SCC File No. 37769

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

BETWEEN:

BRADLEY DAVID BARTON,

APPELLANT
(Respondent)

- and -

HER MAJESTY THE QUEEN,

RESPONDENT
(Appellant)

- and -

THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL OF ONTARIO, THE ATTORNEY GENERAL OF MANITOBA, THE DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS, ABORIGINAL LEGAL SERVICES, THE ASSEMBLY OF FIRST NATIONS, THE WOMEN OF THE MÉTIS NATION/LES FEMMES MICHIF OTIPEMISIWAK, THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, THE CRIMINAL TRIAL LAWYERS' ASSOCIATION (ALBERTA), THE CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO, THE INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY, AD IDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, THE INSTITUTE FOR THE ADVANCEMENT OF ABORIGINAL WOMEN AND THE WOMEN'S LEGAL EDUCATION AND ACTION FUND INC. (JOINTLY), THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS, THE VANCOUVER RAPE RELIEF SOCIETY, LA CONCERTATION DES LUTTES CONTRE L'EXPLOITATION SEXUELLE, THE ASIAN WOMEN FOR EQUALITY SOCIETY, THE ABORIGINAL WOMEN'S ACTION NETWORK, FORMERLY EXPLOITED VOICES NOW EDUCATING AND THE CENTRE TO END ALL SEXUAL EXPLOITATION (JOINTLY),

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Part I – Overview and Statement of Facts

A. *Overview*

1. Almost three decades ago in *R. v. Seaboyer*, this Honourable Court affirmed that "outmoded, sexist-based use of sexual conduct evidence"[1] must be eliminated in criminal sexual offence trials and that the twin myths,[2] now identified in section 276(1) of the *Criminal Code*, "have no place in a rational and just system of law."[3]

2. Nevertheless, inappropriate use of sexual activity evidence[4] continues to pervade criminal trials.[5] Although Parliament has set out a comprehensive scheme governing the process for determining when sexual activity evidence is admissible, occasionally it is admitted without compliance with sections 276 to 276.4.

3. There has been very little judicial commentary on the consequences of non-compliance with sections 276 to 276.4. All parties – Crown, defence and the trial judge – have a responsibility to ensure compliance with these mandatory provisions. A failure by the Crown to request that the statutory process be followed should not preclude appellate review.

4. The distorting effect of using myths and stereotypes to assess a complainant's credibility erodes the truth-seeking function of the trial. It irreparably demeans and degrades complainants and strips them of the privacy and security interests sections 276 to 276.4 were designed to

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[1] *R. v. Seaboyer*, [1991] 2 S.C.R. 577, [1991] S.C.J. No. 62, at para. 2.

[2] The twin myths are that a complainant's other sexual activity suggests that s/he is either a) more likely to have consented to the sexual activity that forms the subject-matter of the charge or b) less worthy of belief.

[3] *Seaboyer* at para. 96.

[4] Common parlance is "prior sexual activity" however the section is triggered whether the sexual activity pre- or post-dates the alleged offence.

[5] Elaine Craig, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions" (2016) 94 Can. Bar. Rev. 45, at pp. 46-47.

protect. This is not a question of prosecutorial tactics. Rather, as this Honourable Court has acknowledged, it is an issue of fundamental justice.[6]

5. Appellate courts must be entitled to remedy failures to follow sections 276 to 276.4. Public confidence in the administration of justice requires that all parties, including witnesses, receive a fair trial that complies with the law.

B. Statement of Facts

6. The Attorney General of Manitoba accepts the facts as set out in the *facta* of the parties.

Part II – Issues

1. Can an appellate court intervene to remedy a failure to comply with sections 276 to 276.4?

Part III – Argument

A. Purpose Underlying Sections 276 to 276.4

7. Sections 276 to 276.4 create a statutory framework for the consideration of sexual activity evidence. They have a threefold purpose:

- to protect the integrity of the trial by excluding irrelevant and misleading sexual activity evidence;
- to protect an accused's right to a fair trial by allowing for the admission of sexual activity evidence when it has significant probative value that is not substantially outweighed by its prejudicial effect; and
- to encourage the reporting of sexual offences by safeguarding the security and privacy of complainants.[7]

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[6] *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443, at paras. 24-25.
[7] *Ibid* at paras. 19, 25.

