# YOUTH JUSTICE COURT OF NOVA SCOTIA

**Citation:** *R. v. T.W.R.*, 2018 NSPC 33

**Date:** 2018-10-19
**Docket:** 8115503
**Registry:** Pictou

**Between:**

Her Majesty the Queen

v.

T.W.R.

## *DECISION REGARDING ADMISSIBILITY OF EVIDENCE*

**Restriction on Publication:**
**Any information that might identify the complainant shall not be broadcast or transmitted in any way—Section 486.4 Criminal Code**
**No one shall publish the name of a young person if it would identify the young person as a young person dealt with under this Act—s. 110 Youth Criminal Justice Act**

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| **Judge:** | The Honourable Judge Del W. Atwood |
| **Heard:** | 2018: 19 October in Pictou, Nova Scotia |
| **Charge:** | Section 246.1 *Criminal Code of Canada*, R.S.C. 1970, c. C-34 |
| **Counsel:** | Jody McNeill for the Nova Scotia Public Prosecution Service<br>Michael Scott for T.W.R. |

**PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 486.4 OF THE CRIMINAL CODE AND s. 110 OF THE YOUTH CRIMINAL JUSTICE ACT APPLY AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.**

***Criminal Code—Order restricting publication—sexual offences***

486.4 (1)Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

***Youth Criminal Justice Act—Identity of offender not to be published***

110. (1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

**By the Court:**

***Preamble—admissibility of an unrelated allegation***

[1] T.W.R. is charged with sexually assaulting a family member (case 8115503). It is alleged to have happened many years ago, when T.W.R. was a young person or a just-over-18 adult. The prosecution is proceeding indictably. T.W.R. elected to be tried in this court in accordance with ss. 16 and 67 of the *Youth Criminal Justice Act*; an election was needed as T.W.R.'s status as a young person was uncertain. T.W.R. pleaded not guilty, and the case is ready for trial.

[2] Counsel for T.W.R. seeks to cross-examine the complainant on whether she made an accusation of sexual assault, unrelated to this case, against a person who was a former intimate partner of her mother's, and then recanted it almost immediately; defence counsel is prepared to call the complainant's mother to try to prove that all this really happened. To be clear, the person in this unrelated matter is not T.W.R. and has no connection to the charge before the court.

[3] Counsel for T.W.R. asserts that this evidence is material and relevant as it affects the complainant's credibility; counsel submits also that the evidence is material and relevant as it may help situate in time when the complainant says it was that T.W.R. did what he is alleged to have done.

[4] The prosecution objects to the complainant being cross-examined about a recanted accusation which is unconnected to the charge before the court; the prosecution objects as well to defence calling evidence on the same point from the mother of the complainant. The prosecution bases its objections on the exclusionary provisions of ss. 276 - 276.1 of the *Criminal Code*, which the prosecution describes as being of mandatory application.

[5] For the reasons that follow, I find that ss. 276 - 276.1 are not applicable to the proposed cross-examination and associated defence evidence. However, I find also that the proposed cross-examination and evidence would be inadmissible for other reasons—except for a very limited purpose, for which the court shall carve out a narrowly defined admissibility ruling.

***What do the statutes say? Scope of Section 276-276.1***

[6] Defence counsel submitted a detailed brief to the court, arguing the statute inapplicable in this case. The prosecution has submitted a thorough reply, in

which it underscores the mandatory application of ss. 276-276.1 of the *Criminal Code*. This, however, begs the question of when it would be mandatory that the statute apply.

[7] Sections 276-276.1—and their procedural and appellate-review adjuncts in ss.276.2-276.5—in their present form were enacted in the *Criminal Law Amendment Act, 2001*, S.C. 2002, c. 13, s. 13, in force 23 July 2002 by SI/2002-106, which modified only very slightly S.C. 1992, c. 38, s. 2, in force 15 August 1992 by SI/92-136. The 1992 enactment reworked the law following the decision of the Supreme Court of Canada in *R. v. Seaboyer; R. v. Gayme*, [1991] 2 S.C.R. 577, a case which found a predecessor provision—enacted in S.C. 1980-81-82-83, c. 125, s. 19 as s. 246.6, amending R.S.C. 1970, c. C-34, in force 4 January 1983 by SI/83-10, (1983) C Gaz II, 372—unconstitutional as offending s. 7 and para. 11(d) of the *Charter*, and not saved by s. 1 or the constitutional-exemption doctrine.

