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Hockey Canada sexual-assault verdict to be delivered after years of challenges, missteps in case

On Thursday, Justice Maria Carroccia will decide the fate of five former members of Canada's 2018 world junior hockey team

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From left to right: Alex Formenton, Cal Foote, Michael McLeod, Dillon Dube and Carter Hart. The five hockey players face sexual-assault charges, with the verdict to be announced on Thursday.

MATT SLOCUM, NOAH K. MURRAY, PAU/THE CANADIAN PRESS

It was Jan. 11, 2024, and police in London, Ont., were preparing to lay sexual-assault charges against five former members of Canada's world junior hockey team.

The men – all of whom were now playing professional hockey, four of them in the NHL – were accused of attacking a woman in a hotel room in June, 2018, after a Hockey Canada gala.

After a year-and-a-half-long investigation, London police felt they had grounds to charge the former junior players – Michael McLeod, Carter Hart, Alex Formenton, Dillon Dubé and Cal Foote.

But there was one last thing to do before proceeding: The Crown attorney wanted to have a frank conversation with the complainant, a woman who is known publicly as E.M.

It's unusual for a Crown and complainant to meet before a charge, but given the stakes and some unique challenges with the case, prosecutor Meaghan Cunningham wanted to be sure E.M. understood what she was signing up for.

Hockey Canada sexual-assault trial is nearly over. We're answering your questions after the verdict

What to know about the Hockey Canada trial ahead of the verdict

The pair met in the early afternoon on the second floor of a family court clinic in downtown London, alongside two other Crowns, E.M.'s mother, her lawyer and the police officers in charge of the file, according to Ms. Cunningham's notes, which were produced as part of the pretrial disclosure.

Ms. Cunningham began by telling E.M. she wasn't there to encourage or discourage her decision about whether to testify. Police would not lay charges if she wasn't on board.

Convictions in sexual-assault trials are always difficult, Ms. Cunningham warned. But this case had additional challenges including the passage of time and the number of investigations involved. The Crown told E.M. that while she considered the file strong, she couldn't say it was a "really, really strong case."

On Thursday, Justice Maria Carroccia will announce her verdict, marking the culmination of a process that has spanned seven years and been marred by countless missteps and false starts. Each of these hurdles has added to an already complex web of legal and evidentiary issues, which Ms. Cunningham touched on in her meeting with E.M.



The courthouse in London, Ont., where the trial was held.

CARLOS OSORIO/REUTERS

An initial police investigation – launched within days of the alleged incident – was closed without charges in 2019. But after E.M. filed a lawsuit against the sports body three years later – which was settled for an undisclosed amount without the knowledge of the players – the case became public, igniting national uproar.

Between the alleged offence and the trial, the Hockey Canada saga produced two police investigations, an external probe by a Hockey Canada investigator, another review by the NHL, E.M.'s civil process and high-profile parliamentary hearings.

The trial was also plagued with delays, a mistrial, two jury dismissals and a dramatic switch to a judge-alone proceeding that the Crown warned would significantly prejudice its case, given that the change occurred after the prosecution had already presented much of its evidence – and in a manner designed for a jury not a judge.

The Globe and Mail interviewed more than a dozen central figures connected to this case, as well as legal experts from across Canada, to better understand the specific challenges with the file.

Michael Coristine, a former senior Crown attorney who is now a defence lawyer in Toronto, said the case is unusual for a myriad of reasons, including the intense public scrutiny, the number of accused players being charged together, and the different overlapping investigations. (Mr. Coristine has followed the trial but is not involved.)

“But time – the length of time from the incident to getting to trial – that’s always the Crown’s biggest enemy,” he said, speaking generally. “That’s simply because witnesses’ memories fade, their evidence goes missing, phones are no longer kept, text messages no longer exist, things of that nature.”



Demonstrators outside the courthouse in May.

GEOFF ROBINS/THE CANADIAN PRESS

In the meeting between Ms. Cunningham and E.M., the Crown highlighted that because of the number of times E.M. had given an account of the night – to police, to Hockey Canada, in her lawsuit – there would be inconsistencies between these versions, Ms. Cunningham said, which defence lawyers would exploit during cross-examination.

