SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Garnier*, 2017 NSSC 341

Date: 2017 12 15
Docket: CRH No. 454738
Registry: Halifax

Between:

Her Majesty the Queen

v.

Christopher Garnier

DECISION: *VOIR DIRE* 4
Part Two - Ability of the Defence to call evidence of prior sexual conduct

Restriction on Publication: Section 486.5 CC
Oral decision of Justice Joshua M. Arnold of December 15, 2017,
to allow the publication ban on the identity of V.H.

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	September 8 and December 14, 2017
Abbreviated decision orally:	December 15, 2017
Written decision:	April 12, 2018
Counsel:	Carla Ball and Christine Driscoll, for the Crown Joel Pink, Q.C. and Nicola Watson, for the Defence

By the Court:

Overview

[1] The Crown alleges that Christopher Garnier murdered Catherine Campbell on September 11, 2015. Mr. Garnier gave notice in advance of this trial that he wishes to call evidence from V.H., a former partner of Ms. Campbell, to discuss her prior sexual conduct in order to support the defence claim that Ms. Campbell would have suggested or participated in erotic asphyxiation with Mr. Garnier.

[2] In *R. v. Garnier*, 2017 NSSC 239, I determined that the defence must call V.H. to give *viva voce* testimony during this pre-trial motion if they wish to rely on his evidence in support of their application.

[3] V.H. testified *in camera* on September 8, 2017, during pre-trial motions. The defence made final argument during that hearing. The Crown requested that final argument be reserved until any defence evidence was heard, so that the relevance of V.H.'s proposed testimony could be put into context.

[4] The trial commenced on November 20, 2017. The Crown closed its case on December 11, 2017. Mr. Garnier elected to call evidence. Testifying for the defence between December 11 and December 15, 2017, were Christopher Garnier, Dr. Stephen Hucker, Constable Justin Russell and V.H.

[5] V.H. again testified *in camera* on December 14, 2017. Further arguments were then made by counsel.

Facts

[6] Prior to Catherine Campbell's body being discovered by the police, she was the subject of a publicized missing persons investigation for several days. During the missing persons investigation V.H. approached the police to advise of his relationship with Ms. Campbell.

[7] The police took a statement from V.H. in a police vehicle on September 15, 2015. That statement was audio recorded and transcribed. In that statement V.H. described his relationship with Ms. Campbell between May and September 2015. V.H. said he and Ms. Campbell met online, communicated with each other but did not meet in person, first met in person at a slow-pitch tournament, and communicated for at least a month after that. They went on a date and then V.H.

was invited by Ms. Campbell to her home and were intimate. He said they talked off and on after that date, but the relationship did not progress. A few months later, less than a month before she died, Ms. Campbell contacted V.H. and invited him back to her place, where he spent most of the night. After that second encounter they chatted off and on. V.H. said he exchanged text messages with Ms. Campbell on September 10, 2015, between 23:23 and 23:30 hours. He never heard from her again. Ms. Campbell died on September 11, 2015.

[8] Of particular interest to the defence are the following comments in V.H.'s audio statement to the police:

> Q. Okay. I know when I was speaking to you on the phone, you said that… before I met you here tonight, you said that the first time and the second time, it was different? You said she was…
>
> A. Yeah. She was a lot more aggressive and… and I… I think it even mentions it in my texts about bruises and stuff. She… she was a lot rougher and she… than I'm used to, and it was not like that at all the first time.
>
> Q. Okay. Just let me check your messages then.
>
> A. She was wanting, like, to wrestle and she liked it because she wanted to practice during… while we were having sex, like, sparring moves that she uses and… and… we mention wrestling in here… we were going to hang out again, and I was, like, I could use a wrestling match, meaning the way it was the last time.
>
> Q. Oh, okay. Yeah… "I could use another wrestling match."
>
> A. And she mentions, I ended up getting lots of bruises.
>
> Q. Yeah. Right. "I ended up with bruises last time…"
>
> A. Yeah.
>
> Q. And that was a conversation you had on September the 8th. So on September the 8th, you're, like, "How are you? How is work?" and she's, like, "Good. It's steady. We ever going to hang out again?" You said, "I'm sure we will at some point. I could use…" you say, "I could use another wrestling match." And we don't need to go into that.
>
> A. And it was nothing like that the first time we had sex. It was just… it wasn't boring sex, but, I mean, it was normal. It was a lot more…

[9] According to materials filed on this application, on June 26, 2016, V.H. met with the Crown and the police to "clarify" his evidence.

[10] In their brief of July 17, 2017, regarding the relevance of V.H.'s evidence, the Crown writes:

> 42. At most, we expect V.H. will say that in the course of their intimate encounters, he put his hand on Ms. Campbell's neck – but that this was only noteworthy because of the pressure and direct questioning that he received by a private investigator hired by the defence. V.H. put his hand on various parts of Ms. Campbell's body. To focus on his hand on the neck of Ms. Campbell does not provide a full picture of V.H. and Ms. Campbell's intimate encounters.

[11] In their brief of September 6, 2017, regarding the necessity of *viva voce* testimony from V.H., the Crown writes:

> 3. On September 6, 2017, the Crown has clarified with the defence that their position is:
>
> a. that the court should only consider the statement given by V.H. to the police on September 15, 2015; and,
>
> b. that the court should not consider the clarification evidence of what he was saying.

[12] The defence says that the evidence of V.H. will support their claim of "a unique preference on behalf of Ms. Campbell for physically rough sexual activity" and would be relevant to support the proposed testimony regarding erotic asphyxiation.

[13] During the *in camera* hearing held on September 8, 2017, V.H. was called by Mr. Pink, on behalf of Mr. Garnier. He was asked many detailed questions about the progression of his relationship with Ms. Campbell. He was eventually asked to describe his first sexual encounter with Ms. Campbell. In doing so, V.H. described kissing, undressing, touching and vaginal intercourse. V.H. said that he does not consume alcohol and no alcohol was involved. V.H. was asked to describe his second sexual encounter with Ms. Campbell and said:

> Q. Okay. Now, how did the second time you had sex with her compare to the first time?
>
> A. The sex was the same pretty much. It was just…
>
> Q. Are you sure of that?
>
> A. Yes.

