

CANADA / JUDGMENT

R. v. Capewell

2020 BCCA 82

COURT

British Columbia Court of Appeal

DECIDED

13 March 2020

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2020 BCCA 82 R. v. Capewell

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Capewell,

2020 BCCA 82

Date: 20200313

Docket: CA45767

Between:

Regina

Respondent

And

David Leslie Capewell

Appellant

Restrictions on publication: Publication bans have 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, referred to in this judgment by the initials K.H., or a witness, referred to in this judgment by the initials A.B. These publication bans apply indefinitely unless otherwise ordered.

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Tysoe

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated
March 13, 2018 (R. v. Capewell, 2018 BCSC 694, Vancouver Docket 26975-2).

Counsel for the Appellant:

E. Purtzki

Counsel for the Respondent:

M. Levitz, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

January 10, 2020

Place and Date of Judgment:

Vancouver, British Columbia

March 13, 2020

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Tysoe

Summary:

The appellant challenges his convictions for sexual assault and administering a stupefying drug with the intent to assist himself in committing sexual assault. The appellant argues the judge erred by: (1) finding that the complainant lacked the capacity to consent to the sexual activity that occurred; and (2) admitting similar fact evidence to prove the actus reus of, and rebut a defence in relation to, the offence of administering a stupefying drug. Held: Appeal dismissed. Firstly, the test for incapacity is not, as the appellant argues, "near unconsciousness". The judge applied the correct legal framework, and there was ample evidence to support the judge's finding that the complainant did not have the capacity to realize that she may choose to decline participation in the sexual activity. Secondly, the judge made no error in admitting the similar fact evidence of the appellant's prior conviction for sexual assault, which involved non-consensual sexual activity after administering the same stupefying drug at issue in this case. The similar fact evidence was probative and admissible for the narrow purpose for which it was used.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

- [1] The appellant, David Capewell, was convicted following a judge-alone trial of one count each of sexual assault and administering a stupefying or overpowering drug with the intent to enable or assist himself in committing sexual assault, contrary to ss. 271 and 246(b) of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. On appeal, Mr. Capewell argues that the trial judge erred by: (1) finding that the complainant lacked the capacity to consent to sexual activity with him; and (2) admitting similar fact evidence in relation to the offence of administering a stupefying drug.
- [2] This appeal raises the question of what constitutes capacity to consent in the law of sexual assault. On the second issue, this appeal offers an opportunity to consider the degree of similarity required to admit similar fact evidence to prove the actus reus of an offence and disprove a defence.
- [3] For the reasons that follow, I would dismiss the appeal.

Background

- [4] As the appellant submits that the factual matrix of this case could not meet the legal standard for proving the complainant's lack of capacity to consent, it is necessary to set out in some detail the judge's findings of fact in the judgment below indexed, but not published, at *R. v. Capewell*, 2018 BCSC 694 (the "Reasons"). These facts are also relevant to assessing the similar fact evidence, as the appellant argues the prior incident in question had insufficient similarity to the facts of the present case to justify their admission at the trial.

Prior communications between the parties

- [5] Mr. Capewell and the complainant, K.H., first met in the mid-1980s in Vancouver, British Columbia. They were in a romantic relationship for less than a year before Mr. Capewell left Vancouver and moved to the Interior of British Columbia, and the complainant remained in the Lower Mainland.
- [6] In 2012, Mr. Capewell contacted the complainant. At this point, they had not seen each other for 27 years. After communicating by telephone and email, the parties arranged to meet during the weekend of April 19-21, 2013, while Mr. Capewell was visiting Vancouver. Mr. Capewell stayed as a guest exclusively at the Westin Bayshore Hotel (the "Bayshore Hotel") from April 19-22, 2013.
- [7] Prior to the weekend visit, the appellant and K.H. exchanged a series of text messages. The tenor of their communication was friendly, and at times, flirtatious. K.H. noted in her testimony that the appellant was adding terms of endearment in the messages such as "sweetie" and "beautiful". K.H. found the appellant's use of such terms odd, as they had not seen each other for 27 years. In one text message, on April 9, 2013, the appellant suggested

that he would give K.H. a massage during their visit. K.H. put him off by responding, "I am thinking after 23 years it would be a good idea to get to know each other before a massage and such": Reasons at para. 75.

- [8] Subsequently, on April 19, 2013, only a few hours before the parties planned to meet for dinner, Mr. Capewell invited K.H. to the Bayshore Hotel and implied that she may be staying the night. Again, K.H. dissuaded him in the following exchange:

2013-04-19-3:53 p.m.

[Appellant] Managed to get an early flight. Will be in Vancouver by 6:00 pm. :-)

Will go straight to Bayshore so if you'd like to come in a little early we may be able to move up the reservation or just go have a glass or two of wine. See you in a bit

Bring your bathing suit in with you and you can have some R&R in the morning, as I'm going to have to run out to Richmond for a bit in the morning to tend to some business, but it won't take long:-)

[K.H.] Hi David, that's great that you got an earlier flight! I'll meet you at carderos hopefully a little earlier than originally planned. I'm a bit confused though, are you under the impression that I'm staying at the hotel tonight?

[Appellant] It's certainly an option if you'd like.

[K.H.] I think we can have dinner and I'll let you know my thoughts on the "booty call"

- [9] K.H. testified that a "booty call" meant a quick sexual experience. She testified that she did not want to stay overnight at the Bayshore Hotel with Mr. Capewell, as she did not know him well enough yet and simply wanted to find out if she would be interested in a relationship with him again.

Friday, April 19, 2013 -- the first date

- [10] Later, in the evening of Friday, April 19, 2013, K.H. met Mr. Capewell at the Bayshore Hotel. K.H. parked her car in the hotel's underground parking and had a drink with Mr. Capewell at the hotel lounge, before they walked to Cardero's Restaurant for dinner. Over dinner, they caught up on the past 27 years. Afterwards, Mr. Capewell walked K.H. back to her car and she drove home.

Saturday, April 20, 2013 -- the second date

- [11] The next day, on Saturday, April 20, 2013, Mr. Capewell and K.H. met in White Rock. They spent some time at a pub and went for a walk. K.H. again declined Mr. Capewell's request to spend a night together, as set out at para. 86 of the Reasons:

[86] At one point, the accused told K.H. that he had checked out of the Bayshore and would like to spend the night at her place, but she declined. She explained to him that he could not spend the night at her place. Her sons lived there, she told the Court, and she wanted to know him better before having him over. She did not want to have sexual relations with the accused, she explained to the Court.

