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SCC rules admissibility of Crown-led 'sexual inactivity' evidence must be decided in a voir dire

By **Cristin Schmitz**

Law360 Canada (June 13, 2025, 6:28 PM EDT) -- Holding 9-0 that evidence of a complainant's "sexual inactivity" forms part of their "sexual history" — and is therefore presumptively inadmissible at trial — the Supreme Court of Canada has also clarified that the common law screening procedure for Crown-led sexual history evidence "should mirror" the s. 276 *Criminal Code* regime that applies in a voir dire for defence-led sexual history evidence.

On June 13, 2025, the top court ruled unanimously that Crown-led social media messages from a 16-year-old complainant to a 22-year-old B.C. man later accused of sexually assaulting her should not have been admitted into evidence by the trial judge without being screened first for admissibility in a common law (*Seaboyer*) voir dire: *R. v. Kinamore*, 2025 SCC 19.

The court allowed the appeal of Dustin Kinamore, quashed his sexual assault conviction in the B.C. lower courts, and ordered a new trial.

Supreme Court of Canada Chief Justice Richard Wagner

The Supreme Court made new common law in the appeal in ruling that the voir dire for Crown-led sexual history evidence should be conducted using the "basic structure" of the two-stage *Criminal Code* procedure applicable to the vetting of defence-led sexual history evidence, which is set out in ss. 278.93 and 278.94 of Code. "Save for two modifications, Crown applications are subject to the same substantive admissibility and procedural requirements that apply to defence-led evidence under

the s. 276 regime" of the Code, Chief Justice Richard Wagner wrote for the court.

The chief justice went on to explain how the two-stage procedure applies to screening Crown-led sexual history evidence for admissibility.

In addition, the court held that "sexual inactivity" evidence is presumptively inadmissible under s. 276 and the common law "because it forms part of a complainant's sexual history and can evoke distinct myths and stereotypes that these rules seek to eliminate."

"Sexual inactivity" evidence encompasses "evidence that the complainant has not previously engaged in, or prefers not to engage in, any sexual activity, certain types of sexual activity, or sexual activity under particular circumstances."

With respect to the process in voir dires to screen Crown- and defence-led sexual history evidence, Chief Justice Wagner reasoned that "a harmonized regime for the admission of sexual history evidence will best allow courts to perform their important evidentiary gatekeeping function, without creating the undue complication that parallel regimes could cause."

In settling that sexual inactivity evidence is presumptively inadmissible under s. 276 and the common law, Chief Justice Wagner explained that "sexual inactivity evidence may evoke inverse twin-myth reasoning."

Rachel Wood, Harper Grey LLP

"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," he wrote.

Yet sexual inactivity evidence is not categorically inadmissible as the presumption against its admissibility only functions to eliminate discriminatory inverse twin-myth lines of reasoning.

There are permissible uses of sexual inactivity evidence, Chief Justice Wagner stipulated.

One among several examples include that, in some circumstances, a complainant's prior indications of sexual disinterest in the accused that are expressed near the time of the alleged assault can be admissible under the hearsay exception for statements of present intention and can be used as circumstantial evidence relevant to the issue of consent, the chief justice said. "The same principle applies to a complainant's prior indications of sexual interest."

Kinamore and the complainant met at a motorcycle shop and exchanged messages on social media for a few months. Eventually they met for dinner and a movie at Kinamore's apartment. Kinamore was charged afterward with sexual assault. In their testimony at trial, the complainant described a sexual assault, while the accused described a consensual sexual encounter.

At the trial, both the Crown and the defence tendered evidence of the prior messages between the complainant and accused. In many of the texts, the complainant repeatedly stated that she did not intend to have a sexual relationship with Kinamore, and some of their discussions referenced her virginity.

The Crown introduced screenshots of the messages as a marked exhibit without a voir dire. Evidence of the complainant's virginity was also introduced through the testimony of the complainant and the accused.

Crucially, all this took place without any judicial pre-screening of the evidence under the *Criminal Code* or the common law. The accused had not applied under s. 276(2) of the Code to have a judge determine in a voir dire the admissibility of any of the defence evidence.

Nor was a *Seaboyer* voir dire held for the judge to determine the admissibility of any evidence led by the Crown.

In ordering a new trial, Chief Justice Wagner explained that the trial judge's assessment of the credibility of the accused and the complainant "was inextricably intertwined with the presumptively inadmissible evidence of sexual history. Given the material role of that evidence in the trial judge's reasons for convicting the accused, the Crown has not proven that the evidentiary error was harmless."

The chief justice concluded by underscoring that "all parties in the criminal justice system have an obligation to assist in minimizing unnecessary costs and delay, which currently affect sexual offence trials in this country."

To that end, he said the Supreme Court's reasons aim "to facilitate this objective by resolving some of the uncertainty that has remained about the evidentiary rules governing a complainant's sexual history."

Matthew Nathanson, MN Law

Matthew Nathanson of Vancouver's MN Law, who with Rachel Wood of Vancouver's Harper Grey LLP represented the appellant, called the judgment "amazing" and a "tour de force."

"The court, speaking with one voice, has accomplished a multitude of key objectives in one wide-ranging, yet doctrinally consistent, judgment," he said.

Nathanson predicted the judgment "will make a real difference on the ground in the day-to-day practice of criminal law."

He explained, "Sexual assault cases have become very complex. Certainty, consistency and stability in the law help mitigate complexity. This ruling accomplishes all of these objectives."

In that regard, the court has laid out "a very clear roadmap for counsel and trial courts to follow," he said.

