

CANADA / JUDGMENT

R. v. A. I.

2020 BCSC 1791

COURT

Supreme Court of British Columbia

DECIDED

17 September 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1791 R. v. A. I.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. A. I.,

2020 BCSC 1791

Date: 20200917

Docket: 82055

Registry: New Westminster

Regina

v.

A. I.

Restriction on publication:

Pursuant to s. 486.4(1) of the Criminal Code, any information that could identify the victim or a witness under the age of 18, shall not be published, broadcast, or transmitted in any way. This publication ban applies indefinitely unless otherwise ordered.

Pursuant to ss. 278.95(1)(a) and (b) of the Criminal Code, the contents of an application under s. 278.93, and evidence taken, information given and representations made during the s. 278.93 and s. 278.94 hearings, shall not be published, broadcast, or transmitted in any way. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Justice Shergill

Oral Ruling on Voir Dire #1

Defence Application under s. 276(2) and 278.92(2)(a)

This version of the Reasons for Judgment complies with the existing publication bans.

Counsel for the Crown:

C. Baerg

Counsel for the Accused:

A. Robinson

E. Talic

Counsel for the Complainant:

G. Allison

Place and Date of Hearing:

New Westminster, B.C.

August 5 - 7, 2020

Place and Date of Judgment:

New Westminster, B.C.

September 17, 2020

Table of Contents

I. Overview.. 4

II. Issues. 4

III. Legal Framework. 5

IV. Background. 8

V. Evidence Sought to be Adduced. 9

A. Part A Evidence. 11

1. June 13 Statement 11

a) May 24, 2013 ("Incident 1") 11

b) June 11, 2013 ("Incident 2") 12

c) September 2013 ("Incident 3") 12

d) February 2014 ("Incident 4") 12

e) November 29, 2016 ("Incident 5") 12

2. September 23 Email 13

3.	Blog Post	14
4.	July 4 WhatsApp Conversation.	14
B. Part B Evidence.		15
1.	June 13 Statement	16
2.	Group Email	16
3.	June 3 WhatsApp Conversation.	17
4.	June 7 Email	17
5.	Social Media Photos.	17
VI. Analysis.		18
A. Scope of Complainant's Right of Participation at the Stage 2 Hearing.		19
B. Sufficiency of the Evidence.		24
C. Twin Myths.		27
D. Relevance to an Issue at Trial		28
1.	Part A Evidence.	29
a)	Incidents 2 and 3, Blog Post and September 23 Email	29
b)	Incident 5 and July 4 WhatsApp Conversation.	30
2.	Part B Evidence.	31
E. Specific Instances of Sexual Activity.		32
F. Probative Versus Prejudicial Value.		33
1.	Interests of Justice.	33
2.	Encouraging Reporting of Sexual Offences.	35
3.	Just Determination.	35
4.	Removing Discriminatory Beliefs/Biases.	36
5.	Risk of Prejudice, Sympathy, Hostility.	36
6.	Personal Dignity and Right of Privacy.	37
7.	Personal Security and Full Protection and Benefit of the Law.	38
8.	Society's Interests in Encouraging Treatment for Complainants.	38
9.	Other Factors.	38

VII. Conclusion. 39

I. Overview

- [1] The accused is charged with the sexual assault of the complainant, contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. The alleged conduct that gives rise to the charge is non-consensual intercourse on May 24, 2013. The matter is set to be tried before a jury, commencing on October 26, 2020.
- [2] This application is brought under ss. 276(2) and 278.92(2)(a) of the Code. In the application, the accused seeks an order permitting him to cross-examine the complainant at trial with respect to:
- a) incidents of sexual activity between the two of them that do not form the subject-matter of the charge ("Part A Evidence"); and
 - b) evidence and communications about the complainant's pregnancy ("Part B Evidence").
- [3] Counsel for the accused submits that the evidence sought to be adduced is admissible because: it is not being proffered to support the "twin myths" inference; it is relevant to an issue at trial (i.e., credibility); it is evidence of a specific sexual activity; and it has significant probative value which is not substantially outweighed by the danger of prejudice to the proper administration of justice.

II. Issues

- [4] The following issues are raised in this proceeding:
- a) What is the scope of participation permitted for the complainant in a hearing held under s. 278.94?
 - b) Can the applicant meet his evidentiary burden on the application in the absence of an affidavit containing his defence and his version of events regarding the subject-matter of the charge?
 - c) Is the proposed evidence being adduced for the purpose of supporting the twin myths?
 - d) Is the proposed evidence relevant to an issue at trial?
 - e) Does the proposed evidence regard specific instances of sexual activity?
 - f) Does the proposed evidence have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice?
- [5] I begin first with the statutory framework governing this application.

III. Legal Framework

- [6] Because the accused stands charged with a sexual offence under s. 271 of the Code, he is required by s. 276(2) to bring an application if he wishes to adduce evidence that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge. In addition, s. 278.92(2) requires the accused to bring an application before he can rely on any record relating to the complainant which contains personal information for which there is a reasonable expectation of privacy, regardless of whether the record makes reference to prior sexual history.
- [7] The two-stage procedure for such applications is governed by the Code at: s. 278.93 which requires a threshold inquiry ("Stage 1"); and s. 278.94 which requires an admissibility hearing ("Stage 2"). The process is mandatory and cannot be waived: *R. v. Barton*, 2019 SCC 33 at para. 68. Pursuant to ss. 278.93(3) and 278.94(1), the jury and the public must be excluded from both stages of this procedure.
- [8] Section 278.93 involves a threshold inquiry at Stage 1, which is to determine whether a Stage 2 hearing should be held under section 278.94. In order to pass the threshold inquiry, the judge must be satisfied of the following:
- a) that the application is made in accordance with s. 278.93(2) such that it is in writing, sets out detailed particulars of the evidence that the accused wishes to adduce, and explains the relevance of that evidence to an issue at trial;
 - b) a copy of the application was given to the prosecutor and the clerk of the court at least seven days prior, or any shorter interval as allowed in the interests of justice; and
 - c) that the evidence sought to be adduced is capable of being admissible under s. 276(2).
- [9] After hearing the submissions of counsel, I was satisfied that the threshold established by section 278.93 had been met for holding an admissibility hearing under section 278.94. Section 278.94 entitles the accused to an evidentiary hearing to establish that the evidence sought to be adduced meets the test for admissibility as set out in s. 276(2) or s. 278.92(2). The complainant is granted standing to make submissions at the Stage 2 hearing, but is not a compellable witness: s. 278.94(2).
- [10] Section 276(1) imposes an absolute bar to using sexual activity evidence to support the "twin myths" inferences: such that by reason of the sexual nature of that activity, the complainant is (a) more likely to have consented to the sexual activity that forms the subject-matter of the charge, or (b) less worthy of belief.
- [11] Under s. 276(4), "sexual activity" includes any communication made for a sexual purpose or whose content is of a sexual nature.