[14] When asked by Mr. Pink to clarify his evidence V.H. stated:

Q. Now, once again, you describe to His Lordship that on the first occasion you had sexual intercourse with her. Was there anything unusual about the first act of intercourse?

A. No.

Q. And what about the second act of intercourse?

A. No.

Q. And you're absolutely sure?

A. Yes.

[15] V.H. was provided with the transcript of his September 15, 2015, audio statement to the police in order to refresh his memory. Once that statement was put to him, V.H. was asked:

Q. Do you recognize that?

A. Um-hmm.

Q. Does that help refresh your memory as to what happened?

A. There's no change in my memory, no.

Q. Okay. Okay. Would you agree with me that on the second occasion she was much more aggressive?

A. Yes, but…

[16] This answer was interrupted by an objection from the Crown. There was a discussion about the appropriate procedure to follow and Mr. Pink requested an opportunity to cross-examine V.H. under s. 9(2) of the *Canada Evidence Act*.

[17] The Crown then cross-examined V.H. about the circumstances of giving his statement and he stated:

Q. Okay. With respect to the statement that you gave to the police…

A. Yes.

Q. …you gave the statement in September 2015, right?

A. Yes.

Q. And you approached the police, is that correct?

A. That is correct.

Q. And the reason that you approached the police is because you knew she was missing, Catherine Campbell?

A. Yes.

Q. And you wanted to give information that could help the police, is that correct?

A. That is correct.

Q. So where did you give this statement?

A. It was in one of the – their -- I don't know what kind of car. Not an official police car but a ghost car, I guess it's called.

Q. Okay.

A. At a car wash in Bayers Lake.

Q. Okay. And how many police officers were present?

A. One.

Q. Do you know the name of that officer?

A. No, but I used to play football with him. I'm not sure of his name.

Q. Okay. And what was your physical health like that day?

A. I was distraught because I was worried about her.

Q. Okay. And can you tell -- do you remember the length of the statement?

A. It felt like forever but it was, I don't know, like, 15 or 20 minutes maybe.

Q. Okay. And you wanted to provide, again, all information to the police in order to help them find her at that time, is that correct?

A. Yes.

[18] Following a s. 9(2) *CEA* hearing, Mr. Pink was granted permission to cross-examine V.H. about his prior statement. During Mr. Pink's examination of V.H., leading up to his cross-examination, the following exchange occurred in which V.H. again reiterated the similarity between both of his intimate encounters with Ms. Campbell:

Q. Now, I asked you the question, was there any difference between the first time you had sexual intercourse with Ms. Campbell and the second time you had intercourse with Ms. Campbell, and your answer was what, sir?

A. The intercourse was the same.

Q. I'm sorry?

A. The intercourse was the same.

Q. Was the same?

A. Yes.

Q. Okay. No difference?

A. No difference.

[19] Mr. Pink then asked V.H. to describe the first sexual interaction between himself and Ms. Campbell. Again, V.H. described kissing, undressing, touching, and vaginal intercourse.

[20] V.H. was then asked similar questions regarding the second occasion he went to Ms. Campbell's home. He described touching, then undressing and vaginal intercourse. V.H. stated in part:

Q. Okay. Where did you get – did you get undressed?

A. Well, fully undressed by the bed.

Q. Yes. And what about her?

A. The same.

Q. And then what happened?

A. Then we went on the bed and had sex.

Q. Yes. And what type of sex did you have on this occasion?

A. Basically the same sex as the last time.

[21] V.H. then was asked what happened after that, to which he replied:

A. We laid around and talked for a bit. We got mostly dressed and then she had talked about a case she was – she was just part of that she cracked some prostitution -- helped with some prostitution ring or something. She was all excited about it. And then we talked about how I did a lot of wrestling and I did sparing in Tai Jitsu and she wanted to do some training, learn -- because I'm a lot bigger than her, and her being a cop, she wanted to -- it was fun, it was different, I had never sparred with a girl before so...

Q. So what happened?

A: I would try holding her down and she would try to get out of the different holds and stuff. That's pretty much it.

Q. Did you receive any injuries?

A. Well, I -- of course, she's a tough little girl so...

Q. I'm sorry.

A. Yes.

Q. I'm sorry, what was your answer?

A. Yes.

Q. What injuries did you receive?

A. I -- a couple bruises maybe.

Q. What, if anything, did you do with your hands?

A. I don't know.

Court: Mr. Pink, can you be more specific as to when you're talking about?

Q. Yeah. At any time did you put her hands around -- your hands around her throat?

A. Well, there's a possibility of it happening while we were both -- while we were having sex or sparring, but there was never any time that she wouldn't have been able to breathe or anything like that.

Q. And that's what I'm asking you.

A. Okay.

Q. Did you put your hands around her throat?

A. Yes.

Q. And when did that occur?

A. I'm not sure of the time, Your Honour.

[22] V.H. was then referred to the portion of his September 15, 2015 statement where he said they wrestled during sex. He stated:

Q. Does that help refresh your memory in relation to what occurred during the act of sex on the second occasion? Does that assist you, sir?

A. There still is no change in my statement.

[23] In questioning V.H. about the relevant portion of his prior police statement, the following exchange occurred:

Q. And would you agree with me, sir, that there's a difference in what you told the police back on September the 15th, 2015, and what you told His Lordship here this morning?

A. Like now, I was very confused and upset and distraught, and I can see why you would assume differently but they weren't at the same time, they were after one another.

Q. Okay. But that's what you told police back on the 15th of September.

A. Well, as the way I read it, that's the way, I guess, it would sound.

Q. While we were having sex, like, sparring moves that she uses.

A. Where is that at?

[24] V.H. went on to state:

A: I can't explain why I would've said it that way, Your Honour.

Q: You did receive bruises?

A: Yes.

Q: She received bruises?

A: Possibly. I'm not a hundred percent sure.

[25] V.H. was questioned further on this point and stated:

Q: Okay. I'm going to -- I'm going to suggest to you, sir, that the wrestling and sparring took place during the act of sex as you told the police back on September the 15th.