"To be clear, the complexities of this area of the law have not disappeared," he added. "But this judgment will help all justice system participants navigate them in a principled, fair and efficient manner."

In addition to settling that sexual inactivity evidence and expressions of "sexual disinterest" are covered by the s. 276 *Criminal Code* and common law *Seaboyer* regimes, the court also interpreted the scope of s. 276 of the Code in a purposive manner, he said.

"It has brought balance to the law of sexual assault by recognizing that both 'twin-myth reasoning' and 'inverse twin-myth reasoning' distort the truth-seeking function of the trial," he said. The court "has harmonized the common law with the statutory regime enacted by Parliament and has provided guidance, for the first time, about the procedure to be used, and the test to be applied, in *Seaboyer* voir dires for Crown-led sexual history evidence."

As well the court has "reaffirmed key temporal limits on the applicability of the 'present intentions' exception to the hearsay rule," Nathanson said.

Additionally, the court has employed the *R. v. Harrer*, [1995] 3 S.C.R. 562 framework of analysis in the domestic law context, Nathanson remarked. "It has overruled one line of appellate authority and clarified the reach of its earlier decision in *R. v. Langan*, 2020 SCC 33."

Finally, the court has also "cautioned against appellate courts conducting speculative 'phantom trials' when considering the curative proviso in s. 686(i)(b)(iii) of the *Criminal Code*," Nathanson said, "thereby preserving the limited, exceptional nature of that provision."

"Any one of these developments could be described as significant — collectively, they are transformative," he suggested.

Some practical benefits flowing from the ruling include that clear, written advance notice by the Crown will help the defence position crystallize, he advised. "It will also focus the trial judge's attention on their gatekeeper function at the outset, and on an ongoing basis throughout the trial."

Moreover, "a clear articulation of the purpose for which the evidence is sought to be tendered will also assist trial judges in formulating clear jury instructions at the end of the trial," he suggested. "Delineating what, and how much, evidence the Crown is seeking to lead will inform the defence if a supplementary s. 276 application is required — an application which the court can consider side-by-side with the Crown application and issue a comprehensive ruling."

Crystal Tomusiak and Lara Vizsolyi of the B.C. Prosecution Service, co-counsel on the appeal for the Crown, said in a statement "the decision provides needed guidance to the Crown, the defence, and to trial judges with respect to the admissibility of other sexual activity evidence, including communications of a sexual nature, where the Crown seeks to lead such evidence."

"The impact of the decision will not be known until we see how trial courts apply it in practice," they said.

However, the court provided guidance as to which aspects of the s. 276 regime are applicable to applications made by the Crown and what factors a trial judge should consider in deciding whether the evidence should be admitted, they said. "In addition, the court clarified that sexual inactivity evidence, including expressions of disinterest, are presumptively inadmissible and must be the subject of a voir dire. While presumptively inadmissible, the evidence is not prohibited and may be adduced at trial if it meets the criteria set out by the court."

Sarah Pringle, Peck and Company

Sarah Pringle of Vancouver's Peck and Company, who with Daniel Song of Pringle Law represented the intervener Trial Lawyers Association of British Columbia, said her client focused on the

admissibility and improper use of text message evidence in sexual assault trials. "While the court ultimately allowed the appeal on other grounds and did not need to decide that issue, the ruling still reflects core concerns we highlighted about fairness and the misuse of prejudicial evidence," she said.

Pringle said the judgment will likely increase the number of pretrial s. 276 and/or *Seaboyer* applications — including ones brought by the Crown — "which adds to the procedural burden in sexual assault trials. These types of cases already involve extensive pretrial litigation, and this clarification may further impact trial timelines under *Jordan*," she suggested. "Still, it provides needed certainty and reinforces the principle that any evidence engaging myths or stereotypes must be properly scrutinized before it goes before the trier of fact."

Pringle said the decision matters because it recognizes that stereotypical reasoning does not only harm complainants, it also prejudices the accused and may undermine the truth-seeking function of the trial. "The court cautioned against 'inverse twin-myth' reasoning: a complainant's prior sexual inactivity cannot be used to bolster credibility or imply a lack of consent. That kind of inference rests on harmful stereotypes about 'ideal victims' and risks undermining an accused's right 'not to be convicted except on evidence directly relevant to the charge in question.'"

Mark Halfyard, Daniel Brown Law LLP

Mark Halfyard of Toronto's Daniel Brown Law LLP, who with Sara Little represented the intervener Criminal Lawyers' Association (Ontario), said, "This is a very positive ruling, and it is encouraging that the court considered many of the on-the-ground, practical submissions raised by the interveners in wrestling with their decision."

He told Law360 Canada the ruling: establishes "clear guardrails to prevent the Crown from being able to misuse evidence of other sexual activity"; provides advance notice to the defence when such evidence is going to be relied upon; and "reinforces that the Crown is not immune from inadvertent pernicious stereotypes."

In this case, the misuse of such evidence led to an unfair trial, Halfyard said. "It is a very balanced and fair judgment on a complicated issue. The court respected the fact that there is a higher burden to exclude defence evidence, which is tied to full answer and defence, and is a very important qualifier."

Halfyard added, "The court was cognizant of how sexual assault trials have become very complex in recent years. Unnecessary complexity leads to delay on an already strained court system — and

delay leads to charges being stayed."

For instance, he noted, the court found that on a Crown application the complainant does not have standing (and the corresponding right to counsel), with some limited exceptions. "This streamlines the litigation process," Halfyard said.

Photo of Supreme Court of Canada Chief Justice Richard Wagner: SCC Collection

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