- [12] Evidence of the complainant's other sexual activity is presumptively inadmissible. In order for it to be adduced by the accused, section 276(2) requires the court to be satisfied that the evidence meets four conditions of admissibility, which are that the evidence:
- a) is not being adduced for the purpose of supporting the twin myths;
 - b) is relevant to an issue at trial;
 - c) is of specific instances of sexual activity; and
 - d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
- [13] Section 276(3) sets out a non-exhaustive list of factors to assist in determining the prejudicial effect of the evidence as weighed against its probative value. These relate to the potential improper use of the evidence by the trier of fact, as well as broader policy considerations, such as:
- 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 considers relevant.
- [14] Section 278.92 relates to any record concerning a complainant that is in the possession or control of the accused, and which the accused intends to adduce. In proceedings involving sexual offences, such a record is presumptively inadmissible unless the court determines the following:
- a) if the evidence is of the complainant's sexual activity, that the evidence meets the conditions set out in section 276(2) while also taking into account the factors set out in s. 278.92(3); or
 - b) in any other case, the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

- [15] The requirement that the evidence have "significant probative value" means that the evidence must have more than "trifling" relevance. In other words, in the context of all of the evidence, it must be capable of leaving the trier of fact with a reasonable doubt: *R. v. Darrach*, 2000 SCC 46, at para. 39.
- [16] Once the evidence is shown by the accused to have significant probative value, its admissibility can only be excluded if the prejudicial effect substantially outweighs the probative value: *Darrach* at paras. 38-41.

IV. Background

- [17] By way of background, the complainant and the accused were involved in a romantic relationship that started in March 2013. They cohabitated between January 2014 to September 2016. The complainant says that the relationship ended in September 2016, whereas the accused says that the parties continued a sexual relationship until July 6, 2017.
- [18] On July 6, 2017, the complainant first made a report to the police regarding the accused's conduct. As a result, the accused was charged with assault contrary to section 266 of the Code. The assault charge was stayed by the Crown on September 6, 2018.
- [19] On June 7, 2018, the complainant sent an email to the police (the "June 7 Statement"), in which she made five allegations of sexual assault against the accused, purported to have occurred between May 24, 2013 and November 29, 2016. The first three incidents were alleged to have occurred within the first six months of their relationship; the fourth while the parties were living together; and the fifth after the parties had already broken up.
- [20] On June 13, 2018, the complainant was interviewed by the police. She repeated the five allegations of sexual assault (the "June 13 Statement"). During her interview, the complainant also alleged that she had become pregnant as a result of the fifth incident, but that she miscarried in the spring of 2017.
- [21] On August 23, 2018, the accused was charged with one count of sexual assault, in relation to the incident on May 24, 2013 (the "Index Offence"). A Preliminary Inquiry was held on November 25, 2019. The matter was set for trial before a jury, for eight days commencing on October 26, 2020.
- [22] The complainant was represented by counsel at this admissibility hearing, which was held over three days in August 2020. Evidence on the voir dire consisted of the transcript of the complainant's testimony from the Preliminary Inquiry, as well as an affidavit from the accused made on July 2, 2020. The affidavit contains a denial of the allegations made against the accused, though it does not assert a positive defence such as honest but mistaken belief in consent, or consent. The accused's affidavit attaches the various records that the accused wishes to put to the complainant, with his evidence as to how those records impugn the credibility of the complainant.

V. Evidence Sought to be Adduced

[23] The evidence that the accused seeks to adduce on cross-examination of the complainant is as follows:

- a) Portions of the June 13 Statement relating to the complainant's allegation of Incidents 2, 3, and 5.
- b) An email from the complainant to the accused dated September 23, 2013, with the subject line "Late night thoughts" ("September 23 Email").
- c) A blog posted by the complainant to the internet titled [omitted for publication] ("Blog Post"), and an attached link to a document [omitted for publication] ("Linked Document").
- d) A WhatsApp conversation from July 4, 2017 between the accused and the complainant about whether she could sleep over at the accused's place ("July 4 WhatsApp Conversation").
- e) An email [omitted for publication] from the complainant to a group of people regarding her relationship with the accused and her pregnancy ("Group Email").
- f) A WhatsApp conversation spanning June 3 to June 6, 2017 between the accused and [omitted for publication] Z.A. ("June 3 WhatsApp Conversation").
- g) An email dated Wednesday, June 7 from the complainant to [omitted for publication] S.I. ("June 7 Email").
- h) Photos of the complainant posted to social media in March and May 2017 ("Social Media Photos").
- i) Portions of the June 13 Statement relating to the complainant's pregnancy.

[24] Items (a)-(d) fall within the broad category of Part A Evidence, and items (e)-(i) fall within the broad category of Part B Evidence.

[25] The accused argues that the Part A Evidence and Part B Evidence strongly undermine the complainant's credibility, and reveal that: (a) the complainant has made conflicting statements about the evolution of her relationship with the accused; (b) the statements to the police differ starkly from the September 23 Email and from her Blog Post; and (c) her statements to the police, regarding the nature of her pregnancy and timing of miscarriage, contradict various statements to friends and family members, and are also inconsistent with photographs that appear to depict her as not being pregnant in the spring of 2017.

[26] I will now turn to the evidence in more detail.

A. Part A Evidence

[27] The Part A Evidence relates to incidents of sexual activity between the complainant and the accused that do not form the subject-matter of the charge.

1. June 13 Statement

- [28] The complainant gave two statements to the police. The first statement consisted of a three-page document emailed to Constable Schuck on June 7, 2018. On June 13, 2018, the complainant confirmed to Constable Schuck that the June 7 Statement was from her, and initialed each page of the document.
- [29] The second statement was provided at the Surrey R.C.M.P. detachment on June 13, 2018. The June 13 Statement was audio and video recorded and later transcribed. At the Preliminary Inquiry, the complainant testified that she had reviewed the transcript of the June 13 Statement, and that with the exception of a minor correction, her statement to the police was true.
- [30] In both the June 7 Statement and June 13 Statement, the complainant makes the following allegations against the accused.
- a) May 24, 2013 ("Incident 1")
- [31] The complainant told the police that the first incident of sexual assault by the accused occurred on May 24, 2013. The couple had not yet had intercourse prior to that day, and had not started living together. On the night in question, the complainant had been out drinking and dancing, and made arrangements with the accused by text to stay at his place for the night. After she got to the accused's apartment, she stated that the accused began to aggressively kiss her. Though she tried to resist, she was unsuccessful, and the accused forcefully removed her clothes and raped her. The next morning, the accused drove the complainant home.
- b) June 11, 2013 ("Incident 2")
- [32] The complainant told the police that the next time that the accused sexually assaulted her was on June 11, 2013 at a hotel. They had gone to the hotel after she had written an exam. After having consensual sex, they went to sleep. The next morning while she was getting dressed, the accused started kissing her. The complainant told him she did not wish to have sex and tried to push him away. The accused became more forceful. He pushed her onto the bed and raped her from behind.
- c) September 2013 ("Incident 3")
- [33] The complainant told the police that the third sexual assault occurred in September 2013. She had bronchitis and was sleeping over at the accused's place. She told the accused that she did not wish to have sex because she was not feeling well. The accused did not care, pushed her legs apart, held her down, and raped her.
- d) February 2014 ("Incident 4")

[34] The complainant told the police that the fourth occasion of sexual assault occurred in February 2014. The accused had just come home from work. She told him that she was not feeling well and did not wish to have sex. However, he cornered her, pushed her down on the bed, held her neck, and raped her from behind.

[35] The accused does not seek to cross-examine the complainant on this alleged incident.

e) November 29, 2016 ("Incident 5")

[36] The final incident of sexual assault was reported to have occurred on November 29, 2016. The complainant told the police that the couple had broken up in September 2016, and that Incident 5 was the first and only time they had sex with each other after their breakup. On that day, they met up over drinks to talk. The accused drove her home and then asked to come inside to see her cats. When they were sitting on the couch, he lunged towards her. The complainant started crying. She agreed to lie down with him and was still crying when they went to the bedroom. Suddenly, the accused got on top of the complainant and started raping her. He ejaculated inside her.

[37] The complainant told the police she became pregnant as a result of Incident 5, but that she miscarried around March or April 2017, when she was five months pregnant.

