

Criminal**SCC sheds light on when judicial curtailment of defence's cross-examination threatens fair trial**By **Cristin Schmitz**

(March 25, 2022, 4:01 PM EDT) -- The Supreme Court of Canada has clarified when a trial judge's curtailment of the defence's cross-examination of a Crown witness strays from discretionary trial management to an evidentiary ruling, including one that improperly restricts an accused's Charter right to make full answer and defence.

The top court divided 6-3 on March 25 to dismiss Victor Samaniego's appeal from a Toronto jury's finding that he was guilty of unauthorized possession of a loaded restricted firearm in 2015: *R. v. Samaniego*, 2022 SCC 9.

Justice Michael Moldaver's majority judgment marks the first time the top court has addressed the content and scope of the discretionary trial management power, which enables trial judges to control the process in their court and ensure that trials proceed in an effective, timely and orderly fashion, including by restricting cross-examination that is unduly repetitive, rambling, argumentative, misleading, or irrelevant.

However, "ensuring efficiency does not mean sacrificing the rules of evidence," Justice Moldaver said. "Trial management does not provide a safe haven for erroneous evidentiary rulings."

The majority noted that trial management decisions can sometimes overlap with the rules of evidence.







Michelle Biddulph and Louis Strezos, Criminal Lawyers' Association

Toronto's Louis Strezos and Michelle Biddulph, co-counsel for the intervener Criminal Lawyers' Association (Ontario) (CLA), told *The Lawyer's Daily* the majority ruling "clearly delineates the trial management power from the rules of evidence," along with clarifying the top court's jurisprudence on when a dissent in a Court of Appeal gives rise to an appeal as of right to the top court.

"This is a very helpful decision not only for the defence, but trial judges," Strezos and Biddulph explained in a joint statement. "The concern of the CLA [is] about a growing trend to blend the trial management power with the rules of evidence. The trend results in inconsistency, differing standards of review, and potentially the misapplication of the rules of evidence that can lead to wrongful conviction."

Biddulph and Strezos added, the "court, generally, in our view, accepted that the trial management power of a judge ends where the rules of evidence begin ... that the exercise of a trial management power that results in the non-application or misapplication of a rule of evidence is an error of law."

This is important, they explained, "because the rules of evidence are built around the truth-seeking function of a criminal trial to ensure that the innocent are not convicted. Trial management powers are different. Their focus is on efficiency and the conduct of the case. In the vast majority they will work together, but when they conflict, the rules of evidence prevail. ... The decision establishes that while trial efficiency is important to all justice system participants, this objective cannot come at too high of a price."

Strezos and Biddulph also highlighted that the case was argued in the Court of Appeal by the Pro Bono Inmate Appeal Program — which operates as a safety net to ensure a final avenue for meaningful appellate review. "The appellant in this case was denied legal aid funding for his appeal based on lack of merit," they noted. Yet "the case is now the leading authority on trial management powers and their intersection with the rules of evidence," they said. "Without the program, and its dedicated members, it is doubtful that this case would have seen the judicial light of day."

The Ontario Crown declined comment on the Supreme Court's decision.



Chris Rudnicki, Rudnicki & Company

However, Samaniego's appellate counsel, Chris Rudnicki of Toronto's Rudnicki & Company, said that while he is disappointed in the result of the appeal, in his view the decision "provides much-needed clarity" on the difference between trial management and evidentiary ruling powers, and "affirms the importance of unfettered cross-examination as part of the right to make full answer and defence."

"This judgment is an important read for trial judges looking to clarify where the trial management power ends and the rules of evidence begin," Rudnicki said. "This is important because how [a mid-trial ruling] is characterized determines the scope of appellate review."

If the trial judge's ruling is seen to be a trial management decision, it is entitled to deference on appeal and can only be overturned if it is unreasonable or there was an error in principle, he explained. "If it is an evidentiary ruling, it is entitled to no deference on appeal, and can be reviewed for correctness. This means that appellate litigation around decisions to curtail cross-examination will become battles over whether the ruling at trial was an exercise of the trial management power or an evidentiary ruling.

Rudnicki advised that where a trial judge decides it is necessary to prevent the questioning of a witness, "they should clearly state which power they are exercising, and why they think it applies in their case."

Police saw Samaniego's co-accused, Jose Serrano, toss away a handgun as they approached the two men outside a nightclub in 2015. The jury convicted Serrano of possessing a loaded, restricted firearm, contrary to s. 95(1) of the *Criminal Code*, but also convicted Samaniego who had been with Serrano.

The main issue at the trial was whether one or both of the co-accused had possessed the gun, with the Crown contending that each man had possessed it at some point during night. The Crown's case that Samaniego had the handgun relied mostly on testimony from the nightclub security guard, who was a good friend of Serrano.

