

CANADA / JUDGMENT

R. v. A.L.

2020 BCCA 18

COURT

British Columbia Court of Appeal

DECIDED

20 January 2020

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2020 BCCA 18 R. v. A.L.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. A.L.,

2020 BCCA 18

Date: 20200120

Docket: CA45690

Between:

Regina

Respondent

And

A.L.

Appellant

Restriction on publication: Section 16(4) of the Sex Offender Information and Registration Act [SOIRA]. This section provides that no person shall disclose any information that is collected pursuant to an order under SOIRA or the fact that information relating to a person is collected under SOIRA.

A publication ban has been mandatorily imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting, or transmission in any way of evidence that could identify a complainant or witness under the age of 18. This

publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated
March 16, 2018 (conviction) (R. v. A.L., New Westminster Docket No. X080226).

Counsel for the Appellant:

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M.E. Sandford, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

April 18, 2019

Place and Date of Judgment:

Vancouver, British Columbia

January 20, 2020

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Newbury

Summary:

Appeal from conviction for sexual assault-related offences and one count of uttering a threat. The offences involved one complainant and were alleged to have been committed over a period of approximately 30 years. The complainant was left with the appellant when she was eight years old and entirely dependent on him. The complainant testified that she was subjected to physical, emotional and sexual abuse by the appellant which began shortly after she was left in his care. The appellant testified. He denied abusing the complainant when she was a child but admitted to

having sexual intercourse with her after she turned 15 years of age (the age of consent was 14 at the material time). The appellant acknowledged that he began having sexual intercourse with the complainant when she was in a relationship of dependency with him. He nonetheless characterized as consensual all sexual contact he had with the complainant. The complainant had four children by the appellant, the first when she was 15 years of age. The Crown was permitted to lead evidence of acts of extrinsic misconduct by the appellant, including in relation to matters predating the start date of the indictment. The defence unsuccessfully sought to adduce, both in the cross-examination of the complainant and as part of its case, a sexually explicit video depicting the appellant and complainant engaging in a variety of sexual acts. The appellant advances three grounds of appeal. He alleges that the trial judge erred in: (1) admitting evidence of extrinsic misconduct and failing to provide a sufficient instruction on the limited use the jury could make of bad character evidence; (2) failing to instruct the jury that a finding of guilt on one count had no probative value in relation to the other counts; and (3) excluding the video evidence. Held: Appeal dismissed. First, the evidence of extrinsic misconduct was admissible to put the relationship between the appellant and complainant in context and explain why the complainant stayed with the appellant for as long as she did without disclosing the abuse to anyone. Having regard to the charge as a whole, the jury would have understood the limited use that could properly be made of the bad character evidence. Second, while it may have been preferable for the trial judge to have given an express instruction that a finding of guilt on one count had no probative value in relation to any other count, nothing the judge said in her charge would convey to the jury that proof of guilt on one count could substitute as evidence constituting proof of guilt on another count. Indeed, the manner in which the jury was instructed guarded against such impermissible reasoning. Finally, the Crown conceded that the trial judge erred in her articulation of the Seaboyer test in her first ruling that excluded clips from the video for cross-examination purposes. Properly applying the Seaboyer test to the circumstances of this case would, however, lead to the same conclusion. The video was not shown to have any probative value in cross-examining the complainant. Even if the video had some limited probative value for cross-examination purposes, it was substantially outweighed by the prejudice that would flow from its admission. The judge's second ruling excluding the video as part of the defence case was not affected by error in principle. The judge's determination that the limited probative value of the video was substantially outweighed by its prejudicial effect is therefore entitled to deference on appeal. The appellant established no grounds for interfering with that discretionary determination.

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Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

- [1] The appellant was convicted by a jury of a number of sexual assault-related offences and one count of uttering a threat to cause bodily harm. The offences were alleged to have occurred between January 4, 1983 and July 1, 2012. All of the offences were committed in relation to the same complainant, who was left in the appellant's care by her mother when she was eight years old. The appellant is 19 years older than the complainant. It was common ground at trial that, as a child, the complainant was entirely dependent on the appellant for the necessities of life.
- [2] The complainant testified that the appellant began sexually assaulting her very shortly after she was left in his care. She described being subjected by the appellant to terrorizing acts of abuse designed to compel her compliance with his sexual demands. She testified that she gave in to those demands largely out of fear.

- [3] The appellant testified at trial. He denied sexually abusing the complainant when she was between the ages of eight and 14. He admitted, however, having what he described as consensual sexual intercourse with her when she was 15 and he was 34 years of age. At all material times, the age of consent was 14. The appellant admitted that when the first act of sexual intercourse occurred, he was a person with whom the complainant was in a relationship of dependency.
- [4] The appellant impregnated the complainant when she was 15 years old. She gave birth to their first child in 1990, about a month before she turned 16. It was an admitted fact at trial that in 1993, 1998 and 2000, the complainant gave birth to three other children fathered by the appellant.
- [5] For a significant period of time, the appellant falsely represented to others that he was the complainant's father, not the father of her four children. Similarly, the complainant did not tell anyone that the appellant was the father of her children for a long time. She presented the appellant as her own father throughout her childhood and adolescent years. It was only later in life that she began presenting the appellant as her husband.
- [6] The complainant lived with the appellant for 30 years. She left him in 2012 when she was almost 38 years of age. Shortly thereafter, she reported to the police what she said had happened to her.
- [7] The Crown led evidence of a number of disreputable acts committed by the appellant -- most of them in the early years of the relationship -- to secure and maintain the complainant's subservience and submission to his sexual desires. This bad character evidence included acts of domination and physical assault designed to instill fear, acts of humiliation designed to undermine the complainant's self-worth and independence, and acts involving the emotional manipulation and abuse of the complainant.
- [8] In addition, the bad character evidence adduced by the Crown included three instances of sexually assaultive behaviour by the appellant in the fall of 1982, a few months before the time period covered by the indictment.
- [9] Against this background, the appellant submits as his first ground of appeal that the trial judge erred: (1) by admitting bad character evidence; and (2) by failing to provide to the jury a sufficient limiting instruction regarding the use that they could properly make of this evidence.
- [10] The appellant's second ground of appeal is that the judge erred: (1) by failing to instruct the jury not to use the evidence on one count to assist in proving guilt on another count; and (2) by failing to warn the jury that a finding of guilt on one count could not be used as evidence of guilt on another count.
- [11] The appellant's third ground of appeal challenges rulings made by the judge in which she refused to admit a DVD created by the appellant and complainant depicting explicit sexual conduct between them. In the court below, the DVD was referred to as the "sex tape". I will

refer to it throughout these reasons as "the video". The video was created when the complainant was approximately 20 years of age. It was said by the defence to depict an act of consensual sexual intercourse during the time span covered by Count 5 of the indictment. The judge made two rulings on this issue. The first prohibited the appellant's trial counsel from cross-examining the complainant on the contents of the video. The second prohibited introduction of the video as part of the defence case during the examination-in-chief of the appellant.

[12] Some additional background is required to put the appellant's grounds of appeal in context.

II. The Indictment

[13] The appellant was charged in a six-count indictment as follows:

Count 1 (Sexual Assault) -- That between the 4th day of January, 1983 and a day in July 1988, at Surrey, British Columbia and Red Deer, Alberta, he sexually assaulted the complainant contrary to s. 246.1 of the Criminal Code, R.S.C. 1970, c. C-34 and R.S.C. 1985, c. C-46. [Section 246.1 came into force on January 4, 1983, the start date of this count. The time frame encompassed by the count ends the day before the complainant's 14th birthday. The age of consent throughout this time frame was 14. As the complainant was between the ages of eight and 13 when this offence was alleged to have been committed, consent was not a defence.];

Count 2 (Sexual Interference) -- That between the 1st day of January, 1988 and a day in July 1988, at Surrey, British Columbia, he touched the complainant, a person under the age of 14, for a sexual purpose contrary to s. 140 of the Criminal Code, R.S.C. 1987, c. 24, s. 1. [Section 140 came into force on January 1, 1988, the start date of this count. The complainant was then 13 years of age. As with Count 1, the time frame encompassed by this count ends the day before the complainant's 14th birthday. Consent was not a defence.];

Count 3 (Sexual Exploitation) -- That between a day in July 1988 and a day in July 1992, at Maple Ridge and Surrey, British Columbia, while being a person in a position of trust or authority towards the complainant ("a young person") or person with whom the complainant is in a relationship of dependency, he touched the complainant for a sexual purpose contrary to s. 146(1)(a) of the Criminal Code, R.S.C. 1987, c. 24, s. 1 and s. 153(1)(a) of the Criminal Code, R.S.C. 1985, c. 19 (3rd Supp.), s. 1. [Section 146 came into force on January 1, 1988. Section 153 came into force on December 12, 1988, in identical terms. At all material times "young person" was defined to mean a person between 14 and 18 years of age. The time frame encompassed by this count begins the day the complainant turned 14 and ends the day before she turned 18. Consent was not a defence.];

Count 4 (Sexual Assault) -- That between a day in July 1988 and the 14th day of August, 1992, at Maple Ridge and Surrey, British Columbia, he sexually assaulted the complainant contrary to s. 246.1 of the Criminal Code, R.S.C. 1970, c. C-34 and R.S.C. 1985, c. C-46 and s. 271 of the Criminal Code, R.S.C. 1985, c. C-46 and R.S.C. 1985, c. 19 (3rd Supp.), s. 10. [Section 246.1 was in force until December 12, 1988, the date upon which s. 271 came into force in identical terms. The time

frame encompassed by this count begins the day the complainant turned 14 and ends the day before s. 273.1 (defining "consent") came into force. Consent and honest but mistaken belief in consent were defences to this count. With the agreement of the parties, honest but mistaken belief in consent was not left with the jury as a defence to this count.];

Count 5 (Sexual Assault) -- That between the 15th day of August, 1992 and the 1st day of July, 2012, at Maple Ridge, British Columbia and at Ancaster, Ontario, he sexually assaulted the complainant contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46. [The time frame encompassed by this count begins the day s. 273.1 (defining "consent") and s. 273.2 (defining the defence of mistaken belief in consent) came into force and ends the day after the complainant left the appellant. Consent and honest but mistaken belief in consent were defences to this count and both were left with the jury.];

Count 6 (Uttering Threats to Cause Death or Bodily Harm) -- That between the 1st day of July, 1987 and the 1st day of November, 1989 at Surrey, British Columbia he knowingly uttered a threat to the complainant to cause her death or bodily harm contrary to s. 264.1(1) of the Criminal Code, R.S.C. 1985, c. C-46.

III. Detailed Overview of the Evidence and Rulings Challenged on Appeal

1. The complainant is left in the appellant's care at the age of eight

[14] The complainant was born in 1974 and lived with her mother and two older brothers in Toronto, Ontario. The appellant had a sexual relationship with the complainant's mother in Toronto in the late 1970s and early 1980s before he moved to Alberta to secure work. He knew the complainant when she was a "toddler." The complainant's mother gave birth to her third son in 1981. She claims that the appellant is the father of this child.

[15] The complainant's mother and four children visited the appellant in Red Deer, Alberta in the summer of 1982 when the complainant was eight years old and between Grades 2 and 3. It was common ground at trial that, after this visit, the complainant's mother left the complainant and her one-year-old half-brother in the appellant's care. The complainant remembered begging her mother not to leave her behind, but recalled coming home from school one day and realizing that her mother was gone. She testified that "[t]hat's when it changed." She never lived with her mother or her two older brothers again.

[16] A representative of the Child Welfare Branch of Alberta Social Services and Community Health had contact with the appellant in Red Deer in October 1982. The appellant claimed at that time to be the father of the complainant and her half-brother.

2. Sexual assaults preceding the start date of the indictment

[17] The Crown led evidence from the complainant of the three incidents pre-dating the January 4, 1983 start date of Count 1 of the indictment in which the appellant sexually assaulted her. The Crown characterized these incidents as grooming behaviour by the appellant.

- [18] The complainant testified that the first time the appellant sexually touched her was about a week after her mother had left Red Deer. This would have been in the late summer or early fall of 1982. On this occasion, the complainant testified that the appellant dried her after she had a bath by rubbing a towel in between her legs. She felt that the touching was wrong and testified that the appellant told her not to say anything to anyone about it. Not long after this incident, the complainant testified the appellant became angry with her for drawing a picture that said she loved her mother and brothers, but did not say the same about him. She testified the appellant pulled her pants down and spanked her before proceeding to caress her "bum" for a few minutes. The third incident occurred when the complainant was in Grade 3 in the fall of 1982. The complainant testified that she was scared of the dark, but that the appellant did not allow her to have a night light. When the complainant became frightened of the dark one evening, the appellant said she could come into his bedroom where there was some light. The complainant testified that she knew what this meant but was so scared of the dark that she got into his bed. He "spooned" her and she could feel the bulge of his penis against her lower backside as he pushed against her.
3. Sexual offences alleged to have occurred during the time frame specified in the indictment
- [19] Sometime after Christmas of 1982 (and after the start date of the indictment), the complainant remembered waking the appellant up because it was dark, she heard a noise in the house and became frightened. The appellant was angry and made her pull her bottom clothing off and put on her infant half-brother's diaper. She cried and asked him not to make her do that because she felt humiliated to be forced to wear a diaper when she was nine years old. She testified that the appellant told her she could take the diaper off if she got into bed with him. When she did this, he put his hand on top of her vagina. She said it felt gross, dirty, degrading and wrong. She testified that touching incidents like this occurred a few times a month while she lived with the appellant in Red Deer. The appellant told her not to tell anyone about these incidents, that she was asking for it, and that no one would believe her if she said anything. The complainant testified that she felt scared and dirty.
- [20] In addition to the sexual touching, the complainant testified that while she lived in Red Deer, the appellant "treated [her] like a nothing." He pinched her below her waist, and threw his construction boots at her causing bruises that were covered by her clothing. She also testified that he instructed her to keep her head down when walking with him and slapped her in the head when she did not comply.
- [21] The complainant testified that she was instructed by the appellant to call him "Dad" and to adopt his last name. She was not permitted by him to participate in extracurricular school activities, nor was she allowed to have her friends over. She testified that the appellant made her cut her "beautiful long hair" into a "mushroom cut like a boy" and wear "homely looking" clothing instead of the dresses she wore when she was with her mother.

