

CANADA / JUDGMENT

R. v. Carlson

2023 BCSC 2138

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Supreme Court of British Columbia

DECIDED

4 December 2023

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2023 BCSC 2138 R. v. Carlson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Carlson,

2023 BCSC 2138

Date: 20231204

Docket: 111267-3

Registry: Kamloops

Rex

v.

Joel Eric Carlson

Ban on publication of any information that would identify the complainants

in this matter, pursuant to s. 486.4(1) of the Criminal Code

Before: The Honourable Mr. Justice Riley

Oral Ruling on Severance Application

Counsel for the Crown:

L. Drake

A. Janse

Counsel for the Accused:

L. Helps

Place and Date of Hearing:

Kamloops, B.C.

October 11-12, 2023

Place and Date of Judgment:

New Westminster, B.C.

December 4, 2023

Introduction

- [1] This is a defence application pursuant to s. 591(3) of the Criminal Code, R.S.C. 1985, c. C-46, for severance of counts on a multi-count Indictment. The accused Mr. Carlson has elected trial by judge and jury on an Indictment with 11 counts alleging that he committed sexual assaults against nine separate complainants. The first two counts involve allegations of sexual assault between 2013 and 2014, at or near Abbotsford. The remaining nine counts involve allegations of sexual assault between 2017 and 2020, at or near Kamloops. Mr. Carlson seeks an order severing the Abbotsford counts.
- [2] Mr. Carlson's position is that requiring him to go to trial on the Abbotsford counts together with the Kamloops counts will be prejudicial to his fair trial interests. Among other things, counsel for Mr. Carlson highlights the different date range of the two sets of allegations, differences in the issues that the defence says are likely to arise in relation to the two sets of charges, and Mr. Carlson's stated intent to testify in his own defence on the Abbotsford counts but not on the Kamloops counts.
- [3] The Crown is opposed to severance. Crown counsel says there is minimal prejudice to the accused, and there is a strong public interest in favour of a single trial on all of the charges against Mr. Carlson. The Crown intends to bring a cross-count similar fact evidence application, seeking to rely on the testimony of each complainant to prove mens rea on the issue of lack of consent, undercut any argument based on honest but mistaken belief in communicated consent, and support the credibility of each other complainant's testimony. If the Abbotsford counts are severed, it would mean that in pursuing its intended similar fact evidence application, the Crown would have to call evidence from all nine complainants on multiple occasions. The Crown also says Mr. Carlson's stated intent to testify in his own defence on some counts but not on others is not objectively reasonable.

The Factual Basis for the Application

- [4] The record on this application consists of (a) an affidavit filed by a Crown legal assistant attaching copies of the transcribed statements of each of the nine complainants, along with some of the other material included within the police investigative files, and (b) statements of counsel. Both the Crown and the defence were agreeable to proceeding on this basis.