8. Section 276(1) categorically excludes sexual activity evidence that is tendered solely to support inferences that engage the twin myths.[8]

9. Pursuant to section 276(2), sexual activity evidence that is not categorically excluded under section 276(1) may be admissible if it "(a) is of specific instances of sexual activity; (b) is relevant to an issue at trial; and (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice."[9] Unless and until these requirements are met, this evidence is presumptively inadmissible.[10] When determining admissibility, a trial judge must consider the factors listed in section 276(3) which include "the need to remove from the fact-finding process any discriminatory belief or bias" and "the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury."[11]

10. In light of the intrusive nature of this evidence, sections 276(2) and 276(3) require a trial judge to perform, with "a high degree of sensitivity,"[12] a delicate balancing of its probative value against its prejudicial effect. Careful scrutiny is required when determining the admissibility of sexual activity evidence since a permitted use of the evidence may closely resemble a prohibited use.[13] Even if the proposed evidence supports a permitted inference, it may be still be excluded given the distorting effects this type of evidence can have on the trial.[14] Indeed, it may engage other myths and stereotypes, aside from the twin myths, that require its exclusion.[15]

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[8] *Ibid* at para. 2; Craig at pp. 53-54.
[9] *Criminal Code*, R.S.C. 1985, c. C-46, s. 276(2). (Emphasis added.)
[10] Craig at pp. 53-54.
[11] *Criminal Code*, ss. 276(3)(d), 276(3)(e).
[12] *Seaboyer* at para. 104.
[13] *Ibid* at para. 58.
[14] *Darrach* at paras. 41-43.
[15] Craig at pp. 60-61. These include, *e.g.*, the myth that because a complainant has reported sexual violence by others means that she is not credible. See *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 17 and *R. v. T.(M.)*, 2012 ONCA 511, 289 C.C.C. (3d) 115, at paras. 41, 49.

11. The mandatory process set out in sections 276.1 to 276.4 exists as a safeguard to ensure that the proposed evidence is closely scrutinized. If admitted, a trial judge must take "special care" to instruct the jury as to the proper and improper uses of the evidence.[16]

12. Sexual activity evidence should not be routinely admitted. Rather, compliance with section 276 ensures it is only admitted in "exceptional case[s] where circumstances demand that such evidence be permitted."[17]

B. Failure to Observe the Statutory Framework for Admission of Sexual Activity Evidence

13. The potential misuse of sexual activity evidence by a trier of fact is very real. As this Honourable Court observed in *R. v. Find*:

> These myths and stereotypes about child and adult complainants are particularly invidious because they comprise part of the fabric of social "common sense" in which we are daily immersed. Their pervasiveness, and the subtlety of their operation, create the risk that victims of abuse will be blamed or unjustly discredited in the minds of both judges and jurors.[18]

14. The improper admission of this evidence thus "distort[s] the truth-seeking function of the trial process."[19] Moreover, it irreparably harms the privacy and security interests of the complainant. Being compelled to answer irrelevant and prejudicial questions about other sexual activity in a public courtroom represents a significant intrusion on the complainant's privacy and dignity.

15. As a result, the process set out in sections 276.1 to 276.4 is mandatory. Specifically, "no evidence shall be adduced … unless the judge … determines [admissibility] in accordance with the procedures set out in sections 276.1 and 276.2."[20] Parliament has expressly obliged both the

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[16] *Criminal Code*, s. 276.4; *Seaboyer* at paras. 103, 105.
[17] *Seaboyer* at para. 105.
[18] *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at paras. 101, 103.
[19] *Darrach* at para. 37, citing *R. v. Mills*, [1999] 3 S.C.R. 668, [1999] S.C.J. No. 68, at para. 74.
[20] *Criminal Code*, s. 276(2).

accused and the trial judge to follow this process to determine the admissibility of the proposed evidence. The sections do not give the trial judge discretion to circumvent the process.

