SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Bethune*, 2022 NSSC 246

Date: 20220825
Docket: CRH 507257
Registry: Halifax

Between:

Her Majesty the Queen

v.

Graeme Bethune

Restriction on Publication: ss. 486.4 and 486.5
This publication ban expired on August 23, 2022

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	June 3, 2022, in Halifax, Nova Scotia
Oral Decision:	June 3, 2022
Written Release:	August 25, 2022
Counsel:	Carla Ball and Katie Lovett, for the Crown Stanley MacDonald, Q.C. and Paul Niefer, for the Defence Carbo Kwan, for the Complainant (on the issue of standing)

By the Court (orally):

[1] Graeme Bethune, who is a medical doctor, faces one count of sexual assault, which is alleged to have occurred between the dates of January 1, 2005 – January 1, 2009. His trial is scheduled to be heard from August 29 to September 2, 2022.

[2] The Crown seeks to adduce at trial, evidence of other sexual activity of the Complainant. I will refer to the nature of that evidence later in these reasons. First, it is appropriate to review the law which governs its admissibility.

[3] To begin, we know that Bill C-51 has established the procedure applicable to Defence led evidence of "other sexual activity" under s. 276 of the *Criminal Code*. That procedure was codified in what is now s. 278.93.

[4] Section 276(1), on the other hand, applies to all such applications, whether Crown or Defence led. The interplay between that section, and its applicability to Crown led evidence of other sexual activity of the Complainant, has been outlined in *R. v. Barton*, 2019 SCC 33, at para. 80:

> ... First, s. 276(1), which confirms the irrelevance of the "twin myths", is categorical in nature and applies irrespective of which party has led the prior sexual activity evidence. Thus, regardless of the evidence adduced by the Crown, Mr. Barton's evidence was inadmissible to support either of the "twin myths". Moving to s. 276(2), while it is true that this provision applies only in respect of "evidence ... adduced by or on behalf of the accused", the common law principles articulated in *Seaboyer* speak to the general admissibility of prior sexual activity evidence. Given that the reasoning dangers inherent in prior sexual activity evidence are potentially present regardless of which party adduces the evidence, trial judges should follow this Court's guidance in *Seaboyer* to determine the admissibility of Crown-led prior sexual activity evidence in a *voir dire* (see pp. 633-36).
>
> [Emphasis added]

[5] The discussion in *Seaboyer* recognizes that the reasoning dangers inherent in evidence of prior sexual activity of the Complainant are potentially present regardless of which party adduces the evidence. However, the procedure outlined in s. 278.93 applies only when the Defence wishes to lead evidence of such activity. As pointed out in *Barton*, therefore, the Court's guidance in *Seaboyer* is where we begin when the procedure with respect to Crown led evidence is considered.

[6] In the eponymous *R. v. Seaboyer*, [1991] 2 S.C.R. 577, the Court summarized the applicable principles as follows:

> 1. On a trial for a sexual offence, evidence that the Complainant has engaged in consensual sexual conduct on other occasions (including past sexual conduct with the accused) is not admissible solely to support the inference that the Complainant is by reason of such conduct (a) more likely to have consented to the sexual conduct at issue on the trial; or (b) less worthy of belief as a witness.
>
> 2. Evidence of consensual sexual conduct on the part of the Complainant may be admissible for purposes other than an inference relating to the consent or credibility of the Complainant where it possesses probative value on an issue in the trial and where that probative value is not substantially outweighed by the danger of unfair prejudice flowing from the evidence…

[7] The over arching consideration is expressed thus in *R. v. Goldfinch*, 2019 SCC 38:

> 97. …when applying this regime, trial judges must take a careful, rigorous approach -- one that recognizes and protects against the risks that accompany sexual activity evidence. The statutory requirements set out in s. 276(2) are designed to ensure that any admissible sexual activity evidence is limited in scope and that its legitimate purpose is identified and weighed against countervailing considerations. A careful application of these requirements is essential to the integrity of the trial process.

[8] On the basis of the foregoing, certain procedural steps may be identified.

