NEUBERGER & PARTNERS LLP
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NEWSLETTER: Sexual Assault Law Updates

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The Meaning of "Control" in Prostitution

Procuring, Coercion or Incidental Involvement?

Since the beginning of 2020, the new prostitution laws under section 286 of the Criminal Code of Canada have been on constitutionally shaky grounds in Ontario. On February 21, 2020, in the case of *R. v. Anwar*, 2020 ONCJ 103, Justice McKay found almost all the sections of 286 unconstitutional and not saved under section 1 of the *Charter*. The accused in that case were not charged under section 286.1 so they did not have standing to challenge that section at the time.

Additionally, prior to the *Anwar* decision, the Ontario Court of Appeal made an interesting comment about overbreadth of the new legislation at paragraph 84 in the decision of *R. v. Gallone*, 2019 ONCA 663

"I agree with the respondent that the Crown's interpretation of ss. 286.4 and 286.5 criminalizes a very broad range of conduct in circumstances where there may be no exploitative relationship between the seller and the person assisting him or her with advertising. However, the respondent did not challenge the constitutionality of the prohibition on advertising."

In the most recent decision regarding the "procuring" or coercive offence under section 286.3, the Ontario Court of Appeal offered more guidance on how to interpret the level of involvement between the accused and the person offering sexual services.

In *R. v. Ochrym*, 2021 ONCA 48, the main analysis was on the importance of the actual relationship between the involved parties. The accused had provided transportation and assisted with the rental of a hotel room. He also responded to requests for food or other supplies while the young woman was staying at the hotel.

At the end of the trial, the accused was found to have not "influenced" the complainant in her decisions to engage in sexual services. One factor was that, upon being discovered by her mother, the complainant was able to leave the hotel room when she wanted to, without any threats or interference from the accused. In essence, the complainant was "free to leave" any time she wanted.

The quorum in *Ochrym* consisted of two of the same judges from the decision in *Gallone*; Justices Hoy and Paciocco. The decision confirmed that “control, direction or influence” should be treated disjunctively but, at paragraph 29, the Court rejected the Crown's submission that simply providing transportation and assistance was equivalent to exercising control, direction or influence over the sale of sexual services.

The *Ochrym* decision found that the liability of an accused cannot be assessed "without regard to the nature of the relationship between the appellant and the complainant, and the impact of the appellant’s conduct on the complainant’s state of mind."

Ochrym clarified that paragraph 47 of *Gallone* cannot be read in isolation to determine the amount of influence an accused had in the circumstances. The question should be focused on whether or not "a person, by virtue of her or his relationship with the complainant, has some power – whether physical, psychological, moral or otherwise – over the complainant and his or her movements."

This question is of importance when looking at the objectives and construction of the new legislation. In *Ochrym*, the Court of Appeal points out that the immunity clause under section 286.5 prevents a sex worker from being prosecuted in connection to his or her own sexual services but does not make such services legal. The wording should be of import in determining how to meet the goals of the legislation.

As laid out in this decision, the goals of the legislation are to abolish prostitution while assisting those who choose to engage in prostitution so that they can safely exit the trade. While the actions of a sex trade worker are not "legal" per se, the legislation seeks to minimize the negative impact of the law on the safety of sex trade workers themselves.

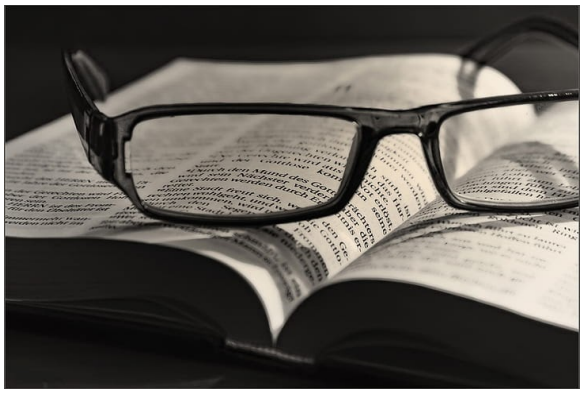
Overbreadth in the interpretation or application of these laws may capture a number of incidental people who are not exerting any control over the sex worker and are only involved peripherally by offering assistance.

A focus on the relationship between the accused and the complainant would help differentiate between people who are exerting control or power over a sex trade worker from those who are assisting with his or her safety and well-being.

In paragraph 36 of *Ochrym*, the Court explains: "there is a difference between encouraging someone to sell sexual services for consideration and exercising influence over the movements of a person who offers or provides sexual services for consideration."