16. While the sections do not explicitly impose a corresponding duty on the Crown, it is implicit in the Crown's responsibility to ensure compliance with the law. To suggest, as the Appellant does,[21] that the Crown's failure to object to the evidence or request a *voir dire* somehow changes the mandatory nature of the process ignores the plain wording of the sections and the statutory obligations imposed on both the accused and the trial judge. It leaves the protection of the complainant's security and privacy solely in the hands of the Crown and fails to acknowledge the accused and the trial judge's obligations in this regard.

17. Trial judges, in their role as the gatekeeper of the evidence are required "to conduct the trial judicially quite apart from the lapses of counsel."[22] Sexual activity evidence is presumptively inadmissible until the trial judge has undertaken the legislated process and determined its admissibility and its proper use. This is precisely the direction provided by the Manitoba Court of Appeal in *R. v. B.(A.J.)*:[23]

> Without prior judicial consideration of the issue and a determination under s. 276.1, no evidence of the complainant's past sexual activity should have been adduced. <u>The fact that it was adduced by the accused without objection from the Crown or comment by the trial judge does not render it admissible</u>.[24]

18. The Appellant suggests that a failure to follow the process set out in sections 276.1 to 276.4 may be harmless and compares it to cases that do not have a statutorily mandated *voir dire*

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[21] Factum of the Appellant at para. 26.

[22] *R. v. Hodgson*, [1998] 2 S.C.R. 449, [1998] S.C.J. No. 66, at paras. 41, 100, citing *R. v. Sweezey*, (1974) 20 C.C.C. (2d) 400, 27 C.R.N.S. 163 (Ont. C.A.), at p. 417.

[23] In the case at bar, the Alberta Court of Appeal endorsed this direction. See *R. v. Barton*, 2017 ABCA 216, 354 C.C.C. (3d) 245, at para. 112.

[24] *R. v. B.(A.J.)*, 2007 MBCA 95, 225 C.C.C. (3d) 171, at para. 51 (Emphasis added.) See also *R. v. Derksen*, 2013 CarswellMan 267, 107 W.C.B. (2d) 316 (Man. Q.B.), at paras. 12, 22.

process to determine the admissibility of evidence. He also relies on *R. v. F.(C.)*,[25] which dealt with the admissibility of a child's videotaped statement under section 715.1.[26]

19. With respect, section 715.1 has a different purpose than sections 276 to 276.4. Its primary purpose is to allow for the admission of hearsay evidence to assist in the truth-finding function of the trial. Its secondary purpose is to make a child's participation in the criminal justice system less stressful and traumatic.[27] This section is, therefore, not analogous to sections 276 to 276.4, which restrict the admission of sexual activity evidence to prevent its misuse and protect the complainant's privacy and security.

20. Provided the technical requirements of section 715.1 are met, the evidence is admissible unless the trial judge "is satisfied that it could interfere with the truth-finding process." Exclusion of the evidence under section 715.1 will be "relatively rare" where the technical requirements are met.[28] In contrast, sexual activity evidence is presumptively inadmissible. Absent satisfaction of the requirements in sections 276 to 276.4, Parliament has held that the risks inherent in allowing this kind of evidence make its use dangerous and unfair.

21. Rarely will the failure to follow the process set out in sections 276.1 to 276.4 be harmless. The insidious nature of this evidence requires constant vigilance. Trial judges have a responsibility to ensure that myths and stereotypes are not part of the trial:

> Trial judges have a heavy responsibility to ensure that counsel do not introduce the spectre of such forbidden reasoning into a trial. If that occurs in a jury trial, it should be answered by a timely and appropriate instruction to the jury (see *R. v. Barton*, 2017 ABCA 216 at paras 1, 159-61). In judge-alone trials, judges must not succumb to drinking from such a poisoned chalice in their assessment of credibility.[29]

[25] *R. v. F.(C.)*, [1997] 3 S.C.R. 1183, [1997] S.C.J. No. 89.
[26] Factum of the Appellant at paras. 78-79.
[27] *F.(C.)* at paras. 18-22.
[28] *Ibid* at paras. 51-52.
[29] *R. v. C.A.M.*, 2017 MBCA 70, [2017] 12 W.W.R. 89, at para. 51.