A: Right after we had sex, Your Honour. It happened after we had sex, Your Honour.

[26] During cross-examination by the Crown, V.H. stated variously about his first sexual encounter with Ms. Campbell:

Q: It started off by sort of making out on in the living room of her place, right?

A: Yes.

Q: And it moved into a place in the bedroom, right?

A: Yes.

Q: Okay. And you touched all parts of her body at that time, correct?

A: Yes.

Q: And at no point did you ever apply any pressure to her neck at that – at that sexual encounter?

A: No.

Q. No?

A. No.

Q: And you never touched her neck after the sexual intercourse happened on the first occasion you had sex, right?

A: No, I did not.

[27] During cross-examination by the Crown in relation to the second sexual encounter, V.H. stated:

Q: And you didn't go to any bar with her after that evening, right?

A: No.

Q: So you went to her place that night. You said that you were not drinking, right?

A: That's correct.

Q: And you weren't doing any marijuana, right?

A: No.

Q: Okay, and again you were talking with her that evening...

A: Um hmm. That is correct.

Q: …at her house?

A: Yes.

Q: You were in the living room, right?

A: Yes.

Q: Making out, touching…

A. Yes.

Q. …kissing all parts of her body?

A: Yes.

Q: Correct. And you were clothed, right?

A: Yes, that's correct.

Q: And then you move into the bedroom with her?

A: Yes.

Q: She agreed to go in with you?

A: Yes.

Q: And, again, you were proceeding to engage in sexual intercourse?

A: That is correct.

Q: And that means penis and vagina, right?

A: Yes.

Q: Okay, so when you're in that bedroom, you touched her neck possibly, you said earlier…

A. Yes

Q. …in your testimony?

A: Yes, that is correct.\

Q: So it's possible that you did, but you're not sure that you touched her neck?

A: That is correct.

Q: Okay, and you touched possibly every other part of her body as well?

A: That is correct.

Q: Okay, and after that, after you had sexual intercourse, again, penis and vagina, you then moved out of the bed at some point, right?

A: Eventually, yes.

Q: Okay, so after you got out of the bed, you talked for a while?

A: Yes.

Q: And then that's when this wrestling happened?

A: That's correct.

Q: Okay. And the wrestling happened when you were clothed?

A: That is correct.

Q: And she was clothed?

A: Yes.

Q: Okay. At no point did you apply pressure to her neck?

A: No.

Q: At no point did she ever ask for erotic asphyxiation?

A: No.

Q: At no point did you ask to apply this type of pressure?

A: No.

Q: And erotic asphyxiation is what I mean by this type of pressure?

A: No I did not.

Q: In fact, at no point did you apply any pressure to a point where she would even remotely lose her breath, right?

A: That is correct.

[28] V.H. then described being distraught and worried about Ms. Campbell when he provided his September 15, 2015, statement. His examination concluded with the following exchange:

Q: Would you agree with that nobody -- compared to the police, we in court here are asking a lot more questions about your sexual history than they ever did?

A: Yes, I am just as uncomfortable now as I was then too.

Q: Right, okay.

[29] On re-direct examination by Mr. Pink, V.H. confirmed:

Q: My learned friend mentioned the sexual act known as erotic asphyxiation. Do you know what that is?

A: It sounds like choking, I guess.

Q. Do you know…

A. Asphyxiation means to…

Q. Mr. [V.H.], do you know…

A. Not to be able to breathe.

Ball: He's answering the question, if he not be interrupted.

Q: Do you know what it is, sir?

A: To not -- to stop somebody from breathing.

Q. Okay. Have you ever…

A. Asphyxiation is to not breathe.

Q: Have you ever practiced erotic asphyxiation?

A: No, never.

Q: Have you ever seen it done?

A: Like, on -- in porn, yeah.

Q: I'm sorry?

A: In porn.

Q. In…

Court: He's saying yes, in porn.

Q: Oh, in porn?

A: Yes.

Q: Okay.

A: And movies.

[30] The hearing was adjourned from September to December to allow the Crown to hear defence evidence on the trial proper.

[31] During the trial proper, Mr. Garnier said that he and Ms. Campbell met in a bar called the Alehouse in the early morning hours of September 11, 2015. They were both drinking. He said Ms. Campbell approached him and struck up a conversation with him. Video evidence confirms that he and Ms. Campbell spoke to each other at the Alehouse, danced together, kissed, and touched each other. The two left the Alehouse by taxi and went to Mr. Garnier's friend's home where Mr. Garnier planned to stay that evening. Mr. Garnier said that once they were inside the apartment, they began kissing again. He said Ms. Campbell announced that she wanted to be dominated and began to masturbate. She asked him to choke her, and, when he was reluctant, she told him it was alright. He said Ms. Campbell admonished him for not choking her hard enough. He led her down the hallway to a pull-out couch that was set up as a bed, all the while kissing her and cupping his hand on her jaw and neck. Ms. Campbell then stretched out on the bed and asked him to apply pressure to her neck. Mr. Garnier said he did this reluctantly by leaning his right arm across the side of her neck while masturbating her. He said that Ms. Campbell asked him to hit her and to squeeze her neck harder, and he eventually succumbed to her requests and awkwardly slapped her backhanded with his left hand three times in the face, while continuing to lean on her neck with his right arm. Mr. Garnier said Ms. Campbell pulled down on his right arm to increase the pressure. He felt something wet on his right arm, saw that it was blood, jumped up to get a towel, and when he returned Ms. Campbell was dead.

[32] Dr. Stephen Hucker was called by Mr. Garnier and was qualified as an expert forensic psychiatrist. He provided opinion evidence at the trial about a variety of issues pertinent to Mr. Garnier's testimony including information about paraphelia (sexual deviance), in particular sexual masochism, which includes a approximately 100 behaviours including asphyxiophelia (erotic asphyxiation), which is one of the few named subsets of sexual masochism. Dr. Hucker testified that individuals who are sexual masochists are sexually aroused by humiliation, pain, suffering and bondage, and often have an interest in more than one subset of sexual masochism.