Ms. Cunningham cautioned that cross-examinations can be brutal for complainants – “They will say you were asking for it. You were begging for it,” Ms. Cunningham warned – and she would

have to face five different, well-funded legal teams. If E.M.'s primary goal was a guilty verdict, the personal cost may be too high.

This didn't mean that the Crown wasn't prepared to proceed, Ms. Cunningham explained. In Ontario, the legal test to bring a charge to court is a "reasonable prospect of conviction" – which essentially means that a guilty finding wouldn't be shocking. The Crown said everyone agreed they met this test. (Several people involved in the case noted that had it occurred in another jurisdiction it may not have been brought to court. For example, in British Columbia, the prosecution threshold is: "a substantial likelihood of conviction.")

At the end of the hour-long meeting, Ms. Cunningham asked if E.M. was prepared to see the case through.

E.M. said she was ready.

A few weeks later, London police charged the five players with sexual assault, all of whom denied wrongdoing. Mr. McLeod faced a second offence of being a party to sexual assault.



London police Chief Thai Truong at a press conference in February, 2024, after charges were announced against the five hockey players.

CARLOS OSORIO/REUTERS

It all began on June 18, 2018, at a downtown London bar called Jack's, where E.M. – who was out with some co-workers – met Mr. McLeod, who was in town with the 2018 world junior hockey team for a Hockey Canada gala that celebrated the team's victory at the world championships earlier that year. After a night of drinking and dancing, E.M. and Mr. McLeod left for his hotel, the Delta Armouries, where they had consensual sex.

What happens next is disputed.

E.M. told the court that when they finished, Mr. McLeod was on his phone and not long after his teammates began showing up at the room. She said this was shocking to her and she eventually became afraid. She said that they began instructing her to perform sexual acts, which she did because she went into "autopilot" to keep herself safe. (Evidence presented during the trial showed Mr. McLeod was telling his teammates to come to the room to engage in sexual acts.)

Mr. McLeod's lawyer, David Humphrey, posited a different theory: It was E.M. who asked his client to invite his teammates and she had been the instigator of the sexual activity in the room.

What is known is that E.M. left the Delta Armouries in tears. Her mother found her curled up in the shower sobbing around 5 a.m.

Later that day, E.M.'s mother's boyfriend contacted someone he knew at Hockey Canada. That official then contacted police and Detective Stephen Newton became involved with the file. (At the same time, Hockey Canada engaged lawyer Danielle Robitaille to investigate whether the sports body's Code of Conduct had been violated.)

Det. Newton contacted the mother's boyfriend – E.M. still wasn't ready to speak with police – and heard a version of events from this man's perspective: The mother's boyfriend believed that Mr. McLeod had gotten E.M. extremely drunk and then he and his teammates used her for sex. He told the officer that E.M. may have blacked out and she was feeling embarrassed.

From that moment forward, Det. Newton's investigation seemed to focus on whether E.M. had had the capacity to consent. He neglected to examine other components of consent, such as whether E.M. had been an active participant in the sexual activity, who was voluntarily agreeing to each act – or whether her consent was coerced out of fear.

Hockey Canada verdict could break new ground on sexual consent

During his investigation, the officer was told by Mr. McLeod's lawyers about two short videos that were shot in the hotel room, in which the player is asking E.M. if she's okay with what's happening. In one video she says, "I'm okay with this," while wiping her eyes. In another she says, "You are so paranoid, holy. I enjoyed it, it was fine. It was all consensual. I am so sober, that's why I can't do this right now."

The officer did not explore questions about why the player felt the need to film these videos. Instead, his notes show that he viewed the footage as evidence that E.M. did not appear drunk, in “distress or non-consenting.” When the officer interviewed E.M., he didn’t pursue lines of questioning to understand if E.M.’s apparent acquiesce was coerced, noted several sources familiar with this investigation.

In her written closing arguments, Ms. Cunningham addressed the initial investigation’s shortcomings. She noted that when Det. Newton was in the witness box during the trial, he told the court that E.M. had displayed a “certain level of consent . . . she’s participating in the acts that were occurring in the room, without resisting, or, you, know, saying she didn’t want to do it, or anything like that.”

This was a fundamental misunderstanding of Canadian laws, Ms. Cunningham said.