[Emphasis added.]

[12] At this point, while they had walked arm in arm and held hands at one point, there was no other physical relations between them. When the two parted company on Saturday evening, K.H. thought they were parting for the final time.

Sunday, April 21, 2013 -- the date of the offences

[13] The following morning, Sunday, April 21, 2013, Mr. Capewell contacted K.H. and invited her to the Bayshore Hotel. K.H. testified that this second invitation to the Bayshore Hotel was unexpected. She thought that Mr. Capewell seemed interested in sex, and to be fair to him, she planned to talk to him about the topic if it arose.

[14] At approximately 8:30-9:00 a.m., K.H. arrived at the Bayshore Hotel. Although there was no particular plan, K.H. expected to go out for breakfast and she packed her bathing suit. When she arrived at the Bayshore Hotel, Mr. Capewell met her in the lobby. K.H. recalled that his behaviour was odd. He did not respond when K.H. said "hi" and then "hello"; he instead walked straight to the elevator. Mr. Capewell told K.H. they were going to his room, but he did not say why.

[15] At the hotel room, Mr. Capewell offered K.H. a cup of tea. She did not see him make the tea. He handed her the tea in a paper cup, the water was lukewarm, and the tea did not have a good taste. She drank it all. She was completely sober and had not taken any prescription drugs.

[16] The judge set out the events that followed at paras. 94-97 of the Reasons:

[94] They stayed in the hotel room for about 15 to 20 minutes and then left for the pool in the spa area. They learned that the spa area was closed, so she changed into her bathing suit in the changing room adjacent to the pool and then entered the hot tub. K.H. recalled doing this and testified that at some point, she felt drugged. She recalled sitting side-by-side with the accused. She recalled that she stepped in the hot tub and recalled being in the pool.

[95] K.H. testified that she did not spend very much time in the hot tub but she felt drugged. She told the accused she felt drugged. He did not have a reaction to that comment. She described a feeling similar to being anesthetized and related her own experience of having had surgeries and having been on pain medication.

- [96] K.H. described the sensation as drowsy, sleepy, and not fully aware. She recalled coming out of the hot tub and tripping on a step. She said she was not completely stable on her feet. It was on entry to the hot tub when she first noticed she was not being completely stable and she felt that she was not totally feeling the way she would normally feel.
- [97] K.H. could not recall having conversations with the accused except for telling him she felt drugged. As she did not feel well in the hot water, they moved over to the pool for the cooler water. Relating to what occurred in the pool, she thought this went on for a little bit but she could not say if she was feeling different from that time. She could not remember and could not recall how she was feeling at that point. She could not recall how long she was in the pool or when she exited. She did recall the accused being in the pool when she was in it but did not recall how close he was to her while she was in the pool.

[Emphasis added.]

- [17] Video footage of the entire time the parties spent in the pool area, which totaled 24 minutes, was played at the trial. The video showed K.H. leaning up against the wall of the hot tub and putting her hands on the tile floors, both of which she testified she would not normally do. The video also showed the parties embracing in the hot tub, Mr. Capewell massaging K.H.'s neck and shoulders, and Mr. Capewell cradling K.H. and carrying her into the deep end of the pool. K.H. had no recollection of any of this and thought she was unconscious. However, in the video, K.H. was not unconscious and appeared to be walking around without stumbling.
- [18] The judge reviewed K.H.'s testimony as to what she remembered happening next at paras. 98-99 of the Reasons as follows:
- [98] Her next memory was seeing a shampoo bottle in her hand while she was in the shower in the hotel room (washing her hair to get the chlorine off). Her memory of being in the shower washing her hair was hazy. She had no sensation in her body or feeling of being present in her body. She said the shower she used was the one in the accused's hotel room but she could not recall where the accused was at that point.
- [99] The next memory related to the Court by K.H. was seeing damp, green grass. She recalled looking at the ground but did not know where she was. She thought she was going out somewhere for coffee. She recalled the coffee shop but the memory was hazy; she referred to it as a "visual". She testified that at that time, she was feeling drugged and out of her body.

[Emphasis added.]

- [19] As these passages illustrate, K.H. was feeling drugged and out of her body, and her memory was impaired. The judge also found that, following the pool, K.H. had no recollection of having breakfast, housekeeping attending the hotel room to clean, or an engineering personnel entering the room. K.H. could only recall snapshots of Mr. Capewell sexually assaulting her, which the judge summarized at paras. 101-106 of the Reasons:

- [101] The next memory she could relate was a hazy visual memory. She was not feeling her body and had a narrow vision, like looking down. It was what she referred to as a "snip of memory". She could see her bare legs and her underpants coming down her legs. She heard the accused say "we don't need these" but she has no memory of ever discussing with him taking off her underpants.
- [102] K.H. was not saying anything to the accused at the time. She could not say what led to that moment. She related that it had occurred and the accused was saying that.
- [103] K.H. sensed that she was leaning back in the bed in the hotel room and she said nothing to him in response. She could not say what led up to that moment. She has no memory of ever wanting in her own mind to participate with the accused in having her underwear removed. She has no memory of whether the accused was close by.
- [104] K.H.'s next memory was being in the bed with the accused. She was on her side and the accused was on his side and they were face-to-face. She felt like she was in a tunnel and that was the only image she had. She then recalled the accused saying "You are so tight". She had no memory in her own mind of wanting to participate with the accused in physical intimacy while she and he were on the bed and while hearing him say "You are so tight".
- [105] She did not know if she was clothed at the time. She does not recall having any answer and she has no memory of the accused asking for sex at that time. Thinking back later in trying to make sense of what had occurred, K.H. thought that he had been trying to have intercourse with her.
- [106] K.H. testified that that at the time she felt drugged in the hot tub, there had been no discussion with the accused of having sexual contact and that she did not want to have sexual contact with him. As well, she testified that the accused had not asked if she wanted to have sexual contact with him. The extent of the physical contact she could recall having with the accused was that they hugged on Saturday night and walked arm in arm to her car on Friday night after the dinner at Cardero's, but she could recall no sexual contact with the accused.
- [Emphasis added.]
- [20] After the assault, K.H.'s next memory was texting on her phone, which she believed was to her son from Mr. Capewell's hotel room. She had a memory of seeing bedsheets below her hand, as she held her cell phone. A text message sent from her iPhone to her son at 6:49 p.m. on April 21, 2013 was admitted into evidence and read, "My mustarddg me kdor if you need tide": Reasons at para. 110. K.H. could not make any sense of the indiscernible message, except the last part, which she believed was asking whether her son needed a ride.