[33] When the *in camera* hearing resumed on December 14, 2017, Mr. Pink advised that he had forgotten about a statement taken from V.H. over the telephone by a private investigator. He read the investigator's notes which suggested that V.H. said that on more than one occasion V.H. had placed his hands around Ms. Campbell's throat during sex. Mr. Pink later confirmed he would not be referring to the private investigator's interview during his questioning. I allowed V.H. to be

recalled for further examination. During this further examination V.H. stated under questioning from Mr. Pink:

> Q: Mr. H., the last time you were in court we were questioning you about your prior sexual behaviour or episodes with Catherine Campbell. Do you remember that, sir?
>
> A: Yes.
>
> Q: And you mentioned to His Lordship at that time that there were on two occasions that you did have sex with her, correct?
>
> A: Yes.
>
> Q: At any time during those two episodes did you ever place your hands around her throat?
>
> A: Yes.
>
> Q: Okay, and on how many occasions did you do that, sir?
>
> A: Once, maybe, twice. I'm not sure.
>
> Q: And at any time did Catherine Campbell resist you putting your hands around her throat?
>
> A: No.
>
> Q: On the once or possibly twice?
>
> A: No.
>
> Q: Okay. Those are my questions. Thank you.

[34] The Crown then cross-examined V.H., who stated:

> Q: You just said that you had put your hands around Ms. Campbell's throat?
>
> A: Yes.
>
> Q: You said the last time that you testified that you had touched her throat? Right?
>
> A: Yes.
>
> Q: And you touched various parts of her body?
>
> A: Yes.
>
> Q: And that the throat was no different than any other part of her body?
>
> A: Yes.
>
> Q: And she didn't ever ask for domination in the times that you had sex with her. Is that correct?

A: That is correct.

Q: She never asked for any kind of erotic asphyxiation which from previous testimony I think you understood it to mean like cutting off the airway around the throat?

A: That is correct.

Q: You never left any marks on her neck from any pressure applied?

A: No.

Q: And this was in the course of having sex while you were naked, right?

A: Yes.

Q: And in her bedroom?

A: Yes.

Q: At her home?

A: Yes.

Q: She was not under the influence of alcohol?

A: No.

Q: And neither were you?

A: Right.

Q: And you never applied pressure at all to her neck, right?

A: No.

Q: Okay. Those are my questions, My Lord.

Position of the Parties

[35] Mr. Garnier argues that the evidence of V.H. is relevant as it supports his claim that Ms. Campbell wanted him to choke her and hit her in a sexual manner. He says that her behaviour with V.H., in not objecting to his putting her hands around her throat during sex, along with her request to wrestle in a sexually connected situation, falls under the umbrella of rough sex, or sexual masochism.

[36] The Crown argues that the evidence of V.H. is inadmissible, as it offends the twin-myth prohibition, would lead to improper and dangerous inferential reasoning on the part of the jury, and is so remote from the facts as alleged by Mr. Garnier in his testimony as to be without any probative value.

Analysis

[37] In *R. v. Barton*, 2017 ABCA 216, Martin J.A. (as she then was), speaking for the majority, stated:

> [1] The jury system is probably the most familiar symbol and manifestation of the Rule of Law in this country. It is enshrined in our traditions, values and the words of our foundational law, the Constitution of Canada. The verdict of a jury is the product of the reason and collective human experience of people taken from their busy lives to work together in an unfamiliar, yet vital, enterprise. But juries, consisting of 12 lay persons, cannot properly discharge their duties if the instructions they receive on the law are incorrect, inconsistent or non-existent on key legal issues of decisive significance. Nor is there any reasonable chance for jurors to discharge their duties impartially if trial judges fail to warn them about relying on improper myths and stereotypes when jurors have been implicitly or explicitly invited to do just that. This is especially so in trials involving sexual offences. Despite our society's recognition of individual autonomy and equality, there still remains an undeniable need for judges to ensure that the criminal law is not tainted by pernicious and unfair assumptions, whether about women, Aboriginal people, or sex trade workers. Failing to meet that need can undermine the jurors' ability to apply the law objectively and correctly. Regrettably, in this case, the jury charge was deficient in all these respects.

[38] Section 276 of the *Criminal* Code states:

> Evidence of complainant's sexual activity
>
> 276 (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
>
> > (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
> >
> > (b) is less worthy of belief.
>
> Idem
>
> (2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused 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, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence
>
> > (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.
>
> Factors that judge must consider
>
> (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account
>
> (a) the interests of justice, including the right of the accused to make a full answer and defence;
>
> (b) society's interest in encouraging the reporting of sexual assault offences;
>
> (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
>
> (d) the need to remove from the fact-finding process any discriminatory belief or bias;
>
> (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
>
> (f) the potential prejudice to the complainant's personal dignity and right of privacy;
>
> (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
>
> (h) any other factor that the judge, provincial court judge or justice considers relevant.

[39] Mr. Garnier is charged with murdering Ms. Campbell and interfering with the human remains of Ms. Campbell. The Crown alleges no sexual component to these crimes. Therefore, the issues of consent and/or Ms. Campbell's credibility are not raised by the Crown's allegations. There is no sexual offence, or underlying sexual offence, alleged by the Crown.

[40] Mr. Garnier introduced a sexual component to this trial during his testimony. He says that Ms. Campbell was killed during erotic asphyxiation gone wrong, as initiated by her. He describes a sexual encounter with Ms. Campbell that he says was initiated by her, which Dr. Hucker says, if true, would fall under the definition of erotic asphyxiation.

[41] Although the charges of murder and interfering with human remains are not enumerated within s. 276, the general principles of that *Criminal Code* section provide strong guidance when dealing with an application to adduce evidence of

prior sexual conduct. Those same principles were relied on when holding the pre-trial admissibility *voir dire* in relation to this matter.

[42] In *R. v. Darrach*, [2000] 2 SCR 443, Gonthier J. , speaking for the court, stated:

> 2 The current s. 276 categorically prohibits evidence of a complainant's sexual history only when it is used to support one of two general inferences. These are that a person is more likely to have consented to the alleged assault and that she is less credible as a witness by virtue of her prior sexual experience. Evidence of sexual activity may be admissible, however, to substantiate other inferences.

