the evidence of the complainant's sexual history will be used, which is necessary to properly weigh its probative value and prejudicial effect (para. 79). For example, when considering both applications, a judge may observe that granting one application will result in the other party's application regarding further particulars of the complainant's sexual history also being granted. In these circumstances, the judge may then conclude that the overall prejudice caused by granting both applications would be too significant for any of the proposed evidence to be admitted.

Pre-trial motions are not technically required less than 7 days before trial but are part of pre-trial management discussions and motion scheduling. Typically these motions are scheduled well in advance of trial so the defence will often remain the primary applicant identifying what issues and evidence from a complainant's statement the Crown may rely upon which relate to other sexual history and may affect the accused's defence application material.

The *Kinamore* decision further stated that Crown-led evidence applications need to be supported by an affidavit, similar to defence applications. Though the affidavit may be based on "information and belief" of an officer, the application may fail if not supported by an affidavit from the complainant who has direct knowledge of the events in question. At paragraphs 45-46:

To start with, the Crown must prepare a written application that sets out detailed particulars of the evidence that it seeks to adduce and the relevance of that evidence to an issue at trial (see s. 278.93(2)). As under the s. 276 regime, the affidavit attached to the written application can be an "information and belief affidavit" in the Stage One inquiry (*Darrach*, at para. 53; D. Brown and J. Witkin, *Prosecuting and Defending Sexual Offence Cases* (3rd ed. 2024), at p. 412).

The Crown must provide fair notice to the accused and the court if it seeks to bring an application. While this generally will be at least seven days' notice, judges can exercise their trial management powers in the interests of justice to shorten this notice requirement (see s. 278.93(4)). This notice assists in allowing the accused to prepare, particularly in circumstances where they wish to bring their own s. 276 application. Such an application will be necessary only when the

defence wishes to adduce details beyond what the Crown is seeking to adduce (see *Brown and Witkin*, at p. 399).

Clearly it is problematic when the defence and Crown are both only required to bring an application with seven days notice, yet the Supreme Court acknowledges that the Crown should give the defence sufficient notice if they intend to bring their own application which could affect the defence position.

This decision has a clear impact on the procedural process for pre-trial motions and has taken the obligations on the Crown up to a new level since the decisions in *Barton, Goldfinch and R.V.* in 2019. The Supreme Court has clearly stated that the Crown should give advance notice to the defence when they intend to lead other sexual history evidence and this must now become part of the process in pre-trial conferences.

As adjustment takes place for the new common law process, the defence should be proactive in identifying, from complainant statements, what may require Crown-led evidence *Seaboyer/Kinamore* applications to facilitate the pretrial applications.

Since the *Kinamore* decision was released, the Alberta Court of Appeal dealt with a Crown appeal in *R v P.E.*, 2025 ABCA 272 in which the Crown suggested they were improperly denied the ability to adduce evidence from the complainant that she told the accused she had

been sexually assaulted in the past and thus was uncomfortable with any sexual interactions with him. The Court of Appeal primarily denied the Crown's appeal on the basis of the *Kinamore* decision, stating at paragraph 14:

At paragraph 3 of *Kinamore*, the Court recognized the wisdom of creating a “harmonized regime for the admission of sexual history evidence” and avoiding “the undue complication that parallel regimes could cause.” Accordingly, it held common law procedures for determining Crown applications “should align with those that apply to defence-led evidence under s. 276.” While the Supreme Court did not directly address the applicability of s 278.97, we see no reason why it would be exempted from the procedural alignment. Accordingly, we find the determination of a Crown application to adduce other sexual activity evidence is deemed a question of law and therefore open to a Crown appeal.

The Court of Appeal ultimately ruled that:

We also cannot say to a “reasonable degree of certainty” that, if admitted, the excluded evidence had the potential to tip the balance of credibility in this case. We acknowledge the authorities provided by the Crown in which prior expressions of non-

consent or limitations have been given weight at trial, but find they are distinguishable on their facts. In any event, these authorities would now need to be viewed through the lens articulated in *Kinamore*.