[9] First, this application will be held in camera. The common-law principles, including those specifically canvassed in *Toronto Star Newspapers v. Ontario*, 2005 SCC 41, were considered by our Court of Appeal in *R. v. Verrilli*, 2020 NSCA 64:

> 23. In Canada, the open court principle is essential for public confidence in the courts and the administration of justice. Judicial proceedings are presumed to be open to the public and the media and should only be restricted where the party seeking to do so can provide sufficient justification. This principle was described by the Supreme Court of Canada in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 as follows:
>
> > 1. In any constitutional climate, the administration of justice thrives on exposure to light -- and withers under a cloud of secrecy.
> >
> > 2. That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2(b) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.

> 3. The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.
>
> 4. Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice* or *unduly impair its proper administration*.

24. In the *Dagenais/Mentuck* decisions, the Supreme Court of Canada considered applications for publication bans in the context of criminal proceedings. In *Dagenais*, the ban was directed at a television program which the applicant alleged would be prejudicial to the fairness of his jury trial then under way. In *Mentuck*, the request was for a temporary ban over the identity of certain undercover police officers and the operational methods used in investigating the accused. The test for assessing whether to issue such common law publication bans was first set out in *Dagenais*, but modified in *Mentuck* to provide:

> 32. …
>
> A publication ban should only be ordered when:
>
> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

…

26. Although both *Dagenais* and *Mentuck* involved applications which were opposed by the media, it is not necessary for the media to be involved in order for the principles to apply. Even if the application is made *ex parte* and there is no person present to argue against the publication ban, a judge must still take into account the interests of the press and public (*Mentuck*, para. 38).

27. In *Toronto Star*, the Supreme Court of Canada considered a challenge to sealing orders issued under s. 487.3 of the *Code* and concluded that the *Dagenais/Mentuck* analysis applies. The Court described the scope of these principles in very broad terms:

> 5. This criterion has come to be known as the *Dagenais/ Mentuck* test, after the decisions of this Court in which the governing principles were

> established and refined. The issue in this case is whether that test, developed in the context of publication bans at the time of trial, applies as well at the pre-charge or "investigative stage" of criminal proceedings. More particularly, whether it applies to "sealing orders" concerning search warrants and the informations upon which their issuance was judicially authorized.
>
> …
>
> 7. ... In my view, the *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values of s. 2 (b) of the *Charter*.

[10] With that said, however, I disagree with the Crown's position that the Complainant (in this case) should be entitled to appear and make submissions with respect to the evidence which the Crown seeks to adduce. I will not permit her to do so, and will outline my reasons below.

[11] I begin by recognizing the fact that s. 278.942 grants the Complainant the right to appear and make submissions with respect to Defence led evidence. However (and to repeat) we are in the realm of the common law when dealing with Crown led evidence.

[12] Next, I consider the principles discussed in *R. v. L.(L.A.) v. A.(B.)*, [1995] 4 S.C.R. 536 (SCC), and specifically para. 27 thereof, where the Court observed:

> The *audi alteram partem* principle, which is a rule of natural justice and one of the tenets of our legal system, requires that courts provide an opportunity to be heard to those who will be affected by the decisions. The rules of natural justice or of procedural fairness are most often discussed in the context of judicial review of the decisions of administrative bodies, but they were originally developed in the criminal law context. In *Blackstone's Criminal Practice* (Murphy rev. 1993), the authors remark at p. 1529:
>
> > Traditionally, the rules of natural justice have been defined with a little more precision, and are said to involve two main principles - no man may be a judge in his own cause, and the tribunal must hear both sides of the case.
> >
> > [Emphasis added]

[13] Although the Complainant in *L.A.* was granted standing in that case, the situation involved the potential use of her private counselling records at trial, to which she was opposed. Her privacy interests were clearly involved.