[21] Finally, K.H. recalled slamming her car brakes while driving home on the highway. She said she was shocked into having a memory by the act of slamming on her breaks when she saw taillights breaking in front of her. Otherwise, she had no memory of leaving the Bayshore Hotel or driving home.

Monday, April 22, 2013 -- the aftermath

[22] The next day, being a Monday morning, K.H was awakened by her son. She testified that on a normal day she would be awake and making lunches for her sons. However, she testified that she "felt sick, nauseous, physically shaky, confused, and shocked": Reasons at para. 113. She bumped into things, could not focus, and was not in good shape. She also realized she had put her shoes in the pantry the night before.

[23] That Monday morning, K.H. saw that Mr. Capewell had texted her at 10:56 p.m. the night before, saying "I love you" and "Please text me when you get home": Reasons at para. 114. He sent another message at 8:03 a.m., asking how she was feeling. The following text conversation ensued, as set out at para. 115 of the Reasons:

2013-04-22 8:58 a.m.

[K.H.] David, I have to say again that how I felt last night was drugged, don't remember much [of] the whole thing other than going to the spa, I'm still quite sick. I tend to be quite sensitive to any drug and [other] foods

[Appellant] Sounds like you should try to get into a doctor sometime this week if your symptoms linger. It was wonderful to see you and I look forward to seeing you again

2013-04-22 9:39 a.m.

[K.H.] You bet I'm going to a doctor right now to see if there is any substance in my system

[Appellant] That's a good idea. Let me know how you make out. Hugs

[K.H.] Maybe if you know what it is, you could let me know so I'm not so upset

[Appellant] I don't know what it could be [K.] I use [Ativan] for sleep, but there is no way you could have ended up with it. I always rinse my glass out. It crossed [my] mind that it could be but I'm very careful with any mess or vitamins.

[K.H.] I think it was likely the tea, something in the tea

[Appellant] Where did you have tea?

[K.H.] At the hotel room with the fruit plate

[Appellant] Ok, I had just remembered the orange juice, but I think you right.

Now I'm worried because it could have been in one off those paper cups, I think I had used the nite before and may have left some residual. If that were the case I would feel awful

[24] K.H. testified that she sent these text messages, along with several others over the course of the next few days, to find out what had happened. At one point, K.H. asked Mr. Capewell whether he had any sexually transmitted diseases, stating that she knew he tried to fool around with her. He replied with the following:

[Appellant] Yes we did try [K.]. You asked me if we should use a condom and I said it wasn't needed, although we were both too poohed to do anything.

[Reasons at para. 118.]

[25] The day after the sexual assault, on Monday, April 22, 2013, K.H. went to her family doctor. She provided blood and urine samples at 3:50 p.m. at B.C. Biomedical Laboratories Ltd. She subsequently went for a sexual assault examination at Vancouver General Hospital on April 27, 2013, the day after reporting the incident to the Vancouver Police Department.

Trial proceedings

Positions of the parties

[26] At trial, the Crown argued that Mr. Capewell was guilty of sexually assaulting K.H., who either did not consent or lacked capacity to consent after ingesting Ativan, as well as intentionally administering to K.H. a stupefying drug (the Ativan).

[27] On the sexual assault count, the defence argued that the Crown had failed to prove beyond a reasonable doubt either lack of consent or lack of capacity to consent, as well as the required element of intentional touching of a sexual nature. The defence also challenged K.H.'s reliability, given her impaired memory.

[28] On the administering a stupefying drug count, the defence argued that the evidence was consistent with Mr. Capewell administering the drug to K.H. by accident. The Crown relied on similar fact evidence, which the judge admitted, to rebut the defence of accident.

Evidence at trial

[29] Mr. Capewell did not testify at trial. In addition to K.H., five other witnesses gave evidence. Cameron Egli, director of the College of Pharmacists of British Columbia from 2013-2015, gave evidence pertaining to medications dispensed to Mr. Capewell at the relevant time, which included 280 tablets of Ativan in 2 mg. sublingual doses. Leslie Banania, director of guest services at the Bayshore Hotel, testified as to room service and door openings on the room registered to Mr. Capewell on April 21, 2013. The remaining witnesses require further discussion.

Expert witnesses

- [30] Two Crown witnesses were qualified as experts. Heather Dinn, an expert forensic toxicologist, conducted an analysis of K.H.'s urine and blood samples and found lorazepam (commonly known as Ativan) present in both. Ms. Dinn found 25 nanograms per millilitre of blood in K.H.'s blood sample, which was taken at 3:50 p.m. on April 22, 2013, the Tuesday of the week in question. While Ms. Dinn testified that this was at the low end of the therapeutic dose spectrum, she added that if a sample is taken 30 hours after ingestion, the amount of lorazepam in the sample will be lower given elimination. How much lower will depend on the rate of elimination and the particular individual. On average, one could expect the level of concentration of the drug in the blood to decrease by one-half in 14 hours, although the half-life ranges from nine to 24 hours.
- [31] Ms. Dinn also provided evidence on the possible effects of lorazepam including sedative effects, anti-anxiety effects (which may lower inhibitions), and anterograde amnesia, all of which vary based on dosages and a person's tolerance. Ms. Dinn testified that one would start feeling the effects of the drug within 20 to 30 minutes of oral ingestion (assuming an empty stomach and therapeutic dose), the effect would increase over time, with the peak effect occurring on average about two hours after oral ingestion. The sedative, relaxing, and anti-anxiety effects are usually present for about ten hours on average. The effects of lorazepam decrease in relation to the rate of elimination of the drug.
- [32] Dr. Sylvia Makaroff, qualified as an expert on sexual assault examinations and related evidence protocols, conducted a vaginal exam of K.H. on April 27, 2013, about a week after the sexual assault. Dr. Makaroff noticed a bruise at the opening of K.H.'s vagina. She testified that the location of the bruise and its tenderness meant that some force had been applied in the recent past, but she could not say the degree of force used to cause the bruise. She said that this was a common type of injury seen in both consensual and non-consensual sex.