[8] The originating purpose of the 1983 amendment was to prevent the cross-examination of victims of alleged sexual assaults—who were then, and remain now, predominantly women—on their sexual history in order to advance defence theories grounded in misogynistic myths and stereotypes. As identified in *Seaboyer* at paras. 166, 194 and 201, this lore emanated from beliefs about

"unchasteness" being related to consent and credibility; however, *Seaboyer* held that the 1983 amendment failed constitutionally, as it foreclosed potentially permissible defences, which violated s. 7 and para. 11(d) of the *Charter*. I should note here that *Seaboyer* does not serve as a complete and closed catalog of the sorts of prejudicial reasoning that might impair the fair assessment of the evidence of a complainant in a sexual-offence case.

[9] The current version of the statute was held constitutionally compliant in *R. v. Darrach*, 2000 SCC 46.

[10] Sections 276 and 276.1 describe an exclusionary rule, which may be overcome in only certain cases when specific substantive and procedural criteria have been met by an accused. *R. v. M.T.*, 2012 ONCA 511 at paras. 29-43 offers as good an explanation as any of the regime; paras. 29-32 are particularly apposite in this case:

> 29 Section 276 of the *Criminal Code* creates a statutory rule of admissibility. Enacted in negative terms, the section, like other admissibility rules, is exclusionary; it precludes the admission of certain evidence. The exclusionary effect of the rule only becomes engaged when three requirements have been met. For discussion purposes, these requirements, which are cumulative, may be characterized as:
>
> i. offence charged;
> ii. subject-matter; and
> iii. purpose.

The exclusionary rule prohibits the person charged from introducing certain evidence (subject-matter) for a specific use (purpose) in proceedings for a listed crime (offence).

30 The "offence" requirement is satisfied where the proceedings in which evidence is tendered relate to a listed offence. Among the listed offences are the crimes charged here: sexual assault, sexual interference, and invitation to sexual touching.

31 The "subject-matter" requirement, which appears in both sections 276(1) and (2), is best expressed in the language of subsection (2):

> Evidence ... that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person.

If the subject-matter of the proposed evidence falls outside the statutory language, the exclusionary terms of the provision do not apply. On the other hand, satisfaction of the subject-matter requirement, on its own, will not necessitate exclusion; the "purpose" requirement must also be satisfied.

32 The "purpose" requirement is crucial to the operation of this exclusionary rule, just as it is with the common law hearsay rule. To engage the exclusionary rule of s. 276, the proposed evidence must be offered to support either of two prohibited inferences grounded on the sexual nature of the activity:

i. that the complainant is more likely to have consented to the conduct charged; or

ii. that the complainant is less worthy of belief.

Where the purpose underlying the introduction of the evidence of extrinsic sexual activity is neither of those prohibited by s. 276(1), this exclusionary rule is not engaged.

33 Section 276(2) provides an exception to the exclusionary rule. To gain entry under this exception, evidence of the complainant's extrinsic sexual activity must:

i. be of specific instances of sexual activity;

ii. be relevant to an issue at trial; and

iii. have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

To determine whether the evidence should be admitted under this exception, the presiding judge must follow the procedure described in ss. 276.1 and 276.2 and consider the factors listed in s. 276(3).

34 The admissibility rules of s. 276 apply only where the evidence proposed for admission is of extrinsic sexual activity on the part of the complainant. A previous allegation of assault, without more, would fall outside the section: *R. v. Gervais* (1990), 58 C.C.C. (3d) 141 (Que. C.A.), at p. 154. Questions that focus on the fact, rather than the details, of an allegation of sexual assault are not prohibited by the section: *R. v. M. (A.G.)* (1993), 26 C.R. (4th) 379 (Que. C.A.), at p. 393.