C. Appellate Intervention

22. Under section 676(1)(a), the Crown may appeal an acquittal on any ground of appeal that involves a question of law alone. The *Criminal Code* explicitly states that "a determination made under section 276.2 shall be deemed to be a question of law."[30] The failure to make a determination under section 276.2 when required to do so would also amount to a question of law.

23. The Appellant relies on a passage in *R. v. Varga*, and suggests that "[j]ust as the Crown cannot challenge an acquittal by advancing a theory of liability for the first time on appeal, it cannot secure a new trial by advancing a new test for admissibility that contradicts the one advanced at trial."[31]

24. With respect, long-standing precedent suggests that the Crown's failure to object is not an absolute bar to an appeal.[32] Where that failure to object involves the separate and distinct interests of the complainant, the Crown's failure to object should be even less of a consideration. The Crown's failure to object to sexual activity evidence is not a matter of tactics. Prosecutorial discretion exists only if the law permits it. As argued above, the Crown cannot waive mandatory obligations under a statutory scheme.

25. The Appellant further relies on *R. v. Wierzbicki*[33] to support his argument that a failure to follow the process set out in sections 276.1 to 276.4 is not sufficient reason to order a new trial.[34]

26. In *Wierzbicki*, the Ontario Court of Appeal dismissed a Crown appeal from an acquittal where one of the alleged errors was the failure to comply with sections 276 to 276.4. Little

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[30] *Criminal Code*, s. 276.5.
[31] Factum of the Appellant at para. 27; *R. v. Varga*, (1994) 90 C.C.C. (3d) 484, 18 O.R. (3d) 784, at para. 41.
[32] *R. v. Cullen*, [1949] 3 D.L.R. 241, [1949] S.C.R. 658, at para. 11.
[33] *R. v. Wierzbicki*, 2012 ONCA 794, 106 W.C.B. (2d) 563. Leave to appeal refused: *R. v. Wierzbicki*, 2013 CarswellOnt 4878, 2013 CarswellOnt 4879 (S.C.C.).
[34] Factum of the Appellant at para. 78.

information was provided regarding the nature of the impugned evidence or its context. In dismissing this ground of appeal, the Court stated: "we see no prejudice from the failure to comply with the procedural requirements of the section" and identified the following considerations:

- The cross-examination did not invoke the twin myths "against which the section is intended to protect."
- If the procedural requirements had been followed, the questions put to the complainant would inevitably have been permitted.
- The Crown did not suggest that section 276 applied nor was an objection raised.
- The complainant was not surprised, confused or otherwise impaired in her ability to respond to the questions.[35]

27. As an initial matter, *Wierzbicki* was a judge-alone trial. The considerations regarding the prejudicial effect of the evidence are different given a trial judge's obligation to provide reasons for decision. A trial judge's reasons provide a level of transparency that permit appellate review of the impact of the failure to follow the mandatory process for admitting sexual activity evidence.

28. Moreover, with respect, there are several issues with the Ontario Court of Appeal's analysis:

- It conflates sections 276(1) and (2). The fact that the impugned evidence did not invoke either of the twin myths only addresses section 276(1). There is a further requirement under section 276(2) that involves weighing the probative value of the presumptively inadmissible evidence in relation to its prejudicial effect.
- Further to that, sections 276(2) and (3) require a delicate and nuanced balancing of interests. When this analysis is not done by the trial judge, an appellate court should carefully consider the insidious nature of the evidence when determining its impact on the trial. It is not clear that this occurred in *Wierzbicki*.

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[35] *Wierzbicki* at para. 2.