Similar fact evidence

- [33] Finally, with respect to administering a stupefying substance, the judge admitted similar fact evidence from A.B., Mr. Capewell's ex-wife. A.B. testified regarding an incident after their separation in November 2000, in which Mr. Capewell provided her with Ativan and sexually assaulted her.
- [34] On November 1, 2000, approximately one week after leaving Mr. Capewell, A.B. returned to the family home to supervise their children because she thought Mr. Capewell was going to a work camp for two to three weeks. On November 3, 2000, Mr. Capewell returned. He convinced A.B. that it would best for the children if she stayed at the home and offered to sleep on the couch. A.B. became stressed. Mr. Capewell took her to her family doctor, where he met with the doctor privately for some time. When A.B. went into the room, the doctor asked if she was depressed and she said no. She was scared and shaken. The doctor gave her a prescription for Ativan. She had never taken Ativan previously.

- [35] That day, A.B. and Mr. Capewell had the Ativan prescription filled. A.B. took one of the pills, which dissolved under her tongue. She testified that she felt weak, fuzzy, and out of control about 10 to 15 minutes after taking the pill. She gave the pill container to Mr. Capewell because he always managed her medications. Mr. Capewell gave her another pill with water around 9:00 or 10:00 p.m. that evening.
- [36] A.B.'s next memory was waking up the next day in the bedroom alone. She thought she had lost four days. When she went downstairs, Mr. Capewell was in the kitchen and said to her, "Thanks for the blow job": Reasons at para. 139. A.B. responded that she would not do that in the circumstances, being that she was only living in the family home to be with her children. She testified that she experienced memory loss, shaking, slurring of speech, and feeling ill afterwards.
- [37] In December 2000, A.B. found two rolls of undeveloped film. She took them to the police. In October 2001, A.B. received the developed photographs in the mail from the police. The photographs depicted Mr. Capewell sexually assaulting her. Based on her hair colour, the photographs were dated to November 2000. Mr. Capewell was charged with sexual assault and administering a stupefying drug. A.B. testified at his preliminary inquiry on May 17, 2002. In September 2002, he pleaded guilty and was convicted of sexually assaulting A.B.
- [38] The judge admitted the similar fact evidence of A.B. solely to prove the actus reus of administering a stupefying drug and to rebut the defence of accident advanced in Mr. Capewell's text messages: Reasons at paras. 251-253. The judge accepted A.B.'s evidence in its entirety: Reasons at para. 247.

Convictions on both counts

- [39] The judge found K.H. to be a credible witness, whose credibility was not eroded on cross-examination. Ultimately, the judge accepted K.H.'s evidence in its entirety: Reasons at paras. 216 and 221. Furthermore, the judge rejected the defence theory that the Ativan had been administered by accident, as Mr. Capewell had alleged in his post-incident text messages: Reasons at para. 242.
- [40] After reviewing all of the evidence and extensive case law, the judge made the following key findings of fact at para. 266 of the Reasons:
- [266] I find on the evidence as a whole the following facts:
1. that there were sexual relations between K.H. and the accused on April 21, 2013;
 2. that on the morning of April 21, 2013, the accused deliberately administered Ativan to K.H. without her knowledge;
 3. that as result of being intoxicated and drugged with Ativan, K.H. did not have the capacity to consent to sexual activity, was not able to understand the risks and consequences associated with that particular activity and was not able to decline to participate in that activity.

[41] In the result, the judge convicted Mr. Capewell on both counts.

Issues

[42] In this court, the appellant does not dispute the facts as outlined in the Reasons, which include that sexual activity occurred between Mr. Capewell and K.H. on April 21, 2013, and that Mr. Capewell administered Ativan to K.H. on that date.

[43] This appeal is narrowly focused on two questions of law:

- (1) did the trial judge err in finding that K.H. lacked the capacity to consent to the sexual activity that occurred?; and
- (2) did the trial judge err in admitting the similar fact evidence of A.B.?

[44] For the reasons that follow, I would answer "no" to both questions.

Discussion

I. Lack of capacity

[45] The appellant submits that the trial judge erred in law by finding that K.H. lacked the capacity to consent to sexual activity on the undisputed facts of this case. This raises a question of law alone, which attracts a standard of correctness: *R. v. Le*, 2019 SCC 34 at para. 23.

What is the relationship between consent and capacity?

[46] As is set out in s. 273.1(2)(b) of the Code, lack of capacity is one pathway by which the Crown can prove non-consent at the actus reus stage of the alleged offence. Recently, the Ontario Court of Appeal held that where both non-consent and incapacity are potentially in issue, judges should first consider whether the Crown has proven beyond a reasonable doubt that the complainant did not consent to the sexual contact, before assessing whether any apparent consent is vitiated by a lack of capacity: *R. v. G.F.*, 2019 ONCA 493 at para. 41, leave to appeal allowed 2020 CarswellOnt 134 (S.C.C.), citing *R. v. Hutchinson*, 2014 SCC 19 at para. 4, and *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (S.C.C.) at para. 40. While the judge did not specifically address the issue on this basis, I am not prepared to find that she erred by grounding her approach from the perspective of incapacity. Suffice it to say that the same facts may evince both non-consent and incapacity.

[47] While having an operating mind to give meaningful consent is distinct from subjectively wishing the sexual touching to take place, the concepts of capacity and consent are not mutually exclusive: Janine Benedet, "The Sexual Assault of Intoxicated Women" (2010) 22 Can. J. Women & L. 435 at p. 459. Furthermore, where the evidence demonstrates that the complainant did not have an operating mind, it cannot be said that she was "experiencing the state of mind of consent while the sexual activity was occurring": *R. v. J.A.*, 2011 SCC 28 at para. 45.