35 To be receivable in a criminal trial each piece of evidence must satisfy three requirements:

*relevance

*materiality

*admissibility

These requirements are cumulative. Evidence that comes up short on any requirement is excluded from consideration by the trier of fact.

36 Relevance is a matter of everyday experience and common sense, not an inherent characteristic of any item of evidence. Relevance exists as the relationship between an item of evidence proposed for reception and the proposition of fact the party tendering the evidence seeks to establish by its introduction. We assess the relevance of individual items of evidence in the context of the case in which the evidence is offered and the positions of counsel. An item of evidence is relevant if it makes the fact it seeks to establish slightly more or less probable than that fact would be without that evidence, through the application of everyday experience and common sense: *R. v. Luciano*, 2011 ONCA 89, 267 C.C.C. (3d), 16, at paras. 204-205.

37 Materiality is a legal concept. Evidence is material if it is offered to prove or disprove a fact in issue. What is in issue is a function of the allegations contained in the indictment and the applicable substantive and procedural law: *Luciano*, at para. 207.

38 Admissibility is also a legal concept. Its rules, which are negative and exclusionary, are grounded in policy considerations that we regard as sufficiently important to justify the exclusion of evidence that is both relevant and material. Admissibility rules are not unforgiving. They cede ground, occasionally admitting evidence by exception: *Luciano*, at para. 209.

39 Section 276 is an admissibility rule. Like other admissibility rules, it excludes evidence that meets the foundational requirements of relevance and materiality. Its application is superfluous where evidence that would otherwise be subject to its exclusionary effect is irrelevant or immaterial.

40 The admissibility rule in s. 276(1) does not exclude all evidence of extrinsic sexual activity of a complainant. What is prohibited is the use of evidence of extrinsic sexual activity to support either or both of the specific, illegitimate inferences described in the section: *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443, at para. 32.

41 Evidence of extrinsic sexual activity of the complainant is rarely relevant to support a denial that the sexual activity charged took place: *Darrach*, at para. 58. The fact that others may have sexually assaulted a complainant is irrelevant to charges of sexual assault against another and to the defences that other person may raise: *R. v. B. (A.R.)* (1998), 41 O.R. (3d) 361 (C.A.), at p. 365, aff'd 2000 SCC 30, [2000] 1 S.C.R. 781.

42 Section 276(1) excludes evidence that the complainant "engaged in sexual activity" with another person at another time and place if it is tendered for either purpose proscribed by the subsection. The exclusionary rule in s. 276(2) rejects all evidence of other sexual activity unless the evidence satisfies each of the requirements of the inclusionary exception.

43 The exceptional admission of evidence of other sexual activity under s. 276(2) requires satisfaction of the three conditions precedent listed in the subsection. One of those requirements, s. 276(2)(c), involves a balancing of probative value and prejudicial effect. But the balance is calibrated differently than we see in the general exclusionary discretion or the more circumscribed discretion to exclude otherwise admissible defence evidence. The addition of the terms "significant", as descriptive of the probative value, and "substantially", as the extent to which significant probative value must predominate over "prejudice to the proper administration of justice", appears to require a more nuanced or qualitative

> assessment of the competing interests. These interests are incommensurables. Probative value has to do with the capacity of the evidence to establish the fact of which it is offered in proof. Prejudicial effect relates to trial fairness.

[11] I pause to observe that, while this exclusionary statute applies to restrict the admission of defence evidence only, and does not bind the prosecution, it will happen sometimes that the prosecution will put itself in a bind. This occurs in cases when the prosecution will seek to put before the court expansive, voyage-of-discovery narrative, as seems to happen quite frequently, which has little to do with the charges being tried, but ends up making relevant and material evidence of other activity. In cases of that sort, the prosecution essentially invites the admission of what would ordinarily be excluded under s. 276: see, *e.g.*, *R. v. Butts*, 2012 ONCA 24. However, that is not the situation the court is dealing with now.

[12] I shall apply the three criteria in sub-s. 276(1) to the controversial evidence sought by defence counsel to be put before the court in this case to determine whether the provisions of the statute are in play.

***What do the statutes say? Application of ss. 276 to this case***

[13] T.W.R. is charged with sexual assault. Sexual assault is one of the offences listed in sub-s. 276(1). The first exclusionary criterion is satisfied.