[14] The distinction between such a situation and this application, is best captured by *R. v. L.F.*, 2020 ONSC 6790, at para. 23:

> When Parliament amended the *Criminal Code* after *Seaboyer* and again in 2018 it did not make the s. 276 regime applicable to the Crown. As I have mentioned, Crown applications continue to be governed by the common law as set out in *Seaboyer*: *R. v. Goldfinch*, 2019 SCC 38, 380 C.C.C. (3d) 1 at para. 142; *Barton* at para. 80. When Parliament amended the s. 276 regime in 2018 it granted a Complainant standing in the specific circumstances of applications by an accused person. *Barton*, *Goldfinch* and *R.V.* all considered the question of Crown-led evidence of prior sexual activity (or inactivity). All three noted that a *voir dire* is required when the Crown seeks to lead evidence of prior sexual activity (or inactivity). None of those cases contemplated that a Complainant would have standing at the *voir dire*. The issue of standing was not squarely before the Court, but it is also true that the Court was giving guidance to trial judges dealing with the issue.

[15] In this case, the Complainant has already consented to the Crown's use of this information, after receiving legal advice with respect to the implications of its release, and the subsequent use of the information at trial. Counsel for the Complainant could not articulate any role that the Complainant could possibly play in this application, other than to support the Crown's position.

[16] As a consequence, the Complainant's privacy interests are neither involved nor at issue in this Application. She has already consented to the Crown's use of the information. If her participation was allowed, as her counsel candidly acknowledged, her role would be that of supporting and buttressing the Crown's position. Absent special or otherwise legislated circumstances, an accused faces only one adversary at common law. It is the Crown.

[17] This will not (necessarily) be the situation in every case. I respectfully agree with the Court in *L.F.*, where at para. 26 it was pointed out that:

> I do not wish to be taken as saying that a Complainant can never have standing where the Crown seeks to introduce evidence of prior sexual activity or inactivity. I think a trial judge, in the exercise of his or her trial management function, could order that the Complainant be given the opportunity to make submissions in a particular case, although I think that such cases would be rare.

[18] Another procedural point must be clarified. It bears emphasis that the Court in *Seaboyer* (at para. 106) noted that the principles enunciated therein were applicable to prior consensual sexual activity or conduct. This is different than what is at issue in this application. Here, what the Crown is seeking to adduce has been variously described as earlier sexual abuse, sexual violence, or sexual trauma. It is clearly not prior consensual sexual activity.

[19] Consider, however, what was said in *R. v. Darrach*, 2000 SCC 46, where at para. 33, Justice Gonthier concluded:

> This section gives effect to McLachlin J.'s finding in *Seaboyer* that the "twin myths" are simply not relevant at trial. They are not probative of consent or credibility and can severely distort the trial process. Section 276(1) also clarifies *Seaboyer* in several respects. Section 276 applies to all sexual activity, whether with the accused or with someone else. It also applies to non-consensual as well as consensual sexual activity, as this Court found implicitly in *R. v. Crosby*, [1995] 2 S.C.R. 912, at para. 17. Although the *Seaboyer* guidelines referred to "consensual sexual conduct" (pp. 634-35), Parliament enacted the new version of s. 276 without the word "consensual". Evidence of non-consensual sexual acts can equally defeat the purposes of s. 276 by distorting the trial process when it is used to evoke stereotypes such as that women who have been assaulted must have deserved it and that they are unreliable witnesses, as well as by deterring people from reporting assault by humiliating them in court. The admissibility of evidence of non-consensual sexual activity is determined by the procedures in s. 276. Section 276 also settles any ambiguity about whether the "twin myths" are limited to inferences about "unchaste" women in particular; they are not (as discussed by C. Boyle and M. MacCrimmon, "*The Constitutionality of Bill C-49: Analyzing Sexual Assault As If Equality Really Mattered*" (1999), 41 Crim. L.Q. 198, at pp. 231-32).
>
> [Emphasis added]

[20] Section 276 applies to both Crown and Defence led evidence of prior sexual activity. *Seaboyer* settled conclusively that the mere fact that the Complainant had engaged in sexual activity prior to that which forms the subject matter of the charge, cannot support an inference that she was either more likely to have consented to the sexual activity at issue in the subject case, or is less worthy of belief.

[21] This may be further extrapolated. Take, for example, the thought that “victims of sexual assault always do “x”. This victim did not do “x”, therefore, she can not be telling the truth when she says that she was assaulted”. This is merely one more example of an assumption which has never been backed up by any empirical evidence whatsoever. There are others.