This Alberta decision supports the trial judge's ruling and grounds *Kinamore* more fulsomely. The Court of Appeal supported the finding that, aside from evidence of virginity, any sexual history intended to bolster the complainant's credibility has more prejudicial effect than probative value and would open the door to inverse reasoning. It directly comments on the "twin myths" and inverse logic.



### **Improperly Curtailed Cross-Examination**

The Ontario Court of Appeal in *R. v. I.M.B.*, 2025 ONCA 678 recently ordered a new trial because the trial judge improperly cut off the cross-examination of the complainant after she was said to have become suicidal.

There was a lack of medical evidence in this case and the curtailing of the complainant's cross-examination was based on evidence from the officer in charge.

The complainant in this case was pregnant at the time of the trial and the Court of Appeal ruled at paragraphs 11 and 12 that there was insufficient grounds for the trial judge to determine she was incapable of continuing her testimony.

First, the trial judge erred in finding that R.C. was unable to continue testifying. His finding rested on a medical judgment he made without a sufficient evidentiary basis. Despite acknowledging that there was no medical evidence supporting R.C.'s claims, the trial judge found that there was a risk to her pregnancy. The evidence of these concerns came from dated hearsay, as it was only tendered through the affidavit of the officer in charge. The trial judge assumed the concerns continued from January 2023 into March 2023, when the application was decided, and merely directed the Crown to confirm that this was correct after he had made his ruling. This was not a sufficient evidentiary basis on which to make a finding that a complainant was medically unable to continue being cross-examined.

Second, and more importantly, the trial judge relied on R.C.'s testimony to bolster the Crown's case in his analysis, despite the discontinued cross-examination. Specifically, he cited R.C.'s evidence respecting her instruction to O.C. not to tell a social worker about sexual abuse she had suffered. He found this corroborated O.C.'s testimony that this instruction from R.C. motivated her to be untruthful to the social worker.

In addition to the first ground of appeal, the Court of Appeal also found that the trial judge was improperly reliant on demeanour evidence of the accused in finding that his evidence did not raise a reasonable doubt. As stated at paragraph 19 of the decision:

Consideration of a witness's demeanour by a trial judge is permissible but will become problematic when it is overemphasized or if undue weight is placed on it: *R. v. J.M.*, 2023 ONCA 472, at para. 3. As the trial judge recognized, reliance on demeanour is an area fraught with problems because demeanour can be affected by many factors unrelated to the honesty of the witness: *R. v. Rhayel*, 2015 ONCA 377, 324 C.C.C. (3d) 362, at para. 85. Crown counsel at trial candidly acknowledged in his closing submissions that the appellant "did testify well", and did not suggest that there had been anything about his

demeanour that would justify rejecting his evidence.

This decision is important to remember the value and purpose of cross-examination and, despite difficulties that witnesses may have in testifying, the rigours of cross-examination are an integral part of the fact finding process in a trial.

Further to this decision, in *R v Harding*, 2025 ABCA 266, "secondary" issues relating to post-offence behaviour by the complainant were deemed to be relevant and admissible if tied to her own evidence about what she did or her lack of memory of what she did right after the alleged assault. The Court of Appeal deemed it an error of law for the trial judge to have curtailed cross-examination. At paragraphs 28-29:

We acknowledge that trial judges have a discretion to stop relevant defence questioning when its prejudicial effect substantially outweighs its probative value: *R v Seaboyer*, 1991 CanLII 76 (SCC), [1991] 2 SCR 577 at 610-611. However, on this record, it was unnecessary to do so. An instruction to the jury not to infer that TR consented (or was not sexually assaulted) because she might have gone out for breakfast or ice cream the next day would have sufficed.

This line of cross-examination was initially relevant to TR's reliability

because it revealed that she did not remember aspects of June 6. Curtailing it also closed off other ways of challenging TR's reliability. TR had testified on direct that she sat in the bathtub crying for "several hours" on June 6 and questioning her about going for ice cream or breakfast that morning had the potential to undermine the "several hours" timeline. Defence counsel was unable to pursue that topic. The inability to do so became more prejudicial when the Crown argued in closing that TR's testimony that she "cried in the bathtub for 2 hours" enhanced the reliability of her evidence overall.