- [48] In cases where the complainant's memory of the sexual activity is limited, the same circumstantial evidence may be relevant to both consent and capacity. The relevant authorities on this point were recently reviewed by the Nova Scotia Court of Appeal in *R. v. Al-Rawi*, 2018 NSCA 10 at paras. 69-70:
- [69] Difficulties present where the complainant, due to the ingestion of drugs or alcohol, truly has little or even no memory of the event. Absent direct evidence from a complainant that subjectively she did not consent, the judge or jury frequently must rely on circumstantial evidence to determine the absence of consent (see for example: *R. v. Merritt*, [2004] O.J. No. 1295 (Ont. S.C.J.); *R. v. Tariq*, 2016 ONCJ 614 (Ont. C.J.); *R. v. Ceden*, 2005 ONCJ 91 (Ont. C.J.); *R. v. Thurairajah*, 2006 CarswellOnt 9699 (Ont. C.J.), 2008 ONCA 91 (Ont. C.A.); *R. v. Anderson*, 2010 YKSC 32 (Y.T. S.C.); *R. v. Basra*, 2008 BCSC 917 (B.C. S.C.), *aff'd* 2009 BCCA 520 (B.C. C.A.); *R. v. P. (C.)*, 2017 ONCJ 277 (Ont. C.J.); *R. v. Merritt*, [2003] O.J. No. 3493 (Ont. C.J.); *R. v. R. (J.)*, [2006] O.J. No. 2698 (Ont. S.C.J.), *aff'd*, 2008 ONCA 200 (Ont. C.A.), leave to appeal denied, [2008] S.C.C.A. No. 189 (S.C.C.)/[2008] S.C.C.A. No. 231 (S.C.C.); *R. v. Kontzamanis*, 2011 BCCA 184 (B.C. C.A.); *R. v. Meikle*, 2011 ONSC 650 (Ont. S.C.J.); *R. v. Olotu*, 2016 SKCA 84 (Sask. C.A.), *aff'd* 2017 SCC 11 (S.C.C.)).
- [70] Where a complainant testifies that she has no memory of the sexual activity in question, the Crown routinely asks: "Would you have consented?" Despite the potential to discount the typically negative response as speculation, the answer is usually received into evidence, and depending on the reasons, may or may not have a bearing on the determination if consent or capacity to consent were absent (see for example: *R. v. R. (J.)*, *supra*; *R. v. Basra*, *supra*; *R. v. Olotu*, *supra*; *R. v. Meikle*, *supra* at para. 45; *R. v. Tariq*, *supra* at para. 70; *R. v. Esau*, *supra* at paras. 4 and 91; *R. v. Kontzamanis*, *supra* at para. 31). For unknown reasons, this question was not put to the complainant.
- [49] Even where the evidence falls short of establishing incapacity beyond a reasonable doubt, evidence of intoxication may be relevant in assessing whether any apparent consent was voluntary. In *G.F.* at para. 49, the Ontario Court of Appeal held that the complainant's vomiting from intoxication was relevant to indicate both that she would not have consented to sexual contact and that her degree of intoxication impacted her capacity to consent. Similarly, evidence that the complainant would not have consented may serve as circumstantial evidence of both non-consent and incapacity: *R. v. Kontzamanis*, 2011 BCCA 184 at para. 31; *Al-Rawi* at para. 70.
- [50] In this case, the judge found that the complainant lacked the capacity to consent. Yet it was equally open to the judge to find that the circumstantial evidence proved non-consent. The law is not, as the appellant submitted in this court, that non-consent could not be in issue because the complainant had no memory of whether she consented or not. Nor does the law infer consent in cases of intoxication: *Kontzamanis* at paras. 30-31; *R. c. Daigle*, 127 C.C.C. (3d) 130 (Que. C.A.) [*Daigle (C.A.)*], *aff'd* [1998] 1 S.C.R. 1220 [*Daigle (S.C.C.)*]. In sexual assault cases, like all cases, judges are permitted to make findings of fact based on circumstantial evidence: *Al-Rawi* at para. 69. It is also permissible for a judge to find that either the

complainant lacked the capacity to consent or did not consent: R. v. B.S.B., 2009 BCCA 520; R. v. Cornejo, [2003] O.J. No. 4517 (Ont. C.A.), Abella J., leave to appeal ref'd [2004] S.C.C.A. No. 32 (S.C.C.); G.F. at para. 25.

What are the elements of consent?

- [51] Consent is defined in s. 273.1(1) of the Code as "the voluntary agreement of the complainant to engage in the sexual activity in question". Consent must be given at the time of the sexual activity, and it can be revoked at any time: Code at s. 273.1(2)(e); J.A. at paras. 34, and 40-43. Consent must relate to the specific sex act, its sexual nature, and the partner's identity: Hutchinson at para. 5.
- [52] Consent is relevant to both the actus reus and the mens rea of sexual assault. However, consent at the actus reus stage is assessed from the point of view of the complainant, whereas at the mens rea stage, the focus shifts to the accused and his steps to ascertain consent: R. v. Barton, 2019 SCC 33 at paras. 89-90.
- [53] The actus reus of sexual assault is met if the accused "touche[d] another person in a sexual way without her consent": J.A. at para. 23. Therefore, the Crown must prove these three elements: (i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent: Ewanchuk at para. 25. The first two elements are objective; it is sufficient for the Crown to prove that the accused's actions were voluntary: Ewanchuk at para. 25. However, non-consent is subjective from the complainant's point of view, as set out in Barton at para. 89:
- [89] Consent is treated differently at each stage of the analysis. For purposes of the actus reus, "consent" means "that the complainant in her mind wanted the sexual touching to take place" (Ewanchuk, at para. 48). Thus, at this stage, the focus is placed squarely on the complainant's state of mind, and the accused's perception of that state of mind is irrelevant. Accordingly, if the complainant testifies that she did not consent, and the trier of fact accepts this evidence, then there was no consent -- plain and simple (see Ewanchuk, at para. 31). At this point, the actus reus is complete. The complainant need not express her lack of consent, or revocation of consent, for the actus reus to be established (see A. (J.), at para. 37).

[Emphasis added.]