- [22] The appellant relocated from Red Deer to Vancouver, British Columbia in the summer of 1983 when the complainant was nine years old. The complainant testified that the appellant's sexually abusive behaviour escalated after this move. He masturbated in her presence and would guide her hand on his penis until he ejaculated. He told the complainant to perform oral sex on him. He ejaculated once in the complainant's mouth but she gagged. On future occasions, he usually ejaculated on her chest or back.
- [23] After the move to Vancouver, the complainant would occasionally see her mother and brothers. She testified that the appellant always accompanied her on these visits. Both of the complainant's older brothers testified that during these visits the appellant never left the complainant's side or let her have time alone with them.
- [24] On one occasion after the move to Vancouver, the appellant, who was under a blue blanket but otherwise naked, made a gesture the complainant interpreted as a request for oral sex. When the complainant ignored him, the appellant said to her, "[D]o you want to see your mom?" The complainant said "Yes" and testified that she knew what she would have to do. She said she performed oral sex on the appellant who then put his penis between her legs. She said she then got to see her mother.
- [25] The complainant testified that there was only one occasion on which she refused to perform a sexual act requested by the appellant. This incident occurred in Vancouver. The complainant was between the ages of nine and 12. She testified that the appellant became enraged by her refusal, drove her to a secluded area, told her to get out and take her pants off, and then drove away. She remembers screaming hysterically. The appellant returned sometime later. She said she never refused the appellant after this incident because she was terrified and "look what happened [after] the first time I said no."
- [26] The complainant testified that the sexual abuse escalated again around the time of her 12th birthday. She asked to see photographs of her mother and brothers. The appellant told her he would permit it if he could "put it in." The complainant knew this meant penile penetration but agreed to the act because she wanted to see the photographs. She testified that the appellant pulled her legs apart, got on top of her and "thrust" his penis into her vagina. The complainant remembers screaming in pain and bleeding everywhere. She said he permitted her to see the photographs afterwards.
- [27] The complainant testified that the appellant continued to have sexual intercourse with her after this incident but used Vaseline as a lubricant. The appellant told the complainant that she wanted these acts to occur, that everyone would think so, and that she should not tell anyone because she would not be believed. The complainant said she was repeatedly told this and that it was a notion "burned in [her] head."

- [28] She testified that the sexual assaults committed thereafter generally consisted of oral sex and penetration. If the appellant had vaginal intercourse with her, he would ejaculate on her chest or back. If the appellant had oral sex with her, he would sometimes ejaculate in her mouth and give her a towel to spit it out and clean up.
- [29] When the complainant was 11½ or 12, the appellant told her that she would start having her menstrual period. The complainant already knew this. The appellant said he would buy her tampons. He did so and left them in the bathroom for her.
- [30] The complainant testified that the visits with her mother and two older brothers stopped after an incident in which the appellant made her call her mother and say that she hated her and did not want to see her again. The complainant, who was 12 or 13 years old at the time, remembers the appellant coaching her through the conversation. After this conversation, the complainant did not see or speak with her mother for 25 years.
- [31] The complainant said that the appellant also isolated her from others. She was not allowed to play with school friends unless the appellant permitted it and was still not allowed to engage in extracurricular activities. On one occasion, where a school friend surprised her with birthday gifts, the appellant made her get rid of them.
- [32] While the complainant did have a Big Sister for a while, the appellant wanted her to take her half-brother to these get-togethers. The Big Sister explained that she was not a babysitting service and the relationship came to an end. The complainant testified that she never told her Big Sister what was happening to her because she was ashamed, made to feel dirty and did not want her Big Sister to think badly of her. She thought that no one would believe her.
- [33] The complainant said she continued to dress in boyish clothes and keep her hair short because the appellant wanted her to look that way. She said he controlled her appearance and dress.
- [34] The appellant, complainant and her half-brother moved to Surrey, British Columbia in the summer of 1987 when she turned 13. The appellant was then 32 years of age. She testified that vaginal penetration or oral sex would occur about once a week in the living room or the appellant's bedroom. She never said no to the appellant during this time noting, "I learned from [the] last time."
- [35] The complainant testified that she was not allowed to use the phone or leave the house, other than to go to school. Around this time, the appellant told her to start calling him "Sweetheart", but only when the two of them were alone together.
- [36] The complainant testified that, after the move to Surrey, she discovered a note on the door when she came home from school one day. She did not read the note, but the appellant did when he got home from work. The appellant reacted very angrily to the note and muttered something about Child Services under his breath. Without explanation, he loaded up the car and drove the children to a hotel. The complainant's half-brother was sent off to play. The appellant told the complainant they were going to stay in the hotel room and play strip Go

Fish. Every time the complainant won, she had to take some of her clothing off. When all of her clothes were off, the appellant threatened to put her out in the hall where someone could attack her. She cried and begged the appellant not to do so. He then had sexual intercourse with her and calmed down.

- [37] When the complainant was 15, the appellant took a urine sample from her to test and told her she was pregnant. The appellant instructed her to tell teachers and counsellors that she had been impregnated by a boy from another school.
- [38] Just before Christmas in 1989, when the complainant was 15 years old, pregnant and in Grade 9, they moved to Maple Ridge, British Columbia. The appellant continued to regularly engage in vaginal and oral sex with the complainant.
- [39] The complainant testified the appellant became increasingly jealous and possessive of her. On one occasion, the appellant saw her with a boy. When she got home, the appellant screamed at her that if she talked to the boy again he would kill him, cut her breasts and put a knife towards her vagina (this incident forms the basis of Count 6 -- uttering a threat to cause death or bodily harm). On another occasion, when the complainant complimented a male neighbour on his new hairstyle, the appellant became irate, confronted her in a narrow hallway and punched a hole in the wall next to her face.
- [40] The evidence of a school counsellor in Maple Ridge was adduced by way of an admission. She remembered the complainant being pregnant while in Grade 9 or 10. She recalled the complainant wearing baggy clothing and no makeup. The complainant had plain hair and the counsellor described her appearance as "almost like a Hutterite, Amish-type, cultish look". The complainant did not have any friends. Unusually, despite the fact that she was pregnant, the counsellor had no contact with any member of the complainant's family.
- [41] The complainant testified that when she went into labour in June 1990, the appellant dropped her off at the hospital and left. An emergency Caesarean section was required. Consent to the procedure was given by the appellant on the telephone who identified himself as the complainant's father, not the father of her child. The appellant made it clear to her that he was not to be named as the father on the birth certificate. Until 2012, the complainant never told anyone in authority that the appellant was the father of her children.
- [42] After giving birth, the complainant decided to create a "pretend world" to protect her child from the "crazy and chaotic" situation the child had been born into. When asked what this pretend world meant in terms of her relationship with the appellant, the complainant answered this way:

Pretend World means you give in to doing what he says to make things okay. I at that point I submitted, I -- I became the wife so my kids would be happy, and my kids could have what they wanted, and I could protect [her first child] that way and made Pretend World to make it right for them, not for me.

- [43] In cross-examination, the complainant elaborated that the pretend world was about keeping up appearances and ensuring that her children were safe and not burdened with what she described as the "disgusting truth" of how they came to be.
- [44] The appellant resumed having sexual intercourse with the complainant six weeks after she gave birth.
- [45] After giving birth to her first child, the appellant prohibited the complainant from attending school. She stayed home and looked after her child and half-brother. She said the appellant continued to restrict her freedom, including her ability to leave the house without him. Around this time, the complainant testified that she made the first of several suicide attempts. She recalled that on one such occasion, the appellant wanted her to call Poison Control or the hospital when she had taken an overdose of prescription medication. Despite giving this evidence, the complainant testified that "[h]e didn't care."
- [46] Around this time, the appellant instructed the complainant to apply for welfare and to report that the father of her child had been deported and was unreachable.
- [47] The complainant gave birth to their second child in 1993. She was 18 years old. Shortly thereafter, they moved to another community. After this move, the complainant began telling most other people that the appellant was her husband. She also began sleeping in the appellant's bedroom.
- [48] In 1993 or 1994, while living at this location, the appellant and complainant participated in the creation of the video. The complainant disclosed the existence of this video in her preliminary inquiry evidence. When asked in examination-in-chief about the contents of the video and how it came into being, the complainant said this:

A What happened? What happened? I'm on top, [the appellant] is on top; oral sex, that is what's going on, and he's filming it. You do what you're told.

Q What do you mean by that?

A You do what he told -- I did what he told me to do. He tells me to do something and I did it. You don't question it. You just do it, so I did it. That's what it means. You just do it.

- [49] The complainant gave birth to their third child in 1998 when she was 23 years old. She gave birth to their fourth child in 2000 when she was 25 years old. The complainant testified that the appellant's name is not on any of his children's birth certificates. She said he made sure he was not identified as their father. The birth certificates of the third and fourth children were entered as exhibits at trial. The appellant's name does not appear on either of these birth certificates.
- [50] The appellant and complainant moved frequently in the years they spent together, including to Ontario. The complainant testified that this would occur when questions were asked by neighbours as to the nature of the relationship between them.

[51] The complainant testified that the appellant continued to have sexual intercourse with her after the children were born. She said that in her mind she never consented to having sexual relations with him. She never told him "No." She said that after she told him "no" once as a child and was forced to undress before being abandoned on a rural road, she just gave in. This exchange then occurred between the complainant and Crown counsel:

Q What do you mean you gave in?

A Continued on with the pretend world, and that's part of the pretend world. You just submit. You give in. You don't make waves. Do what you're told. Do what you're groomed. Everybody's safe. You say no, I learned from the past you don't say no.

[52] The complainant testified that even in their later years together, the appellant objected to her working outside the home. He undermined her in front of the children by telling them that their mother loved working more than she loved them.

[53] When the appellant found out she had taken a job over the Christmas season selling perfume to male customers, he grabbed her by her shoulders and shook her. He told her (falsely) on Christmas Eve that he had not purchased any gifts for the children. This caused the complainant to "lose it". She took the Christmas tree and all the decorations down. When she sought to blame the appellant in front of the children for ruining Christmas, he produced gifts for the children making the complainant look "like the crazy one."

[54] The complainant testified that when she went back and obtained her high school diploma, the appellant would not let her attend the graduation ceremony.

[55] The complainant left the appellant on one occasion for a number of weeks between 2008 and 2011. She said she returned at the appellant's urging. She testified that she felt weak and hated herself for doing so. In cross-examination, she described the control the appellant had over her as an "invisible cord".

[56] She left the appellant for good on June 30, 2012. She provided a statement to the police on August 8, 2012. She testified that she sought the assistance of a divorce lawyer, but was unable to explain to him the background of her relationship with the appellant.

[57] The complainant was cross-examined on why she did not disclose the sexual abuse at an earlier time to others, including her mother and a school counsellor. She said that she was afraid to do so and feared that she would not be believed.

[58] The complainant was also cross-examined on the three incidents that were alleged to have occurred before the start date of the indictment -- the inappropriate touching of the complainant while drying her off after she had a bath, the spanking and "bum" fondling incident, and the spooning incident that occurred when the complainant got into bed with the appellant because she was afraid of the dark. It was pointed out to the complainant that while she mentioned these incidents to the police, she did not convey to them the sexualized version of these events she related at trial. The complainant was also cross-examined on her

failure to tell the police about the humiliating diaper incident, the repeated pinching and sexual touching she says occurred in Red Deer, or the sexual assault she said occurred in the hotel.

[59] The inconsistencies between the complainant's trial testimony and statement to the police became an important component of the defence theory that she was reimagining past events through the lens of a failed relationship and that her testimony was unreliable.

[60] In cross-examination, the complainant objected to the use of the word "relationship" to characterize the years she spent with the appellant.

4. The appellant's unsuccessful attempts to have the video admitted at trial

[61] When it became apparent towards the end of the cross-examination of the complainant that the appellant's trial counsel (not counsel before us on appeal) was setting up equipment to play the video, Crown counsel advised the judge that he had not seen the video and suggested that it be played in the absence of the jury in the event the Crown determined to contest its admissibility. Defence counsel advised that the video was 54 minutes long and that he only wanted to show part of it in his cross-examination of the complainant.

[62] When the judge asked the purpose for which the video would be used, trial counsel submitted that cross-examination should be permitted on the narrow grounds that it would contradict the complainant's trial evidence that there was "no kissing whatsoever [and] no affection whatsoever in this entire relationship". He submitted that the complainant testified at trial that she was never able to kiss the appellant throughout the course of their relationship and that the video would show her evidence on this point to be fundamentally untrue. Counsel advised that, "that's the only reason why I want to use it".

[63] In fact, the complainant had not testified at trial that she had never kissed the appellant or that there were no moments of affection between them. The essence of the complainant's evidence is that she learned to submit to what the appellant wanted for her physical and mental well-being and for the emotional well-being of the children.

[64] The judge declared a voir dire to assess the prejudicial effect of the proposed evidence as against its probative value. She was right to do so: *R. v. Osolin*, [1993] 4 S.C.R. 595 at 671-672. Trial counsel did not ask the judge to defer consideration of her residual discretion to exclude this evidence until a later point in the complainant's cross-examination.

[65] Trial counsel advised that he had a full transcript of the contents of the video and acknowledged that he could put the transcript to the complainant. He said, "that may solve the problem."

[66] Trial counsel said he wanted to play two brief clips from the video in cross-examining the complainant. When the judge asked what she was being asked to look for in assessing the probative value of the video clips, defence counsel responded, "[t]he kissing, the affectionate kissing."

- [67] In the absence of the jury, and following an order excluding the public, the video clips were played for the judge. As the complainant testified in-chief, the video clips depict the appellant and complainant actively engaged in oral sex and vaginal intercourse. The video clips also depict the appellant and complainant kissing. The appellant's trial counsel also noted that it was the complainant who eventually turned off the camcorder.
- [68] The judge pointed out that the complainant had not testified at trial that she never kissed the appellant. The appellant's trial counsel then agreed that this was so, but noted that the complainant had testified at the preliminary inquiry that she was unable to bring herself to kiss the appellant. This alleged inconsistency had not been put to the complainant at the time of the voir dire. Trial counsel said he would be laying the foundation for cross-examination of the complainant on this point. He did not do so. The complainant was never confronted in cross-examination with evidence she gave at the preliminary inquiry that she was unable to bring herself to kiss the appellant.
- [69] The appellant's trial counsel said he was going to ask the complainant "a bunch of questions" about the video. He said, "I don't need any video for that." He said that if her evidence contradicted what was depicted on the video, he might want to use it to undermine the complainant's credibility. He also submitted that the video depicted a very different relationship from the one the complainant described in her testimony. He submitted that the video reflected the existence of a romantic relationship characterized by both affection and passion. He suggested that the video contradicted the complainant's refusal to even acknowledge there was a "relationship" between them. Finally, the appellant's trial counsel submitted that the video clips demonstrated that the complainant enjoyed having sexual relations with the appellant, at least on that occasion. He suggested that the complainant had testified at trial that she never experienced or acknowledged any physical pleasure associated with having sexual intercourse with the appellant. In fact, the complainant had not been asked about this and had not given this evidence at the time of the first voir dire.
- [70] Crown counsel submitted that the complainant had not been contradicted on her preliminary inquiry evidence that she was unable to bring herself to kiss the appellant. The Crown also submitted that the probative value of the video was minimal given: (1) the uncontested fact that the appellant and complainant had engaged in frequent sexual relations over many years; and (2) the complainant's evidence that she submitted to the appellant and had never said "no" to him since she attempted to defy him as a child and was subjected to terrorizing acts in order to overcome her resistance. By contrast, the Crown submitted that the prejudicial effect was extremely high as showing the video in front of the jury would have a significant deleterious impact on the complainant's dignity and privacy interests. In the alternative, and to balance the appellant's interests against those of the complainant, the Crown suggested that an agreed statement of facts might be prepared describing what the video depicts and that this might obviate the need to show it to the jury.