[22] The point is this. The fundamental reason why evidence of earlier (or other) sexual activity, whether it invokes one of the twin myths noted in s. 276(2), or some other unsubstantiated generalization(s), is inadmissible, is because such generalizations are unfounded. If unfounded, there is no proven connection or nexus between the "other sexual activity" and the proposition in support of which this evidence is being advanced. This makes it irrelevant and, therefore, inadmissible.

[23] It is always incumbent upon the party seeking to adduce evidence of sexual activity (other than that with which the accused is charged) to demonstrate its potential probative value with respect to a live issue in the subject proceeding.

[24] So, at the risk of further repetition, in order for the evidence to be admissible it must be potentially relevant (or probative). Either by itself, or in connection with other facts, it must have the potential to prove or render probable the past, present or future existence (or non-existence) of the other fact. The onus is on the party seeking to adduce the evidence to demonstrate this relevance.

[25] The Crown says this in its brief at para. 27:

> The Crown seeks to introduce evidence that the Complainant was a victim of sexual violence as child, prior to the alleged sexual assault that is the subject of this trial. The Crown also seeks to adduce evidence that the Complainant disclosed the details of prior sexual violence she experienced to the accused in the course of their doctor/patient relationship.
>
> [Emphasis added]

[26] This was nuanced by somewhat of a change in the Crown's position during argument. The Crown then said that it would be prepared to adduce some details of the prior abuse, including the nature of the relationship between the Complainant and the person who committed the abuse, and the type of act committed during the abuse. The Crown was not willing, however, to provide all of the details. The Crown provided the Court with an example during argument: "suppose the Complainant was to say that she had been digitally penetrated by a teacher as a child".

[27] This is linked, the Crown says, to s. 273 of the *Criminal Code*, upon which it will be relying. That section, among other things, outlines the circumstances in which an accused will be considered to have induced the Complainant to engage in the activity by abuse of a position of trust or authority (s. 273.1(2)).

[28] This evidence (the argument continues) will assist the Court in its determination as to whether a position of trust existed in the first place and, if so, the depth of that trust, or the nuances associated with it. This, in turn, will demonstrate the scope of the power or authority that the accused is said to have exerted over the Complainant.

[29] The Crown goes on to argue that the evidence which it seeks to adduce will be limited to those facts just mentioned, plus the fact that these details were disclosed to the accused, plus the number of occasions of abuse which were disclosed to the accused. After the Crown leads this evidence in direct, they argue that the scope of the accused's cross-examination of the Complainant must not stray into the details of the prior sexual violence which she says that she disclosed to him.

[30] Finally, at paras. 32 and 33 of its brief, the Crown argues:

> 32. The accused's knowledge that the Complainant had been the victim of childhood sexual violence is relevant for two reasons:
>
> > 1. The admission of this evidence will permit the Complainant to fully describe the doctor/patient relationship between herself and the accused, including the fact that he was privy to private and intimate details of her personal history and medical issues. The accused's knowledge of these details about the Complainant will also assist the Complainant in explaining the level of trust she had for him as her medical doctor; and
> >
> > 2. The accused's knowledge of this information about the Complainant is relevant to the abuse of his position of trust over the Complainant when he allegedly induced her to engage in sexual activity.
>
> 33. In sum, the evidence is relevant to the depth of the doctor/patient relationship between the accused and the Complainant, as well as the accused's ability to abuse his position of trust over her.
>
> (*Crown brief dated April 14, 2022*)

[31] This is all of the specifics with which the Court and the accused have been provided.

[32] With respect, a *Seaboyer* application must relate to specific evidence of "other sexual activity". It must amount to concrete, discernable evidence of such activity. How can the Court conclude that the evidence in question is potentially relevant to an issue at trial if it is uncertain of what that evidence will consist?

[33] This is not the only difficulty that the Crown faces. It argues that the nature of the evidence is related to whether a position of authority existed. Yet, to the extent that I understand the Crown's argument, there is no evidence before me to show how such disclosure is potentially relevant to, adds to, or even contextualizes, a position of trust or power.