The Crown told the court that Mr. Newton made only a passive attempt at interviewing the players. The officer did end up speaking with three of the accused, but Ms. Cunningham noted that he handled himself in a way that indicated “he was conducting these interviews to say that he did, rather than with a genuine interest at getting at the truth.” For example, he didn’t press the men on many of E.M.’s claims, including whether she had been slapped.

VIDEO 3:21

Excerpts from a video interview Michael McLeod gave to London police in November, 2018.

THE GLOBE AND MAIL

Notably, while interviewing Mr. McLeod, the officer asked if players had been texting each other about the fact there was a girl in his room. Det. Newton asked Mr. McLeod if he sent any messages like that, to which Mr. McLeod answered: “No.” Despite apparently being aware that such messages may exist, the officer made no effort to try and obtain them.

Det. Newton closed the case without charges in February, 2019.

Multiple sources connected to the case said Det. Newton was a good police officer, but he clearly formed an opinion early on, which resulted in a flawed investigation. (The now-retired officer declined an interview request. During the trial, Det. Newton told the court: “I did the best I could.”)

It was an outcome that was even more surprising to some given the timing of the Hockey Canada case.

In February, 2017, The Globe published an investigative series called Unfounded that detailed how Canadian police services were mishandling sexual-assault files. The reporting, which investigated 54 specific cases, and collected data from 873 police jurisdictions, showed that one in five cases in Canada were being thrown out as false or baseless. The series showed that police were skipping basic investigative steps, falling prey to rape myths and stereotypes and were often misapplying Canadian consent law.

The first story in the series focused on a London Police Service case. The city also had one of the country’s highest unfounded rates: 30 per cent of sexual-assault allegations were being closed as such. After the Unfounded series ran, police services across the country – including in London – vowed to overhaul their policies, procedures and training.

London was one of the first in Canada to adopt a sexual-assault case review committee, which allowed civilian experts to examine closed cases for potential missteps and bias. But the committee became backlogged and by the time the Hockey Canada case came up for review, the group was no longer allowed to meet because of the pandemic.

“The committee would not have been in agreement with the outcome of the first investigation,” said Jane McGregor, a member of the committee and former chair. “Honestly, I’m angry.”

Ms. McGregor, who is the director of programs and services at Anova, a support centre for women and children, has still not seen the file herself, but she’s learned about the steps taken during the trial.

“It was just clear bias,” she said. “It was obvious to me that they didn’t do their due diligence in collecting all the evidence.”

(The London review committee has long since resumed looking at cases and Ms. McGregor noted that she has seen a big improvement in the quality of the investigations.)



London Police headquarters in the winter of 2024. London was one of the first cities in Canada to adopt a sexual-assault case review committee.