- [71] The appellant's trial counsel countered that the video was critical to the defence and that he would not willingly participate in the presentation of an agreed statement of facts. He reiterated that prejudice to the complainant's interests would be attenuated because all he wanted to show was the kissing that accompanied the sexual acts depicted on the video.
5. The first ruling prohibiting the appellant from using the video in cross-examining the complainant (Voir Dire #1)
- [72] The judge, who had a jury waiting and was required to rule on this issue with no notice and little time for reflection, framed her ruling by identifying what was at issue -- the admission of two clips from the video in the cross-examination of the complainant. The judge was aware that the appellant might seek to introduce the entirety of the video later in the trial but noted that "that is not before me now in this application." She acknowledged that due consideration had to be given to the fair trial rights of the appellant and to the prejudice that would flow from admission of the video clips in the cross-examination of the complainant. After referring to Osolin at 671 for the proposition that, as a general rule, a complainant may be cross-examined for the purpose of eliciting evidence pertaining to credibility when the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice which may flow from it, the judge ruled as follows:
- [5] In my view the evidence here is highly prejudicial and has a shock value that cannot be ignored. It is that shock value that causes me great concern and as such I am exercising my discretion not to permit the proposed clips to be played during her cross-examination in the manner proposed. Having considered the authorities and the submissions here, I am not satisfied that playing of the video is necessary in the manner suggested by counsel. The object he wishes to pursue can be obtained as effectively without the shock value through cross-examination about the tape as it could be by playing a degrading and highly prejudicial video recording capturing a moment in time between the complainant and the accused.
- [6] Simply put, I am not satisfied that the defence has met its burden here, that the probative value outweighs the prejudice and I am dismissing the application to put the proposed clips to the complainant at this stage.
- [Emphasis added.]
- [73] The Crown concedes that the judge erred in her concluding articulation of the test by putting the burden on the defence to establish that the probative value of the evidence outweighs its prejudicial effect. It is well-established that defence-led evidence should only be excluded where its prejudicial effect substantially outweighs its probative value: *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 611. The test applies to the admission of defence evidence and -- as here -- to questions put to a complainant in cross-examination for impeachment purposes: *Osolin* at 671-672; *R. v. Shearing*, 2002 SCC 58 at paras. 107-109.

[74] When cross-examination of the complainant recommenced, she was asked whether there was any change in the "relationship" over time and whether it became an affectionate or romantic one. The appellant's trial counsel put it to her that it certainly seemed like there was such a change. The complainant answered this and related questions in the following way:

Yes, sir. One, I just want to make it clear again, and I'm not arguing with you whatsoever, I don't like the term "relationship". I feel that's a different word. But to answer your question, once I submitted into pretend world, you do to portray to the outside world and to my children a relationship of what they thought it would be. If I -- as long as I behaved, as long as the children needed things, and to have their life the way it is, you portray a pretend world.

I stated that pretend world was when my child was born that to maintain sanity for myself and for my children I sacrificed my life to live in a crazy world to make sure my children didn't have to be a part of it.

It is you're good, he rewards you like a dog rewards -- you behave you don't get beat. You get a treat.

[75] The complainant testified that she had been instructed by the appellant to display affection towards him in front of the children. She did so. The appellant's trial counsel asked the complainant whether she had given evidence at trial that she could not bring herself to kiss the appellant (she had not). The following exchange occurred:

Q Okay. And so did you -- didn't you say to my friend when inquiring that you couldn't actually kiss [the appellant] based on everything that he did? Just couldn't actually kiss him at all? That's what you said.

A Willingly, no, sir. No. Was I forced to? Yes.

Q You were forced to kiss him?

A Behind closed doors you were told you do it. There are consequences, sir.

[Emphasis added.]

[76] The appellant's trial counsel pursued in cross-examination of the issue of whether kissing occurred behind closed doors:

Q I was asking before we broke about the relationship between -- or interaction, to let me use your phrase, between [the appellant] and you, and I had suggested to you that you found it difficult even to kiss him, and you agreed with me that you certainly did; is that true?

A Sir, I answered that question

Q But there was never any kissing behind closed doors between you and [the appellant]?

A Sir, I --

Q Is that true?

A I told you I did what I was told when I was told to do it. I don't know how else to answer that.

[Emphasis added.]

[77] The complainant did not deny in cross-examination participating in the video and said that her participation and conduct reflected directions she was given by the appellant before filming began. The complainant had no recollection of what she said on the video, which was created about 24 years before the trial. She did not, however, deny telling the appellant near the end of the video that she "liked it". She said she did so to get it over with and to please him.

[78] The following exchange about the video then occurred:

Q I see. Okay. Well, let me just get right to it, then.

A Then let's do it.

Q That tape does not reflect what you told this jury in terms of --

A Okay.

Q -- the way it reflects --

A Depending on which tape you have, sir.

Q Well, you can -- I'm happy to show it.

A No, thank you. I lived it.

Q Okay. But it shows you being very affectionate with [the appellant].

A Okay.

Q It shows you kissing him very affectionately --

A Okay.

Q -- over the entirety of the tape, which is --

A Okay.

Q -- 54 minutes long.

A Really? That's great.

Q You are controlling everything.

A Awesome.

Q He's doing what you want to do.

A Yes, controllers tell you what to do.

Q You told this jury a very different version of the tape than what actually exists on the tape and --

A I did what he told me to do, sir.

Q -- what actually exists on the tape is that you are being very affectionate to --

A Yes, sir.

Q -- him and controlling.

A Yes.

Q He's serving you. He's helping you.

A Yes.

Q He's being nothing but respectful --

THE COURT: Is there -- is there a question in there? There's -- you've said a number of things. You've asked her --

[Defence Counsel]: I'm just asking --

A And I'm saying yes.

[Defence Counsel]: -- and she's rejecting me.

Q Are you rejecting what I say?

A I did the tape based on what he told me, sir.

...

A I did what he told me. It showed -- it shows that I did what exactly -- if that was too believable, then I did what he told me to do, sir.

Q Okay. Well --

A If this is showing before the door, before all this, what I was told to do beforehand, no, sir. Am I saying did it happen? Yes, sir. I am agreeing with you.

Q Well, we have the -- we have a copy of the tape.

A Sir, I did what I was told. I was groomed. I played the role of what I was told and groomed to do. I don't know what else to say to you. I don't know what else to say to this court. I did what I was told and what I was groomed to do as a child.

Q Well, I'm --

A Yes. I said yes, there's a tape. Yes, I did it. Yes, you've embarrassed me -- made me feel like dirt. I'm saying yes.

Q What I say, what I suggest to you, is that the tape actually portrays a different dynamic and that, in fact, this relationship was quite different from what you've described, it was a consensual relationship from 15 onwards, and you -- you wanted to have these children --

A Ha.

Q You wanted these children --

A Is he allowed to talk to me like that?

Q Isn't that true?

A That is enough. Enough.

THE COURT: [Defence Counsel], what I'd like you to do --

A Disgusting.

A I'm in pretend world. Okay? I'm explaining it again. I portrayed what was told and groomed, and I've been saying that since day one. I didn't want it.

Q And later you may -- you came to hate [the appellant] for it. I totally understand that. You may have hated yourself for it. But that is the reality here. That's the dynamic. Is that true?

A No. No.

[Emphasis added.]

[79] I pause to make four observations about the cross-examination of the complainant on the video. First, the appellant's trial counsel was not prohibited from asking the complainant questions about the contents of the video or what it depicted to lay the foundation for contradicting her evidence and thereby impeaching her credibility and reliability. Second, trial counsel was not prohibited from seeking to use a transcript of the video to cross-examine the complainant. Despite suggesting that use of the transcript might solve the problem, trial counsel never sought to use the transcript in cross-examination. Third, the complainant did not deny any of the conduct the video was said to depict, nor did she deny making any remark she was said to have made while the video was being created. She acknowledged being an active participant -- but at his direction. As she put it, "I did what he told me. if that was too believable, then I did what he told me to do, sir." Fourth, trial counsel advised that the only reason he wanted to show the video to the complainant was to demonstrate that her preliminary inquiry evidence about never kissing the appellant was not true. Despite this stated purpose, the complainant was never cross-examined on evidence she gave at the preliminary inquiry that she could not bring herself to kiss the appellant. At trial, she did not dispute the proposition that she kissed the appellant or that this was depicted on the video. Her evidence was that she was groomed to have sexual intercourse with the appellant, that she learned to submit to his wishes and that she did so unwillingly, including by kissing him.

6. The evidence of the complainant's mother

[80] The complainant's mother agreed that she left the complainant and her half-brother (whom she says is the appellant's son) in the appellant's care because she did not have the means to take care of them. On subsequent visits, she never saw either of the children when they were not in the appellant's company. She testified that after the visits stopped, she called the appellant on one occasion and asked to speak to the complainant. The appellant said the complainant was "fat" -- which the mother understood to mean pregnant -- and had married someone from Saskatchewan. She agreed in cross-examination that the complainant never told her she was being sexually abused by the appellant.

7. The appellant's evidence-in-chief

[81] The appellant confirmed that the complainant and her half-brother were left with him in Red Deer by their mother in the summer of 1982 when the complaint was eight years old. He did not ask for or want the responsibility of caring for the two young children, but said he was "stuck" with them.

[82] The appellant testified that he never thought of himself as being the complainant's father.

[83] He testified that the complainant became an independent young adolescent who determined what she would wear and how she would style her hair. He denied prohibiting her from seeing her friends. He testified that she had friends but acknowledged that he never met any of them.

[84] The appellant denied having any sexual contact with the complainant when she was a child.

[85] The appellant testified that their relationship changed after the complainant turned 15 years old. He said that they started "playing around" one day and they ended up having sexual intercourse on the couch. He said that he had never before sexually touched the complainant and felt "worried" and "sick about it." He said the complainant became pregnant as a result of this single act. The appellant wanted her to have an abortion. She did not believe in abortion and wanted to keep the child. In his examination-in-chief, the appellant relied on the complainant's assertion of her wishes in this regard to show that "now she's in charge."

[86] The appellant agreed that he dropped the complainant off at the hospital before she gave birth to their first child. He went to work. He testified that she had experienced a number of previous "false alarms." He agreed that he was subsequently contacted by the hospital and gave his consent on the telephone to an emergency C-section.

[87] He denied telling the complainant not to go back to school after the birth of their first child. He said she wanted to stay home to look after the child.

- [88] The appellant testified that after the birth of their first child, they became more like "husband and wife" and had regular sexual relations which he characterized as being consensual. He said he came to love the complainant. He said she wanted to have more children and did not believe in birth control.
- [89] The appellant said he found the video in a tool box in the garage after he was reminded of it by the complainant during her preliminary inquiry testimony. He said the video depicts the two of them having sexual intercourse, and that while both of them participated in positioning the camcorder, she was directing him. Beyond this, the appellant was not asked very much about the contents of the video. He did not testify that the contents of the video would contradict the evidence of the complainant on any specific issue.
- [90] The appellant's trial counsel then sought to have the appellant identify the video with the intention of having it admitted as an exhibit at trial. The jury was excused. The Crown took the position that the video had already been ruled inadmissible. The judge clarified that the ruling was limited to whether excerpts of the video could be played during cross-examination of the complainant, but that no ruling had been made as to its admissibility as part of the defence case. The judge said she would declare a further voir dire to determine the admissibility of the video. The parties agreed to continue with the evidence with submissions on the admissibility of the video to be heard the following morning.
- [91] The appellant testified that at least some of the family's frequent moves were at the complainant's behest, explaining that, "[she] gets what she wants." He denied restricting her freedom. Indeed, he testified that she took care of the houses, mail and their finances.
- [92] The appellant testified that he never threatened or physically assaulted the complainant. He denied ever spanking her as a child.
8. The admissibility voir dire and second ruling excluding the video (Voir Dire #2)
- [93] In her exchanges with the appellant's trial counsel, the judge appeared to accept that the evidence was relevant and material. She was clearly focused on assessing the probative value of the evidence against its prejudicial effect. In the absence of any real conflict between the appellant and complainant about what was depicted on the video, she asked why it was necessary to show it to the jury.
- [94] The appellant's trial counsel submitted that there was a fundamental conflict between what the video portrays and how the complainant testified. He submitted that the complainant testified at trial that there was no kissing in the relationship except in front of the children (she did not give this evidence). He argued that the complainant never testified that the "pretend world" did not apply behind closed doors in her relations with the appellant (she did not say this). As noted earlier, the claimant testified that he told her what to do behind closed doors and she complied with his wishes. Finally, the appellant's trial counsel submitted that the jury should be permitted to see the video to evaluate her evidence that

she never consented to sexual relations with the appellant. Relying on *R. v. Nikolovski*, [1996] 3 S.C.R. 1197 at para. 28, he argued that it was critical evidence depicting the commission of at least one instance of the alleged crime.

- [95] The judge made a second order excluding the public and viewed the entirety of the video.
- [96] The appellant's trial counsel submitted that the video ostensibly showed consensual sexual relations between the appellant and the complainant. He submitted that the complainant's evidence on this point completely misrepresented what was depicted on the video.
- [97] Crown counsel submitted that the complainant's trial testimony was not at all inconsistent with the contents of the video. In fact, the video depicts what the complainant said it would. In the result, the Crown submitted that the probative value of the video is "minimal to none". The Crown noted that, even on the appellant's version of events, the video had been created about five years after the appellant first had sexual intercourse with the complainant. The complainant testified that she had long ago stopped saying "no" and simply submitted to the appellant. The video depicts one sexual act in the context of a 30-year relationship. The Crown argued that the video could not assist in showing what was in the complainant or the appellant's mind during the sexual encounter. The Crown submitted that Nikolovski had no value in assessing the admissibility of evidence of this kind in a sexual assault trial where the issue was whether the judge should exercise her residual discretion to exclude the evidence on grounds that its prejudicial effect substantially outweighed its probative value. The Crown also submitted that the video was extremely prejudicial. It was said to have the potential to distort the truth-seeking function of the trial by confusing the issues of ostensible factual consent and legal consent. Most significantly, the Crown submitted that admission of the video before the jury would be an affront to the complainant's dignity and violate her privacy and equality rights. From the complainant's perspective, the video depicts one instance of the sexual abuse she had endured since she was a child.
- [98] In reply, the appellant's trial counsel submitted that the video demonstrates the existence of a loving relationship with actual emotional engagement and mutual pleasure in sexual relations which is contrary to the evidence given by the complainant.
- [99] In ruling the video inadmissible as part of the defence, the judge said that her reasons should be read in conjunction with the reasons given on *Voir Dire* #1.
- [100] The judge noted that the complainant appears to be an active participant on the video and did not express, through words or conduct, resistance to the activity. After reviewing the positions of the parties, the judge referred to Seaboyer and correctly stated the test she was obliged to apply -- that the prejudicial effect of the evidence must be shown to substantially outweigh its probative value before a judge can exclude evidence tendered by the defence. She also recognized that the concept of a fair trial embraces other interests and perspectives beyond those of an accused person. She said that the test she was obliged to apply engaged a "balancing exercise" to ensure that the accused's fair trial rights were protected while, at the same time, recognizing the importance of the dignity and privacy

interests of the complainant.

[101] Having framed the issue thus, the judge said this:

[36] The difficulty with the DVD is that it does not portray the inconsistency advanced by [the appellant]. Rather, the DVD portrays what [the complainant] has already described in her testimony, both in direct and cross-examination. She says she had stopped saying no many years before the DVD was created.