- [5] I will not summarize the allegations of each of the nine complainants. Their allegations against Mr. Carlson are summarized at paras. 39-50 of the Crown's written submissions. In addition to this, the defence has referenced certain other details in its written submission, specifically in the defence written outline at paras. 10-14 (with respect to the first Abbotsford complainant, CW) and paras. 15-18 (with respect to the second Abbotsford complainant, NR). I have taken all of this into account and I will refer only to the particular details as necessary to address the arguments advanced by the parties. I will, however, make the following general observations about the allegations.
- [6] Part of the context here is that all of the allegations against Mr. Carlson came to light in the wake of a media statement issued by the police, soliciting information about any allegations of sexual misconduct on Mr. Carlson's part. However, the parties are now agreed that the jury will be told as little as possible about the particulars of the media statement in order to avoid unnecessary speculation about the circumstances in which Mr. Carlson came to be the subject of such a public statement by the police.
- [7] In general terms, all nine complainants allege that they knew or were familiar with Mr. Carlson prior to the alleged assaults, and thus identity will not be an issue in these proceedings. All of the complainants allege that Mr. Carlson had non-consensual intercourse with them, using some degree of physical force. All of the complainants say in their statements that they expressly told Mr. Carlson they were not consenting, and Mr. Carlson persisted. There are other, more specific allegations that are common to some but not all of the complainants. I will discuss those common features in more detail below, when dealing with the similar fact evidence aspect of the analysis.
- [8] I move on to address the extent to which there are differences between the Abbotsford counts on the one hand and the Kamloops counts on the other.
- [9] The Abbotsford counts, counts 1 and 2 on the Indictment, involve allegations of sexual assault committed against two different complainants, in Abbotsford, over various dates from 2013 to 2016. The complainants in relation to these two counts were both in extended relationships with Mr. Carlson, which is something the defence seeks to highlight as a difference between the Abbotsford counts and most of the Kamloops counts. I will explain the defence position on that issue in more detail below. The defence also points out that both of the Abbotsford complainants were interviewed by the same Abbotsford Police Department officer, Cst. Davidson, whom defence counsel says behaved improperly by passing information between the complainants. The defence says that if Cst. Davidson is not called as a Crown witness, this officer will very likely be called as a defence witness, with the expectation of eliciting evidence about the improper sharing of information between the two Abbotsford complainants.
- [10] The Kamloops counts, counts 3 through 11, involve allegations of sexual assault committed against seven different complainants, in Kamloops, on various dates between 2017 and 2020. The Crown says most or all but one of the Kamloops complainants met Mr. Carlson on

Tinder, an online dating app. The defence asserts that for the most part the Kamloops complainants interacted with Mr. Carlson at what the defence characterizes as the local club scene or party scene. Defence counsel puts this forward as a milieu that was common between the complainants and Mr. Carlson. Counsel submits that this is contextually quite different from the Abbotsford counts, both of which involve complainants who were in established relationships with the accused. To be fair, defence counsel concedes that one of the seven Kamloops complainants was in fact in a long-term relationship with Mr. Carlson, and the Crown points out that another one of the Kamloops complainants was in a relationship with Mr. Carlson for a number of months. Nevertheless, one of the themes advanced by defence counsel in the severance application is that the Abbotsford counts involve allegations arising out of long-term relationships, whereas the Kamloops counts generally involve allegations that are tied to the local club scene or party culture.

- [11] Finally, and significantly, the defence points out that a number of the Kamloops complainants made posts about Mr. Carlson on a Facebook group chat called Roastpower 2.0. This was a semi-public group chat. One of the threads on this group chat was specifically about Mr. Carlson. Three of the seven Kamloops complainants posted on this thread, making allegations of sexual misconduct against Mr. Carlson. Another person who made posts about Mr. Carlson was Ms. Graham, who is not one of the complainants, and does not allege that Mr. Carlson committed any acts of sexual misconduct against her, but took an interest in the matter and made posts encouraging anyone who was mistreated by Mr. Carlson to report their allegations to the police. At some point after the police laid one or more sexual assault charges against Mr. Carlson, Ms. Graham provided the police with screenshots of the Roastpower thread relating to Mr. Carlson. All of this is relevant because the defence says that the Roastpower posts afford evidence of animus toward Mr. Carlson. These posts will also be the basis for an argument of collusion or witness tainting in relation to some or all of the Kamloops complainants. Defence counsel says this is important in the severance application, because there is no indication that either of the Abbotsford complainants ever saw or had anything to do with the Roastpower thread about Mr. Carlson. Thus, the defence says, the Roastpower issue will have nothing to do with those two complainants.

Legal Principles

- [12] Under s. 591(3)(a) of the Criminal Code, the trial judge has the discretion to order severance of counts where satisfied that it is required in the interests of justice. When dealing with the question of severance, the interests of justice have been said to encompass the accused's right to a fair trial, and in particular the right to be tried on admissible evidence, and society's interest in seeing that justice is done in a reasonably efficient and cost-effective manner: *R. v. Last*, 2009 SCC 45.