2. September 23 Email

[38] The accused submits that the statements in June 2018 to the police are inconsistent with the September 23 Email. The two-page email has the subject line "Late night thoughts". In the email, the complainant makes the following statements:

- a) "I love you because you make me feel safe and loved and cared for."
- b) "I love you because you've never given me a reason to doubt your love even though I keep trying to find one."
- c) [Omitted for publication].
- d) "I love how I never feel pressured and how you let me go my own pace and you don't get insecure about my doubts or uncertainty".

[39] The defence argues that the statements in the September 23 Email are inconsistent with the complainant's testimony at the Preliminary Inquiry, where she stated that she knew, since the first incident, that she had been violated and pressured into having sex. The statements are also alleged to be inconsistent with the complainant's allegations that the accused had sexually assaulted her on May 24, 2013, and June 11, 2013. The defence concedes that it is uncertain whether the September 23 Email is inconsistent with Incident 3 having occurred, as the exact date of Incident 3 is unknown.

3. Blog Post

- [40] Defence counsel argues that the statements to the police of multiple sexual assaults, having occurred in the first six months of their relationship, are also inconsistent with the Blog Post authored by the complainant some years before the statements in June 2018 to the police.
- [41] In [omitted for publication] the complainant published a blog titled [omitted for publication]. Although she did not mention the accused by name, she testified at her Preliminary Inquiry that the Blog Post was about her relationship with the accused. The complainant also testified that the Blog Post was available for public consumption for anyone who wanted to read it, and it was not password-protected. At the end of the Blog Post, the complainant attached a link to a document called [omitted for publication].
- [42] At the beginning of the Blog Post, the complainant discusses the early days of her relationship with the accused. She then states: [how it was not until more than six months had passed, before she had any cause for concern]. This passage is alleged to contradict her statement to the police that she was sexually assaulted the first time they had intercourse (i.e., during Incident 1) and on two other occasions, all of which occurred in the first six months of their relationship. In the Blog Post, the complainant does not mention having been sexually assaulted.

4. July 4 WhatsApp Conversation

- [43] According to the complainant, the couple's sexual relationship ended in September 2016. She told the police that the only time they had sex after they broke up in September 2016 was when the accused assaulted her on November 29, 2016. The accused refutes this, and states in his affidavit that they continued to have a sexual relationship until July 6, 2017, when they finally broke up.
- [44] On July 4, 2017, the complainant and the accused had a WhatsApp communication, during which the complainant asks the accused, "[c]an I sleep over tonight?" The accused refuses. Over the next five minutes or so, the two exchanged messages which can be interpreted as the complainant trying to convince the accused to let her sleep over at his place. Parts of their exchange are excerpted below:

The complainant: Pretty please?

The complainant: I promise I won't drink a bottle of wine in an hour.

The complainant: I was basically ready to fall asleep while you were over.

The accused: I really hate when you ask me something after I've said no.

The complainant: I always ask super casual as if I haven't already thought about it for a while and tried to plan out my weeks sleep needs around it.

The accused: Ok but no.

The complainant: I know.

The accused: I'm not changing my mind so please stop asking me.

The complainant: But I was just explaining why

The accused: It really upsets me

The complainant: Well because I didn't play that card because I often think it's less likely you'll say okay if you know how much I need it.

The complainant: Because you get anxious when I'm sad

The complainant: Would it be better if I just said off the bat, 'I really need a good nights sleep and I haven't gotten any since the last time I was over, do you think maybe tonight I could?'

[45] The accused says that the WhatsApp messages corroborate his evidence that the two had an ongoing sexual relationship after November 2016. The accused says that these statements made by the complainant are inconsistent with her statement to the police that the only time she had sex with the accused after they broke up in September 2016 was when he assaulted her on November 29, 2016.

B. Part B Evidence

[46] The Part B Evidence consists of the complainant's statements to the police about her pregnancy, communications with the accused and others about her pregnancy, and photographs of the complainant during the time when she would have been pregnant.

1. June 13 Statement

[47] In her June 13 Statement, the complainant told the police that the fifth and final time that she was sexually assaulted by the accused was in November 2016, two months after they had broken up. This sexual assault resulted in a pregnancy. She stated that this was the only time she was intimate with the accused after their breakup and that she had not been sexually active with anyone else prior to becoming pregnant.

[48] The complainant told the police that she miscarried in the spring of 2017, around March or April. She was five months pregnant and into her second trimester when she miscarried. However, she did not tell the police other pertinent details about her pregnancy.

[49] Constable Schuck asked the complainant if she would sign a medical consent release form regarding her pregnancy and the miscarriage. The complainant said she was not willing to do so.

2. Group Email

[50] The complainant sent an email dated [omitted for publication] to a group of people with whom the accused attended a social event. The subject line of the email is [omitted for publication]. In this email, the complainant makes the following statements:

[Omitted for publication]

[51] Defence counsel argues that based on the date and contents of the email, it can be inferred that the complainant was asserting that she miscarried on a specific weekend.

3. June 3 WhatsApp Conversation

[52] The accused also wishes to cross-examine the complainant on a WhatsApp conversation from June 3 to June 6, 2017 between the accused and [omitted for publication] Z.A. In this conversation, the two men discussed their concerns about the complainant's pregnancy and health.

4. June 7 Email

[53] On June 7 of a specific year, the complainant sent an email to [omitted for publication] S.I. telling her various things about the pregnancy and her health:

[Omitted for publication]

5. Social Media Photos

[54] Based on her statements to the police, the complainant would have been approximately four months pregnant in March 2017. In his affidavit, the accused states that he did not observe the complainant to be showing signs of pregnancy at any time.

[55] In March 2017, the complainant posted a selfie photo to her Instagram account. The photo reveals a slender woman who does not appear to be visibly pregnant. In May 2017, the complainant posted another photograph of herself to her Instagram account (the "Group Photo"). This time she is seen with a group of people. Comments on the Instagram page suggest that the Group Photo was posted on a specific date in May 2017. The defendant argues that the Group Photo was taken during an event attended by the complainant on the weekend she alleges she miscarried.

[56] The complainant testified at her Preliminary Inquiry that she was a member of a group and attended an event for that group for several years. She said she attended the event as a facilitator in 2017 and agreed the event was likely held in May 2017. The accused provided search results of an internet site which suggested that the event was held at a particular location over four specific days in May 2017.

[57] In May 2017, the complainant would have been approximately six months pregnant. However, the Group Photo depicts a slender woman who does not visibly appear to be pregnant. In addition, the Group Photo places her at the event potentially during the same weekend that she had miscarried.

VI. Analysis

- [58] With the exception of the July 4 WhatsApp Conversation, the Crown concedes the relevance of the Part A Evidence and does not otherwise oppose its admission under s. 276. The Crown opposes the admission of the July 4 WhatsApp Conversation, and all of the Part B Evidence, on the grounds that this evidence is irrelevant and its probative value does not outweigh the prejudicial impact. In the event that this evidence is admitted, Crown counsel asks that the jury be given a strong caution through a mid-trial instruction and during final instructions, as to the permissible and impermissible uses of this evidence.
- [59] The complainant opposes the application in its entirety. At para. 7 of the complainant's written brief of argument ("Complainant's Brief"), her counsel explains why:
- a) The application is deficient. The failure of the applicant to set out his defence and his version of events regarding the subject-matter of the charge (or indeed, the evidence he seeks to admit) means that he is unable to meet his burden on the application.
 - b) The only logical use for the proposed evidence is to support the inference that the complainant was more likely to have consented to the sexual activity which forms the subject of the charge and/or that she is less worthy of belief.
 - c) The proposed evidence is not relevant to an issue at trial. Indeed, much of the proposed evidence is collateral.
 - d) The proposed evidence is not probative.
 - e) There is significant prejudice to the complainant by the admission of the proposed evidence.
- [60] This then leads to the first issue for my determination.