[40] The issue of consent will be a live one for the jury [on Counts 4 and 5]. However, it has been nearly 20 years since the Supreme Court of Canada adopted the legal definition of consent that rejects the stereotype that women who actually do not agree to the sexual contact at issue will physically resist, and that those who fail to do so, in fact, consented. The law is abundantly clear that the absence of protest on the part of the complainant may be probative of nothing. Acquiescence is not consent.

[41] Having viewed the DVD and having considered the evidence of [the complainant] and [the appellant], and having considered the authorities relating to consent, I agree with the Crown that the evidence proffered has minimal, if any, probative value. That is simply because I do not assess the images depicted in the DVD as being different from [the complainant's] testimony about its contents.

[42] In this trial, she has remained consistent about what is depicted on the DVD and, for the most part, she agreed in cross-examination with almost every proposition that was put to her by counsel about the content of the tape. She testified she could not recall the statements she may have made, but she did not deny them.

[43] [The appellant] says that [the complainant's] evidence about the pretend world did not exist when it was just she and [the appellant] behind closed doors. That is not how I take her evidence about the scope of the pretend world, and she repeated that evidence in the context of a thorough cross-examination about the DVD.

[44] I agree that the probative value of the DVD is minimal. On the other hand, the prejudicial effect of the DVD is high for many of the same reasons expressed in the first ruling regarding the DVD in the cross-examination of [the complainant]. The mischief with the DVD is that it will distort the truth seeking function of the trier of fact. It adds only the visual images to what has been described by [the complainant]. It is explicit. It could be disturbing for some members of the jury, and it adds nothing but a visual to what they have already learned about in this trial.

[45] Finding the probative value of the DVD to be minimal, if at all, and the prejudicial effect high, I find that the DVD to be inadmissible in this trial.

[Emphasis added.]

[102] The judge subsequently made clear that her inadmissibility ruling regarding the video also precluded the defence from adducing as evidence the audio portion of the video.

9. The appellant's evidence on cross-examination

[103] The appellant agreed that he cared for both the complainant and her half-brother when they were left with him in Red Deer. When asked whether he took on the role of single-parent to both children, the appellant replied, "I guess." He agreed that the children were reliant on him for food, clothing and shelter and that he was their sole caregiver. He acknowledged that in Red Deer and Vancouver, both of the children were dependent on him for support.

[104] He claimed to have no recollection of identifying himself to the Alberta child services worker in 1982 as the father of both children.

[105] He denied ever coaching the complainant to say hurtful things to her mother that would likely have the effect of fracturing their relationship. He testified that when the complainant was about 13 years old, she decided to end her relationship with her mother and two older brothers because she hated them.

[106] He denied sexually touching the complainant before she was 15.

[107] The appellant was unwilling or unable to provide any significant details about how he came to have sexual intercourse with the 15-year-old girl he knew since she was a toddler and had raised since she was eight years old. As he testified, they started playing around one day, had sexual intercourse and "that's all there is to it". When pressed as to who made the first move, he testified that she started playing with him.

[108] The appellant testified that he knew it was wrong to have sexual intercourse with the complainant when she was 15 years of age. He said he felt guilty and sorry about what had occurred. He said he made a mistake and felt sick about it. He said he did not have sexual intercourse with her again until they discovered that she was pregnant.

[109] When asked why he felt it was a mistake to have sexual intercourse with the complainant when she was 15, he initially replied, "I don't have an answer for you on that." When pressed, the appellant testified that he felt it was a mistake because "it was a stupid thing to do" because "she was a young girl". He agreed that he felt bad about it because there was a 19-year age difference between them. He also testified that he "probably" felt bad about it because he had been taking care of her since she was eight years old.

[110] Despite his regrets, the appellant said he resumed having sexual intercourse with the complainant between one and three months later, after learning she was pregnant. He was unwilling or unable to provide specifics about the second occasion upon which he had sexual intercourse with the complainant. He testified that after learning she was pregnant, he "wasn't worried about having sex with her" because "the damage was done".

[111] The appellant conceded that the complainant was entirely dependent on him when he first had sexual intercourse with her:

Q -- at the time you first have that sex with her?

A Yeah.

Q She's 100 percent dependent on you?

A Yeah.

Q For her life, do you agree with that?

A Yes.

Q You bought her food, right? You bought her clothes?

A That's right.

Q She wasn't working?

A No.

Q She lived with you?

A That's right.

Q There were no adults in the -- other adults in the house?

A No.

Q She didn't even have a driver's licence at the time?

A No, she didn't.

Q If she needed to go somewhere, you drove her?

A Yeah, on the weekends, yeah.

Q At that time you'd agree with me she -- there's no way she could live without your support?

A That's right.

Q She didn't have --

A She had no choice.

Q Her mother was not in the picture?

A Not -- not in the picture, no.

Q In your words, she had no choice --

A That's right.

- [112] The appellant agreed that he provided consent to the complainant undergoing a C-section when their first child was born. He agreed that he must have identified himself as her father. When asked whether he viewed himself at the time as the complainant's father, he said "[m]aybe I did" and "I don't recall."
- [113] The appellant testified in cross-examination that he considered the complainant to be his wife when she was 16 years old. He said he had nothing to hide. He testified that the complainant's half-brother must have known they were conducting themselves as husband and wife because they were sleeping together at the time. He denied ever telling the complainant's half-brother that the four children in the house were not his.
- [114] The complainant's half-brother was called by the defence at trial. He was brought up believing that the appellant was his father and the father of the complainant. He described the appellant as the father figure in the house. He never asked the complainant who fathered her first child. He testified that when the complainant was in her late teens or early 20s, she seemed to take on "more of a wife role" and would display affection and use terms of endearment when referring to the appellant in his presence. This evidence was generally confirmed by the complainant's first child who also testified that she was "the boss" in the household.
- [115] The complainant's half-brother testified that later in life, and in the course of an argument, he asked the appellant if the four children borne by the complainant were his. The appellant said they were not. The complainant's half-brother moved out shortly after this conversation.
10. Closing addresses
- (a) The appellant's trial counsel
- [116] Defence counsel submitted to the jury that the fact the complainant never said anything to anyone about what the appellant was doing to her was a factor telling against her credibility.
- [117] He submitted that if the jury rejected some portion of her evidence or found that she was prone to exaggeration, it should raise a reasonable doubt about her credibility and reliability generally.
- [118] To illustrate the point, defence counsel relied on the fact that the complainant did not tell the police that the three pre-indictment incidents she testified to at trial had an overtly sexual component to them. Her failure to do so was said to negatively impact on her entire narrative. Indeed, defence counsel submitted that her failure to make complaint to the police about the sexually-assaultive nature of these three pre-indictment incidents was "key" to understanding the appellant's position that the complainant was an untrustworthy witness.

- [119] Defence counsel did not expressly concede in his closing submissions to the jury that the appellant was guilty on Count 3. He acknowledged, however, that the appellant was in a de facto step-parent relationship with the complainant when she was left in his care and at material times thereafter. He conceded that the relationship started "in a very inappropriate" and "wrong way" and said the appellant admitted as much. Indeed, he conceded that the appellant was in a position of authority over the complainant when they first had sexual intercourse. He submitted to the jury that the relationship became normal over time and that by the time the sexual activity underlying Counts 4 and 5 occurred, the complainant consented to that activity and her consent was not vitiated by threats or fear of the application of force or the exercise of authority (s. 265(3)(b) and (d)) or induced by the abuse of a position of trust, power or authority (s. 273.1(2)(c)).
- [120] With respect to the video, defence counsel reminded the jury that it was 54 minutes in length and depicted what the appellant said it depicted and what the complainant refused to accept -- the existence of a consensual sexual relationship between them after she turned 15 years of age.
- [121] Defence counsel submitted that all of the counts were "interlinked" and that the case turned on the jury's assessment of the complainant and appellant's credibility based on the entirety of the evidence.
- (b) Crown counsel
- [122] Crown counsel emphasized in his closing address that the appellant refused to concede in his evidence what was admitted by his counsel in closing submissions -- that he assumed the role of the complainant's step-father and had sexual intercourse with her when he was a person with whom she was in a relationship of dependency. The Crown acknowledged that the jury's verdict would turn on their assessment of the credibility of the complainant and appellant. He characterized the appellant's evidence as nonsensical, evasive and untruthful. He submitted that the appellant took steps to conceal that he was the father of the complainant's children, choosing instead to describe himself as her father. He suggested that the complainant's first pregnancy was not the result of a single act of sexual intercourse, but the inevitable outcome of the appellant's decision to engage the complainant in sexual intercourse throughout her childhood and into her teenage years.
- [123] Crown counsel submitted that the complainant's failure to mention the sexualized details of the three pre-indictment incidents was attributable to the fact that these events occurred 30 years ago when she was a child and that, as she testified, she was not ready to share certain incidents with the police.
- [124] The Crown submitted that the complainant's decision to submit to the appellant's sexual desires and not tell anyone what was happening to her was explained by his abusive behaviour towards her. As the Crown put it:

Put yourself in the shoes of a little girl, eight years old, abandoned by her mother, to live with a man she barely knows. This man starts sexually abusing her right away. At the same time, he humiliates her, he degrades her. When she refused to engage in sex, he drives her to the middle of nowhere and leaves her out in the cold, no pants on [indiscernible]. He tells her over and over again "No one is going to believe you. Don't tell anyone because if you do, people are going to think you wanted it."

He does all this to destroy her self-esteem and make her feel guilty and ashamed. It works. She learns her lessons and adapts her behaviour. She submits. She doesn't say no anymore. At the age of 12, the last lifeline to her old life is gone, she has no family, no friends, no support, her entire world is the accused and he made it that way. She is at his mercy. Also at the age of 12, as I've described, he forced intercourse on her for the first time and the sex becomes routine. She told you she feels dirty, ashamed, disgusted, but she submits because she does not have any other choice. On one occasion the accused tells her that he saw her with a boy. He becomes enraged and threatens her. She testified she told you she became terrified as a result of that incident, thought he could be everywhere. Remember, this is just a young girl, 13 years old, around -- around that age. She learns her lesson, don't make him angry, especially when it comes to other boys.

[125] With respect to Count 4, the Crown submitted the complainant did not voluntarily agree (consent) to have sexual relations with the appellant. In the alternative, the Crown argued that no consent in law was given because the complainant submitted to the appellant's demand by reason of threats or fear of the application of force to her or the exercise of authority: s. 265(3)(b) and (d).

[126] With respect to Count 5, the Crown submitted the complainant did not voluntarily agree (consent) to have sexual relations with the appellant. In the alternative, the Crown argued that no consent in law was given because the complainant submitted to the appellant's demand by reason of threats or fear of the application or of force to her or the exercise of authority (s. 265(3)(b) and (d)) or because the appellant induced her to engage in sexual activity with him by abusing a position of trust, power or authority: s. 273.1(2)(c). As was recently noted in *R. v. Snelgrove*, 2019 SCC 16 at para. 3, inducing consent by abusing the relationships set out in s. 273.1(2)(c) does not imply the same kind of coercion contemplated by s. 265(3)(d) of the Code which speaks to consent obtained where the complainant submits or does not resist by reason of the exercise of authority. The Court in *Snelgrove* adopted the observations of Justice Doherty in *R. v. Lutoslawski*, 2010 ONCA 207 at para. 12 that, "[a]n individual who is in a position of trust over another may use the personal feelings and confidence engendered by that relationship to secure an apparent consent to sexual activity."

[127] With the agreement of counsel, the jury was instructed on honest but mistaken belief and consent in relation to Count 5 only.

IV. The Grounds of Appeal

[128] Against this background, the appellant advances three grounds of appeal which he frames as follows:

1. The trial judge erred in admitting evidence of extrinsic misconduct and in failing to provide a sufficient limiting instruction on bad character evidence;
2. The trial judge erred in failing to instruct the jury that a finding of guilt on one count had no probative value to the other counts; and
3. The trial judge erred in excluding the video.

V. Analysis

1. Did the trial judge err in admitting evidence of extrinsic misconduct and by failing to provide a sufficient limiting instruction with respect to that evidence?

(a) The appellant's position

[129] The appellant takes issue on appeal with the admission of bad character evidence. His submission on this issue has three prongs.

[130] First, he submits that the judge erred by admitting evidence of the three uncharged sexual assaults said by the complainant to have occurred in the pre-indictment period -- the "towelings", "caressing" and "spooning" incidents.

[131] Second, he submits that the judge erred by admitting general bad character evidence bound up with sexual assault allegations covered by the indictment. The appellant refers, in particular, to evidence elicited by the Crown from the complainant that he:

- physically abused and dominated her;
- undermined her self-worth by forcing her to walk with her head down;
- isolated her from family and friends;
- interfered with the complainant's relationship with her Big Sister by telling her to take her half-brother with her to these get-togethers;
- forced her to wear plain clothes and made her cut her hair in an unfashionable style when she was a young woman;
- did not mentally prepare the complainant for her menstrual cycle but, instead, simply bought her tampons and left them in the bathroom;
- was jealous and possessive of the complainant and became angry with her when she attracted even the most innocuous form of male attention;
- dropped her off at the hospital before she delivered their first child and left her there alone;

- undermined her in front of their children, particularly when she attempted to assert her independence, including by working outside the home; and
- was uncaring when she attempted to commit suicide.

[132] Third, the appellant submits that even if all or part of this evidence was properly admitted, the judge failed to: (1) identify for the jury the bad character evidence in issue; (2) adequately instruct the jury on the limited use that could be made of this evidence; and (3) adequately instruct the jury on the prohibited uses of this evidence.

(b) General principles

[133] With one exception, the Crown and defence agree on the general principles governing the admissibility of bad character evidence at the behest of the Crown. Indeed, those principles are well-established in the law.

[134] The exception is this -- the Crown and defence disagree on whether the bad character evidence adduced by the Crown (or at least some of it) was admissible as evidence probative of the appellant's disposition to do the very things alleged in the indictment. Relying on *R. v. Batte* (2000), 145 C.C.C. (3d) 449 at para. 102 (Ont. C.A.), the Crown says the evidence was admissible for this purpose. The appellant argues that for the extrinsic misconduct evidence to be admissible on this basis, it must meet the test for the admission of similar fact evidence set out in *R. v. Handy*, 2002 SCC 56.

[135] This issue was not argued at trial. Further, I consider the Crown's position on appeal to be inconsistent with the position it took in the trial court. I note, in this regard, that the Crown emphasized the importance of the limited use instruction in relation to the bad character evidence to guard against prohibited propensity reasoning.

[136] In any event, I do not consider that we need to resolve the controversy in this case. For reasons I will develop, the bad character evidence was admissible to assist the jury in comprehending the nature of the relationship between the complainant and the appellant, how it developed, and why it persisted for as long as it did. It was also admissible to assist the jury in understanding why the complainant did not disclose at an earlier time what she says happened to her. Further, the jury was not invited by the judge to engage in propensity reasoning in relation to this evidence. Indeed, they were specifically cautioned against concluding that because the appellant may have engaged in wrongdoing in the past, he is the kind of person who would have committed the crimes charged. In these circumstances, the issue that divides the parties is best left to another day.