[14] Advancing to the second criterion: does the evidence proposed to be put before the court by defence constitute evidence that the complainant engaged in sexual activity other than the sexual activity that forms the subject matter of the charge?

[15] I do not believe that it does.

[16] Defence counsel wishes to cross-examine the complainant on whether she told her mother that she had been sexually assaulted by a former intimate partner of her mother's; defence counsel wishes to ask the complainant whether she recanted that accusation at some point in time later. Defence counsel proposes also calling the complainant's mother to give defence evidence on this point.

[17] In my view, the evidence sought to be admitted by defence counsel is not evidence that the complainant engaged in sexual activity other than the sexual activity that forms the subject matter of the charge; I base this finding on what I consider to be a well settled line of authority.

[18] The fact that a complainant made an allegation of sexual assault against a person other than the accused has been held not to be caught by s. 276, when it is the fact of another allegation only, and not the details of it, that an accused

seeks to have admitted: *R. v. Gervais* (1990), 58 C.C.C. (3d) 53 at para. 59 (QCCA); *R. v. M. (A.)* (1993), 26 C.R. 4th 379 (QCCA) at 393; *M.T., supra,* at para. 34. It seems to me that if the fact of an allegation would not fall under s. 276, then, *a fortiori*, the fact of a recantation of an allegation would land outside the scope of the statute, too: if the mere fact of an act avoids the statute, then a statement denying that the act ever happened must be even less vulnerable to exclusion.

[19] Given that the evidence which defence counsel proposes putting before the court is not an excluded subject matter, it is not necessary for me to consider the purpose of the evidence.

[20] Therefore, I find ss. 276-276.4 inapplicable to the evidence sought admitted by defence.

[21] However, this not mean that the evidence should be admitted. I shall now move on to consider another statute.

***What do the statutes say? Canada Evidence Act, ss. 10-11***

[22] One of the duties of defence counsel is to expose weaknesses in the case for the prosecution. Effective cross-examination is a core part of this effort. In *R. v. McLaughlin* (1974), 15 C.C.C. (2d) 562 at 570 (ONCA) the Court stated that

the two main objectives of cross-examination by the defence are to discredit the evidence of a witness who has testified to matters implicating the accused in the offence charged, and to elicit evidence of facts, deliberately concealed or omitted inadvertently, relevant to the issue and favourable to the accused.

[23] One means of discrediting a witness for an opponent is to cross-examine that witness on statements made prior to the trial. This sort of cross-examination as to credit is covered in ss. 10 (governing written and recorded statements) and 11 (governing recorded or unrecorded statements) of the *Canada Evidence Act (CEA)*. Section 10 permits cross-examination on any written or recorded statement "relative to the subject matter of the case". Section 11 allows for cross-examination on any statement "inconsistent with . . . [the] present testimony" of the witness.

[24] Neither section of the *CEA* would apply to what is being proposed by defence counsel.

[25] Section 10 is inapplicable, as the accusation alleged to have been made by the complainant against her mother's former partner does not appear to have been recorded.

[26] Section 11 is inapplicable because, were defence counsel allowed to embark on the proposed line of cross-examination, the complainant would not have testified about the accusation on direct, so that there would be no "present testimony" to try to contradict; I feel I can predetermine that evidence inventory with some degree of confidence, as an accusation made by the complainant against someone other than the accused would have nothing to do with the elements of the offence before the court, and direct examination by the prosecution about it would not be permissible as the evidence would be immaterial to the case for the prosecution. Accordingly, there would be no inconsistency with direct-examination testimony that might engage s. 11.

[27] Accordingly, s. 276 of the *Code* would not apply to exclude the proposed evidence, and ss. 10 and 11 of the *CEA* would not apply to admit it.

***What do the common-law rules of evidence say?***

[28] What does the common law have to say about what defence counsel wishes to put before the court?

[29] Recall that defence counsel proposes introducing the subject matter of another allegation of sexual assault against someone other than the accused by

cross-examining the complainant about it and then calling evidence as part of the defence case.

[30] All of this would seem at first take to fall within the definition of collateral fact.