In this case, the complainant contradicted her own testimony that she cried for hours and confronted him the next time she saw him, yet evidence was presented at trial that she went for ice cream and breakfast with him the next day. The Court of Appeal determined that the trial judge should not have cut off cross-examination on this point as it was directly relevant to the credibility and reliability of her evidence.



## Revisiting Myths & Stereotypes

In the recent decision of the Ontario Court of Appeal, *R. v. J.W.*, 2025 ONCA 637, though the appeal was denied, Justice Paciocco provided a very useful outline of when evidence is not based on myth based reasoning and is actually connected to the relevant evidence at trial.

As stated at paragraph 23 of *J.W.*:

It is important that judges not overstate or interpret prohibited myths and stereotypes too broadly, including when charging juries. Myths and stereotypes operate like many rules of evidence by prohibiting lines of reasoning but not proof of categories of fact. As Martin J. cautioned in *Kruk*, "[J]ust because the evidence happens to align with a myth or stereotype does not necessarily mean that any inferences that can be drawn from that evidence will be prejudicial": *Kruk*, at para. 65. She provided an instructive example at para. 65:

While it is a myth that women regularly fabricate allegations of sexual assault, it is not an error to consider whether the circumstances of a particular case support the existence of a motive to fabricate — indeed, where the defence adduces evidence on this point, a trial judge is *obliged* to consider it to give full effect to the

presumption of innocence, and a failure to do so constitutes reversible error. [Citations omitted; emphasis in original.]

This decision is an important reminder that evidence is not inadmissible simply because it could support a myth or stereotype. Evidence must be tied to testimony and issues at trial and, if it is connected to evidence at trial, the evidence cannot be rejected simply because it could be a myth or stereotype.

Specifically, this decision reiterates that “[t]here is no general rule presuming that evidence capable of supporting prohibited mythical reasoning will be inadmissible. As with any other evidence, so long as the evidence is relevant for a permissible purpose, it can be received.”

In particular, the decision discusses the “myth” about delay in reporting and makes it clear that the timing of a criminal allegation may be relevant when it is contemporaneously connected to an event. At paragraph 27:

The most widely encountered and available instance of a permissible inference arises where “the timing of disclosure supports a defence argument that the complainant had a motive to fabricate the events”: *R. v. Greif*, 2021 BCCA 187, at para. 63, leave to appeal refused, [2021] S.C.C.A. No. 182 (emphasis added); see also *R. v. Esquivel-Benitez*, 2020 ONCA 160, 61

C.R. (7th) 326, at paras. 8-15. For example, in *R. v. S.C.* (2004), 2004 CanLII 4770 (ON CA), 188 O.A.C. 357 (C.A.), the delayed complaint against the accused coincided with a discussion the complainant had with her boyfriend who was upset about the accused having been at the home where she was babysitting. There may be other situations where evidence of delay is relevant. In *R. v. Brown* (2005), 2005 CanLII 30694 (ON CA), 201 C.C.C. (3d) 309 (Ont. C.A.), at para. 15, Sharpe J. recognized that a delay in reporting may be relevant where the complainant makes a complaint to the police without mentioning an allegation that is subsequently made only after a period of delay. The relevant inference – that the initial narrated complaint differs from and is therefore inconsistent with the delayed complaint – is not based on generalizations about the way victims would behave. It is based instead on a case-specific inconsistency by omission.

Though this decision did not result in a reversal of the lower court decision it is a very good case for understanding the boundaries between myths and stereotypes versus legitimate evidence at trial.

In addition to this decision, the Alberta Court of Appeal also decided in *R v I.J.M.*, 2025 ABCA 311

that motive and timing of a report were not properly put to the jury. At paragraph 21:

In the circumstances of this case, it would not have been improper for the jurors to consider whether the timing of disclosure supported the appellant's position that the complainant had a motive to misrepresent, which would be relevant to the assessment of her credibility. As a result of the jury being instructed to ignore the delay, a factor relevant to assessing the complainant's credibility was effectively removed from the jury's consideration.