- [137] I turn now to summarize the legal framework about which there is no dispute. Evidence of an accused's bad character that shows only that he is the type of person likely to have committed the offence(s) charged is inadmissible. Bad character evidence may, however, be admissible at the behest of the Crown where it is relevant to a material issue at trial other than the accused's character, and its probative value outweighs its prejudicial effect: *R. v. B. (F.F.)*, [1993] 1 S.C.R. 697 at 730-731; *R. v. G. (S.G.)*, [1997] 2 S.C.R. 716 at paras. 63-65.
- [138] The rule of presumptive inadmissibility recognizes the risks inherent in the admission of evidence demonstrating an accused's bad character: namely, moral prejudice and reasoning prejudice. The trier of fact may assume, from its acceptance of the evidence of extrinsic misconduct, that the accused is a bad person more likely to have committed the offence(s) charged or worthy of punishment for those uncharged acts (moral prejudice). Alternatively, evidence of this kind may confuse the trier of fact or, worse yet, distract the trier of fact from its main duty and tempt them to substitute their conclusion on the extrinsic misconduct for their verdict in respect of the charges set out in the indictment (reasoning prejudice): *R. v. J.A.T.*, 2012 ONCA 177 at paras. 51-52.
- [139] As the appellant concedes, evidence of extrinsic misconduct may be admitted by exception in cases of this kind to demonstrate a system of control over others that could explain why the abuse occurred and continued unreported, or as part of the narrative to provide necessary context for subsequent events: *B. (F.F.)* at 732; *R. v. F. (D.S.)* (1999), 132 C.C.C. (3d) 97 at paras. 22, 26 (Ont. C.A.); *R. v. R.O.*, 2015 ONCA 814 at paras. 16, 18, 25. In *F. (D.S.)*, the court noted that in cases involving allegations of sexual abuse in the course of an ongoing relationship, courts have frequently admitted evidence of discreditable conduct to assist the trier of fact in understanding: (1) the nature of the relationship between the parties and the context in which the alleged abuse occurred; and (2) why the complainant did not leave the relationship or report the abuse at an earlier time, particularly where the complainant's failure to so act is (or will be) relied on by the defence to undermine her credibility: see also *J.A.T.* at para. 54.
- [140] Further, in spousal and sexual assault cases, it is not uncommon for extrinsic misconduct evidence to be led concerning events that predate the allegations set out in the indictment: see *F. (D.S.)* at paras. 25-26; *R. v. R. (B.S.)* (2006), 212 C.C.C. (3d) 65 at para. 38 (Ont. C.A.).
- [141] A judge presiding over a criminal trial exercises a gatekeeping function to ensure that only relevant, material and admissible evidence goes before the jury. Where bad character evidence is admitted for limited purposes, it is generally understood that the judge should instruct the jury about the permitted and prohibited uses of that evidence. Although an instruction to this effect has occasionally been characterized as being "mandatory" (*R. v. Ball*, 2019 BCCA 32 at para. 91) or "obligatory" (*J.A.T.* at para. 50), in some narrowly defined circumstances the instruction has been found to be "unnecessary": see, for example, *R. v. Beausoleil*, 2011 ONCA 471 at para. 28, where there was no realistic potential for misuse of the bad character evidence; *R. v. C.B.*, 2008 ONCA 486 at para. 20; and *R. v. M.T.*, 2012 ONCA 511 at para. 88. In *Batte* at paras. 113-114, no error was found in non-direction on this issue

in part because a limiting instruction would inevitably have highlighted a significant body of bad character evidence and operated against the appellant's interests.

[142] With these principles in mind, I turn to consider the three prongs of the appellant's submission.

(c) Improper admission of the pre-indictment sexual misconduct

[143] The appellant submits that the three pre-indictment events testified to by the complainant created significant moral and reasoning prejudice that exceeded its probative value. He argues that there is a danger the jury would engage in prohibited propensity reasoning and conclude that it was more likely he committed the sexual assaults with which he was charged because he had sexually assaulted the complainant in the past. He submits that it is not mere speculation to conclude that the introduction of this evidence caused reasoning prejudice. He notes, in this regard, that the jury asked this question in the course of their deliberations:

If [the] Red Deer events may have occurred prior to Jan[uary] 1, 1983, can we count them as evidence?

[144] The appellant also submits that evidence respecting these three incidents, alleged to have occurred just months before the start date of Count 1, was not essential to explain the relationship or the context in which the abuse allegedly occurred.

[145] I am not persuaded by these submissions.

[146] It does not appear from the record before us that the Crown alerted the judge to its intention to elicit this evidence from the complainant. As evidence of this kind is presumptively inadmissible, the Crown ought to have done so and, if the admissibility of the evidence was at issue, obtained a pre-trial ruling on the point.

[147] I am satisfied, however, that the evidence was admissible for the purposes identified. On the complainant's evidence, these three early acts of grooming marked the commencement of a series of continuing sexual assaults of escalating severity that culminated in the appellant engaging in sexual intercourse with her when she was 12 years old. On the complainant's evidence, the acts were designed to accustom her to giving over her physical and sexual integrity to the appellant. If the complainant's evidence was accepted, these acts could also be viewed as acclimatizing her to physical abuse (spanking followed by sexual touching) and emotional abuse (requiring her to sleep in the appellant's bed and experience his sexual arousal rather than giving her a night light in her own room) in conjunction with sexual touching. Finally, on the complainant's evidence, these acts, and what the appellant said to her in committing them, reinforced with her at an early age that she should not tell anyone what was happening to her. These three acts provided important contextual background for the jury's evaluation of the charged conduct. Collectively, they were highly probative of trial issues put in play by the defence -- specifically, why the complainant did not resist the appellant's conduct captured by the time frame of the indictment and why she

did not tell anyone about these incidents.

- [148] I see little potential for undue moral prejudice flowing from the admission of this evidence. This is not a case in which the Crown sought to tender discreditable conduct evidence from a witness other than the complainant. Further, if the jury did not accept the complainant's evidence about the charges, they were unlikely to have been swayed by the additional pre-indictment evidence of discreditable conduct: see F. (D.S.) at para. 33.
- [149] In addition, the extent to which the introduction of this evidence truly risked moral prejudice must be assessed in the context of the appellant's admission at trial that he began having vaginal sexual intercourse with a 15-year-old dependent girl with whom he stood in loco parentis -- an egregious act he admitted knowing was morally wrong. In light of the conduct admitted by the appellant at trial, it cannot reasonably be suggested that he was prejudiced by the admission of evidence concerning these three comparatively less serious pre-indictment events. In any event, it is my view that any moral or reasoning prejudice flowing from this evidence could be contained by an appropriate instruction.
- [150] While this is sufficient to dispose of this aspect of the appellant's first ground of appeal, I note that the appellant's trial counsel did not object to the introduction of this evidence. While failure to object to the admission of evidence may be a relevant factor, it is not necessarily a determinative one. The gatekeeping function of trial judges is such that they have a duty to vigilantly assess and exclude inadmissible evidence regardless of the positions taken (or not taken) by counsel: Ball at para. 89; R. v. Fierro, 2013 BCCA 436 at para. 19.
- [151] At the same time, and absent an allegation of ineffective assistance by trial counsel (no such allegation has been made on appeal), failure to object may signal more than simple resignation that objection to the admission of the evidence would be pointless. The failure to object may point to the existence of tactical reasons that motivated counsel to remain silent at the time the evidence was tendered.
- [152] If the circumstances support an inference that trial counsel made a tactical decision not to contest the admissibility of evidence at trial, this Court should be slow to intervene where doing so facilitates a "second kick at the can" on appeal following adoption of a different and ultimately unsuccessful trial strategy: R. v. Calnen, 2019 SCC 6 at paras. 44, 67, 70.
- [153] I note, in this regard, that the judge asked trial counsel during a break in the complainant's examination-in-chief (and in the absence of the jury) whether he had any objection to the Crown tendering certain exhibits. The inquiry, although directed to another issue, was made immediately after the complainant had given evidence about the three pre-indictment incidents. Defence counsel raised no concern about the admissibility of this evidence. Indeed, in responding to the judge's question about the introduction of certain exhibits, he said, "I haven't objected, and you don't need to call on me because we've obviously discussed all this". The only concern defence counsel raised was with the Crown leading the witness.

- [154] The complainant gave evidence at the preliminary inquiry. It was never suggested that her preliminary inquiry testimony was inconsistent with the evidence she gave at trial about these three incidents. The issue pursued on behalf of the appellant in cross-examination was that the complainant's trial testimony respecting the pre-indictment conduct of the appellant was inconsistent with the statement she had given to the police.
- [155] I infer from all of this that the appellant's trial counsel was not taken by surprise by the complainant's testimony concerning these three incidents. I am satisfied that trial counsel was not in the position of having to deal as best he could with unanticipated allegations of pre-indictment sexual misconduct. Nor is the failure to object in this case properly characterized as "passive inadvertence": see *R. v. Barton*, 2019 SCC 33 at para. 48. Rather, I infer that defence counsel knew the complainant would testify at trial as she did and considered that cross-examining her on inconsistencies between her trial evidence and her statement to the police was an important way in which her credibility and reliability might be undermined in relation to the allegations before the court.
- [156] The complainant was, in fact, extensively cross-examined on her failure to tell the police the sexualized versions of these three incidents she related at trial.
- [157] In his closing address, defence counsel emphasized that her failure to do so undermined her entire version of events and was a critical component of the theory of the defence that the complainant was an untrustworthy witness.
- [158] When the jury returned with their question (the use, if any, they could make of the Red Deer incidents that predated the indictment), defence counsel reminded the judge that he used the pre-indictment incidents to undermine the complainant's credibility. He agreed that the jury should be instructed that they could consider the pre-indictment incidents as part of the narrative, to assess the complainant's credibility, and to put her evidence in context.
- [159] In the course of dealing with another question from the jury, Crown counsel made further submissions on the response that had been given to the first question. He asked the judge to consider repeating the instruction she gave the jury in the main charge on the limited use they could make of the bad character evidence with specific reference to the pre-indictment incidents. Defence counsel said he was "somewhat persuaded" by the Crown's suggestion that the discreditable conduct warning be repeated in the context of the pre-indictment incidents, but pronounced that he was content with the way in which the issue had been dealt with in the main charge and suggested that the judge, "[j]ust keep [the charge] the way it was." In the end, the judge supplemented her answer to the first question in a further instruction which directed the jury to consider the instruction given in the main charge on the limited use that could be made of the pre-indictment bad character evidence.

- [160] I am prepared to draw two additional inferences from the course of the proceedings in relation to this issue. First, the appellant wanted the complainant's evidence concerning the three comparatively less serious pre-indictment incidents before the jury because it was inconsistent with what she told the police. This inconsistency provided useful fodder for cross-examination. It was said by trial counsel to be the "key" to the appellant's effort at trial to undermine her credibility.
- [161] Second, the appellant's trial counsel was not concerned about the risk of moral prejudice stemming from the admission of this evidence. When the opportunity arose, he did not seek a further direction linking the limited use instruction given in the main charge to the pre-indictment incidents. In short, the appellant made a strategic decision not to object to the admission of this evidence, but to use it to undermine the complainant's credibility. He should not be permitted to resile from that position now and argue, for the first time on appeal, that the evidence should never have been admitted.
- (d) Improper admission of bad character evidence in relation to the charged counts
- [162] The appellant submits that "it is not clear" why the jury needed to hear evidence about acts of physical abuse alleged by the complainant or evidence respecting the degree to which he controlled her life. He submits that this evidence was not necessary to explain the relationship between the parties, the context in which the offences were committed, or why the abuse went unreported for as long as it did. I respectfully disagree.
- [163] I note, once again, that no objection was taken to the admission of any of this evidence at trial.
- [164] At paragraph 131 of these reasons, I have grouped and summarized the evidence the appellant says on appeal should not have been admitted at trial.
- [165] Some of the evidence to which objection is taken is not, in my view, properly characterized as bad character evidence at all. That the appellant let the complainant have a Big Sister was, if anything, suggestive of good character. The evidence tended to undermine the testimony of the complainant that he isolated her from adults to whom complaint might be made. Although it may have been ill-advised for the appellant to tell the complainant to take her half-brother with her when she visited her Big Sister, the jury could not reasonably have regarded this as bad character evidence. The jury knew that the appellant was working long hours and had no care plan for the complainant's half-brother when she was out of the house. In the context of the evidence as a whole, this incident was of no moment.
- [166] I say the same about the appellant's assertion that the complainant's evidence concerning her first menstrual period was led to portray him as being uncaring and insensitive because he did not discuss it with her in advance. That was not the complainant's evidence. She testified that the topic was raised by him and he left tampons for her in the bathroom. The jury could not reasonably regard this as evidence of bad character.

- [167] The alleged acts of physical and emotional abuse and the control the complainant said the appellant exercised over her, particularly in her formative years, was important contextual evidence probative of central issues in the case -- including why the complainant said she submitted but did not consent in her own mind to having sexual relations with the appellant, and why she did not report what was happening to her for so many years. I say the same about evidence respecting the appellant's jealous rages and threats he directed at the complainant. Again, this evidence was probative of the complainant's fear of the appellant. She testified that she submitted to the appellant's sexual demands, remained in the relationship and did not report the abuse to anyone because she was fearful of the "consequences" of doing so and taught that no one would believe her account.
- [168] The Crown led evidence of two additional incidents that, in my mind, have somewhat less probative value. As noted earlier, the complainant testified that the appellant directed her to commit welfare fraud when she was 15 years old. In addition, the complainant testified that the appellant was uncaring about her first suicide attempt. This evidence was not, however, devoid of probative value. Like much of the other impugned evidence, it illustrated the degree of control the appellant exercised over the complainant as an adolescent. It was contextual evidence the jury could use in determining whether behavioural patterns established when the complainant was a child and adolescent were characteristic of the relationship and persisted as the complainant became an adult.
- [169] Further, as noted earlier, the risk of moral prejudice that could reasonably be said to have arisen from the introduction of this evidence paled in comparison to the appellant's admission that he began having regular sexual intercourse with a 15-year-old girl who was dependent on him as a surrogate parent, and that he continued to have sexual intercourse with her (despite knowing it was wrong) after she became pregnant and after she gave birth to their first child.
- [170] Crown counsel made extensive reference to the body of extrinsic misconduct evidence in his closing address, but confined his submissions to the permissible reasons for which the jury could use this evidence (see, for example, paragraph 124 of these reasons).
- [171] In my view, this evidence was admissible. The risk of moral and reasoning prejudice was attenuated by the nature of the appellant's admissions and, in my view, could be contained by an appropriate limiting instruction. It is to that issue I now turn.
- (e) The charge on the use the jury could make of the bad character evidence
- [172] The judge instructed the jury on the permitted and prohibited uses of the bad character evidence in the following passage:

Discreditable conduct

During the trial you heard some evidence from [the complainant] that [the appellant] spanked, pinched and hit her when she was a child. I will now explain to you how you may and may not use this evidence. You have heard this evidence because it would have been impossible for the Crown's case to be presented in an understandable way if this evidence was not heard. The evidence may not have made sense. You can use this evidence only to put the events in context and to help you understand what happened in this case. You can use it for no other purpose.

I will now explain why you may not use this evidence for any other purpose. Ordinarily in a criminal trial the Crown cannot lead evidence of wrongdoing as evidence that the accused committed the crimes of which the accused is charged. The Crown cannot lead this kind of evidence because judges and juries cannot conclude that because an accused may have engaged in prior wrongdoing, he's the kind of person who could have or would have committed the crime with which he is now charged. Judges and juries cannot use evidence of wrongdoing as evidence of guilt in that way. We must rely on evidence that an accused committed the crime charged with, not evidence that an accused may have done something else wrong.