Samaniego urged at the Supreme Court that four rulings by the trial judge during his 2018 trial — which reined in defence questioning aimed at impeaching the credibility of the key Crown witness — went beyond the trial judge's trial management discretion to misdirecting the jury on that witness's prior statements and undermined his right to a fair trial.

The Ontario Court of Appeal's 2-1 judgment below dismissed Samaniego's appeal, *R. v. Samaniego*, 2020 ONCA 439, finding that the trial judge's rulings were not erroneous and were entitled to deference as she was exercising her discretionary trial management power; the dissenting appellate judge perceived evidentiary errors in all four rulings and would have ordered a new trial.

At the Supreme Court of Canada, the six-judge majority concluded that although one of the trial judge's four rulings was, in part, erroneous, the *Criminal Code*'s s. 686(1)(b)(iii) "curative proviso" applied to sustain Samaniego's conviction as the trial judge's error did not amount to a substantial wrong or miscarriage of justice.



Justice Michael Moldaver

"The proviso can only rarely apply in cases where cross-examination has been improperly curtailed," Justice Moldaver stipulated. However, this was "one of those rare cases" as the "technical error" made by the trial judge was "harmless and would not have affected the outcome," the majority held.

In particular, the trial judge had restricted cross-examination about the security guard's preliminary inquiry testimony prior to his adoption of his police statement — an incorrect evidentiary ruling. The witness's adoption of his police statement as true did not erase his different initial version of events, the majority said. "There was an inconsistency that the accused's counsel could probe, had she sought to do so."

However, the majority concluded that the defence was able to vigorously challenge the credibility of the key Crown witness, and to repeatedly emphasize its primary theory that the Crown witness was lying to protect Samaniego's co-accused. "Furthermore, there was no indication that the accused's counsel wanted to ask the questions improperly barred by the trial judge," Justice Moldaver wrote. "Even if [defence counsel] did want to pursue that line of questioning, this would likely have undermined — rather than supported — the primary theory advanced by the accused."

Justice Moldaver observed that the defence cross-examination at trial "was neither a model of brevity nor clarity. On the contrary, it went on at great length and drew numerous objections from both Crown counsel and [the co-accused's] counsel for being repetitive, unfocused, and misleading. To make matters worse, when the trial judge tried to clarify the purpose and relevance of trial counsel's questions, she was often met with unclear and unhelpful responses."

Justice Moldaver, a former trial judge and prominent defence counsel, observed that conducting a criminal trial is "a demanding task."

"This trial was no exception," he noted. "It devolved into a nine-day, highly contested jury trial over a seemingly straightforward issue: whether Mr. Samaniego and/or his co-accused, Mr. Serrano, had possession of a handgun. The experienced trial judge had her hands full keeping the proceedings on track. Without her patience and her overriding concern that all parties be treated fairly, it almost certainly would have resulted in a mistrial."

Justice Moldaver added that the "cut-throat" defences as between the co-accused led to "bickering among the parties; time estimates were honoured more in the breach than in the observance; and the jury was repeatedly required to leave the courtroom while the trial judge dealt with case management and evidentiary issues, many of which were attributable to the manner in which the main Crown witness was cross-examined by Mr. Samaniego's trial counsel."



Justice Suzanne Côté

In their co-written dissent, Justices Suzanne Côté and Malcolm Rowe (backed by Justice Russell Brown), would have set aside Samaniego's conviction and ordered a new trial. "The accused was deprived of the right to pursue a highly relevant line of cross-examination," Justices Côté and Rowe held.

"The trial judge's exclusion of the security guard's prior inconsistent statement made at the preliminary inquiry about who dropped and picked up the gun was an erroneous evidentiary ruling, not a trial management decision," the minority held. "This error cannot be saved by the curative proviso."

There was no video evidence showing Samaniego in possession of the gun. Serrano did not testify. The only evidence linking Samaniego to the handgun was testimony by the security guard, who testified Serrano only came to possess the handgun when, in order to protect the security guard, Serrano took it away from Samaniego, who brought the gun and brandished it before the security guard.

The trial judge prevented defence counsel from cross-examining the security guard on his prior statements to police and at the preliminary inquiry, and she disallowed a line of questioning related to alleged discreditable conduct by the co-accused, Serrano. The trial judge also directed the jury that the witness had made prior consistent statements, but did not require those statements to be put into evidence.

Photo of Justice Michael Moldaver by Jessica Deeks photography

Photo of Justice Suzanne Côté by Phillip Landreville photography

If you have any information, story ideas or news tips for The Lawyer's Daily, please contact Cristin Schmitz at Cristin.schmitz@lexisnexis.ca or call 613 820-2794