GEOFF ROBINS/THE GLOBE AND MAIL

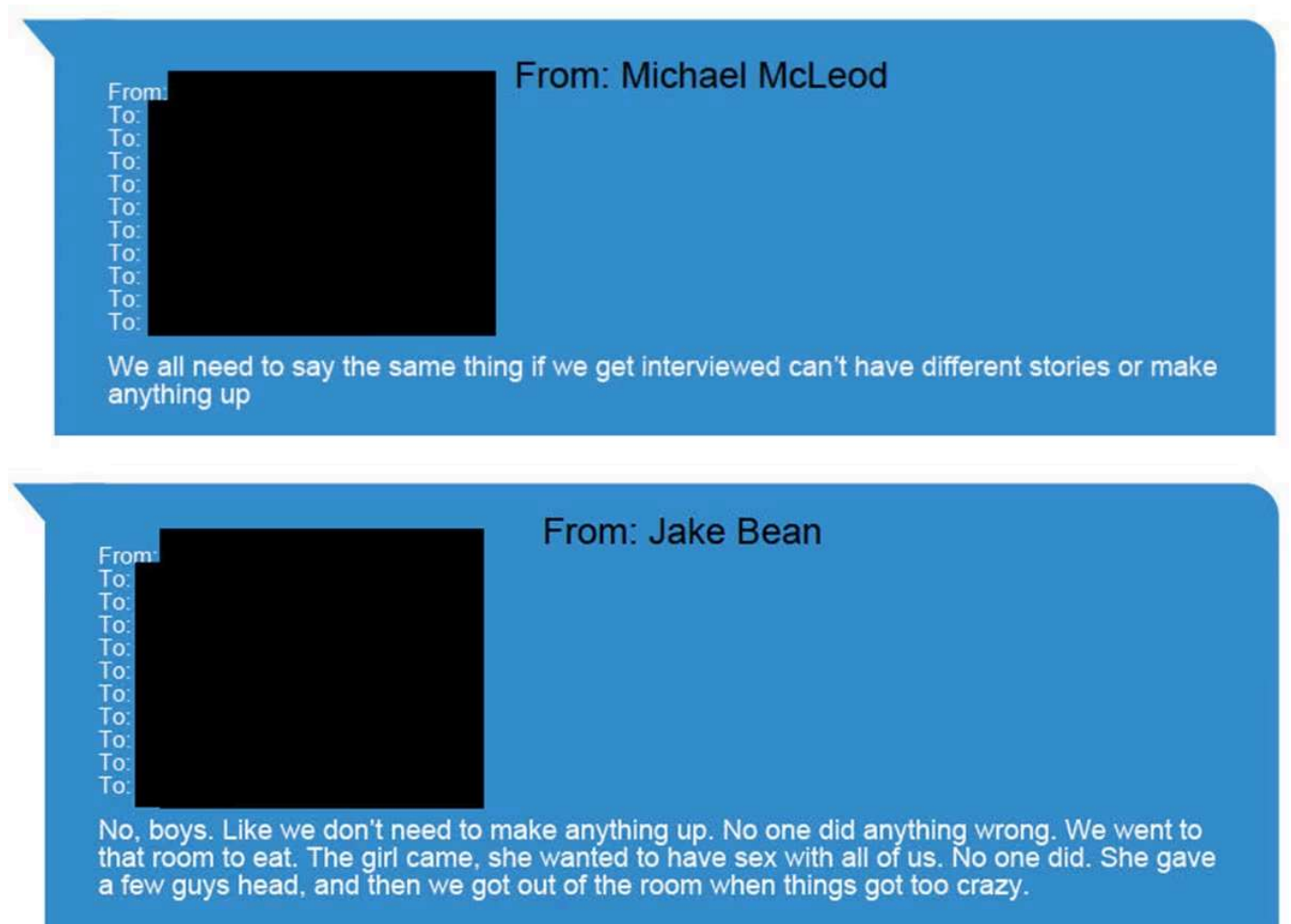
After London police closed the file in 2019, the Hockey Canada investigation also fizzled. E.M. would not agree to an interview with Ms. Robitaille or to provide her with a written statement. Without her account of the night, Ms. Robitaille said she could not continue with the investigation.

Things changed three years later, when E.M. filed a lawsuit against Hockey Canada and unnamed members of the junior team. TSN got a hold of E.M.'s statement of claim and reported on the settlement. The allegations shocked Canadians and triggered a wave of departures at Hockey Canada, as well as parliamentary hearings.

In response to public outcry, both London police and Hockey Canada – which now had access to her allegations in the statement of claim – reopened their investigations. In London, a new officer, Detective Lyndsey Ryan, saw the evidence differently than Det. Newton. She believed the facts suggested E.M. was not voluntarily consenting because she was acting out of fear.

This renewed probe had hurdles: By 2022, the former junior team had moved on and many were playing in the NHL. It had been four years since the alleged incident. Memories had faded, which made collecting evidence even more difficult.

But the officer had one new avenue: the Hockey Canada investigation. Det. Ryan filed a production order for Ms. Robitaille's investigative file, which included a trove of evidence, such as interviews with the accused players. The officer also obtained access to a players' group chat from 2018 that was created after the men learned police and Hockey Canada were looking into the incident. In the chat, the players can be seen strategizing what they should say about the night.



Reproduction of text messages between the hockey players.

ONTARIO SUPERIOR COURT OF JUSTICE/SUPPLIED

Ms. Robitaille's investigation for Hockey Canada produced some of the most contentious evidentiary issues in the case. The sports body told the players that if they did not participate, they could face a lifetime ban or have their names released.

She interviewed all of the accused players, except Mr. Hart. (Mr. Hart's interview was cancelled after Ms. Robitaille received the production order.) Each described actions by their teammates in the room that would have been helpful to the Crown.