[43] Justice Gonthier went on to explain:

> 19 In *Seaboyer*, the Court unanimously affirmed the legitimate purposes of s. 276 as being to protect the integrity of the trial by excluding evidence that is misleading, to protect the rights of the accused as well as to encourage reporting of sexual offences by protecting the security and privacy of complainants (at p. 606). The majority found that the earlier version of s. 276 was unconstitutional because it was a blanket exclusion of evidence of sexual activity, subject to three categorical exceptions. It did not allow for the potential multiple relevance of this evidence or for the exercise of judicial discretion to determine its relevance (at p. 618). The law was struck down and in its place the Court provided guidelines for the admission of evidence designed to remedy these defects while preserving the intent of s. 276.
>
> 20 The current version of s. 276 is in essence a codification by Parliament of the Court's guidelines in *Seaboyer*. It contains substantive sections that prevent evidence of a complainant's past sexual activity from being used for improper purposes and procedural sections that enforce this rule.
>
> …
>
> 25 In *Seaboyer*, the Court found that the principles of fundamental justice include the three purposes of s. 276 identified above: protecting the integrity of the trial by excluding evidence that is misleading, protecting the rights of the accused, as well as encouraging the reporting of sexual violence and protecting "the security and privacy of the witnesses" (p. 606). This was affirmed in *Mills*, *supra*, at para. 72. The Court crafted its guidelines in *Seaboyer* in accordance with these principles, and it is in relation to these principles that the effects of s. 276 on the accused must be evaluated.

[44] Section 276 does allow for evidence of prior sexual conduct to be admitted in certain circumstances, as explained by Gonthier J:

32 The accused objects to the exclusionary rule itself in s. 276(1) on the grounds that it is a "blanket exclusion" that prevents him from adducing evidence necessary to make full answer and defence, as guaranteed by ss. 7 and 11(*d*) of the *Charter*. He is mistaken in his characterization of the rule. Far from being a "blanket exclusion", s. 276(1) only prohibits the use of evidence of past sexual activity when it is offered to support two specific, illegitimate inferences. These are known as the "twin myths", namely that a complainant is more likely to have consented or that she is less worthy of belief "by reason of the sexual nature of [the] activity" she once engaged in.

33 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 CanLII 107 (SCC), [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...

34 The *Criminal Code* excludes all discriminatory generalizations about a complainant's disposition to consent or about her credibility based on the sexual nature of her past sexual activity on the grounds that these are improper lines of reasoning. This was the import of the Court's findings in *Seaboyer* about how sexist beliefs about women distort the trial process. The text of the exclusionary rule in s. 276(1) diverges very little from the guidelines in *Seaboyer*. The mere fact that the wording differs between the Court's guidelines and Parliament's enactment is itself immaterial. In *Mills*, *supra*, the Court affirmed that "[t]o insist on slavish conformity" by Parliament to judicial pronouncements "would belie the mutual respect that underpins the relationship" between the two institutions (para. 55). In this case, the legislation follows the Court's suggestions very closely.

35 The phrase "by reason of the sexual nature of that activity" in s. 276 is a clarification by Parliament that it is inferences from the sexual nature of the activity, as opposed to inferences from other potentially relevant features of the activity, that are prohibited. If evidence of sexual activity is proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement, it may be permitted. The phrase "by reason of the sexual nature of that activity" has the same effect as the qualification "solely to support the inference" in *Seaboyer* in that it limits the exclusion of evidence to that used to invoke the "twin myths" (p. 635).

36 This Court has already had occasion to admit evidence of prior sexual activity under the current version of s. 276. In *Crosby*, *supra*, such evidence was admissible because it was inextricably linked to a prior inconsistent statement that was relevant to the complainant's credibility (at para. 14). This case itself demonstrates that

> s. 276 does not function in practice as a blanket exclusion, as alleged by the accused. On the contrary, s. 276 controls the admissibility of evidence of sexual activity by providing judges with criteria and procedures to help them exercise their discretion to admit it. I explain below why the procedure to assess relevance is constitutional. Suffice it here to say that it is this procedure that makes the *Seaboyer* guidelines and the current version of s. 276 constitutional where the earlier version of s. 276 was not.
>
> 37 An accused has never had a right to adduce irrelevant evidence. Nor does he have the right to adduce misleading evidence to support illegitimate inferences: "the accused is not permitted to distort the truth-seeking function of the trial process" (*Mills*, *supra*, at para. 74). Because s. 276(1) is an evidentiary rule that only excludes material that is not relevant, it cannot infringe the accused's right to make full answer and defence. Section 276(2) is more complicated, and I turn to it now.

[45] Mr. Garnier has the constitutional right to make full answer and defence. While an accused is not entitled to the most favourable procedures that could possibly be imagined, the right to a fair trial is a fundamental concern to the administration of justice. However, evidence that is irrelevant, that will distort the truth-seeking process or that is more prejudicial to the administration of justice than it is probative, cannot make its way before a jury.

[46] Just because Ms. Campbell is deceased, and just because Mr. Garnier is charged with murder and interfering with human remains, as opposed to sexual assault or another offence enumerated in s. 276 of the *Criminal Code*, does not mean that Ms. Campbell's prior sexual conduct can be used to compromise the fair trial process. As stated by Martin J.A. in *Barton*:

> [107] Where a listed offence is, as here, an underlying offence to both the first degree murder charge and the included offence of unlawful act manslaughter, those purposes are not diminished simply because the victim has died. As Punnett J aptly stated in *R v Iverson*, 2014 BCSC 2400 (CanLII) at para 180, [2014] BCJ No 3130 (QL), citing *R v Dempsey*, 2001 BCSC 371 (CanLII) at para 35, 2001 CarswellBC 2394 [*Dempsey*], "evidence that would be inadmissible pursuant to s 276 if the victim were alive is not rendered admissible merely by virtue of his or her death". Canadians would be shocked if a victim of crime could be stripped of his or her dignity after death. They would be equally shocked if a charge of murder where an underlying act is alleged to be sexual assault were treated differently, for purposes of s 276, than a case in which sexual assault were charged directly. To do so would place form over substance and invite prosecutors to charge sexual assault along with murder in cases in which the two were linked. This makes no sense.
>
> [108] Indeed, it is all the more important to prevent irrelevant evidence about the victim's past sexual conduct from compromising the fair trial process when the victim has died at the hands of the accused – and the only one left to testify as

> to the circumstances is the accused. This is especially so where the defence advanced includes the accused's alleged mistaken belief in consent to the very sexual activity that caused the victim's death. Requiring compliance with s 276 ensures that a claimed mistaken belief cannot be based on misleading evidence about prior sexual conduct from which the jury is invited to draw improper inferences.