This decision still leaves many pathways to conviction under section 286.3 in stating "the meaning Gallone ascribes to 'exercise of control, direction or influence' covers a wide range of intentional conduct and is consistent with the purpose of s. 286.3, as articulated in Joseph." The decision in R. v. Joseph, 2020 ONCA 733 also determined that to harbour "includes the simple provision of shelter, whether secretly or not."

As it stands, the constitutional ruling in the *Anwar* decision is not binding and there has not yet been a successful constitutional challenge to the new legislation in the higher courts. Based on the current decisions, an interpretation that any kind assistance offered to a sex worker is equivalent to "encouragement" or procurement is not likely to survive appellate review.



A Tale of Two Crown Appeals

Two similar, though not identical, Crown appeals of acquittals were heard in the Nova Scotia and Alberta Courts of Appeal last month with two very different outcomes.

In *R. v. Nelson*, 2021 NSCA 11, the Crown unsuccessfully argued that "the trial judge erred in law by making findings of fact which were not supported by the evidence when ruling on the credibility of the complainant."

In *R. v. A.S.P.*, 2021 ABCA 10, the Crown successfully argued that "the trial judge failed to give legal effect to facts as found by requiring the Crown to prove additional facts or considering legally irrelevant matters."

In *Nelson*, under the heading " Findings of fact not supported by the evidence," at paragraphs 16 and 17 the Court noted the limitations on Crown appeals when related to credibility assessments. It was described as follows:

"Appellate courts must defer to a trial judge's factual findings, except on conviction appeals where, in addition to legal errors, a verdict can be overturned if it is unreasonable or unsupported by the evidence.

Crown appeals from acquittals are a different breed. They are limited to questions of law alone. Courts must decline Crown invitations to provide appellate relief for what amounts to a claim of an unreasonable acquittal."

The main issue of dispute in *Nelson* was whether inconsistencies in the complainant's evidence were significant where the Crown maintained the "core of the allegation" was unshaken. Citing Justice Cromwell in *R. v. J.M.H.*, 2011 SCC 45, this ground of appeal was rejected on the basis that "an acquittal is not a finding of fact, but a conclusion that the standard of persuasion of beyond a reasonable doubt has not been met."

The Nova Scotia Court of Appeal highlighted a portion of the trial judge's reasons discussing the weight assigned to inconsistencies in a complainant's evidence:

"If inconsistencies can be routinely dismissed as inconsequential, there's little more that an accused person can do... To find someone guilty of a criminal offence, there has to be a reliable narrative. This narrative is so uncertain that it raises reasonable doubt as to the issue of consent."

In contrast, in *A.S.P.*, the Alberta Court of Appeal agreed with the Crown in finding "a fundamental inconsistency in the oral reasons for decision regarding the assessment of the complainant's evidence such that this Court cannot understand the pathway to the trial judge's conclusion to acquit."

The key area of dispute in this case was whether, after finding the complainant to be "credible" but having concern about the lack of detail in her description of the assault, the trial judge misspoke in his reasons for acquittal. The inconsistency in this appeal was not an issue of the complainant's evidence but of the trial judge's own credibility findings.

In summary, after finding the complainant credible, the trial judge stated: "On the limited evidence given, I am not able to properly assess her credibility to recall and recount the facts." (Emphasis added.)

The Respondent argued that the judge had meant "reliability" and that it was consistent with his concerns about the lack of detail in the complainant's description of the alleged assault. Ultimately, the Court of Appeal was unable to determine the pathway to acquittal and ruled that the deficiencies in the judge's reasons prevented meaningful appellate review.

In *A.S.P.*, the Alberta Court of Appeal also commented that the trial judge's failure to specifically address the first and second steps of the *W.(D.)* assessment contributed to confusion about why he was left with a reasonable doubt. An absence of these first two prongs is normally only the subject of appellate scrutiny when there is a conviction, as they are designed to ensure the burden of proof remains on the Crown.

Though the grounds of appeal were similar in *Nelson* and *A.S.P.*, these two cases highlight the difference between a dispute over credibility assessments, which are not available on Crown appeals, and a situation in which the trial judge's reasons are internally contradictory or lack sufficient detail to understand the basis of the judge's conclusion. In both trials the judge delivered only oral reasons for their decisions. A written decision in both cases would likely have resulted in a more fulsome explanation of how the trial judges reached their conclusions.

The Risks of "Narrative as Circumstantial Evidence"

In a recent BC Appeal, *R. v. N.P.*, 2021 BCCA 25, the Crown conceded that a retrial was warranted after the trial judge improperly used prior consistent statements to corroborate the complainant's testimony.