During the pretrial motions, defence counsel fought to exclude those statements from evidence.

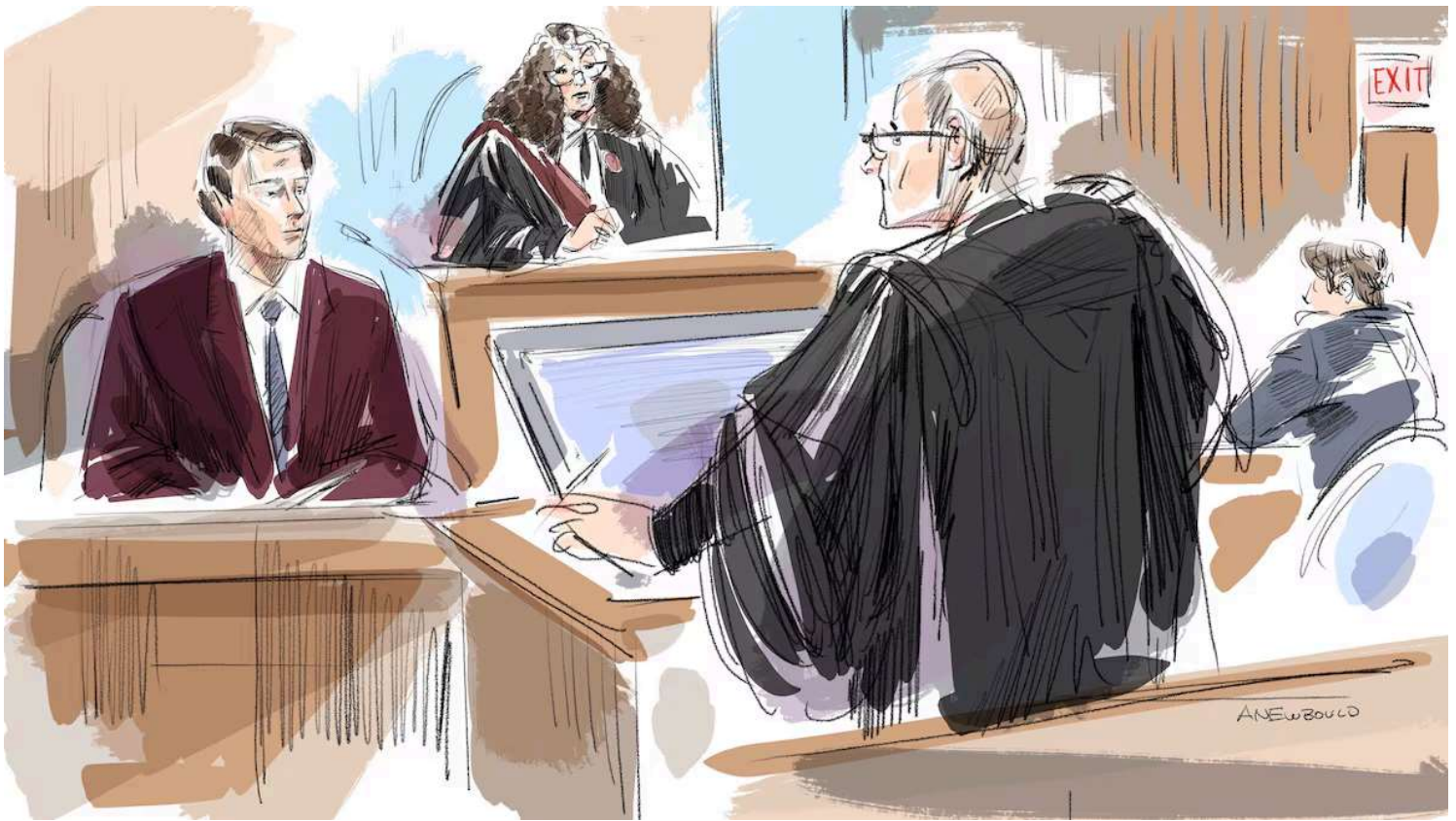
Mr. Coristine, the former Crown who has followed the trial but who isn't connected to the case, explained that, generally speaking, if a person gives an incriminating statement to someone who is not in a position of authority – for example, someone tells their neighbour that they committed robbery – that can be admissible evidence against the accused.