[31] The law regarding the admission of collateral facts was covered in Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed. (Markham: LexisNexis, 2018) at para. 16.238:

> There is a general rule that answers given by a witness to questions put to him or her on cross-examination concerning collateral facts are treated as final, and cannot be contradicted by extrinsic evidence. Without such a rule, there is the danger that litigation will otherwise be prolonged and become sidetracked and involved in numerous subsidiary issues. The rule does permit the use of extrinsic evidence to contradict a witness who has made a statement in cross-examination which is relevant to the substantive issue. However, with respect to questions which are directed solely to impeaching a witness' credibility, the answers must, save for certain common law and statutory exceptions, be accepted as final. McIntyre J., in *Krause v. R.*, [1986] 2 S.C.R. 466, 29 C.C.C. (3d) 385 at 391-92 C.C.C.] described *collateral matters as being "non determinative of an issue arising in the pleadings or indictment or not relevant to matters which must be proved for the determination of the case."* (emphasis added)

[32] But the prior question here is whether to allow, at all, a cross-examination which would seek, not to pull apart collateral or extrinsic facts testified to by the complainant earlier in the trial, but, rather, to introduce them for the first time. This leads the court to consider certain foundational principles.

[33] The common-law rule relating to the admissibility of evidence is that the party seeking to admit the evidence must establish on the balance of probabilities precedent matters governing the use of that evidence: *R. v. Evans*, [1993] 3 S.C.R. 653, at p. 668; *R. v. Carter*, [1982] 1 S.C.R. 938, at pp. 947-48, and *R. v. Arp*, [1998] 3 S.C.R. 339, at para. 70 .

[34] Common-law authority dealing particularly with cross-examination mirrors the *CEA* provisions which I reviewed a few paragraphs above: see *R. v. G.P.*, [1996] O.J. No. 4286 at paras. 35, 38, 53, 55, 57 (ONCA). See also, Alan W. Bryant, "The Adversary's Witness: Cross-Examination and Proof of Prior Inconsistent Statements" (1984), 62 Can Bar Rev 43.

[35] The purpose of the *CEA* provisions—and of the common law that had developed before it—was to promote fair and efficient trials. Counsel must be given wide latitude to conduct cross-examination on statements regarding pertinent matters made by opposing witnesses prior to trial; following from this, witnesses must be confronted with those earlier statements and given an opportunity to explain them, should they be out of line with testimony given in court, or should they otherwise undermine witness credibility. This was the principle laid down in *Browne v. Dunn* (1893), 6 R. 67 (HL). These procedural

guarantees reduce the need for rebuttal evidence or other delays, and help trials move along smoothly.

[36] However, foundational at common law to the admission of any evidence—even on cross examination—are the criteria of materiality and relevance.

[37] Whether evidence is material is a legal question. Does the proposed evidence help to resolve a trial issue? See *R. v. White*, 2011 SCC 13 at para. 44. Material evidence in a criminal case has to do mostly with elements of the charged offences, general defences or denials of an offence. Then there is witness credibility, which is said—sometimes rather expansively—always to be in issue. More about that later.

[38] Relevancy has logical and legal components: evidence is relevant logically if it tends to prove a material issue; it is relevant legally if its probative value is greater than its prejudicial effect, if it can be received economically and efficiently, and if it is not misleading: *R. v. Mohan*, [1994] 2 S.C.R. 9 at para. 22.

[39] The basic question left for the court to resolve, then, is the materiality and relevance of the evidence which defence counsel seeks to put before the court.

[40] This is where the proposed cross-examination and supporting evidence get hung up.

[41] To recap, defence counsel proposes asking the complainant whether she made a statement to her mother that she had been sexually assaulted by a former intimate partner of her mother's; defence counsel wishes as well to cross-examine the complainant about recanting that statement. Defence counsel proposes calling the complainant's mother to try to prove that the complainant made the allegation and then recanted it. Defence counsel submits that this goes to the complainant's credibility.