A. Scope of Complainant's Right of Participation at the Stage 2 Hearing

- [61] The Crown did not raise the argument about the deficiency of the accused's application at either the Stage 1 or Stage 2 inquiry. Rather, it is an argument raised only by the complainant during the Stage 2 hearing.
- [62] According to the complainant, the authorities require the accused to make "positive assertions of a defence, and evidence to link the other sexual history evidence to a defence connected to the subject matter of the charge" (Complainant's Brief at para. 66). The failure of the accused to do so means that the court lacks the necessary tools "to engage in a meaningful application of the s. 276 framework and a meaningful consideration of the significance of the proposed evidence. Consequently, the complainant submits that the application must fail" (Complainant's Brief at para. 67).

- [63] Defence counsel submits that the complainant has overstepped her permissible role at this hearing. The argument about the deficiency in the defendant's affidavit material is one that only the Crown should be entitled to make. It is submitted that as a matter of policy and law, the complainant should only be permitted to make arguments on substantive matters that directly affect the complainant, such as the considerations stipulated under s. 276(2) or s. 278.92(2). The Crown counsel did not take any position on the issue.
- [64] Counsel for the complainant argues that neither the statute, nor the case authorities, support such a restrictive interpretation of the role of the complainant in a s. 278.94 hearing.
- [65] In determining this issue, it is important to first understand the distinction between a Stage 1 and Stage 2 hearing. As discussed earlier, a hearing under section 278.93 is the first stage of a two-stage proceeding related to the admissibility of evidence under sections 276(2) or 278.92(2). Whereas s. 278.94(2) explicitly provides for the participation of the complainant in a Stage 2 hearing, no such provision is made at a Stage 1 inquiry.
- [66] None of the counsel have suggested that the complainant should have standing at a Stage 1 inquiry, nor is this proposition supported by the authorities. In *R. v. Roland*, 2020 BCPC 130, the issue for the Court was whether a complainant in a sexual assault prosecution had standing at an application brought by an accused pursuant to section 278.93 seeking a hearing under section 278.94. In his comprehensive analysis of the statutory provisions and applicable authorities, Judge Cutler noted the lack of any authorities or statutory provisions giving the complainant standing at a Stage 1 hearing. He stated as follows at para 13:
- [13] That no courts have concluded the complainant ought to have standing at the application stage under s. 278.93 is not surprising given the language of the legislative provisions and the legal history surrounding the troublesome evidentiary issues engaging the complainant's security and privacy interests in sexual assault prosecutions. After reviewing the provisions of the Code, the jurisprudence addressing the provisions, and the legal history and policy considerations engaged in addressing the admissibility of sensitive evidence in sexual assault prosecutions, I am satisfied that it was never the intention of Parliament, nor should it be the practice of the courts, to engage the complainant at the initial application pursuant to s. 278.93.
- [67] Judge Cutler concisely explained the purpose of this provision, as follows:
- [31] The fundamental purpose of the screening stage created by s. 278.93 is to ensure the expedition's vessel does not leave the dock, potentially disrupting the trial process and causing needless anxiety, if not harm, to the complainant, until the judge is satisfied that there is a valid reason to embark on the expedition. The justice system must ensure the difficult position of the complainant is not compounded by frivolous and harmful evidentiary applications attacking the complainant's privacy, dignity, and security.

- [68] As I have noted, there is no dispute that the complainant does not have standing at a Stage 1 hearing. The question therefore arises, as to whether the issue of deficiency of the applicant's material falls under a Stage 1 or Stage 2 inquiry. If it is part of the Stage 2 inquiry, is this an issue that can properly be raised by the complainant?
- [69] There are two aspects to the threshold inquiry at Stage 1. First, the court is tasked with determining whether the applicant has met the procedural requirements for an application for a s. 278.94 hearing. The procedural requirements relate to timing, notice, and form of the application. The second aspect of the threshold inquiry is more substantive. In it, the court is to determine if the evidence sought to be adduced is capable of being admissible under s. 276(2). Of concern are the four conditions of admissibility, notably that the evidence: is not being adduced for supporting a twin myths inference; is relevant to an issue at trial; is of specific instances of sexual activity; and its probative value is not outweighed by its prejudicial effect. Once a matter passes Stage 1, the court's goal is to determine if the proposed evidence is admissible under ss. 276(2) or 278.92(2) at a Stage 2 hearing.
- [70] In *R. v. A.C.*, 2019 ONSC 4270, one of the issues before the Court was what parameters should be placed on the complainant's involvement at a Stage 2 hearing. Justice Sutherland noted at para. 68 that the role has to be a meaningful one, which includes the ability to cross examine and lead evidence at the hearing. Justice Sutherland went on to say as follows at paras. 69 and 71:
- [69] However, the ability to "attend and make submissions" is a limited one. It is for the sole and limited purpose of determining the admissibility of proposed evidence at the trial proper based on the statutory framework and goals. It is not to attend and make submissions at the trial proper. It is not to have standing at the trial. It is strictly limited to the issue of the admissibility of the proposed evidence at the trial and the opportunity to convey the perspective of the complainant to assist the court in its decision-making as to whether the proposed evidence should be admitted, such that it does not perpetuate the twin myths and offend the factors described in s. 276 of the Criminal Code.
- [71] As the gatekeeper, it is the obligation of the court to make sure that the involvement of the complainant is focused and limited. The cross-examination, affidavit, or testimonial evidence provided at the hearing by the complainant must be focused and limited to the issue(s) on the voir dire. The Crown and the complainant must stay on track and not diverge from the limited scope of involvement of the complainant at the hearing. It is not a forum for the Crown or the complainant to conduct "unfair questioning of the accused".
- [Emphasis added]
- [71] It is important to note that A.C. does not recognize an unfettered right of participation of the complainant at a s. 278.94 hearing. Rather, the complainant's participation is restricted by the admissibility criteria set out in ss. 276(2) or 278.92(2).

- [72] The complainant relies on *R. v. T.A.H.*, 2019 BCSC 1614, in which the complainant was also represented by Ms. Allison. In *T.A.H.*, the Crown argued that the s. 276(2) application was flawed as the accused had not supported his application with an affidavit containing "detailed particulars of the evidence" sought to be adduced, and the "relevance of that evidence to an issue at trial": *T.A.H.* at para. 11.
- [73] In concluding that the matter met the threshold requirements for holding a Stage 2 hearing, Justice Blok noted that both the Crown and the complainant were "content to proceed to a determination of the admissibility of the proposed evidence (despite the Crown's somewhat mixed message that an affidavit from the accused was mandatory)": *T.A.H.* at paras. 9, 36, and 38.
- [74] Ms. Allison submits that *T.A.H.* stands for the proposition that the role of the complainant at a Stage 2 hearing is unfettered, and that the complainant is permitted to make the kind of objection she has advanced in this case. There is nothing in *T.A.H.* that would lead this Court to either conclusion. I say this because:
- a) The issue of the complainant's role in either a s. 278.93 or s. 278.94 hearing was not before the court in *T.A.H.*, nor was it ever directly addressed.
 - b) The deficiency argument in *T.A.H.* was advanced and argued primarily by the Crown.
 - c) The complainant did not advance the same deficiency argument in *T.A.H.* as the complainant is doing here. In *T.A.H.*, the complainant argued that "the absence of an affidavit from the accused meant 'we do not know what the issue at trial really is'": *T.A.H.* at paras. 12 and 20.
- [75] In my view, the deficiency objection raised here by the complainant goes far beyond the "focused and limited" role of the complainant contemplated by s. 278.94.
- [76] The complainant submits that the accused's application is deficient because he has failed to set out in his affidavit: his defence; his version of events regarding the subject-matter of the charge; and the evidence he seeks to admit. The complainant argues that courts have refused to admit evidence of other sexual history where the applicant has failed to provide affidavit evidence setting out his defence and his version of events that form the subject-matter of the charge. The complainant asks this Court to dismiss the accused's application because the absence of such evidence from the accused means that the accused is unable to meet his burden to show relevance of the sexual history evidence to an issue at trial.
- [77] It is open to the complainant to argue at a Stage 2 inquiry that the accused has failed to establish relevance of the proposed evidence to an issue at trial. Relevance is identified under s. 276(2) and s. 278.92(2) as part of the criteria for admissibility. However, it is not within the scope of the role of the complainant to seek to have the application dismissed on the grounds that the accused has failed to provide affidavit evidence asserting a positive defence or providing his version of events. I consider this an argument that is properly advanced by the Crown at a Stage 1 inquiry.