- [54] It bears emphasizing that at the actus reus stage, the complainant's state of mind is determinative in establishing non-consent. The accused's perception of the complainant's state of mind is irrelevant, and only arises when a defence of honest but mistaken belief in communicated consent is raised at the mens rea stage: Ewanchuk at para. 173.
- [55] The mens rea of sexual assault is met if the accused had the "intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched": Ewanchuk at para. 42. The Supreme Court of Canada in Barton at para. 90 set out the role of consent at the mens rea stage as follows:

- [90] For purposes of the mens rea, and specifically for purposes of the defence of honest but mistaken belief in communicated consent, "consent" means "that the complainant had affirmatively communicated by words or conduct her agreement to engage in [the] sexual activity with the accused" (Ewanchuk, at para. 49). Hence, the focus at this stage shifts to the mental state of the accused, and the question becomes whether the accused honestly believed "the complainant effectively said 'yes' through her words and/or actions" (ibid., at para. 47).
- [56] The defence of honest but mistaken belief in communicated consent is not available if the belief arose from the accused's self-induced intoxication, recklessness, or wilful blindness, or if the accused failed to take reasonable steps in the circumstances to ascertain that the complainant was consenting: Code, s. 273.2. Furthermore, the law prohibits any inference of consent based on implied consent, broad advanced consent, or a propensity to consent: Barton at paras. 98-100. While consent at the mens rea stage shifts the focus to the accused's mental state, his belief that the complainant was consenting must be based on his reasonable steps to ascertain consent and his perception of the complainant's words or conduct.

What are the elements of capacity?

- [57] Under the Code, consent--defined as "the voluntary agreement of the complainant to engage in the sexual activity in question"--cannot be obtained where "the complainant is incapable of consenting to the activity": ss. 273.1(1) and (2)(b). Consent requires voluntariness, agreement, and capacity. The Supreme Court of Canada has interpreted these provisions as indicating that Parliament saw consent as requiring the "conscious consent of an operating mind", or in other words, the "mental capacity to give meaningful consent": J.A. at para. 36 (emphasis added).
- [58] Where the complainant's capacity to consent is at issue, the analysis at the actus reus stage similarly focuses solely on the complainant's state of mind: J.A. at para. 37. As the appellant and Crown agreed in this court, in cases of intoxication, the voluntariness of the complainant's cognitive impairment is irrelevant when assessing her state of mind and capacity at the actus reus stage. That said, the accused's conduct in bringing about the complainant's intoxication will be relevant at the mens rea stage in assessing his state of mind as to her capacity and consent.
- [59] As I have noted, the accused's perception of the complainant's capacity is irrelevant at the actus reus stage, and it can only be raised at the mens rea stage as part of a defence of honest but mistaken belief in communicated consent if the accused took reasonable steps to ascertain consent: Daigle (S.C.C.) at para. 3. In Cornejo, Abella J.A. (as she then was), writing for a unanimous panel of the Ontario Court of Appeal, held that the judge erred in leaving the defence of honest but mistaken belief in consent with the jury because the accused's perception of the intoxicated complainant's silence and passivity, after he initiated sexual activity with her, did not constitute reasonable steps.

[60] The defence of mistake of fact is not only precluded where the accused failed to take reasonable steps, but also where the accused's belief arose from his own self-induced intoxication, recklessness, or wilful blindness, or any circumstance in which no consent is obtained including the complainant's unconsciousness or lack of capacity: Code, s. 273.2(a). Further, where the accused surreptitiously induced the complainant's impaired state of mind, the defence of honest but mistaken belief in consent has no air of reality and is foreclosed: *R. v. P.N.W.*, 2017 ONSC 5698 at para. 44, citing *R. v. Fleming*, 2007 ONCA 808 at para. 7 and *R. v. L.G.*, 2007 ONCA 654 at para. 9.

[61] The issue then becomes, what is the legal test for capacity? The appellant submits that the standard is "close to unconsciousness," and relies on the following statement from Janine Benedet in "The Sexual Assault of Intoxicated Women" at p. 460:

The legal standard for incapacity appears to be both unarticulated and hard to reach. While some courts speak of the inability to understand the consequences of the sexual activity and to know one can decline to participate, in practice the standard appears to be one of near unconsciousness.

[62] I would note, first of all, that the comment in question was made in an article published the better part of a decade ago. Secondly, if such a "practice" did exist, its continuation, in my view, is not in accordance with more recent pronouncements on this issue.

[63] "Near unconsciousness" cannot, in my opinion, effectively amount to a stand-alone legal evidentiary standard for incapacity. Section 273.1(2) of the Code provides that no consent is obtained if the complainant is unconscious (a.1), or is incapable of consenting for any reason other than being unconscious (b). Thus, unconsciousness cannot be the only state capable of negating a complainant's capacity: *R. v. Esau*, [1997] 2 S.C.R. 777 at para. 24.

[64] The Supreme Court of Canada has held that capacity requires the "conscious consent of an operating mind": *J.A.* at para. 36. Similarly, the Court has held that mere awareness of the activity does not constitute capacity where the judge accepted that the complainant was "out of control" and "not able to say no": *Daigle (C.A.)* at paras. 18-20. Furthermore, the complainant must at least have the capacity to appreciate the sexual nature of the touching, the quality of the specific sex act, and the identity of the other person: *Hutchinson* at para. 5; *Al-Rawi* at para. 64.

[65] In this province, the test for capacity was set out by Bennett J. (as she then was) in *R. v. Siddiqui*, 2004 BCSC 1717 at para. 55:

[55] Therefore, the test is not one of automatism or even one of being unconscious or insensate, although all of those states would result in incapacity. In order to be incapacitated, due to whatever reason, the complainant must be unable to understand the risks and consequences associated with the activity that she or he is engaged in. The complainant must understand the sexual nature of the act and realize that he or she could choose to decline to participate.

[66] This test has been adopted in other trial decisions in British Columbia, and by the judge in the present case: see *R. v. Saadatmandi*, 2008 BCSC 250; *R. v. McRae*, 2010 BCSC 558; Reasons at paras. 170-181. In *Saadatmandi*, Fisher J. (as she then was) interpreted the test to be disjunctive, stating at para. 10:

[10] A complainant may be incapable of consenting due to the consumption of alcohol or drugs. Whether or not the consumption was voluntary, the complainant must have been intoxicated to the point where she could not understand the risks and consequences associated with the sexual activity. Where alcohol is involved, a person must be intoxicated to the point where she is not able to understand the sexual nature of the act or realize that she can decline to participate: see *R. v. Siddiqui*, 2004 BCSC 1717 (B.C. S.C.) at ¶52-55; *R. c. Daigle* (1997), 127 C.C.C. (3d) 130 (Que. C.A.), *aff'd* [1998] 1 S.C.R. 1220 (S.C.C.); *R. v. R. (J.)*, [2006] O.J. No. 2698 (Ont. S.C.J.) at ¶41-43.