The Court of Appeal issued their decision, elaborating on how "narrative as circumstantial evidence" should be properly used at trial. This exception may form an admissible purpose but can also lead to

misuse if the proper uses are not outlined during submissions or by holding a *voir dire* regarding admissibility at the time the prior statement is introduced.

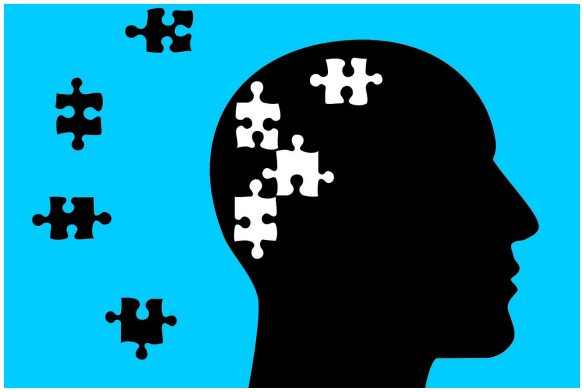
In the case of *N.P.*, the Crown conceded that "the prior consistent statements of [the complainant] should not have been entered into evidence or considered by the trial judge in assessing her credibility or corroborating her testimony. The only relevance these statements could have had was to support the 'prohibited inference that repetition enhances truthfulness.'"

The use and misuse of prior consistent statements is a constant issue in the appellate courts and the Supreme Court recently declined the opportunity to provide further guidance in *R. v. Langan*, 2020 SCC 33.

The most often cited reference regarding the permitted and prohibited uses of prior consistent statements is Justice David Paciocco's article, "The Perils and Potential of Prior Consistent Statements: Let's Get it Right" (2012) 17 Can Crim L Rev 181. In that article, Justice Paciocco advises that the growing jurisprudence warrants focusing less on admissibility arguments and more focus on how much weight can be placed on a prior statement and for what limited purposes.

The nature of prior consistent statements, even where they are permitted, allows for improper bolstering of a complainant's credibility and this improper usage may not always be articulated by the judge in the decision. The case of N.P. is a timely reminder that both the prosecutor and defence counsel should be alive to the dangers and articulate their concerns in a timely manner during the course of the trial.

Clearly it is better to address these concerns at the time of the trial instead of in a court of appeal.



Recovered Memory Evidence in Jury Trials

Another recent ruling from the bench at the Supreme Court of Canada allowed the Crown appeal in *R. v. Waterman*, 2020 NLCA 18, restoring the convictions.

The case was a jury trial involving a complainant who recovered memories of childhood sexual abuse with the help of a therapist. At trial the complainant testified that inconsistencies in prior statements were resolved when a therapist helped the complainant differentiate between his nightmares and the actual events. No expert evidence was called to assist the jury in understanding how memory works and the risks posed by recovered memories.

The majority of the Newfoundland and Labrador Court of Appeal quashed the convictions as an unreasonable verdict and

substituted acquittals. In dissent, Justice Butler concluded that interference by the appellate courts amounted to acting as a "thirteenth juror" by engaging in their “own review of the evidence.”

Justice Butler also disagreed that the jury required evidence from an expert to assess the reasonableness of the complainant's explanation for how the memories were solidified or why they changed over time.

Recovered or repressed memories are a controversial subject but numerous appellate courts have dismissed arguments on appeal claiming that these memories cannot meet the burden of proof beyond a reasonable doubt. With jury verdicts it is not possible to know how the question of the complainant's credibility and reliability was resolved and this decision confirms that jury decisions in these cases will be assumed to have grappled with those concerns in reaching a verdict.

In cases involving memories recovered during therapy, the defence should be prepared to call their own expert witness at trial instead of assuming the onus is on the Crown to validate the legitimacy or reliability of the complainant's memories.

Other Cases To Watch

R. v. J.J, 2020 BCSC 349 SCC File # 39133
The hearing for this Crown appeal of a constitutional ruling regarding the new rules of evidence since Bill C-51 has been adjourned from March 2021. The defence was also granted leave to cross-appeal, opening up the case for a ruling regarding the entirety of the original constitutional challenge. The Attorneys General of Canada, Ontario, Nova Scotia, Alberta, Manitoba and Saskatchewan have currently been granted intervenor status.

R v Ramos, 2020 MBCA 111 SCC File # 39466
The main ground of appeal against conviction was the adequacy of reasons. In dissent Justice Steel offered a definition of "a considered and reasoned explanation" for believing the evidence of a complainant over that of the accused. The primary concern was where the "reason" for believing is merely the "conclusion" that the complainant was believed.

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