***Stereotypical reasoning affects trial fairness***

[42] To the contrary, I find that this evidence, which is not material to any of the elements of the offence before the court, would not be relevant to the court's assessment of the complainant's credibility, other than by resort to prejudicial and stereotypical reasoning, and would distract the court most inefficiently from assessing authentically material and relevant evidence.

[43] Assume for the sake of argument the best possible case for the defence should the evidence go in: the complainant admits on cross-examination having made the allegation against her mother's ex-partner and admits also recanting it.

What of it? If the complainant acknowledges, at the trial, having made an accusation, years ago, and acknowledges, again, at the trial, recanting it, what would end up being the position taken by defence? Presumably, it would be that the court believe the complainant on this point. What then of the challenge to the complainant's credibility?

[44] The credibility analysis would become more convoluted were the complainant's answers to be less obliging. "Yes, I made the allegation, but didn't recant it." "No, I never accused my mom's boyfriend of anything." Presumably, the mother of the complainant would be called as a defence witness to try to prove that the complainant did make the allegation, and did recant it, diverting the trial into a contest over an issue that has nothing to do with the elements of the charge before the court.

[45] At the core of the credibility-use argument made by defence is this: should the court find the complainant to have recanted this unrelated accusation, the court ought to infer from the recantation the accusation to have been false; based on that inference, it should find the accusation against T.W.R. false also.

[46] In my view, this is a prime example of evidence of limited probative value being put forward for a purpose that would have significant prejudicial effect, in

that the court would be invited to draw an inference based on stereotypical reasoning. As discussed in *Seaboyer* at para. 207, stereotypical reasoning affects trial fairness. Trial fairness is a symmetrical right: it is shared by the accused and the state.

[47] Recantations are facts of life in cases alleging violence or abuse within family units. Experience informs me that there are many reasons for them: power imbalance, dependency, loyalty, fear, isolation, shame, bullying, intimidation, social rejection. Sometimes, yes, a recantation will represent an authentic—and possibly demonstrable—avowal of falsehood; but that doesn't seem to happen too often. In my view, it does not follow that a recantation means that the misconduct as alleged originally did not happen.

[48] Moreover, what if, in the course of cross-examination, the complainant in this case were to answer: "Yes, I made the allegation; yes, I took it all back; but I really was sexually abused by Mom's boyfriend"? Would defence counsel then seek to call the complainant's mother's ex-boyfriend to deny it? I try imaging how all this might unfurl were the court to allow the cross-examination proposed by the defence. It is a sure formula for forensic misfortune.

[49] In any event, if the court is being invited to infer that the complainant would be less worthy of belief, were it to be proven that she recanted an allegation of sexual assault against somebody other than the accused, I would not be prepared to accede to it.

[50] What is being proposed by defence counsel would turn the trial of the charge that is before the court into a sideshow, which must not be allowed to happen. The evidence is not material to the charge before the court. Further, its reception would play on prejudicial and not-very-probative reasoning. Finally, its reception would be inefficient, would prolong the trial unnecessarily, and would not assist the court in fulfilling its core duty in determining whether the prosecution might have proven its case beyond a reasonable doubt. This is why extraneous evidence of other allegations against uncharged persons is typically not admitted at trial: it is immaterial, not probative of witness credibility or any fact in issue, and prolongs cases unnecessarily—winning the trifecta of inadmissibility : *R. v. S.B.*, 2017 SCC 16, rev'g 2016 NLCA 20; *R. v. Riley* (1992), 11 O.R. (3d) 151 (ONCA), leave to appeal refused, [1993] S.C.C.A. No. 26; *R. v. A.R.B.* (1998), 41 O.R. (3d) 361 at 365 (ONCA), aff'd, 2000 SCC 30; *M.T., supra*, at para. 41; see also *Campbell v. Jones*, 2002 NSCA 128 at para. 246.

[51] In *S.B.* NLCA at para. 23, the majority of the Newfoundland and Labrador Court of Appeal stated the following about the reception of extrinsic facts:

> [B]y its nature it deflects the trial away from whether the accused committed the offence as charged into a potentially far ranging and extensive series of inquiries into the background of witnesses, notably complainants. Inevitably, the approach will have a discouraging effect on the reporting of crime by persons who have a checkered past; such victims will fear that defence counsel will hang out all the dirty laundry of their past in a general assault on their character.