Ms. Cunningham argued that Ms. Robitaille was not a person of authority, which is a designation most often associated with a police officer. None of the players were forced to co-operate with the sports body, the Crown offered. They may not have liked the consequence, but it was a choice. Hockey Canada had been upfront with each of the accused that while the interviews were confidential, they could at some point be turned over to police.

"Fairness doesn't require the accused to be protected from inconsistencies in their interviews or facts that they've acknowledged, but would now prefer to keep hidden in a trial," Ms. Cunningham told the court.

But Ontario Superior Court Justice Bruce Thomas – who handled the pretrial – ruled on the spot that, while he did not believe Ms. Robitaille was a person of authority, he concluded that the interviews were obtained unfairly.

In practice, these interviews would only have been valuable to the Crown had the players testified – only Mr. Hart, who did not speak to Ms. Robitaille or police, took the witness box – because of the rules around how evidence can be introduced in court. Their value would have come during a cross-examination. Ms. Robitaille's interviews with other members of the junior team who were in the room on the night in question were used during the trial.



A courtroom sketch of Mr. Hart, Justice Carroccia, defence lawyer David Humphrey and Mr. McLeod during the trial.

ALEXANDRA NEWBOULD/THE CANADIAN PRESS

Another evidentiary issue came up during the trial relating to a text message sent by former world junior player Brett Howden, who was not accused of wrongdoing, but who was called as a witness. Court heard that on June 26, 2018, Mr. Howden texted a teammate: “Dude I’m so happy I left . . . Man, when I was leaving, Duber was smacking this girl’s ass so hard. Like, it looked like it hurt so bad.” (Duber refers to Mr. Dubé.)

Ms. Cunningham argued this text was a crucial piece of evidence that corroborated testimony from E.M. as well as a statement from another witness – player Tyler Steenbergen, who was also not accused of wrongdoing – who said he saw Mr. Dubé slap E.M. on the buttocks: “It wasn’t hard but it didn’t seem soft either.”

However, Mr. Howden told the court he didn’t remember sending the text message. He said he also couldn’t remember key details he had previously described to Ms. Robitaille, including that E.M. had been “weeping” in the hotel room. Mr. Howden pointed to the length of time that had passed and noted that he had since suffered a serious head injury that has impacted his memory.

The Crown argued Mr. Howden’s memory issues were feigned to help his friends, but Justice Carroccia disagreed. Because of this, she determined the text message was inadmissible as he would not be able to speak to its accuracy.

This was another serious blow to the Crown's case that may have been created by the long delay between the incident and the trial. Sources pointed out that had the first investigation resulted in charges, many of the witness memory issues could have been mitigated.



The interior of Delta Hotels London Armouries in London, Ont., the site of the alleged sexual assault.

BRETT GUNDLOCK/THE GLOBE AND MAIL

Tony Paisana, a senior trial litigator in Vancouver with Peck and Company, said regardless of what happens on Thursday with the verdict, the Hockey Canada case will be remembered as one of the country's most significant sexual-assault trials, alongside the 2016 Jian Ghomeshi case, which pushed conversations about consent and the limitations of the criminal justice system into the mainstream. (Mr. Ghomeshi was found not guilty. Ms. Robitaille was one of his defence lawyers, alongside lead counsel Marie Henein.)

"As a defence lawyer, it's really highlighted how much the pendulum has swung in terms of the public discourse," Mr. Paisana said. "I think there was a time when, if this type of evidence had come out – like a video where she's saying, 'Why are you so paranoid' – I think the public would have been skeptical."

Instead, people were having legal debates about whether E.M. was coerced. It's a reflection of how far the public's understanding of sexual-assault cases has come, he said.

But Mr. Paisana cautioned that this evolution shouldn't lower the bar in the criminal justice system, which is designed to protect people against wrongful conviction. For example, he said, courts shouldn't presume the most favourable interpretation of evidence just because society wants to take a more sensitive approach to these cases.

In a criminal trial, a judge isn't comparing one version of events to another and determining which one they believe, Mr. Paisana said. This is more typical of a civil proceeding.

"The criminal system asks a more nuanced question. I have version A and version B. Do I accept version B? Version A? Or does this whole thing leave me with doubt?" he said.

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