- [78] In *R. v. A.M.*, 2020 ONSC 4541, the Court noted the importance of balancing the Charter rights of the accused with the complainant's rights to privacy, security, dignity, and equality: para. 103. In my view, Parliament sought to achieve such a balance by permitting the complainant to participate only at the Stage 2 inquiry process. Allowing a complainant to raise arguments at a Stage 2 hearing, that are reserved for the Crown at a Stage 1 hearing, would undermine this purpose and blur the distinction made by Parliament between the broad prosecutorial role of the Crown versus the limited role of the complainant in a Stage 2 inquiry.
- [79] I conclude that the objection raised by the complainant as to the sufficiency of the applicant's materials goes beyond the scope of the s. 276(2) or s. 278.92(2) inquiry, and as such, the complainant does not have standing to raise it.

B. Sufficiency of the Evidence

- [80] Even if I were to conclude that the complainant was entitled to argue that the defendant has failed to meet the evidentiary burden under s. 276(2) or s. 278.92(2) by not providing an affidavit that advances a defence of honest but mistaken belief, or consent, I conclude that this argument is without merit.
- [81] The accused submits that he does not need to present his full defence at the voir dire. Rather, he is required to only present enough evidence to enable me to determine the relevance of the proposed evidence to an issue at trial. He argues that in the unique circumstances of this case, the defence that the Crown has not proven its case is sufficient to meet the burden on the accused without him having to also swear an affidavit to advance a defence of honest but mistaken belief, or consent.
- [82] This sentiment is shared by the Crown. The Crown counsel takes no issue with the lack of affidavit evidence asserting a positive defence, and concedes in her written submissions that "[c]hallenging credibility based on inconsistent statements can be a legitimate purpose of cross examination on prior sexual history" (Crown Counsel's Brief of Argument at para. 18). However, the Crown submits that such inconsistent statements must be material, see *R. v. Crosby*, [1995] 2 S.C.R. 912, at para. 12.
- [83] The complainant argues that there are no cases before the Court in which the court has admitted evidence of other sexual history where an applicant has not set out his defence, and in most cases, his version of events that form the subject-matter of the charge (Complainant's Brief at para. 56).
- [84] While I accept that counsel did not place before me any cases where the court had admitted sexual history evidence in the absence of an affidavit from the accused asserting a positive defence, this does not mean that such cases do not exist. Indeed, in *R. v. Edgar*, 2020 BCSC 381, Justice Schultes did the very thing that complainant's counsel asserts has never been done.

[85] In Edgar, it was the position of the Crown that "when considering the relevance of the evidence for the purposes of s. 276, the focus must be on the specific defence that the accused is putting forward" (para. 26). Crown counsel in Edgar relied on the following passage from R. v. Goldfinch, 2019 SCC 38, at para. 95:

[T]he accused must demonstrate that the evidence goes to a legitimate aspect of his defence and is integral to his ability to make full answer and defence. This requires that the accused be able to identify specific facts or issues relating to his defence that can be properly understood and resolved by the trier of fact only if reference is made to the sexual activity evidence in question.

[86] In rejecting the Crown's argument that a positive defence must be asserted in order to establish relevance, Justice Schultes stated as follows:

[43] It is important to keep in mind that the most fundamental of all defences is to assert that the Crown has not proven its case beyond a reasonable doubt. I do not understand the defence to have yet committed itself to any additional defences beyond that. Mr. Edgar is not required to have a specific theory in addition to taking that fundamental position, which has the virtue of not requiring any defence evidence in order to have the potential to succeed.

[44] What the passage from Goldfinch that is being relied on by the Crown means, in my opinion, is that the defence cannot simply seek to elicit evidence of prior sexual activity at large - there needs to be a demonstrated connection between the probative value of the evidence and the defence that will be advanced. It does not mean that such evidence can only be elicited when the accused is presenting a positive defence, as opposed to simply attacking the sufficiency of the Crown's proof, as in this case.

[45] In furtherance of such an attack, evidence that is capable of undermining a critical element of how the complainant says that the offence was committed, in this case that the accused ejaculated, could be vital to undermining the credibility and reliability of that account, and may in itself raise a reasonable doubt.

[87] The fact that there are very few cases before the Court where other sexual conduct evidence has been admitted in the absence of the assertion of a positive defence speaks more to the unique circumstances of this case, rather than a bar on the admission of such evidence in the absence of a positive affirmation of a defence. As noted by the Court in Darrach at para 59:

Section 276 is most often used in attempts to substantiate claims of an honest but mistaken belief in consent. To make out the defence, the accused must show that "he believed that the complainant communicated consent to engage in the sexual activity in question" (Ewanchuk, *supra*, at para. 46 (emphasis in original)). To establish that the complainant's prior sexual activity is relevant to his mistaken belief during the alleged assault, the accused must provide some evidence of what he believed at the time of the alleged assault. This is necessary for the trial judge to be able to assess the relevance of the evidence in accordance with the statute. It is an essential part of the legislative scheme which provides a means by which the accused may

establish the relevance of the evidence he chooses to put forward.

- [88] I do not read any of the authorities relied on by the complainant as standing for the proposition that the accused can only succeed on an application under s. 276 or s. 278.92 on the strength of an affidavit asserting a positive defence. Rather, the key concern raised by the courts is whether the accused is able to meet his burden of establishing admissibility of the evidence he proposes to call: see Darrach at para. 51. I accept that, in most cases, the "absence of an affidavit may well impair an accused in surmounting the presumption of inadmissibility": T.A.H. at para 37. However, this is not a hard and fast rule. Each case must be determined on its own unique set of facts.
- [89] In my view, requiring the accused to provide an affidavit asserting a positive defence in every instance of a s. 276(2) or s. 278.92(2) application would be akin to mandating that an accused must always call a defence in a sexual assault trial. The fact that the accused may choose to challenge the prosecutions case, without calling a defence, is well established: see Darrach at paras. 50-52; and Edgar at paras. 43-45.
- [90] In *R. v. R.S.*, 2019 ONCJ 645, which dealt with the constitutionality of ss. 278.93 and 278.94, Justice Breen noted at para. 66 that "an accused's tactical choice to respond to a prima facie case by calling a defence is distinct from the right to challenge the prosecution case through cross-examination".
- [91] I conclude that the failure of the accused to provide an affidavit positively asserting a defence is not a bar to my ability to admit evidence under s. 276(2) or s. 278.92(2).
- [92] I turn now to an analysis of the various factors set out in s. 276(3) and 278.92(3).