- [13] A number of different factors bearing on the interests of justice have been identified in the case law. I will review those in a moment. Before doing so I will note two interrelated principles. The first is that, as a matter of first instance, the Crown has a broad and generally unfettered discretion to charge multiple counts on a single indictment as contemplated in s. 591(1) of the Criminal Code. The second principle, which follows upon the first, is that the burden is on the accused to establish on a balance of probabilities that the interests of justice require an order for severance of counts: *R. v. Arp*, [1998] 3 S.C.R. 339 at para. 52.
- [14] Returning to the factors commonly considered in determining whether severance is necessary in the interests of justice, a list of factors was set out in the leading case of *Last* at para. 18. This list is not exhaustive, and the listed factors are simply a means of considering particular aspects of the interests of justice. In the present matter, both the defence and the Crown cited *R. v. Zakuti*, 2021 BCSC 2405, as a recent decision in which these factors were helpfully summarized and applied. For present purposes, I will address each factor relevant to this particular case under a separate sub-heading. In doing so, I acknowledge the point, made by Justice Donegan in *Zakuti* at para. 37, that it is incumbent on the trial judge to "consider and weigh cumulatively all of the relevant factors" in order to determine the ultimate question of whether the interests of justice require severance. No one factor standing alone can be taken as dispositive.
- [15] With those overarching principles in mind, I turn to an application of factors discussed in the case law, focusing only on the particular factors that apply in this case.

General Prejudice to the Accused

- [16] The case law recognizes that there is always likely to be prejudice to the accused when tried on an indictment that includes multiple counts involving distinct allegations. The degree of prejudice will obviously vary depending on the nature of the allegations, their similarity or lack thereof, and a variety of other factors discussed in the case law. The prejudice will depend, for example, on the relative seriousness and moral turpitude of the allegations, the extent to which the separate allegations could reflect on the character of the accused, the possibility that the breadth or variety of the allegations could confuse the trier of fact, and the ability of the accused to defend himself or herself by challenging or responding to the allegations on the whole or individually: *R. v. Z.W.C.*, 2021 ONCA 116 at para. 104.
- [17] It is clear that the prejudice associated with facing multiple allegations will be greater where there is no basis on which the trier of fact could legitimately consider the evidence across counts on the indictment. As Deschamps J. put it in *Last* at para. 16, "[t]he obvious risk when counts are tried together is that the evidence admissible on one count will influence the verdict on an unrelated count". In other words, where the Crown prefers an indictment that contains disparate counts such that the evidence of each count would only ever be admissible to prove that count, the prejudice to the accused would be significant. By contrast, where the Crown has a good case for saying that the evidence on each count would be relevant and admissible as evidence on each and every other count on the indictment,

there will generally be less prejudice to the accused. Hence, this aspect of the severance analysis is connected to the factor addressing similar fact evidence, discussed below. All of this really serves to demonstrate how the factors identified in *Last* can often be interrelated such that they must be weighed and balanced in reaching a conclusion. In any event, while prejudice to the accused and admissibility of similar fact evidence can be closely linked, the trial judge cannot simply skip over the consideration of prejudice.

- [18] Courts have acknowledged that the risk of prejudice to an accused where evidence is admissible on some counts but not on others can be attenuated by limiting instructions: *R. v. Mastronardi*, 2014 BCCA 302 at para. 33. However, sometimes a jury instruction is not enough. As Deschamps J., speaking for the Court, explained in *Last* at para. 46, "if a proper jury instruction were all that was needed to deal with potential prejudice to the accused, then prejudice would in a sense cease to be a relevant factor in the analysis". Thus, a trial judge should not resort to a limiting instruction where there is no justification for a joint trial on multiple counts based on a consideration of all the relevant factors in the severance analysis.
- [19] In the case at bar, the defence argues that a joint trial on the Abbotsford counts together with the Kamloops counts could create a risk of both moral prejudice and reasoning prejudice. The greater the number of allegations of sexual assault the accused faces, the greater the risk that the jury will consider the accused to be a bad person and therefore likely guilty. This is particularly so where the Abbotsford allegations are added to the Kamloops allegations, to cover multiple locations and a broader time frame. Further, in this particular case the risk that the jury will inappropriately use the evidence of each complainant to bolster the reliability of each other complainant is heightened because, while the Facebook Roastpower posts afford a basis for challenging the credibility of the Kamloops complainants, the evidence of potential collusion will not be relevant to the Abbotsford complainants. Thus, the credibility of one group of complainants whose testimony may be called into question on the basis of collusion could potentially be bolstered by two other complainants whose allegations arise in what the defence says is a completely different milieu. The defence notice of application also references portions of the statements given by the two Abbotsford complainants, containing allegations of extrinsic misconduct, or uncharged bad acts, such as drug dealing, failure to pay rent, fraud, and uncharged allegations of intimate partner violence.
- [20] On the other hand, the Crown maintains that the general prejudice to the accused associated with a joint trial of both the Abbotsford and Kamloops complainants is minimal. The Abbotsford allegations are not fundamentally different from the Kamloops allegations in terms of their relative seriousness or degree of moral turpitude. This is not a case like *Last* where one set of allegations involved an alleged use of a firearm and the other did not, and where one set of allegations involved graphic evidence of injuries that were not present in relation to the other set of allegations. In this sense, the Crown says that where the accused is already facing allegations from seven complainants, there is minimal additional