Despite that rule, this evidence was permitted to be heard as I have just explained for a different purpose only; that is to put the events in context. You may not use the evidence for any other purpose. In particular, you may not use the evidence to conclude that [the appellant] is a bad person and so is more likely to have committed the offence with which he is charged, nor may you use the evidence to punish [the appellant] for any past misconduct.

[173] With respect to the pre-indictment acts of sexual misconduct alleged by the complainant, the jury was instructed in these terms:

With respect to Count 1, if you are satisfied beyond a reasonable doubt that [the appellant] intentionally applied force in circumstances of a sexual nature and all of the other elements have been proven beyond a reasonable doubt, including the fact that at least one of the incidents took place in British Columbia, then you must find [the appellant] guilty of Count 1. You heard [the complainant] testify in general about multiple incidents of sexual conduct that occurred in Red Deer, Alberta, Vancouver and Surrey, British Columbia. It is not necessary that all allegations of sexual conduct be proven. One incident in British Columbia proven beyond a reasonable doubt within the timeframe alleged and at the place alleged is sufficient for Count 1.

I should tell you as well that you heard [the complainant] testify about events occurring shortly after her mother left Red Deer which would have been in 1982. [The appellant] is not charged with any event that may have occurred before January the 4th, 1983. As discussed in the Crown and defence closing statements, you may find that these particular incidents are relevant as part of the narrative and relevant to [the complainant's] credibility, but they should not be relied upon to convict.

[174] When the jury asked whether the pre-indictment events in Red Deer could be counted as evidence, the judge provided this answer:

During this trial, you heard evidence relating to events that occurred in Red Deer, Alberta, that occurred before January the 4th, 1983. You can consider all of that evidence as part of the narrative and as relevant to [the complainant's] credibility, and to put the evidence into context. However, as I have stated, to convict on Count 1, you must be satisfied that the Crown has proven beyond a reasonable doubt that an incident of sexual assault occurred after January 1, 1983 [sic] and before [a day in July] 1988, and at least one of those events occurred in British Columbia.

[175] At the Crown's request, the judge supplemented her initial response to the jury's question by linking the limiting instruction on bad character evidence to the pre-indictment allegations:

I also want to say, with respect to the first question that we answered -- or I answered earlier today. I remind you about paragraphs 49 and 50 in the final written instructions [paragraphs 49 and 50 of the written copy of the charge provided to the jury are reproduced above at paragraph 172.] Again, I'm not going to reread those paragraphs to you. You have them. But you can take a look at paragraphs 49 and 50 when you recommence your deliberations.

[176] No objection was taken to the instructions given on the limited use the jury could make of the bad character evidence, including the evidence of misconduct that predated the start date of the indictment.

[177] For the first time on appeal, the appellant asserts that the limiting instruction was inadequate to alleviate the prejudice associated with this evidence. He argues that the judge was obliged to identify all of the evidence to which the instruction pertained (not just the spanking, pinching, and hitting incidents when the complainant was a child) and explain to the jury its permitted and prohibited uses. The appellant complains that the instruction highlighted only a small fraction of the bad character evidence. He argues that the jury may have understood it could use bad character evidence not specifically mentioned by the judge however it wished.

[178] I do not agree with the appellant's position on this point.

[179] The precise form a limiting instruction of this kind should take is a matter of judicial discretion, shaped by the type and volume of the bad character evidence admitted at trial, the prejudice that may be occasioned by a more detailed instruction of the sort the appellant now says should have been given, and the positions of counsel at trial. A judge is certainly not obliged to review every instance of discreditable conduct when providing a limiting instruction of this kind: *R. v. Owen*, 2015 ONCA 462 at para. 24. In some circumstances, it may be inadvisable to do so.

[180] While the judge would not have been wrong to identify with greater particularity the evidence to which the limiting instruction applied, such an instruction would not have inured to the appellant's benefit. The appellant's trial counsel recognized as much.

- [181] The instruction the appellant submits on appeal should have been given would have obliged the judge to highlight his highly abusive conduct, including how the jury could use the complainant's evidence that when she was between nine and 12 years of age, he abandoned her after telling her to take her pants off on a dark, rural road after she attempted to defy him. It would also have obliged the judge to instruct the jury on the use they could make of the complainant's evidence that, when she was 15, he threatened to leave her unclothed in the hallway of a hotel to coerce her into having sexual intercourse with him.
- [182] Against this background, it is not surprising that in one of the pre-charge conferences, trial counsel asked the judge to "keep the facts to a minimum" in the charge to the jury.
- [183] The failure to object on this basis, particularly in a case where counsel had been provided in advance with a hard copy of the proposed charge, may speak to the overall adequacy of the charge, the gravity of the alleged non-direction, and the assessment of trial counsel that the specific direction sought for the first time on appeal would not have been in his or her client's interests: Calnen at paras. 38-41; Barton at para. 49. In this case, the failure to object simply confirms my conclusion that the type of instruction the appellant now says should have been given was unwanted at the material time and would have been much more prejudicial to him than the instruction that was given. I see no reviewable error on this issue.
- [184] Likewise, while the judge could have said more about the permitted uses of the bad character evidence, perfection is not the standard applied on appellate review: *R. v. Jacquard*, [1997] 1 S.C.R. 314 at para. 2. Moreover, it is unlikely that a more detailed instruction concerning the permitted uses of the evidence would have been helpful to the appellant.
- [185] In any event, I am satisfied from the instructions as a whole that the jury would have understood the limited use that could properly be made of this evidence. I am also satisfied that the instructions were adequate to convey to the jury the use that could not be made of this evidence. For these reasons, I would not give effect to this ground of appeal.
2. Did the trial judge err in failing to instruct the jury that a finding of guilt on one count had no probative value to the other counts?
- (a) The appellant's position
- [186] The manner in which the appellant framed this ground of appeal in his factum does not fully capture his position on this point. There are, in fact, two prongs to this ground of appeal. The appellant submits that the judge erred: (1) by failing to instruct the jury that they were not permitted to use evidence admissible on one count to prove any other count; and (2) that a finding of guilt on one count could not be used as evidence of guilt on any other count.

[187] The appellant argues that if the jury accepted the complainant's evidence about the alleged sexual assaults from the time she was eight to 13 years old, there was a real danger that the jury would engage in impermissible propensity reasoning and conclude that he also sexually assaulted her when she was an adult. The appellant submits that this risk was heightened by virtue of the fact that he admitted having sexual intercourse with the complainant when she was between the ages of 15 and 18 and when he was in a position of trust or authority towards her. Although the appellant's guilt on Count 3 was not formally conceded in the trial court, the jury was instructed that the appellant "appears to admit that he was in a position of authority to [the complainant], and she was in a relationship of dependency to him in the time frame alleged in Count 3".

[188] The appellant submits on appeal that his evidence made a conviction on Count 3 "inevitable."

[189] Once again, these objections to the charge are raised for the first time on appeal.

(b) General principles

[190] In cases involving multiple counts and multiple complainants, the jury should be instructed to consider each count separately and not to use evidence on one count to prove any other count: *R. v. Rarru*, [1996] 2 S.C.R. 165; *R. v. Thomas*, 2019 BCCA 247 at paras. 29-32; *R. v. G.W.*, 2016 BCCA 510 at paras. 50-52; *R. v. M. (B.)* (1998), 130 C.C.C. (3d) 353 (Ont. C.A.); *J.A.T.* at para. 55. The instruction is designed to guard against the risk that the jury will use its acceptance of the evidence of a complainant on one count to bolster their assessment of the credibility of another complainant on another count.

[191] Cases like the one at bar involving multiple counts and allegations of long-term abuse in relation to a single complainant do not stand on the same footing and do not necessarily require the same instruction. The risk that a complainant's evidence on one count will be bolstered by acceptance of the evidence of different complainants on other counts does not logically arise in this context. Further, in cases like the one at bar, the evidence will often be common to all of the counts. The whole of the evidence may provide important contextual evidence concerning the nature of the relationship, the context in which the abuse was said to have occurred, and why disclosure was not made at an earlier time. In these circumstances, instructing a jury to consider each count separately and not to use evidence on one count to prove any other count might well cause confusion or mislead the jury as to the nature of its task: *R. v. Albert* (1996), 83 B.C.A.C. 119 at para. 20, leave to appeal ref'd [1997] S.C.C.A. No. 205; *R. v. Sandhu*, 2009 ONCA 102 at paras. 11-16; *R. v. N.T.*, 2011 ONCA 114 at para. 13.

(c) Analysis

[192] This was a case involving a single complainant and multiple counts. The evidence of abuse on one count could not be compartmentalized as the appellant suggests. That evidence provided important context for understanding the dynamics of the relationship between

the appellant and complainant over time. The evidence of abuse, control and domination given by the complainant at the time of the events underlying Counts 1-3 was relevant to and probative of whether the complainant consented in law to the assaultive conduct underlying Count 4, or whether any ostensible consent was vitiated either by reason of threats or fear of the application of force or the exercise of authority. In addition, the conduct associated with Counts 1-3 was relevant to and probative of a critical question in relation to Count 5 -- whether no consent in law to the sexual acts covered by this count was obtained because the appellant induced the complainant to engage in the activity by abusing a position of trust, power or authority that had been established earlier in their relationship and continued to be operative at the relevant time. In my view, this use of the evidence does not involve propensity reasoning.

- [193] Against this background, I am of the view that the judge was not required to instruct the jury to consider each count as a separate silo informed only by the evidence admissible on that count. In the context of this case, such instruction would have been worse than confusing -- it would have misled the jury. In addition, such instruction would have been to the appellant's detriment.
- [194] Again, the appellant's trial counsel recognized this to be the case. In his closing address, counsel invited the jury to assess the credibility of the complainant against the whole of the evidence. He suggested that if the jury found that the complainant was being untruthful, inconsistent or prone to embellishment with respect to one incident, it should affect their assessment of her credibility as a whole. He submitted that inconsistencies in the complainant's account, including those already highlighted in relation to the pre-indictment period, undermined her reliability in relation to subsequent charged events. Similarly, he submitted that weaknesses in the complainant's evidence with respect to events that occurred later in time undermined her credibility and the reliability of her evidence in relation to earlier events that were the subject of a count. In this way, the defence invited the jury to see all of the counts as being "interlinked", and to have a reasonable doubt based on the whole of the evidence.
- [195] In this context, it is not surprising that defence counsel did not object to the charge on this basis. In addition to potentially undermining the defence strategy, an instruction of the sort sought by the appellant for the first time on appeal would necessarily have involved the repetition of evidence that portrayed the appellant in a most unfavourable light. Such an instruction would be contrary to trial counsel's entreaty to keep the facts to a minimum. I would not give effect to the appellant's submissions on this issue.
- [196] I turn next to the appellant's contention that the trial judge erred by failing to warn the jury that a finding of guilt on one count was not evidence of guilt on another. While this ground of appeal was asserted by the appellant in his factum, it was not developed either in writing or in oral argument. Again, no objection to the charge was taken on this ground.

[197] While it may have been preferable for the trial judge to have given an express instruction to this effect, I am not prepared to conclude that non-direction on this point constitutes reversible error in law. First, the jury was properly instructed on the different elements of each of the offences charged and the distinct factual and legal issues they would need to resolve before convicting on any individual count. Nothing the judge said in her charge would convey to the jury that proof of guilt on one count could substitute as evidence constituting proof of guilt on another count. Indeed, the structure of the charge stands against this reasoning. Second, although said in the context of the use that could be made of discreditable conduct evidence, the judge's instructions on this issue made clear that "[j]udges and juries cannot use evidence of wrongdoing as evidence of guilt". In the face of this warning against propensity reasoning, it is unreasonable to suppose that the jury would regard a finding of guilt on one count as circumstantial evidence of guilt on another count. Once again, no objection was taken to the charge on this basis. In my view, defence counsel's failure to object speaks to the seriousness of the alleged non-direction in this case: Jacquard at para. 38. I would not give effect to this ground of appeal.

3. Did the trial judge err in excluding the video?

(a) The appellant's position

[198] In light of the acknowledged error in principle in the ruling on Voir Dire #1 -- casting the burden on the defence to show that the probative value of the evidence outweighed its prejudicial effect -- the appellant submits that the judge's conclusion is not entitled to appellate deference.

[199] In light of this error in principle, the parties agree that this Court should apply the test set out in *Seaboyer* and determine whether the video ought to have been admitted at trial for cross-examination purposes.

[200] The appellant argues that the video was relevant, material to the resolution of central issues at trial, and not subject to an exclusionary rule. It was, thus, presumptively admissible. It could only be excluded through the exercise of the judge's residual discretion not to admit the evidence on grounds that its prejudicial effect substantially exceeded its probative value.

[201] The appellant submits that this case turned on the jury's assessment of the credibility of the appellant and complainant. The complainant testified that she did not consent to any sexual act in the time frame set out in Counts 4 and 5 (alleging sexual assault when she was between the ages of 14 and 38). The appellant testified that all of those acts, which he said started when the complainant was 15 years of age, were consensual. The appellant submits that the video depicts one instance of the offence alleged in Count 5. The appellant argues that he should have been permitted to cross-examine the complainant on the two video clips, and introduce the whole of the video as part of his case, to contradict the complainant generally and on issues going directly to the defence of consent and honest but mistaken belief in consent.

- [202] The appellant submits that as a consequence of the ruling on Voir Dire #1, his trial counsel was unable to ask specific and detailed questions about the video or impeach the complainant on its contents.
- [203] The appellant further submits that in weighing prejudice against probative value, the judge improperly emphasized the "shock value" of the video. The appellant notes that jurors are often required to view potentially disturbing images, and that such evidence is rarely excluded because of its potential to cause prejudice by inflaming the sensibilities of jurors: *R. v. Sipes*, 2011 BCSC 920 at paras. 22-23.
- [204] The appellant says that on a correct application of the Seaboyer test, it is clear that any potential prejudice flowing from admission of the video did not substantially outweigh its probative value in cross-examining the complainant.
- [205] The appellant acknowledges that the complainant's dignity, privacy and equality interests were appropriate considerations in the application of the test. He submits, however, that these concerns could have been addressed by blurring out the depiction of genitals in the video, closing the courtroom when the video was shown, allowing the complainant to testify behind a screen during cross-examination, and instructing the jury on any impermissible inferences they might be tempted to draw from this evidence.
- [206] The appellant submits that the ruling on Voir Dire #2 also reflects error in principle in the articulation of the test. After reviewing Seaboyer and other leading authorities at some length, the judge said this in her second admissibility ruling:
- [33] I take from these authorities that we again embark on a balancing exercise to ensure that [the appellant's] fair trial rights are protected, and recognizing the importance of dignity and the privacy and [e]quality rights of [the complainant].

[Emphasis added.]

The appellant argues that the judge erred in this passage by characterizing her task as a simple exercise in balancing interests. He submits that in considering her residual discretion to exclude defence-led evidence, the judge was required to consider whether prejudice substantially outweighed the probative value of that evidence.