These decisions confirm that motive and timing are legitimate areas for the defence to explore at trial and cannot be deemed "myths or stereotypes" when grounded in facts at trial.

Stereotypes are based on presumptions about "real victims" but they are not stereotypes when grounded in the facts of a case and based on testimony or statements given by the complainant or cross-examination about what was happening in the complainant's life related to motive to fabricate.



### **Misuse of Propensity Reasoning**

In a recent decision from the Alberta Court of Appeal, *R v K.W.P.*, 2025 ABCA 312 a new trial was ordered due to the trial judge perceiving animus by the accused and improperly assuming a propensity to commit the alleged crimes by relying upon bad character evidence.

The appellant was convicted of two offences, assault by choking and sexual assault during the breakdown of the marriage to the complainant.

The trial judge took exception to portions of the appellant's evidence in particular portraying himself as the unwitting victim of the complainant's unhappiness. The judge found that the appellant was "extremely angry and hurt and felt justified in this anger and hurt. This justification made it easier if his wife's unhappiness has nothing to do with him. It is a self-serving denial." Quoting the trial judge's reasons for conviction, the Court of Appeal quoted paragraphs 82-84:

This same justification is why [the appellant] very matter of factly told this court that he grabbed [the complainant's] phone from her and attempted to open it and then took the laptop that his son was using in order to look at this so that he might get the "truth" about his suspicions that [the complainant] was seeing another man. He then hid these devices from [the complainant]. While these actions may be understandable on an emotional

level in the context of a breakdown of a marriage, [the appellant] did not betray any insight into the inappropriateness of this behavior when he testified to it many months later. There was no hint that he thought there was anything wrong with what he had done – even the parts that involved his son.

[83] It was clear that, just as [the appellant] felt entitled to an itinerary of his wife's UK trip even though she was not living with him and they were estranged at that time, [the appellant] felt entitled to forcibly take [the complainant's] devices from her without her permission.

**[84] It is this same entitlement - an entitlement fueled by pain and anger - that allowed [the appellant] to assault [the complainant] in February and again in June of 2022.**  
(Emphasis Added)

The Court of Appeal noted at paragraphs 11-12:

The admissibility and use of evidence relevant to motive or animus, particularly in the context of domestic violence, is well established.[6] The use of such evidence in assessing credibility is also well established.[7] Even where evidence is admitted for that purpose a balancing of the probative value and prejudicial effect of that evidence is required.[8]

While the issue of animus was raised by the appellant in relation to the complainant, no similar argument was made in relation to the appellant by the Crown at trial. Further, neither party referred to the applicable principles on the limited use of such evidence. As a result, reference to the broader record does not assist in clarifying the trial judge's statement at paragraph 84 of her reasons.

The Court of Appeal noted that the judge's analysis made no reference to motive, animus or their use in assessing credibility. Rather, it moved directly from an observed attitude to a conclusion that the appellant was responsible for both offences. This conclusion was reached prior to any examination of the complainant's evidence in her decision and before a definitive finding on credibility of either the complainant or the appellant in the context of all the evidence at trial.

Thus, the trial judge's reasoning slipped into impermissible propensity reasoning by relying on bad character evidence to convict the appellant.

This case is an important reminder to be careful about the use of animus and propensity evidence when not properly grounded or relevant. Animus can only be used to establish motive or intent and it is not automatically admissible. Further, evidence of animus must be probative and provide actual insight into the

relationship rather than simply revealing past conflicts or “bad character” as the trial judge found in this case.

File# 41980

Inconsistencies due to alcohol and drug use and how they affected the complainant’s credibility.

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## Other Cases To Watch

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

File # 41610

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

*His Majesty the King v. Robert Joseph DeSutter*

File# 41754

Whether the trial judge acquitted due to an improper ruling regarding inadmissibility of sexual images on a USB proffered by the Crown.

*His Majesty the King v. A.M., et al.*

File# 41528

Application of s.276 to human trafficking charges.

*Matthew Berg v. His Majesty the King*