[34] The fact that the accused was the Complainant's doctor for a lengthy period of time does not appear to be in dispute. Neither does the fact that part of the treatment that the accused administered involved counselling.

[35] What is missing from the equation is precisely how the fact that she disclosed the (unspecified) trauma to him could be relevant to the characterization or the depth of the authority that he held over her. It will not assist the Court in determining the parameters of that authority or the scope of that authority. I am unaware of any suggestion that the accused used the information that he obtained in some way to extort or induce the Complainant to behave in a certain manner.

[36] In its essence, the argument seems to implicitly accept the proposition that a victim who discloses childhood abuse tends to be more trusting of, under the authority of, or more submissive in relation to the professional to whom she entrusts it. With respect, that premise has not been established. A premise without a foundation is every bit as fallacious as either of the twin myths enshrined in s. 276.

[37] Put differently, it has not been shown how such information will assist the trier of fact (which, in this case, is myself) in a determination of whether the consent of the Complainant was given in circumstances that are contemplated by s. 273.1(2).

[38] It is true that in *R. v. Williams*, 2019 NSSC 399, while not allowing (into evidence) records with respect to details surrounding a report to the police by the Complainant about acts of a sexual nature directed toward her by two other males, I did allow Defence led evidence of the fact that the complaint itself had been made (without details) to be admitted into evidence.

[39] I explained why this was so in the particular circumstances of that case at para. 65:

> However, the fact of the complaint itself is different. It does pass the stage one test. [I pause here to say that we were dealing with defence led evidence at that time.] It is potentially linked and relevant to an issue at trial because the apparent theory of both accused is that S.H. consented to the "threesome activity" until M.M.K. entered the room for the second time and made repeated references to "do you

> remember what happened", and S.H.'s response that "Jonah doesn't know." There are also the earlier remarks attributed to S.H. by both accused and expected to be attributed to her by at least one RA to the effect that her friends were "overreacting", and her subsequently beginning to cry when M.M.K. persistently repeated "do you remember what happened". Therefore, this evidence is potentially relevant to an issue at trial.

[40] In this particular case, the potential relevance, or the necessary linkage to an issue at trial has not been established.

[41] This is exacerbated by the (previously noted) fact that the evidence itself is entirely lacking in specificity. I am still not entirely sure of what it will consist. We have heard some hypotheticals. We have heard the Crown say “suppose the Complainant was to say this”, or “suppose the Complainant was to say that”. One of the problems which this raises is how to determine the boundaries of the potential body of evidence for which admittance is sought.

[42] The corollary of this problem is obvious too. If the evidence is not clearly articulated, the accused cannot ever know precisely a significant portion of the case which he must meet. And, of equal importance, how does the Court protect the Complainant’s rights in a situation where we are dealing with something so amorphous?

[43] If I am wrong, and the evidence is somehow specific enough and relevant, I would nonetheless have concluded that its probative effect is very slight, and would be substantially outweighed by the prejudice which would accrue to the accused if the evidence were to be admitted.

[44] To cite merely one example, the credibility of the Complainant with respect to the earlier acts of sexual abuse (which the Complainant will say that she confided to the accused) and her credibility as to the reality of those events having actually occurred, will have to be assessed. However, under the scenario proposed by the Crown, cross-examination of the Complainant must either be truncated, or completely forbidden, with respect to the details of the abuse reported.

[45] The evidence which the Crown seeks to admit will not assist me in establishing the parameters of the doctor/patient relationship, or position of trust, in the slightest. Nor will it shed any light (for example) on whether there was an abuse of power which vitiated any consent which the Complainant may be alleged to have provided in the case at bar.

[46] In sum, the onus was on the Crown to establish:

(a) The specific evidence that it proposes to call;

(b) How that specific evidence is potentially relevant to the issue (in this case) which was identified: that of the abuse of power and position of authority by the accused as contemplated by the *Criminal Code*, s. 273, and also that;

(c) The probative value of such evidence outweighs its prejudice to the accused.

[47] The Crown has not established even one of these criteria.

[48] The Application is therefore dismissed.

Gabriel, J.