[47] In this case, we are not dealing with a charge of sexual assault. The Crown says there was absolutely no sexual component to the offences. Mr. Garnier says that Ms. Campbell died as the result of an accident during a sexual encounter, that would fall under the umbrella of masochism and erotic asphyxiation, or rough sex. Ms. Campbell's credibility is not in issue as she is deceased. So one of the twin myths, that Ms. Campbell is less worthy of belief due to her prior sexual activity, is not in issue.

[48] The other myth, that Ms. Campbell is more likely to have consented to the activity as described by Mr. Garnier because of her prior sexual history, is engaged in part. Ms. Campbell is deceased. The Crown says that consent to sexual activity played no part in Ms. Campbell's death as their theory is that Mr. Garnier murdered her in a non-sexual manner. The Crown's theory, supported by evidence, including Mr. Garnier's own statement, is that Mr. Garnier killed Ms. Campbell for reasons unknown, possibly due to stress. In his confession to the police, in sharp contrast to his testimony at trial, Mr. Garnier said he punched Ms. Campbell and then strangled her with his hands. In his statement, Mr. Garnier said that nothing of a sexual nature was transpiring between he and Ms. Campbell when this occurred.

[49] At trial Mr. Garnier now says that Ms. Campbell wanted him to choke her while she either masturbated herself or while he masturbated her, and that she died accidentally during this activity. He argues that in combination with the evidence of Dr. Hucker regarding sexually masochistic behaviour generally, the testimony of V.H. will enhance his credibility regarding his allegation that Ms. Campbell had an interest in sexual masochism or rough sex.

[50] V.H. says that during a sexual encounter less than a month prior to September 11, 2015, he had a sexual encounter with Ms. Campbell during which he placed his hands around her throat. In a statement to police given on September 15, 2015, he says that during this same encounter, in the midst of having intercourse, Ms. Campbell asked him to wrestle roughly, such that he was bruised afterwards.

[51] Mr. Garnier's testimony, combined with Dr. Hucker's explanation of sexual masochism, gives V.H.'s potential testimony significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice in this trial. While the impact of any testimony regarding prior sexual conduct is highly prejudicial to the proper administration of justice, there is no blanket prohibition to this type of evidence. I believe that any potential prejudice can be cured with a strong mid-trial instruction and final instruction to the jury.

[52] In keeping with the suggestion in *Barton*, I will provide the jury, at a minimum and depending on the trial testimony of V.H., with the following final instruction:

> The Crown introduced evidence of the interaction between Christopher Garnier and Catherine Campbell at the Alehouse. This evidence came by way of surveillance video and bar staff.
>
> Mr. Garnier called V.H. who gave evidence about some of Catherine Campbell's prior sexual conduct.
>
> It would be understandable if one or more of you came to this trial with assumptions as to what the evidence of Ms. Campbell's prior sexual conduct means. It is important that you leave behind any such assumptions.
>
> To protect the constitutional rights of all Canadians and to reduce the danger of prejudice to the proper administration of justice, the circumstances in which evidence of a person's prior sexual conduct is admissible in a criminal trial and for what purposes it may be used is restricted. That is because past experience has taught us that to this day, some still believe that a woman who has engaged in sexual activity with others is more likely to consent to sexual activity and is less worthy of belief. These assumptions are wrong and unfair.
>
> Some believe that a woman who engages in sexual activities in one situation, is more likely to engage in other sexual activity that then follows. This assumption is wrong and unfair.
>
> The evidence from the Alehouse shows you that Mr. Garnier and Ms. Campbell were together at the Alehouse, what they were doing at the Alehouse and shows that they appear to have left together.
>
> The evidence of V.H. is admitted for a very limited purpose. As I mentioned at the time he was called, the evidence of Mr. H. was admitted to assist you in determining whether you believe Ms. Campbell had an interest in sexual masochism.
>
> You must not let evidence of Ms. Campbell's prior sexual conduct influence your decision on any other issues in this trial. In fact, I must warn you that you are prohibited by law from considering this evidence for any purpose other than the

> one I have explained. This is because this evidence may be very prejudicial if it is used for purposes other than those I have described.

[53] Here there is no allegation of sexual assault. The Crown says that Mr. Garnier's testimony is not true. The issue of consent is not live in the same way it would be in a sexual assault case. In *R. v. Seaboyer*, [1991] 2 S.C.R. 577, McLachlin J. (as she then was), referred to Professor Harriett R. Galvin's proposal, where she detailed where such evidence might be admissible at para. 94, including:

> (1) (C) Evidence of a pattern of sexual conduct so distinctive and so closely resembling the accused's version of the alleged encounter with the victim as to tend to prove that the victim consented to the act charged or behaved in such a manner as to lead the accused reasonably to believe that the victim consented;

[54] Justice McLachlin modified Professor Galvin's proposal in this regard and stated at para. 101:

> 2. (D) Evidence of prior sexual conduct which meets the requirements for the reception of similar act evidence, bearing in mind that such evidence cannot be used illegitimately merely to show that the complainant consented or is an unreliable witness;

[55] Section 276 does not reflect this aspect of McLachlin J.'s decision, however, the spirit of her words is captured. Of course, s. 276 does not apply directly to this case.