[52] *S.B.* is a case worthy of significant note. In the appeal to the Court of Appeal, the panel was reviewing an acquittal rendered in a jury trial that included an indictment for sexual assault. The majority of the Court found the trial judge to have been in error in, among other things, allowing the complainant to be cross-examined on her sexual relationship with someone other than the accused; however, the majority held ultimately that the verdict of acquittal was unassailable as they were not satisfied that there was a legal nexus between the errors and the verdict. The lone dissenting member of the panel agreed with the analysis done by the majority identifying the legal errors committed by the trial judge; however, that judge found those errors to have had a material bearing on the acquittal and decided that a new trial was in order.

[53] Eventually, the Supreme Court of Canada adopted the reasons of the dissenting judge in *S.B.*, quashed the acquittal and ordered a new trial. Although somewhat circuitous, the decision of the Court kept alive the analysis

of the majority of the Court of Appeal regarding the erroneous admissibility rulings of the trial judge. This is why the portion of their opinion which I quoted a few paragraphs previously retains full vigour.

[54] The majority of the Court of Appeal in *S.B.* had another thing to say about an argument advanced often in support of the reception of collateral or extrinsic evidence—an argument that seems to endure due to an echo-chamber effect:

> 14 One often hears the phrase "credibility is always in issue" or "credibility is always relevant" as the rationale for seeking to contradict a witness on a collateral fact. This use of words confuses what is at issue (*i.e.* did the accused commit the offence as charged) and what is relevant to that (*e.g.* has identity been proven) with the process of assessing credibility which is "in issue" only in the sense that it is the subject of controversy.
>
> 15 Put another way, if "credibility is always in issue" or "credibility is always relevant", then the collateral fact rule would be rendered meaningless as any factual basis for an attack on credibility would become "relevant" and, thereby, would not be "collateral".
>
> 16 Viewed properly, the collateral fact rule is a particular application of the general rule that evidence should be relevant. By definition, what is collateral is not relevant and what is relevant is not collateral.

[55] Accordingly, I rule that defence counsel may not cross-examine the complainant regarding any allegation she might have made to her mother—or later recanted— about being sexually assaulted by her mother's former intimate partner, nor may defence lead evidence on that point, for the purposes of challenging the complainant's credibility.

***A permissible purpose***

[56] However, defence counsel had a second purpose in mind in seeking admission of this evidence; specifically, to try to help situate in time when the complainant says it was that T.W.R. did what he is alleged to have done in the charge before the court.

[57] This purpose, in my view, has merit.

[58] The merit arises from uncertainty about T.W.R.'s age at the time of the alleged offence.

[59] The charge before the court alleges the commission of an offence over a time frame running from 1 March 1988 to 31 March 1990. This would cover a period after T.W.R. turned 18 years of age, and no longer a young person.

[60] In making submissions to the court on the admissibility-of-evidence issue, the prosecution took the view that there would be no need for defence counsel to question the complainant regarding an accusation against her mother's former partner in order to try to pin down the date of T.W.R.'s alleged conduct; this is because, regardless of whether T.W.R. was a young person or an adult, the court would have jurisdiction to deal with him either way, under s. 16 of the *YCJA*.

[61] In my view, this overlooks a very important legal point.

[62] Should the prosecution discharge the burden of proving all the elements of the offence beyond a reasonable doubt, it matters most definitely whether the court find T.W.R. to have been an adult or young person at the time, given paras. 16(a) and (b) of the *YCJA*. If found to have been a young person, he would be sentenced under the *YCJA*; if an adult, he would be subject to an adult sentence under the *Code*. The two are not equivalent. The potential penal consequences are vastly different, and I factor into my analysis the potential for ancillary orders.

***Conclusion***

[63] In my view, the age of T.W.R. at the material time is highly relevant; I am satisfied that allowing defence counsel to question the complainant and to call evidence, but for that limited purpose only, may assist the court in making a finding of fact on that issue. The court will permit the cross-examination for that purpose, and will permit defence evidence to be called from the complainant's mother for that purpose as well.

**JPC**