- [207] With respect to the ruling on Voir Dire #2, the appellant repeats his submission that the video was probative of the complainant's credibility because it was capable of contradicting her testimony on the critical issues of consent and honest but mistaken belief in consent. Relying on *Nikolovski* at para. 21, the appellant also argues that the video was the best available evidence of at least one instance of sexual assault alleged within the timeframe set out in Count 5. He points out that, while the absence of consent is subjectively determined, the jury was required to consider the complainant's words and actions, before and during the sexual activity, to determine whether there was a reasonable doubt about whether she did not consent: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at paras. 29-30. The appellant submits that the complainant's conduct in participating in the creation of the

video, and the reasonable inferences that the appellant says flow from that conduct, give the video significant probative value.

(b) The Crown's position

- [208] The Crown submits that while the test in *Seaboyer* gives expression to an accused's constitutionally protected right to make full answer and defence, care must be taken to ensure that the truth-seeking function of the trial is not impaired by the admission of evidence that relies for its probative value on myths, stereotypes and generalizations about how complainants in sexual assault cases are expected to behave: *Osolin* at 671; *R. v. D.D.*, 2000 SCC 43 at para. 65; *R. v. A.R.D.*, 2017 ABCA 237 at paras. 51, 57, *aff'd* 2018 SCC 6; *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 119.
- [209] With respect to *Voir Dire* #1, the Crown concedes error in principle in the judge's articulation of the *Seaboyer* test but submits that the application of the correct test would result in the same decision.
- [210] The Crown submits that the prejudicial effect of admitting the two video clips for cross-examination purposes substantially outweighed the probative value of the evidence in impeaching the complainant's testimony. The Crown says that on the basis of the submissions made by trial counsel, the video was not shown to have any probative value.
- [211] The Crown argues that trial counsel's submissions on the probative value of the video clips in cross-examining the complainant rested on his own misapprehension of her evidence. The Crown says that when the ruling was made, the contents of the video had not been shown to be inconsistent in any way with the complainant's testimony. Further, no evidentiary foundation for potential impeachment of the complainant's credibility was established after the ruling was made. The Crown says this explains why no application was made by the appellant to have the judge revisit the ruling on grounds of a material change in circumstance -- specifically, that the post-ruling evidence given by the complainant in cross-examination was inconsistent with the contents of the video.
- [212] In contrast, the Crown submits that admission of the video clips would constitute a gross invasion of the privacy, dignity and equality interests of the complainant. In addition, admission of this evidence would raise the risk that the jury would engage in impermissible and stereotypical reasoning about how complainants in sexual assault cases should engage with their alleged abuser.
- [213] With respect to *Voir Dire* #2, the Crown submits that the judge did not err in principle by concluding that the *Seaboyer* test contemplates "a balancing exercise." The Crown submits, therefore, that the ruling is entitled to deference on appellate review and that it has not been shown that the judge was clearly wrong in determining that the probative value of the evidence was substantially outweighed by its prejudicial effect.

[214] Finally, the Crown submits that it is not open to the appellant to advance on appeal arguments in support of the probative value of the video that were not raised below. In this regard, the Crown notes that trial counsel did not argue on the second voir dire that the video was probative of honest but mistaken belief in consent in relation to Count 5.

(c) Analysis

(i) Factual context informing the admissibility rulings

[215] The complainant testified that when the video was created, the appellant had been having sexual intercourse with her on a weekly basis for approximately eight years, starting when she was about 12 years old. By the time the video was created, she had given birth to two children fathered by the appellant. For reasons the complainant described, rooted largely in her fear of the appellant and the control he exercised over her, she testified that she had long ago given up resisting his sexual advances. The complainant said she participated in the creation of the video because he instructed her to do so.

[216] On the appellant's version of events, when the video was created, he had been having regular sexual intercourse with the complainant for about five years -- conduct that he admitted followed his sexual exploitation of her. He did not take issue with the complainant's testimony that he had sexual intercourse with her on a roughly weekly basis since she was 15 years of age. Thus, it was common ground at trial that the video depicts one of literally hundreds of sexual encounters between the complainant and appellant in the time period covered by the sexual assault counts.

[217] In practical terms, the video was potentially relevant only to Counts 4 and 5 -- counts to which the defences of consent (Count 4) or consent and honest but mistaken belief in consent (Counts 4 and 5) were left with the jury.

[218] Finally, the video was not created surreptitiously. Both the appellant and complainant participated in staging the video and performing for the camera.

(ii) Legal context informing the admissibility rulings

[219] Full answer and defence is a principle of fundamental justice protected by s. 7 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. A key element of the right to make full answer and defence is the right to cross-examine a Crown witness without significant and unwarranted restraint: *R. v. Lyttle*, 2004 SCC 5 at paras. 1, 41.

[220] Canadian courts must exercise caution in restricting the ability of an accused to call evidence in his or her defence or to cross-examine a Crown witness. This reluctance is founded in the fundamental tenet of our justice system that an innocent person must not be convicted: *Seaboyer* at 611. It is reflected in the *Seaboyer* test itself. Generally, a complainant may be cross-examined for the purpose of eliciting evidence relating to consent and pertaining to credibility when the probative value of that evidence is not

substantially outweighed by the risk of unfair prejudice flowing from its admission: Osolin at 671.

- [221] The right to cross-examine is not, however, unlimited: *R. v. R.V.*, 2019 SCC 41 at para. 40. In the context of sexual assault cases in particular, limits may be necessary to protect the complainant's dignity, privacy and equality interests: Osolin at 669. These interests may be more compelling where, as here, the sexual assault offences alleged and the circumstances in which the video was created are, by the appellant's own admission, historically bound up with the sexual exploitation of a very young girl: *R.V.* at para. 68.
- [222] These limits also aim to achieve the important social objective of encouraging the reporting of sexual assault offences. As Justice L'Heureux-Dubé noted in her dissenting reasons in Osolin at 628, "[o]ne of the most powerful disincentives to reporting sexual assaults is women's fear of further victimization at the hands of the criminal justice system".
- [223] These countervailing considerations are not unique to the legislative regime established under s. 276 of the Code. They are rooted in the common law. Their goal is to ensure that trials be fair from both the perspective of the accused and of society more broadly: Barton at para 83. Indeed, as Justice Binnie noted in *Shearing* at para. 98, some of our current legislative provisions designed to more appropriately balance the privacy interests of sexual assault complainants with the right of an accused to make full answer and defence -- including the regime set out for the production of private records in ss. 278.1-278.97 of the Code -- sprang from the recognition of privacy and equality interests in common law and Charter cases.
- [224] In the result, the right to make full answer and defence does not necessarily open the door to the widest possible range of inquiries. Nor does it guarantee to an accused the most favourable procedures imaginable -- procedures that take only his or her interests into account or that permit the introduction of evidence that purports to take its probative value from impermissible reasoning based on myths and stereotypes that have long plagued this area of the law and distorted the truth-seeking function of a trial: *R.V.* at para. 67; *R. v. Darrach*, 2000 SCC 46 at para. 24; Barton at para. 1; *R. v. Goldfinch*, 2019 SCC 38 at paras. 2, 30.
- [225] In some cases, it will be appropriate for trial judges to narrow the scope of questioning to minimize infringement of the complainant's legitimate interests, while maintaining the accused's ability to make full answer and defence: *R.V.* at para. 67. Where serious concerns arise about the potential for unnecessary infringement of a complainant's privacy, dignity and equality interests, a judge applying *Seaboyer* may legitimately ask how important the evidence really is to the accused's right to make full answer and defence: *Goldfinch* at para. 69 (per Justice Karakatsanis) and at para. 96 (per Justice Moldaver, concurring in the result). The more important evidence is to the defence, the more weight must be given to the rights of the accused: *R.V.* at para. 64. In my view, such an approach is faithful to the requirement that competing Charter rights be examined in a contextual manner to resolve

conflicts between them: Mills at para. 21.

- [226] By its terms, the Seaboyer test permits the introduction of relevant and material evidence that is not captured by an exclusionary rule where the evidence is possessed of some probative value not substantially outweighed by its prejudicial effect.
- [227] The probative value of evidence is a function of its tendency to establish the proposition for which it is tendered: Handy at para. 148. In assessing probative value, the trial judge does not determine whether the evidence establishes the proposition for which it is tendered, but only the threshold question of whether it should be heard by the trier of fact because it is capable of doing so.
- [228] In this case, the probative value of the video for cross-examination purposes was said to lie in its capacity to undermine the complainant's credibility in both general and specific ways. In general terms, the evidence was said to be capable of undermining the complainant's characterization of the nature of the relationship she had with the appellant in her adult years. More specifically, the evidence was said to be capable of undermining her testimony that she did not consent to sexual activity with the appellant.
- [229] Prejudice from allowing the video to be used in cross-examination of the complainant could manifest itself in two overlapping ways.
- [230] The first is reasoning prejudice based on the risk that the jury would be tempted to draw impermissible inferences based on stereotypes and myths about how sexual assault complainants who allege long-term abuse should behave. This is what I understand the judge to be referring to when she emphasized the "shock value" of the video. Preventing the admission of evidence that purports to take its probative value from impermissible reasoning founded on gender-based myths and stereotypes promotes trial fairness. In my view, this type of prejudice may be more amenable to limiting instructions that guard against impermissible reasoning. But the risk of misuse persists precisely because some of the myths and stereotypes upon which illegitimate reasoning rests have long masqueraded as "truths" based on common sense: Seaboyer at 679-680 (per L'Heureux-Dubé J., dissenting in part); A.R.D. at paras. 9, 42-43. As Chief Justice McLachlin observed in *R. v. Find*, 2001 SCC 32 at para. 103:

These myths and stereotypes about child and adult complainants are particularly invidious because they comprise part of the fabric of social "common sense" in which we are daily immersed. Their pervasiveness, and the subtlety of their operation, create the risk that victims of abuse will be blamed or unjustly discredited in the minds of both judges and jurors.

- [231] I pause here to make two additional observations. First, the phrase "gender-based myths" reflects both the gendered nature of sexual violence and the inescapable reality that the myths and stereotypes the law has recently attempted to ferret out have traditionally disadvantaged female complainants. I recognize, however, that similar myths and stereotypes about how sexual assault complainants should behave can equally arise in trials that involve the alleged abuse of male complainants.
- [232] Second, some of the evidence led by the defence in this case underscores the extent to which gender-based myths continue to permeate the resolution of sexual assault cases. For example, the complainant's daughter gave unsolicited evidence that her mother dressed in a way that made it clear she was "very proud of her cleavage." For his part, the appellant gave unsolicited (and unsubstantiated) evidence that the complainant had an affair with the husband of a close friend. There was nothing the trial judge or counsel could have done to prevent either witness from blurting out this evidence in front of the jury. The sole purpose of this testimony was to discredit the complainant by suggesting that she was, by virtue of her dress and sexual history, a promiscuous woman who could not be trusted. In their determination to give this evidence, the complainant's daughter and the appellant were implicitly relying on the false (but what they considered to be common sense) premise that a woman who is alleged to have dressed provocatively or to have engaged an extra-marital affair is inherently less worthy of belief.
- [233] The second type of prejudice has both an individual and societal component. On an individual level, showing any portion of the video to the jury, even in the face of an order excluding the public from the courtroom, would constitute a significant invasion of the complainant's privacy and dignity interests. In addition, the admissibility of the video engaged the complainant's equality rights under ss. 15 and 28 of the Charter: *Osolin* at 669. As noted in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 64, the role of s. 15(1) is to overcome prejudicial stereotypes in society. Individual harm occasioned by the unnecessary introduction of evidence like the evidence at issue in this case is not remediable. Prejudice in this context also engages broader societal interests. Those interests include promoting access to justice by encouraging sexual assault victims to report complaints of sexual abuse, and to participate in criminal trials which do not turn on the invocation of unfounded and discredited myths and stereotypes.
- [234] As with any exercise of discretion, the balancing of probative value and prejudicial effect is fact-specific and context-dependent.
- [235] Section 276 of the Code has no direct application to this case. It prohibits the admission of evidence that a complainant has engaged in sexual activity with the accused or with any other person to support an inference that, by reason of the sexual nature of that activity, the complainant is more likely to have consented to the sexual activity that forms the subject matter of the charge or is less worthy of belief (the "twin myths"). Where an accused seeks to introduce such evidence for some other purpose, the evidence is presumptively inadmissible unless the accused establishes under s. 276(2) that the

evidence is of specific instances of sexual activity, 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: *Goldfinch* at para. 49. Section 276 applies where the prior sexual history evidence sought to be adduced relates to activity "other than the sexual activity that forms the subject-matter of the charge". In this case, the video depicts sexual activity that forms one instance of the offence charged in Count 5.

[236] As a final comment, I note that this trial was completed before the enactment of ss. 278.92-278.97 of the Code. In summary, these provisions establish a framework for the admission of a "record" (defined in s. 278.1 to mean any form of record that contains personal information for which there is a reasonable expectation of privacy) in the possession or control of an accused that relates to a complainant in proceedings for enumerated sexual assault-related offences. Specifically, such a record shall not be admitted at the behest of an accused unless the judge determines: (1) where the admissibility of the evidence is subject to s. 276, that the evidence meets the conditions set out in s. 276(2); or (2) in any other case, that 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. The factors to be considered on an application engaging s. 278.92 largely mirror the factors to be considered on an application under s. 276. These provisions give statutory expression to a test that is different from the *Seaboyer* test the judge was required to apply in this case.

(iii) *Voir Dire* #1: The admissibility ruling for cross-examination purposes

[237] The judge made clear in her first ruling that she was addressing the admissibility of the video for cross-examination purposes based on the two clips she had been shown. Her ruling was necessarily based on the evidentiary foundation that existed when trial counsel attempted to use the video clips to cross-examine the complainant. Our assessment of the correctness of the judge's ruling must be sensitive to the context in which that determination was made.

[238] As noted earlier, the parties agree that the task of this Court is to consider the admissibility of the video afresh on the basis of the test set out in *Seaboyer* and the arguments presented to the trial judge. In my view, our assessment must also accord deference to any factual findings made below that are untainted by the error.

[239] As I read her reasons, the judge concluded that the appellant could make full answer and defence without the need to show the complainant the video in cross-examination. As she put it, "[t]he object [the appellant] wishes to pursue can be obtained as effectively without the shock value through cross-examination about the tape as it could be by playing a degrading and highly prejudicial video". In my view, that is a heavily fact-laden finding to which deference is owed. It is also entirely consistent with the approach taken in *R.V.* Although decided in the context of s. 276, *R.V.* stands for the proposition that the manner in which full answer and defence is made may be judicially shaped in order to minimize the

impact the admission of certain types of evidence will have on a complainant's privacy, dignity and equality interests: at paras. 67-70.