C. Twin Myths

- [93] While s. 276 prohibits evidence of a complainant's sexual history, it does so only when it is used to support one of the twin myths inferences. Evidence of sexual activity may be admissible to substantiate other inferences: Darrach at para. 2. Other inferences that may justify adducing evidence of sexual history include impeaching a complainant's credibility through prior inconsistent statements: Darrach at paras. 35-36, and Crosby at para. 14.
- [94] The complainant submits that the proposed evidence engages the "twin myths" prohibited by s. 276, in that it invites the trier of fact to infer that the complainant is more likely to have consented to sexual activity with the accused, or that she is less worthy of belief by reason of the sexual nature of the activity.
- [95] I disagree. It is not the position of the accused that the complainant is less worthy of belief or more likely to have consented because she engaged in consensual sexual activity with the accused on other occasions, but rather, that she is less credible because her description of the relationship has changed dramatically over time.
- [96] I conclude that the proposed evidence does not engage either of the twin myth inferences.

D. Relevance to an Issue at Trial

[97] The fundamental question when determining relevance in this case is how the admission of the proposed evidence will assist the trier of fact in determining what happened on May 24, 2013.

[98] The actus reus of sexual assault is committed when a person touches another person in a sexual way without that person's consent. The mens rea consists of the "intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched": Barton at para. 87.

[99] Here, the accused wishes to rely on the proposed evidence to undermine a critical element of how the complainant says that the offence was committed (i.e., that it was a non-consensual act). It is argued that the admission of the proposed evidence could be vital to undermining the credibility and reliability of the complainant's account, and may in itself raise a reasonable doubt.

[100] In *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 609, the Court held that the Code should be interpreted to allow for the admissibility of logically probative evidence:

It is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the issues. This goal is reflected in the basic tenet of relevance which underlies all our rules of evidence: see *Morris v. The Queen*, [1983] 2 S.C.R. 190, and *R. v. Corbett*, [1988] 1 S.C.R. 670. In general, nothing is to be received which is not logically probative of some matter requiring to be proved and everything which is probative should be received, unless its exclusion can be justified on some other ground. A law which prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law justifying the exclusion runs afoul of our fundamental conceptions of justice and what constitutes a fair trial.

[Emphasis added]

[101] The following authorities illustrate the point that s. 276 was never intended to exclude evidence that is capable of contradicting material aspects of the Crown's case: *Crosby*; *R. v. Harris*, (1997) 118 C.C.C. (3d) 498 (Ont. C.A.); and *R. v. R.V.*, 2019 SCC 41. As noted by Justice Schultes in *Edgar* at para. 20, "[t]he common thread in these cases is that the sexual content of the evidence was secondary to its contradictory value in relation to the complainant's version of events."

[102] It is well established that material inconsistencies are relevant to the complainant's credibility. Where inconsistent statements by the complainant undermine the credibility of the Crown's evidence, the interests of justice favor admissibility: *Crosby* at para. 12. The Court held in *Crosby* at para. 12 that given that the central issue at trial was credibility, an inconsistency on a material and pertinent issue was highly relevant.

[103] In *R. v. Buzzard*, 2002 BCCA 1, at para. 35, the Court of Appeal overturned a conviction for sexual assault on the basis that evidence excluded under s. 276 went to the credibility of the complainant, which was the central issue in the case.

[104] As in *Crosby and Buzzard*, the central issue in this case is credibility.

1. Part A Evidence

[105] I conclude that the accused has met his burden of establishing the relevance of the Part A Evidence, which informs the credibility of the complainant on a material and pertinent issue.

a) Incidents 2 and 3, Blog Post and September 23 Email

[106] The complainant told the police in her statements in June 2018 that a sexual assault took place on May 24, 2013. However, the Blog Post and September 23 Email can lead to the inference that the sexual assault did not take place, for the following reasons:

- a) The complainant's statement in the Blog Post that [omitted for publication] appears to contradict her assertion to the police that she had been sexually assaulted three times within the first six months of the relationship.
- b) Statements in the September 23 Email referred to by the defence appear to contradict the complainant's evidence at the Preliminary Inquiry that she knew since the first incident that she had been violated and pressured into having sex.
- c) The September 23 Email also appears to be inconsistent with the complainant's allegations that the accused had sexually assaulted her on May 24, 2013, and June 11, 2013, and possibly September 2013 (depending on when this specific incident is alleged to have occurred).

[107] These inconsistencies have the potential to raise doubts about the credibility of the Crown's key witness as to whether the Index Offence actually occurred. They take this application beyond bare assertions of relevance to credibility, to actual evidence of material inconsistencies.

[108] Unlike the type of prior sexual conduct evidence rejected by the Supreme Court of Canada in *Goldfinch*, the complainant's September 23 Email and Blog Post were written after the alleged assault, but before she gave her statements to the police. In my view, this makes the proposed evidence directly relevant to the credibility of the complainant's statements about what happened on May 24, 2013.

b) Incident 5 and July 4 WhatsApp Conversation

[109] I also conclude that the July 4 WhatsApp Conversation, when taken together with the report of Incident 5, meet the test of relevance on the question of credibility. Those communications appear to contradict the complainant's assertion to the police that she did not have any sexual relationship with the accused after November 2016.

[110] In *R. v. L.S.*, 2017 ONCA 685, at para. 87, the parties "had a spousal relationship that began sometime before the alleged sexual assault and carried on long after the alleged sexual assault". The Ontario Court of Appeal concluded at para. 88 that the:

evidence that the relationship between E.K. and the appellant, including the sexual component of the relationship, carried on as it had before the alleged assault was relevant to whether the assault occurred [because] [t]he defence could argue that evidence that the sexual component of the relationship carried on as before, supported the defence position that the parties carried on as if nothing had happened because nothing had in fact happened.

[111] The Court noted that while the evidence of an ongoing sexual relationship that included consensual sexual intercourse after the alleged assault did not demonstrate that the assault did not occur, it was nevertheless relevant to an issue at trial, as follows at para. 89:

Evidence does not have to establish or refute a fact in issue to be relevant; it need only, as a matter of common sense and human experience, have some tendency to make the existence or non-existence of that material fact more or less likely. There is a big difference between evidence that is relevant and evidence that is determinative: see *R. v. A.*, [2001] 2 W.L.R. 1546 (U.K. H.L.), at para. 31. This evidence was relevant.

[112] Similar to *L.S.*, I conclude that evidence about whether the complainant continued a sexual relationship with the accused after having been sexually assaulted is relevant to an issue at trial, even in the absence of any prior inconsistent statement on this matter. This evidence could support the defence that the parties carried on a sexual relationship as if nothing happened because nothing had, in fact, happened.

2. Part B Evidence

[113] I turn now to the Part B Evidence. In my view, the complainant's statements to the police about her pregnancy, portions of the Group Email and the June 7 Email, and the Social Media Photos, are all relevant for many of the same reasons as the Part A Evidence. This proposed evidence goes to the complainant's credibility. It is an important part of the narrative of the parties' relationship and is inextricably intertwined with Incident 5. Some of this evidence could also help establish that the allegations of sexual assault were made in the context of a poisoned and acrimonious relationship.

[114] I have already set out elsewhere the specific contradictions raised by virtue of the Part B Evidence, and will not repeat them here. In my view, the contradictions between what the complainant told the police regarding her pregnancy, versus what she told others or posted on social media, are material and significant.