- As argued above, the failure of the Crown to object does not render presumptively inadmissible evidence admissible.
- The sections are intended to protect against irrelevant questions that impede on the complainant's privacy and security interests. Whether she was "surprised" or "confused" is, with respect, beside the point. The failure to follow the mandatory process affects the public confidence in the justice system and discourages the reporting of sexual offences.

29. While it is impossible to ever say with certainty that a verdict would necessarily be different, this Honourable Court has repeatedly recognized the dangerous nature of sexual activity evidence and its subtle but toxic ability to infect the reasoning process of otherwise reasonable triers of fact. This is why it is presumptively inadmissible and only allowed in exceptional circumstances following a delicate and nuanced balancing of interests. Like other character evidence, it has the real potential to distort the truth-seeking function of the trial, and should be treated accordingly.

30. Trust in the trial process to address misconceptions based on myths and stereotypes requires reliance "on the rules of evidence, statutory protections, and guidance from the judge and counsel to clarify potential misconceptions and promote a reasoned verdict based solely on the merits of the case."[36]

31. The principles of fundamental justice enshrined in section 7 of the *Charter* not only protect the rights of an accused, but also the security and privacy interests of the witnesses.[37] An appellate court must be permitted to intervene when statutory provisions designed to ensure a fair trial for all participants have not been followed. Public confidence in the administration of justice is eroded when a statutory scheme is ignored.

Part IV – Costs

32. The Intervener does not seek costs and asks that no costs be awarded against it.

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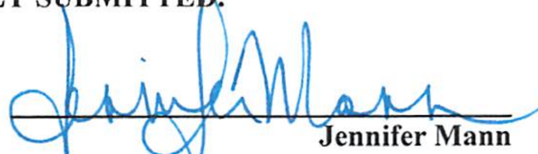
[36] *Find* at para. 104.
[37] *Darrach* at paras. 24-25.

Part V – Order Sought

33. The Intervener takes no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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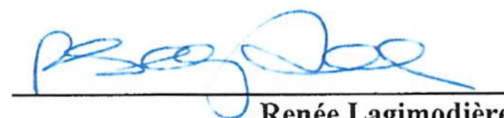

Renée Lagimodière
Counsel for the Intervener,
The Attorney General for Manitoba

Part VI – Table of Authorities and Legislation

Authorities	**Cited at Paragraph No.**	**Tab No. (if applicable)**
R. v. B.(A.J.), 2007 MBCA 95, 225 C.C.C. (3d) 171	17	
R. v. Barton, 2017 ABCA 216, 354 C.C.C. (3d) 245	17	
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R. v. F.(C.), [1997] 3 S.C.R. 1183, [1997] S.C.J. No. 89	18, 19, 20	
R. v. Find, 2001 SCC 32, [2001] 1 S.C.R. 863	13, 30	
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R. v. Quesnelle, 2014 SCC 46, [2014] 2 S.C.R. 390	10	
R. v. Seaboyer, [1991] 2 S.C.R. 577, [1991] S.C.J. No. 62	1, 10, 11, 12	
R. v. T.(M.), 2012 ONCA 511, 289 C.C.C. (3d) 115	10	
R. v. Varga, (1994) 90 C.C.C. (3d) 484, 18 O.R. (3d) 784	23	
R. v. Wierzbicki, 2012 ONCA 794, 106 W.C.B. (2d) 563	25, 26, 27, 28	

Legislation	**Cited at Paragraph No.**
Criminal Code, RSC 1985, c C-46, s. 276 *Code Criminel*, LRC 1985, ch C-46, s. 276	1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 15, 18, 19, 20, 21, 22, 25, 26, 28
Criminal Code, RSC 1985, c C-46, s. 676(1)(a) *Code Criminel*, LRC 1985, ch C-46, s. 676(1)(a)	22
Criminal Code, RSC 1985, c C-46, 715.1 *Code Criminel*, LRC 1985, ch C-46, 715.1	18, 19, 20

Other Documents	**Cited at Paragraph No.**
Elaine Craig, "Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions" (2016) 94 Can. Bar. Rev. 45	2, 8, 9, 10