[56] V.H.'s potential evidence is of specific instances of sexual activity that meet the requirements for similar act evidence or are evidence of a pattern of sexual conduct (rough sex, also known as sexual masochism) that resemble Mr. Garnier's version of the alleged encounter with Ms. Campbell; it is relevant to an issue at trial; and, based on the defence evidence, it has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[57] In making this decision I take into account:

> (a) the interests of justice, including the right of the accused to make a full answer and defence;
>
> (b) society's interest in encouraging the reporting of sexual assault offences;

> (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
>
> (d) the need to remove from the fact-finding process any discriminatory belief or bias;
>
> (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
>
> (f) the potential prejudice to the complainant's personal dignity and right of privacy;
>
> (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
>
> (h) any other factor that the judge, provincial court judge or justice considers relevant.

[58] Mr. Garnier will be permitted to call V.H. at trial. Depending on the actual testimony of V.H. before the jury, Mr. Garnier may be permitted argue that Ms. Campbell had an interest in rough sex or sexual masochism.

Exclusion at the Preliminary Inquiry

[59] Her Honour Judge Anne Derrick (as she then was) dealt with an application by Mr. Garnier to elicit evidence of Ms. Campbell's prior sexual conduct by way of the evidence of V.H. In *R. v. Garnier*, 2016 NSPC 86, Derrick J. refused to allow such evidence.

[60] The purpose of a trial is to determine whether the Crown has proven the guilt of an accused beyond a reasonable doubt. In contrast, the purpose of a preliminary inquiry, as reiterated by Murphy J. in *R. v. MacDonald*, 2007 NSSC 255, "is to determine whether the crown has sufficient evidence to warrant committing the accused to stand trial." Justice Murphy also determined that, within certain limits, defence discovery is also an ancillary purpose of a preliminary inquiry.

[61] At the preliminary inquiry, the only "foundation" for the defence application to call V.H. was a hypothetical put to Dr. Matthew Bowes, the Medical Examiner. Of course, such a hypothetical with no evidence in support of the propositions, provided no actual foundation.

[62] In contrast, at trial, in support of Mr. Garnier's application, the following foundation was provided:

- The hypothetical and then confirmatory testimony of Dr. Bowes;
- The testimony of Mr. Garnier which provided a foundation for the hypothetical put to Dr. Bowes;
- The testimony of Dr. Stephen Hucker, a forensic psychiatrist who provided expert opinion evidence in the area of forensic and correctional psychiatry capable of giving opinion evidence and assessing and diagnosing medical disorders, including automatism, and evidence of paraphilia and in particular sexual masochism, which includes asphyxiophilia, which includes erotic asphyxiation;
- Dr. Hucker explained that individuals who are sexual masochists are sexually aroused by humiliation, pain, suffering and bondage, and often have an interest in more than one subset of sexual masochism; and
- The testimony of Constable Justin Russell who explained that he had gone through the police academy with Ms. Campbell. He testified that Ms. Campbell was trained in self-defence and in escaping neck restraints.

[63] As well, through the course of the *in camera voir dires*, I heard V.H. testify.

[64] Therefore, the circumstances surrounding Mr. Garnier's application to allow V.H.'s evidence was significantly different at Mr. Garnier's trial than was the case during his preliminary inquiry.

Conclusion on the Testimony of V.H.

[65] Mr. Garnier will not be permitted to use this evidence illegitimately, merely to show that Ms. Campbell was an unreliable or bad person. While the proposed evidence does contain an aspect that suggests Ms. Campbell may have been more likely to consent to this type of sexual activity with him, in these highly unusual circumstances, it is admissible.

[66] This is a companion decision to *R. v. Garnier*, 2017 NSSC 239. Having determined that the defence is able to call V.H. at trial to give evidence of prior sexual conduct, there is no longer a reason to ban the publication of this decision, although the hearing proceeded *in camera*.

Publication Ban on V.H.'s Identity

[67] A hearing was held regarding a publication ban related to two proposed *in camera* pre-trial hearings that touched on Catherine Campbell's prior sexual conduct. The media was properly notified and only David Coles, representing CBC and CTV, chose to make submissions.

[68] In *R. v. Garnier*, 2017 NSSC 238, I ruled that the hearings that would mention Ms. Campbell's prior sexual conduct would be held *in camera* and would be subject to a publication ban.

[69] The evidence of V.H. was taken during one of those *in camera* hearings. That hearing was adjourned for continuation until the end of the majority of the defence evidence to allow Mr. Garnier to put forward a foundation for his application.

[70] At the conclusion of the majority of the defence evidence, including testimony from Christopher Garnier, Constable Justin Russell and Dr. Stephen Hucker, the *in camera* hearing relating to Ms. Campbell's prior sexual conduct continued.

[71] Having determined that, contrary to what occurred at the preliminary inquiry, the defence had established a proper foundation to admit the testimony of V.H., I inquired as to whether the Crown was making an application under s. 486.5 of the *Criminal Code of Canada*, which states:

> 486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

[72] The application continued on December 14, 2017, which was the sixteenth day of the trial. Counsel for Mr. Garnier indicated that if allowed to testify, V.H. would be his final witness. Once the defence closed its case, the Crown would then need to consider whether it would call reply evidence. There were significant legal issues to resolve (as a result of the unusual nature of the evidence), which were to be discussed at the conclusion of all of the evidence. Counsel would need time to prepare their closing arguments. My charge to the jury would have to be

reviewed by counsel and discussed. All parties wanted to ensure that the jury would not be impacted by Christmas.