[115] However, with respect to the June 7 Email to S.I., I find that only the following portions of the email are relevant:

[Omitted for publication]

[116] The remaining portions of the June 7 Email that counsel has sought to rely on for cross-examination are irrelevant and ought to be excluded.

[117] I also do not find the June 3 WhatsApp Conversation between Z.A. and the accused relevant to an issue at trial. There is no basis upon which the accused could impeach the complainant on these communications since she is not a party to the conversation.

E. Specific Instances of Sexual Activity

[118] The complainant submits that the September 23 Email, the Blog Post, and the July 4 WhatsApp Conversation do not relate to specific instances of sexual activity.

[119] In R.V., the Court held at para. 48 that:

the words "specific instances of sexual activity" must be read purposively and contextually. They limit admissible evidence to discrete sexual acts, and protect against the misuse of general reputation evidence to discredit the complainant and distort the trial process: see R. v. L.S., 2017 ONCA 685, 40 C.R. (7th) 351, at paras. 79-80.

[120] The Court in R.V. noted at para. 49 that:

Section 276(2) does not always require an accused to come before the court armed with names, dates and locations. Rather the degree of specificity required depends on the circumstances of the case, the nature of the sexual activity that the accused seeks to adduce and the use to be made of that evidence: L.S., at para. 83; Goldfinch, at para. 53.

[121] Bearing in mind that sexual activity includes any communication made for a sexual purpose or whose content is of a sexual nature, I conclude this evidence meets the criteria of specific instances of sexual activity. The September 23 Email, Blog Post, and July 4 WhatsApp Conversation are all sexual communications sent on specific dates. While the exact date of the Blog Post is not known, the accused is able to narrow it down to a one month time period during which it was posted. I consider this to be sufficient to meet the requirement for this condition.

F. Probative Versus Prejudicial Value

[122] I turn now to the fourth condition for admissibility. In assessing whether the evidence has significant probative value which is not substantially outweighed by the danger of prejudice to the proper administration of justice, the Court must consider the factors set out in s. 276(3) or s. 278.92(3).

[123] The factors enumerated under s. 278.92(3) mirror those set out in s. 276(3), with the additional requirement that the judge is also to take into account "society's interest in encouraging the obtaining of treatment by complainants of sexual offences".

1. Interests of Justice

- [124] The interests of justice, including the accused's right to make full answer and defence, favour granting the application. The interests of justice require that the accused have the opportunity to cross-examine the complainant on material inconsistencies raised by her statements to the police, and the Part A Evidence and Part B Evidence that I have found to be relevant.
- [125] In my view, the proposed areas of cross-examination are not a fishing expedition. Rather, the accused has established a sound basis to believe that the complainant has made prior inconsistent statements which could affect her credibility on matters relevant to an issue at trial.
- [126] I reject the complainant's assertion that it is against the interests of justice to permit the accused to cross-examine the complainant on email communications which appear to contradict his assertion that the complainant may have lied about her pregnancy. The complainant argues that it is not in the interests of justice to permit the accused to put a false proposition to a complainant in cross-examination for the purpose of attacking her credibility.
- [127] I do not consider that allowing the accused to cross-examine the complainant on her pregnancy is akin to putting a false proposition to her. Just because the accused may have once believed that the complainant was pregnant does not mean that he is required to continue to hold that belief. If based on credible evidence, and there is reason to believe that the complainant may not have been pregnant during the time when she told the police and others that she was, the interests of justice mandate that the accused be permitted to follow that line of cross-examination as it could have significant bearing on the complainant's credibility or propensity to lie.
- [128] To the extent that the emails raise a contradiction between the suggestion that the complainant may have lied about her pregnancy and the accused's acceptance of the existence of the pregnancy, the accused acknowledges that his cross-examination of the complainant on the Part B Evidence may be at his peril. However, that is a risk for the accused to take so long as there is a legitimate and sound basis to cross-examine the complainant on the Part B Evidence.
- [129] As noted in R.V. at para. 62, the focus of the inquiry here is not whether the proposed line of questioning would be successful, but rather whether the answers given would be probative. The right of the accused to cross-examine and present one's case should not be curtailed unless the curtailment is justified by even stronger contrary considerations. Those do not exist in this case.
- [130] With respect to the September 23 Email, I do not find that the proposed evidence is gratuitous humiliation and degradation of the complainant. However, as will be discussed later, the passage of particular concern to the complainant (at paragraph 38(c)) does act to unnecessarily offend the complainant's personal dignity and right of privacy. To the extent that the remaining passages are highly personal, intimate, and embarrassing, they are not

unnecessarily so. Those portions of the email provide a legitimate and credible area of cross-examination relating to the complainant's credibility. In these circumstances, the interests of justice mandate that the accused be permitted to cross-examine on these statements despite their embarrassing content to the complainant.

2. Encouraging Reporting of Sexual Offences

[131] It is submitted that there is already evidence in the police narrative that the complainant was reluctant to make a statement to report her allegations of sexual assault after first disclosing them to the police. As such, it is submitted that permitting cross-examination of the complainant's sexual history could be a disincentive to the reporting of sexual assaults.

[132] While society has an interest in encouraging the reporting of sexual offences, society also has an interest in ensuring that the offences reported are truthful. In my view, granting the application to permit cross-examination on the sexual history evidence would not discourage the reporting of sexual assault offences since there is evidence that even despite her initial hesitation, the complainant did report all five incidents to the police.

[133] However, I do accept that permitting cross-examination on the complainant's refusal to disclose her medical records to the police could act as a deterrent to reporting sexual offences. Medical records contain highly personal information which is provided in the context of a confidential doctor-patient relationship. There is a reasonable expectation of the privacy of this information. The drawing of a negative inference from the failure of the complainant to provide access to her private medical records could cause future complainants to fear that their sensitive medical information could be put on display simply because they reported a sexual assault. In my view, these concerns weigh against permitting the accused to cross-examine the complainant on her refusal to sign a consent form for the police to access her medical records. As such, this evidence is deemed inadmissible.

3. Just Determination

[134] I find that there is a reasonable prospect that the evidence would assist the jury in arriving at a just determination in the case: s. 276(3)(c); Crosby at para. 12.

[135] Credibility is always a relevant and important factor in a trial, and particularly so in this case, where it is the central issue. It is important that the jury be permitted to hear evidence going to this issue.

4. Removing Discriminatory Beliefs/Biases

[136] The complainant outlined a number of stereotypes that courts have sought to vanquish in addition to the twin myths. These include: women who have been assaulted deserve it; women are unreliable witnesses; women lie about sexual assault; real victims of sexual assault immediately complain about sexual assault; real victims of sexual assault engage in avoidance behaviours; and sexual assault is committed by strangers.

[137] The complainant submits that the applicant is seeking to perpetuate these stereotypes by, for example, putting forward evidence that would question the length of time between the date of the alleged offence and the complaint made to the police. However, I do not find that the evidence sought to be adduced imports into these proceedings any discriminatory belief or bias such as those listed above. The issue is not why the complainant delayed in reporting the alleged offence to the police, but rather, how the complainant's description of the relationship with the accused has changed over time.

5. Risk of Prejudice, Sympathy, Hostility

[138] In my view, the Part A Evidence and Part B Evidence that I have found to be relevant will not unduly arouse sentiments of prejudice, sympathy, or hostility in the jury. If such a risk exists, it is more likely that any prejudice or hostility which arises from adducing other non-charged allegations of sexual assault, or questioning the complainant's pregnancy, will be directed at the accused, not at the complainant.