[Emphasis added.]

[67] More recently, in *Al-Rawi* at para. 66, the Nova Scotia Court of Appeal held that the test for incapacity requires proof that the complainant did not have an operating mind capable of:

1. appreciating the nature and quality of the sexual activity; or
2. knowing the identity of the person or persons wishing to engage in the sexual activity; or
3. understanding she could agree or decline to engage in, or to continue, the sexual activity.

[68] The Court in *Al-Rawi* reversed the accused's acquittal for sexual assault due, in part, to the trial judge's legal error in conflating incapacity with unconsciousness or being insensate: paras. 115-120. The test for incapacity set out in *Al-Rawi* was subsequently endorsed by the Ontario Court of Appeal, which recognized that incapacity may be found despite evidence of the complainant "walking a short distance, making a phone call, speaking, and [having] some awareness of or resistance to sexual activity": *G.F.* at para. 38. As the recent jurisprudence makes clear, incapacity can arise in a range of circumstances.

[69] Interestingly, both the Nova Scotia and Ontario appellate courts rejected the view expressed in *Siddiqui* and *Saadatmandi* that a complainant who is unable to understand the risks and consequences associated with the sexual activity lacks the capacity to consent: *Al-Rawi* at para. 38; *G.F.* at para. 36. However, this issue is not before the Court on this appeal. The judge in this case found that K.H. did not have the capacity to realize that she may choose to decline participation in the sexual activity with Mr. Capewell, and the law is clear, in my view, that in such a case, a complainant does not have the capacity to consent: *Al-Rawi* at para. 66; *G.F.* at para. 37; *Siddiqui* at para. 55; *Saadatmandi* at para. 10.

[70] Accordingly, in my opinion, the authorities establish that, from a practical perspective, a "sliding scale" exists in terms of the level of cognitive impairment short of unconsciousness that can result in a finding of incapacity. While a finding of "near unconsciousness" would satisfy the Crown's legal onus, one can hypothesize a number of factual circumstances that

fall short of "near unconsciousness" and nonetheless could satisfy the trier of fact that the complainant did not have an "operating mind", as that term has been described as recently as in *Al-Rawi* at paras. 60-67; see also *G.F.* at para. 37.

Application to this case

- [71] The appellant argues that a legal error was made because the judge found that the complainant, who had no memory of the sexual activity in question, lacked the capacity to consent based on: (1) the complainant's memory loss from ingesting Ativan; and (2) Ms. Dinn's expert evidence that the Ativan would cause lowered inhibitions. The appellant relies on paras. 237 and 240 of the Reasons:
- [237] There is no question here that K.H., a non-user of lorazepam, had indeed ingested lorazepam -- the drug screening report was admitted. I find that, in the circumstances, the Crown has proven lack of capacity beyond a reasonable doubt. Heather Dinn testified that one may do things one ordinarily would not do after taking lorazepam, and I accept that evidence. The factual background prior to the incident does not assist in determining whether there was consent to the act at the time, and it would be an error to do so. One cannot consent in advance.
- [240] I find that there is evidence to satisfy me that K.H. lacked capacity, given her testimony which I accept. Heather Dinn, the forensic toxicologist, testified that K.H. was under the influence of Ativan and her evidence on the effect of anterograde amnesia was that one can be physically functioning and yet have no memory of the events. I accept Heather Dinn's evidence.
- [72] If these excerpts from the Reasons are read in isolation, the appellant's submission is superficially attractive. The judge appears to have found a lack of capacity based on the complainant's memory loss and Ms. Dinn's evidence that Ativan can cause lowered inhibitions. The Crown conceded that memory loss and lowered inhibitions, without more, cannot prove lack of capacity beyond a reasonable doubt. However, during appellate review, this court cannot read the impugned language set out above in isolation but must view the reasons as a whole: *R. v. Robertson*, 2019 BCCA 116 at para. 75.
- [73] It is clear that the judge properly instructed herself on the law concerning capacity to consent. On my reading of the Reasons as a whole, I am satisfied that the judge grounded her conclusion regarding lack of capacity on many aspects of the evidentiary record, which are not disputed on appeal and included:
- a) K.H.'s evidence, which the judge accepted in its entirety;
 - b) K.H.'s memory loss (expert evidence established that anterograde amnesia may be a symptom from ingesting Ativan);
 - c) K.H.'s "snippets of memory", including (in chronological order):

- i. sensations of feeling drugged, sleepy, drowsy, out of her body, and unwell in hot water while in the hot tub;
 - ii. telling Mr. Capewell that she felt drugged while in the pool area;
 - iii. losing sensation in her body and feeling out of her body when taking a shower after exiting the pool area;
 - iv. feeling out of her body and having visual effects while at the coffee shop;
 - v. back in the hotel room, lying in bed with Mr. Capewell, seeing him take off her underwear, and at that time, feeling out of her body, like she was in a tunnel, and visually impaired;
 - d) K.H.'s evidence that she would not have consented to sexual activity with Mr. Capewell on the date of the offences;
 - e) Ms. Dinn's expert evidence, which the judge accepted, including:
 - i. the amount of lorazepam in K.H.'s blood the next day, and the drug's rate of elimination from the body (on average, reduced by one-half at 14 hours and diminished presence at 30 hours);
 - ii. the timing of the effects, which usually begin 20-30 minutes after ingestion, increase over time, peak after about 2 hours, and continue for approximately 10 hours, although this varies;
 - iii. the effects of lorazepam, which may include stupefying effects, amnesia, sedation (even induced sleep), and lowered inhibitions, depending on dosage and tolerance;
 - iv. that a new user of Ativan would have more sedative effects; and
 - f) the indiscernible text message sent from K.H. to her son at 6:49 p.m. on April 21, 2013, which read, "My mustarddg me kdor if you need tide".
- [74] These undisputed findings of fact sufficiently support the judge's conclusion that K.H. lacked the capacity to consent. In my view, there was ample evidence upon which the judge concluded that K.H.'s cognitive impairment from ingesting Ativan--while short of unconsciousness--was nevertheless at such an elevated level that K.H. did not have an operating mind capable of appreciating that she could decline to participate in the sexual activity at the time that it occurred.
- [75] In reaching this conclusion, the judge was entitled to consider K.H.'s actions both before and after the sexual activity, including what she observed in the pool area video surveillance and K.H.'s text message to her son later that day.
- [76] Accordingly, I would not accede to this ground of appeal.