[73] At the time the application was made to ban the publication of V.H.'s identity, I considered the following facts:

- Catherine Campbell had a relationship with V.H. between May and September 2015;
- During intimate encounters at Ms. Campbell's apartment, V.H. says he placed his hands around Ms. Campbell's throat on a couple of occasions;
- Without knowing why, V.H. was questioned by the police, while being audio-recorded, about his prior sexual conduct with Ms. Campbell;
- The statement of V.H. was disclosed to Mr. Garnier;
- V.H. told the police in the audio-recorded statement taken on September 15, 2015, that, in the middle of a sexual situation, Ms. Campbell had asked him to wrestle and it had been so rough that he was bruised and she said she had bruises;
- Ms. Campbell had been texting with V.H. on September 10, 2015, at approximately 11:30 PM;
- Ms. Campbell went to the Alehouse at 12:40 AM on September 11, 2015;
- Ms. Campbell was the subject of a widely reported missing persons investigation;
- V.H. contacted the authorities to assist them in finding Ms. Campbell when she was the subject of a missing person's investigation, and provided a statement to the police on September 15, 2015;
- Mr. Garnier hired a private investigator to ask V.H. further questions;
- The police and the Crown then spoke to V.H. for further clarification; and
- The defence subpoenaed V.H. for the pre-trial motion, and he was therefore legally required to attend. When he testified it appeared very clear that V.H. was a reluctant and uncomfortable witness for the defence.

[74] In allowing a s. 486.5 publication ban on the identity of V.H. I have considered:

(a) the right to a fair and public hearing;

(b) whether there is a real and substantial risk that a victim, witness, or justice system participant would suffer harm if their identity were disclosed;

(c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

(d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

(e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

(f) the salutary and deleterious effects of the proposed order;

(g) the impact of the proposed order on the freedom of expression of those affected by it; and

(h) any other factor that the judge or justice considers relevant.

[75] V.H. was a witness who came forward to assist the police with a missing person's investigation. The police questioned him about his prior sexual conduct with the missing person. Mr. Garnier was charged with murder. Through disclosure, Mr. Garnier received V.H.'s statement. The defence had a private investigator ask V.H. follow up questions about his relationship with the deceased. The Crown and the police also spoke to V.H. regarding clarification of his statement. His potential evidence was the subject of a lengthy *in camera* hearing. I ruled that Mr. Garnier would be permitted to call V.H. in open court during the murder trial.

[76] The justice system wants to encourage people to come forward to assist with investigations of all types. Society has a great interest in the reporting of sexual offences. Society must protect the personal dignity and privacy of justice system participants. Every individual has the right to personal security and the full protection and benefit of the law. In contrast, every accused person has a constitutional right to make full answer and defence to criminal charges. The Supreme Court of Canada considered the competing interests at stake (in the context of disclosure of therapeutic and counselling records) in *R. v. Mills*, [1999] 3 S.C.R. 668, [1999] S.C.J. No. 68:

> 94 … The right of the accused to make full answer and defence is a core principle of fundamental justice, but it does not automatically entitle the accused

> to gain access to information contained in the private records of complainants and witnesses. Rather, the scope of the right to make full answer and defence must be determined in light of privacy and equality rights of complainants and witnesses. It is clear that the right to full answer and defence is not engaged where the accused seeks information that will only serve to distort the truth-seeking purpose of a trial, and in such a situation, privacy and equality rights are paramount. On the other hand, where the information contained in a record directly bears on the right to make full answer and defence, privacy rights must yield to the need to avoid convicting the innocent. Most cases, however, will not be so clear, and in assessing applications for production, courts must determine the weight to be granted to the interests protected by privacy and full answer and defence in the particular circumstances of each case. Full answer and defence will be more centrally implicated where the information contained in a record is part of the case to meet or where its potential probative value is high. A complainant's privacy interest is very high where the confidential information contained in a record concerns the complainant's personal identity or where the confidentiality of the record is vital to protect a therapeutic relationship.

[77] Ms. Campbell is the named victim in a charge of murder. Her identity is not protected. While her dignity and privacy must be protected to the greatest extent possible, keeping in mind the right of Mr. Garnier to make full answer and defence, the probative value of evidence that intrudes on Ms. Campbell's and V.H.'s privacy and dignity must be weighed against its prejudicial effect.

[78] Section 276 of the *Criminal Code,* which provides many safeguards to justice system participants in allegations of sexual crimes does not apply to the charge of murder. In *R. v. Garnier*, 2017 NSSC 238, I determined that although murder is not an enumerated offence within s. 276, I would apply its principles in considering the publication ban issue. I also applied many of the principles detailed within s. 276 in determining whether or not to allow V.H. to testify on the trial proper in *R. v. Garnier*, 2017 NSSC 239, even though s. 276 is not directly applicable according to the *Criminal Code*.

[79] Section 486.5 of the *Criminal Code* allows for a ban on the publication of V.H.'s name as a witness. In my opinion, refusing to allow a ban on the identity of V.H. would discourage individuals from coming forward to speak to authorities when their evidence includes a sexual component. V.H. testified and while the testimony of V.H. will therefore be subject to the open court principle and be made public, there are strong policy reasons to ban the publication of his name.

[80] Section 486.5(6) of the *Criminal Code* allows for the application of a ban of a witness' name to be held *in camera*. Parliament has sanctioned the process followed in this case.

[81] In my opinion, banning the publication of V.H.'s name is necessary in order to prevent a serious risk to the administration of justice, that is, a possible chilling effect on citizens who come forward to assist the police where prior sexual conduct is questioned. There is no reasonable alternative. Allowing V.H.'s evidence to be published, without identifying him, is the only reasonable alternative.

[82] Mr. Garnier does not oppose the Crown's application. The administration of justice is enhanced by the ban. The impact of on the right to freedom of expression is minimal. The salutary effects of the publication ban outweigh any effect on the rights and interests of the parties and the public.

[83] Even if I had chosen not to conduct the application *in camera*, the timing of the application to protect the identity of V.H. was made so close to Christmas that there was absolutely no way to notify the media and comply with the usual timelines, receive briefs, and hear argument from members of the media, before the holiday. This is a jury trial. During jury selection on November 20 and 21, 2017, the jury was told that the trial would conclude the week of December 21, 2017. Specific exemption requests by jurors were based on that timeline. If the matter was adjourned for a week merely to discuss whether V.H.'s full name would be published, the jurors might not be available to continue the trial. Fourteen citizens who make up the jury would have their lives put on hold. The evidence would be less fresh in their minds. Mr. Garnier's right to a fair trial in accordance with s. 7 of the *Charter* and his right to a trial within a reasonable time in accordance with s. 11(b) of the *Charter* could be compromised in these specific circumstances.

Arnold, J.