[139] However, I do agree with the Crown that there is a risk that large portions of the Group Email could invoke unfair hostility by the jury against the complainant and should be excised. I conclude that the probative value of the Group Email is limited to two alleged inconsistencies: [omitted for publication]. The remainder of the email consists largely of the complainant's perception of the accused's complaints about his friends. Not only are these statements not relevant to an issue at trial, but allowing cross-examination on those statements could invoke unfair hostility towards the complainant. As such, the remaining portions of the email are inadmissible.

6. Personal Dignity and Right of Privacy

[140] The complainant agrees that her right to privacy in the Blog Post and Social Media Photos is attenuated because they were available for public consumption and were easily accessible. However, the complainant argues that her personal dignity and right to privacy would be unnecessarily impinged by permitting the accused to cross-examine her on the other sexual assault incidents reported to the police, her pregnancy, and the September 23 Email.

[141] During the course of his submissions, defence counsel modified his position with respect to the incidents of sexual assault reported to the police, and agreed that there could be a risk of prejudice to the dignity of the complainant if the evidence in relation to Incidents 2 and 3 is permitted. However, defence counsel submits that the purpose of the evidence is to focus on the fact that the allegations were made, rather than the specific details of the allegations. Other than the dates and some details needed for context, defence counsel does not consider it necessary to explore with any depth the details of these sexual assault allegations.

- [142] I conclude that while there is risk of prejudice to the complainant's personal dignity and right to privacy in adducing specific details of Incidents 2, 3, and 5, this risk can be ameliorated with properly crafted questions so as to avoid unnecessarily invading the complainant's personal dignity and right to privacy.
- [143] Regarding the pregnancy, while I accept that the complainant's right to privacy is impinged, there is significant probative value of this evidence, which is not substantially outweighed by its prejudicial impact.
- [144] Finally, in regards to the September 23 Email, I conclude that certain statements in the email are intensely private and have little probative value to the matters at issue. To that end, with respect to the four statements on which the accused wishes to cross-examine the complainant, I consider only three of them to have sufficient probative value such that they do not unnecessarily prejudice the complainant's personal dignity and right to privacy. The accused is not permitted to cross-examine the complainant with respect to her statement made at paragraph 35(c) in the accused's written brief of argument.
7. Personal Security and Full Protection and Benefit of the Law
- [145] I do not find the proposed evidence to impact the rights of the complainant or any other individual to personal security or to the full protection and benefit of the law. Indeed, the complainant's rights are protected by virtue of this application.
8. Society's Interests in Encouraging Treatment for Complainants
- [146] The evidence does not support a finding that society's interest in encouraging the obtaining of treatment by complainants of sexual offences is prejudiced by the proposed evidence.
9. Other Factors
- [147] The defendant argues that it would be unfair for the Crown, by virtue of conduct over which the accused had no control (namely, the charge approval process), to render inadmissible certain evidence that would otherwise have been admissible and relevant to the defence of the accused: Crosby at para. 13.
- [148] The defence asserts that had all five allegations of sexual assault been charged, the accused would be entitled to cross-examine the complainant on the proposed evidence without having to make this application. If this application is not granted, it is argued that the ruling would incentivize the Crown in cases of multiple allegations of sexual assault to approve only those allegations where no prior inconsistent statements could be established. This would serve to distort the truth finding process and deny the accused a right to a fair trial.
- [149] I do not find any impropriety with respect to the Crown's decision to not approve charges with respect to the four other incidents. There is no evidence that the Crown's decision not to charge on the four other incidents was made for improper reasons. However, I agree with the defence that it would be unfair to deny the accused the right to cross-examine the complainant on the other allegations of non-consensual sex which bring into question her

credibility, when the only reason that he is prohibited from doing so is because the Crown chose not to charge them. This would undermine his right to make full answer and defence.

[150] I turn now to the argument that the proposed evidence should be prohibited because it offends the collateral fact rule as articulated by the court in *R. v. B.* (A.R.) (1998), 41 O.R. (3d) 361 (Ont. C.A.), aff'd [2000] 1. S.C.R. 781 at para. 13.

[151] The collateral fact rule prevents a party from trying to impeach the credibility of the opponent's witness "by calling witnesses to contradict him as to matters of credit or other collateral matters": *B.* (A.R.) at para. 13. Simply put, the party is stuck with the answer given during the cross-examination and not entitled to call further evidence on these collateral matters.

[152] I am satisfied that the evidence on which the accused wishes to cross-examine the complainant is directly relevant to the issues at trial and does not offend the collateral fact rule. The collateral fact rule is not raised or offended by permitting the accused to cross-examine the complainant on the Part A Evidence or Part B Evidence using the proposed records relating to the complainant.

VII. Conclusion

[153] I am satisfied that the conditions for admissibility of the evidence noted at paragraph 157, have been satisfied such that the evidence has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[154] The admissible evidence reveals inconsistencies which have significant probative value, both individually and collectively. At best, they demonstrate material inconsistencies and, at worst, a propensity to lie, including under oath. Indeed, there would be prejudice to the proper administration of justice if the application to cross-examine, on what I deem to be admissible evidence, was not granted as it would prevent the accused from advancing a full answer and defence.

[155] The evidence that I have found admissible meets the requirement of being evidence of specific instances of sexual activity; it is being advanced for a relevant purpose, to expose credibility issues with respect to the complainant's evidence; and not to advance either of the "twin myths".

[156] In order to minimize any possible prejudice to the fairness of the trial, however, the admission of this evidence should, of course, be accompanied by a clear warning to the jury that the only significance of this evidence is in relation to the effect of the inconsistent statements on the complainant's credibility. The jury must not infer from the unrelated sexual act that the complainant was therefore more likely to have consented to the sexual activity that forms the subject-matter of the charge, or that she is therefore less worthy of belief.

[157] As such, the accused is permitted to cross-examine the complainant on the following evidence which is deemed admissible:

- a) Portions of the June 13 Statement relating to the complainant's allegation of Incidents 2, 3, and 5, and her pregnancy, subject to further vetting by this Court to ensure compliance with the concerns raised in this ruling.
- b) The following portions of the September 23 Email:
 - "I love you because you make me feel safe and loved and cared for."
 - "I love you because you've never given me a reason to doubt your love even though I keep trying to find one."
 - "I love how I never feel pressured and how you let me go my own pace and you don't get insecure about my doubts or uncertainty".
- c) The Blog Post and Linked Document called [omitted for publication].
- d) The July 4 WhatsApp Conversation.
- e) The following portions from the Group Email:
[Omitted for publication].
- f) The following portions from the June 7 Email:
[Omitted for publication].
- g) Social Media Photos of the complainant.

[158] To ensure that the cross-examination of the complainant on evidence deemed admissible does not go beyond the scope of this ruling, the accused is to provide this Court with a list of questions prior to the commencement of the trial.

[159] I find that evidence in relation to the June 3 WhatsApp Conversation is inadmissible as it does not meet the test for relevance. While the evidence of the complainant's refusal to sign a medical release allowing the police to obtain the medical records related to the pregnancy and miscarriage has probative value in the overall credibility assessment, when compared to the danger of prejudice to the proper administration of justice, I conclude that its probative value is substantially outweighed by its prejudicial impact. In my view, no inference should be drawn from the fact that the complainant did not agree to disclose her medical records to the police. There are legitimate and perfectly acceptable reasons why she may not want her private medical records used for the purposes of the prosecution, which may have nothing to do with her credibility. As such, this evidence is deemed inadmissible.

"Shergill J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/17/2020BCSC1791.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-a-i-2020>

Prepared on 25 October 2026 · Esheria