- [240] The probative value of the portion of the video trial counsel sought to put to the complainant in cross-examination was said to lie in its capacity to impeach her credibility on specific issues: (1) whether she ever kissed the appellant; (2) whether the "pretend world" was limited to the maintenance of outward appearances and, therefore, did not extend to sexual conduct behind closed doors; (3) whether she was in a "relationship" with the appellant; (4) whether she ever derived physical pleasure from having sexual intercourse with the appellant; and (5) whether that relationship was romantic and affectionate as opposed to one characterized by dominance and abuse.
- [241] In my view, cross-examining the complainant on the two video clips could not have served to impeach the complainant's credibility on whether she kissed the appellant. The complainant did not deny kissing the appellant. Her evidence was that she did not do so voluntarily. I note that this was the primary basis upon which the defence sought to use the video. Indeed, trial counsel said at one point that it was the "only reason" he sought to use the video in cross-examination. It was the only thing he asked the judge to look for in viewing the video clips on the first voir dire.
- [242] Further, the video would not contradict the complainant on her description of the "pretend world". The complainant did not testify that the pretend world was limited to the maintenance of outward appearances. She clearly testified that the pretend world extended to the appellant's expectations of her behind closed doors, and that there were consequences for her if she did not comply with his wishes.
- [243] On the issue of whether the complainant was in a relationship with the appellant, the complainant objected to trial counsel's use of the term "relationship" if it was meant to connote a loving partnership entered into through an exercise of free will. It is obvious the complainant did not deny being in a relationship with the appellant and the video could not possibly have been used to undermine the complainant's credibility on this issue.
- [244] I do not see any meaningful difference between what is depicted on the video and the complainant's evidence. In these circumstances, I am unable to see how the video had any probative value in terms of impeaching the complainant's credibility. A similar conclusion was reached in *R. v. S.B.*, 2016 NLCA 20 at para. 55, rev'd on other grounds 2017 SCC 16. Unlike the case at bar, *S.B.* directly engaged s. 276 of the Code. The complainant told the police she did not enjoy anal intercourse, but engaged in it with the accused to fulfil his desires. The appellant sought to cross-examine the complainant on a video the two of them had made showing her (at least ostensibly) to be a willing partner with the accused in an act of anal intercourse. The video was made before the charges arose and, therefore, depicted activity other than the sexual activity that formed the subject matter of the charges before the court. The trial judge permitted cross-examination of the complainant on a transcript of the video (but not the video itself). In the absence of any meaningful

difference between the contents of the video and the complainant's statement to the police, Rowe J.A. (as he then was), writing for the Court on this issue, was unable to discern how the video had any probative value in cross-examining the complainant. Put simply, it did not give rise to an inconsistency capable of impeaching her credibility. The same is true in this case.

- [245] I do not accept the appellant's position that without the video, trial counsel was unable to ask specific and detailed questions about the video with a view to impeaching the complainant on its contents. Trial counsel was not prohibited from asking the complainant any questions about the contents of the video in an effort to lay the foundation for impeachment -- either before or after the first ruling. In fact, he attempted to do so after the first ruling. He put to the complainant that the video showed her kissing the appellant and being affectionate with him. She did not deny either suggestion. He put to the complainant that the video would show him "servicing her" in a sexually pleasurable way. She agreed that it would. Her evidence was not in any way inconsistent with the video clips trial counsel sought to confront her with in cross-examination. Against this background, I do not see how introducing the video clips for cross-examination purposes would impeach the complainant's credibility and thereby assist the appellant in making full answer and defence.
- [246] The appellant's trial counsel was not prohibited from using a transcript of the video to cross-examine the complainant on alleged inconsistencies -- an avenue that he acknowledged "may solve the problem." He did not do so. It is fair to infer that the transcript was not used in cross-examination because it would not contradict the complainant on any material issue.
- [247] In addition, the appellant was not prohibited from giving evidence himself that the contents of the video contradicted what the complainant said it would depict. In fact, he was never asked to describe what was on the video, let alone how its contents were inconsistent with the complainant's account. It is a curious feature of this case that the appellant -- who submits that the video was a critical component of his defence, particularly in relation to Counts 4 and 5 -- was never asked in examination-in-chief to describe what was on the video. Further, the appellant never testified that the sexual acts performed in front of the camera on this occasion were typical of the sexual relations the two of them had between 1988 (when the complainant was 14 years of age) and 2012, or that the context in which the sexual acts depicted on the video was no different from the context in which other sexual acts covered by the indictment period took place.
- [248] I turn next to consider the probative value of the video in potentially undermining the complainant's testimony that she did not consent to any sexual activity with the appellant. Although the argument was poorly articulated in the trial court, I understand the appellant to advance the position that the video could be used in cross-examination in an effort to raise a reasonable doubt about the absence of consent because: (1) the complainant appears to be a willing participant to the acts depicted on the video; (2) the video

demonstrates that the complainant derived physical pleasure from having sexual intercourse with the appellant on this occasion; and (3) the video depicts the complainant displaying affection towards the appellant.

- [249] I note that the complainant was never specifically asked in cross-examination about whether she ever derived any physical pleasure from having sexual intercourse with the appellant. The issue was not explored either before or after the first voir dire ruling. Similarly, it was never put to the complainant in cross-examination that there were no moments of affection between them in the 24-year period covered by the sexual assault counts -- a period in which they raised four children together.
- [250] If the video had any probative value for cross-examination purposes, it was attenuated by three additional facts. First, it does not depict a single act said to constitute the offence of sexual assault. Rather, the video in the case at bar depicts only one of several hundred sexual acts involving the appellant and complainant in the time frame encompassed by the indictment. Second, it depicts the conduct of a woman who was sexually exploited by the appellant, beginning, at the latest, when she was 15 years of age. Third, it depicts a staged event -- the creation of a pornographic video. One could not reasonably expect that such a video would reveal much about the truth of the relationship between the two people performing for the camera. For these reasons, I am of the view that the video reveals virtually nothing probative of the state of mind of either the complainant or appellant at the relevant time.
- [251] In any event, I am of the view that the probative value the two video clips were said to possess in fact rested largely, if not exclusively, on impermissible reasoning. This reasoning is grounded in myths and stereotypes about how a sexual assault complainant, in circumstances such as these, should behave.
- [252] The appellant's submission that consent (or a reasonable doubt about the complainant's testimony that she did not consent to having sexual intercourse with him) may be inferred from the complainant's active participation in the creation of the video rests on stereotypic assumptions about how sexual assault complainants who allege long-term abuse should be expected to behave. The submission is insufficiently sensitive to the context in which this particular relationship arose and comes freighted with gender-based assumptions that are ill-suited to this case. The appellant's submission rests on a further stereotypic assumption about how a young person who was sexually exploited from the age of 15 (at the latest) should subsequently engage with her abuser.
- [253] The appellant's submission that a reasonable doubt about the absence of consent could properly be inferred from the fact that the complainant was shown to physically respond to the sexual acts depicted on the video also rests on stereotypic assumptions and myths about how "truthful complainants" who allege long-term abuse can be expected to behave. In my view, the appellant's position rests on the invalid premise that sexual abuse victims should be expected to demonstrate resistance, even if doing so will likely result in injury.

The appellant's position also rests on the invalid premise that no truthful sexual assault complainant, even one who alleges long-term abuse, should ever be responsive to the physical sensations that accompany sexual acts. By employing this reasoning, submission to the inevitable and responsiveness to sexual touch risks becoming an illegitimate proxy for consent.

[254] Finally, although the appellant denies this, I am of the view that what lies at the heart of the appellant's submission on the probative value of the video is the notion that a trier of fact could legitimately infer that consent to one sexual act on an indictment charging a single count of sexual assault over a very broad period of time is probative of whether consent was given on another occasion.

[255] This goes directly to one of the "twin myths" identified in *Seaboyer*. As explained above, s. 276(1) of the Code protects against the admission of evidence that the complainant has engaged in sexual activity to support an inference that by reason of the sexual nature of the activity, the complainant is more likely to have consented to the sexual activity that forms the subject matter of the charge. Although s. 276 is not applicable to this case because the act depicted forms one instance of the subject matter of the charge, I see no reason why the principles animating this provision should not be considered in cases involving multiple counts over a long period of time. Accordingly, even assuming the video clearly depicts consensual acts, the fact that the complainant may have consented to one staged sexual act performed in front of a camera during the period covered by the charge does not permit an inference that she consented on any other occasion. As the Supreme Court of Canada noted in *Goldfinch* at para. 60:

It is difficult to conceive of a more clear instance of twin-myth reasoning than the proposition that because the complainant had "at some point" consented to be intimate with the accused, it was "more probable" that she would have done so again.

[256] I would also note that trial counsel was not prevented from using the viva voce evidence respecting the contents of the video in his closing address. He emphasized that this evidence supported the appellant's position that his sexual relationship with the complainant was consensual. As he put it, the relationship started "in a very inappropriate way, in a very wrong way, as [the appellant] has said and admitted but it became normal."

[257] If there is any probative value in the video clips proposed to be used in cross-examination of the complainant, that limited probative value must be weighed against the substantial prejudice that would be occasioned by admission of the evidence.

[258] Although this is not a case that falls within the legislative framework of s. 276 of the Code, I am of the view that the considerations properly taken into account in determining whether the prejudicial effect of the evidence substantially outweighs its probative value largely mirror those set out in s. 276(3). Those factors include:

(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; [and]
- (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law[.]

[259] Applying the Seaboyer test to the circumstances of this case, I conclude that any probative value the video clips may have possessed in impeaching the complainant in cross-examination was substantially exceeded by the prejudicial effect, both individual and societal, that admission of the evidence would entail.

[260] In the result, and looking at the matter afresh with the Seaboyer test in mind, I have come to the same conclusion that the trial judge did in her first voir dire ruling. I am satisfied that the error in law committed by the judge in her articulation of the Seaboyer test on the first voir dire is harmless in the sense that it did not have any impact on the result: *R. v. Van*, 2009 SCC 22 at para. 34. Given my conclusion on this point, I would apply the curative proviso in s. 686(1)(b)(iii) of the Code to the error committed in the first voir dire ruling.

(iv) Voir Dire #2: The ruling on the admissibility of the video as part of the defence case

[261] The appellant does not argue that the judge erred in her articulation of the Seaboyer test in the second ruling. To reiterate, he submits that the judge erred in principle in her application of the test. Specifically, he submits that the judge erred by holding that the test required her to "embark on a balancing exercise to ensure that [the appellant's] fair trial rights are protected, and recognizing the importance of dignity and the privacy and [e]quality rights of [the complainant]" (emphasis added).

[262] I do not agree with the appellant's submission that the judge's remarks highlighted above reflect error in principle. In my view, there was nothing remarkable or incorrect about this statement.

[263] The Seaboyer test does contemplate a balancing exercise. The judge did not suggest that Seaboyer engages a simple balancing of interests test, nor did she import into the analysis irrelevant considerations. She expressly recognized that prejudice must be shown to substantially outweigh probative value before defence-led evidence can be excluded.

- [264] Further, characterizing the test as requiring a balancing exercise does not mean that the factors being balanced cannot have asymmetric legal weights. For example, in *R. v. Crosby*, [1995] 2 S.C.R. 912 at para. 11, in addressing the test contemplated by s. 276(2)(c) of the Code, L'Heureux-Dubé J., for the majority, noted that the provision requires judges to undertake a "balancing exercise" that is sensitive to potential conflicting interests. The same is true here.
- [265] The appellant reiterates many of the arguments asserted in relation to the first admissibility ruling but argues, in addition, that the video was relevant to the jury's consideration of the defence of honest but mistaken belief in consent in relation to Count 5. He submits that the judge erred by failing to recognize the probative value of the video in relation to this defence.
- [266] This argument was not put to the judge on the second voir dire. Thus, the appellant challenges the second ruling of the judge not only on the basis of admissibility arguments that were made, but on the basis of admissibility arguments that might have been made, but were not.
- [267] While I accept that judges exercising their gatekeeping function on evidentiary matters must generally be vigilant to protect what Binnie J. described in *Shearing* at para. 140 as the "legitimate entitlement of the accused", the duty to do so must have reasonable limits.
- [268] To give effect to this goal, it may be necessary in some cases for an appellate court to consider an admissibility argument not made below to prevent a miscarriage of justice. On the other hand, permitting justifications for the admissibility of evidence to be advanced for the first time on appeal would alter the traditional role of appellate courts to sit in review of rulings made at trial. It would require appellate courts to become the court of first instance on discretionary rulings respecting the admissibility of evidence. Routinely entertaining new arguments on appeal would also tend to impair achievement of the important public policy goal of finality in criminal proceedings.
- [269] In my view, it is neither desirable nor necessary in this case to attempt to posit a general rule governing the circumstances in which new arguments in support of the admissibility of evidence should be entertained on appeal. What can be said is this: trial counsel disclaimed reliance on the defence of honest but mistaken belief in consent, including in relation to Count 5, until very shortly before the jury was charged. The defence of honest but mistaken belief in consent had not been put in play by trial counsel when the second voir dire ruling was made. The appellant has not suggested he was ineffectively represented by his trial counsel.

- [270] More importantly, the viva voce evidence left little to the imagination in terms of what was depicted on the video. The jury would have taken this evidence into account in assessing the defence of honest but mistaken belief in consent in relation to Count 5. I am not persuaded in this case that the judge erred in principle by failing to take into account an argument not put to her at the relevant time.
- [271] Even accepting that it is open to us to consider this argument for the first time on appeal, I am not persuaded that it would lead to a different admissibility determination. For the reasons given, I am not persuaded that exclusion of the video impaired the appellant's ability to make full answer and defence or undermined the fairness of the trial.
- [272] In the absence of error in principle, a misapprehension of the evidence or a decision that is clearly wrong or unreasonable, the judge's second ruling on the admissibility of the video must be accorded a good deal of deference on appeal: *Shearing* at para. 73; *R. v. Stewart*, 2018 BCCA 76 at para. 14; *R. v. Skeete*, 2017 ONCA 926 at para. 88. The rationale underlying this deferential standard of review was explained in *R. v. Shafia*, 2016 ONCA 812 at para. 255, leave to appeal ref'd [2017] S.C.C.A. No. 17:
- [255] Any assessment of where the balance between probative value and prejudicial effect falls is case-specific. It is an analysis that a trial judge is uniquely equipped to undertake. After all, the trial judge is an ear and eye witness to the trial process, the issues raised and the positions advanced. The inquiry must be undertaken and a determination made in the context of the trial, not on some level of abstraction at one remove from the trial process. The inquiry is very much a function of the other evidence and issues raised in the case.
- [273] A similar rationale for appellate deference to rulings that weigh probative value against prejudicial effect was expressed in *Shearing*:
- [73] In the weighing up of probative value versus prejudice, a good deal of deference is inevitably paid to the view of the trial judge. This does not mean that the trial judge has a discretion to admit similar fact evidence whose prejudicial effect outweighs its probative value, but it does mean that the Court recognizes the trial judge's advantage of being able to assess on the spot the dynamics of the trial and the likely impact of the evidence on the jurors. These are evidentiary issues on which reasonable judges may differ and, absent error in principle, the decision should rest where it was allocated, to the trial judge.
- [Emphasis added.]
- [274] The trial judge concluded that the probative value of the video was minimal, at best. It would not serve to contradict the complainant and would add only visual images to the explicit sexual conduct described by the complainant in her testimony. On the other hand, the judge concluded that the prejudicial effect flowing from admission of the video would be high. Admission of the video would be a gross invasion of the complainant's privacy and dignity interests. In addition, it was found to have the potential to cause mischief by distorting the truth-seeking function of the trial. I see no reason to interfere with that

conclusion.

[275] In the result, I would not give effect to this ground of appeal.

VI. Conclusion

[276] For the foregoing reasons, I am of the view that the appellant had a fair trial unimpaired by consequential legal error. I would, therefore, dismiss the appeal.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Madam Justice Newbury"

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