II. Similar fact evidence

[77] The appellant submits that the judge erred in admitting the similar fact evidence of A.B. to prove the actus reus of administering a stupefying drug and to rebut the appellant's defence of accident to that count. Firstly, the appellant argues that there was no similarity between the facts of this case and the prior incident involving A.B., and there was certainly no evidence of a common modus operandi. Secondly, the appellant argues that the judge ignored relevant evidence of dissimilarity between the two incidents.

[78] The Crown submits the judge did not err in admitting the similar fact evidence, as it was sufficiently similar to the offence charged and was probative on the central issue as to whether Mr. Capewell put Ativan in K.H.'s tea intentionally or by accident. The judge was well aware of the dissimilarities, and concluded they did not lessen the probative value of the evidence.

What is the test for admitting similar fact evidence?

[79] Similar fact evidence is propensity evidence, and as such, is presumptively inadmissible. To displace this presumption, the Crown must satisfy the judge, on a balance of probabilities, that its probative value in relation to a particular issue outweighs its potential prejudicial effect: *R. v. Handy*, 2002 SCC 56 at para. 55.

[80] The assessment of the probative value of similar fact evidence is performed in an analysis of the context of the purpose for which the evidence is proffered. The court must (i) assess the probative value of the evidence, which is driven by the connectedness of the similar fact evidence and the offence alleged; (ii) assess its prejudicial effect; and (iii) weigh and balance the two together: *Handy* at paras. 82-84.

[81] In *Handy* at para. 82, the Supreme Court of Canada set out a non-exhaustive list of factors connecting the similar facts to the circumstances set out in the charge, which may exist (but will not be necessary in every case), including:

- (1) proximity in time of the similar acts;
- (2) extent to which the other acts are similar in detail to the charged conduct;
- (3) number of occurrences of the similar acts;
- (4) circumstances surrounding or relating to the similar acts;
- (5) any distinctive feature(s) unifying the incidents;
- (6) intervening events;
- (7) any other factor which would tend to support or rebut the underlying unity of the similar acts.

[Citations omitted.]

- [82] While the degree of similarity required to establish the probative value of the evidence depends on context, "it is not an invariable requirement that there be a strong peculiarity or unusual distinctiveness underlying the events compared": *R. v. J.M.*, 2010 ONCA 117 at para. 91; see also *Handy* at para. 81; *R. v. Burman*, 2015 BCCA 519 at para. 64. If, unlike this case, the purpose of the evidence was to prove identity, distinctive features amounting to a "signature" may be required: *R. v. Cresswell*, 2009 ONCA 95 at para. 9. This is because the required degree of similarity is "particularly high" where similar fact evidence is led to prove identity: *R. v. Butorac*, 2013 BCCA 421. By contrast, a lesser degree of similarity may be sufficient where the similar fact evidence is relied upon to establish the actus reus of an offence: *Cresswell* at para. 9.
- [83] Distinctive dissimilarities do not preclude the admissibility of similar fact evidence: *R. v. Shearing*, 2002 SCC 58 at para. 60. The weight to be given to similarities and dissimilarities will often depend on their relevance to the issue in question: *Handy* at para. 80. Ultimately, the question is whether the evidence is probative of some issue, and this probative value outweighs its potential prejudice.

Application to this case

- [84] Following a voir dire on the similar fact evidence, the judge delivered an oral ruling admitting the evidence. She did so based on lengthy oral submissions and transcripts from the preliminary inquiry in this case and a preliminary inquiry in the criminal trial for the incident involving A.B.
- [85] The evidence was admitted to prove the actus reus, and rebut the defence of accident, in relation to the offence of administering Ativan to K.H. with the intent to enable or assist himself in committing sexual assault, contrary to s. 246(b) of the Code. After the conclusion of the evidence, the judge was requested by defence counsel to reverse the ruling but concluded there was no basis to do so: *Reasons* at para. 251.
- [86] The judge reviewed the cogency of the similarities between the incidents, applying the list of considerations in *Handy* at para. 82 (set out above). In particular, the judge found the similarities between the incidents to be so peculiar and unique that they were distinctive. This finding was based, in part, on the fact that both acts involved administering the drug Ativan with water, followed by non-consensual sexual acts, where the victims experienced long periods of unconsciousness. The judge later found that when K.H. described herself as being unconscious, she actually meant "unaware" or having "no memory": *Reasons* at para. 227.
- [87] The appellant submits that the similar fact evidence lacked similarity, or a common modus operandi. Specifically, the appellant argues the judge erroneously relied on the apparent similarity between how the Ativan was administered with water or tea in both instances. The evidence at trial later established that Mr. Capewell put Ativan in lukewarm water in K.H.'s tea, whereas he gave A.B. the Ativan pill and a glass of water. Furthermore, Mr. Capewell was

alleged to have surreptitiously given K.H. the Ativan in her tea, whereas he gave A.B. the Ativan with her knowledge.

- [88] The appellant's submissions on this issue were squarely before the judge. At trial, defence counsel argued at length that the prior incident with A.B. was unlike the circumstances of this case, in which Mr. Capewell allegedly surreptitiously administered Ativan to K.H. for the purpose of inducing her involuntary intoxication.
- [89] In my view, the judge did not err in concluding that such dissimilarities do not undermine the probative value of the similar fact evidence. The evidence was used to establish the *actus reus* of intentionally administering Ativan to K.H. and to rebut the defence of accident. The evidence is probative because, in both instances, Mr. Capewell administered Ativan to the complainants and engaged in sexual activity with them when they could not consent. The prior incident was probative in establishing that this time, it was not an accident. As the judge held, the defence of accident "lacks common sense" because Mr. Capewell would not have given a soiled cup to K.H. to use, given his familiarity with how the drug is taken and his prior incident with A.B.: Reasons at para. 254.
- [90] A trial judge's decision to admit similar fact evidence, after weighing the probative value and potential prejudicial effects, is entitled to substantial deference on appeal: Handy at para. 153; Burman at para. 63. I can find no error in the judge's discretionary decision to admit the similar fact evidence for the narrow purpose for which it was used.
- [91] I would not accede to this ground of appeal.

Disposition

- [92] In the result, I would dismiss the appeal.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Mr. Justice Tysoe"

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