prejudice to the accused in facing allegations of two further complainants. The Crown points out that the defence evidently accepts that it is not contrary to the interests of justice for the accused to have a single trial on the Kamloops counts. In this context, the question then becomes whether there is any added prejudice to the accused associated with trying the Kamloops counts (involving allegations of sexual assault by seven complainants) together with the Abbotsford counts (involving additional allegations of sexual assault by a further two complainants). The Crown says there is no added prejudice associated with the additional counts, and that there is nothing about the Abbotsford counts that is likely to cause the jury to become unnecessarily confused or distracted from its assessment of the merits of the allegations on the Kamloops counts. Finally, with respect to the risk of prejudice associated with credibility bolstering, the Crown intends to bring a similar fact evidence application in which it will argue that the evidence of each complainant should be admitted and considered by the jury in assessing the credibility of each other complainant. Thus, the accused's argument about reasoning prejudice is answered, the Crown says, by the similar fact evidence point, addressed under a separate heading below. Finally, the Crown says that any prejudice to the accused can be dealt with by way of proper limiting instructions to the jury.

- [21] Taking all of these submissions into account, I accept that a joint trial on both the Kamloops counts and the Abbotsford counts would carry with it an added risk of prejudice, but I agree with the Crown that the prejudice associated with facing allegations from two additional complainants is not the same as it might be if those additional allegations were fundamentally more serious in their nature, or involved evidence that was significantly more graphic or potentially disturbing to the jury.
- [22] I also accept the defence submission that there is a risk that the jury could consider the testimony of the two Abbotsford complainants to bolster or reinforce the credibility of each of the Kamloops complainants, and that this prejudice is heightened where the evidence of the latter seven complainants may be challenged based on evidence of potential collusion that is not in issue in relation to the former two complainants. However, the Crown is also correct that this prejudice would be significantly diminished if not eliminated entirely if the Crown succeeds in its similar fact evidence application. I will deal with that argument more directly under a separate heading below.
- [23] With respect to the accusations of extrinsic misconduct such as uncharged drug trafficking, fraud, and intimate partner violence, these are allegations contained within the video-recorded statements given by the Abbotsford complainants to the police. The Crown concedes that none of this would be admissible at the instance of the Crown, and on that basis, the Crown does not intend to adduce this evidence at trial. In that context, I find that there is little likelihood of prejudice associated with these extrinsic misconduct allegations, at least as part of the Crown's case.

- [24] I wrap up the discussion of general prejudice with two observations to be borne in mind for the balance of the analysis. First, I accept that there is general prejudice to the accused flowing from his having to face two further counts involving allegations from two different complainants, arising over an expanded time frame, in a different location and arguably in a different milieu or context. Second, I accept the idea that limiting instructions may be relied upon to mitigate the moral and reasoning prejudice, but this would only be a just approach "where there are sufficient countervailing factors" that provide a rationale for a joint trial, as explained in Last at para. 45.

Legal and Factual Nexus Between the Counts

- [25] The defence argues that there is no factual or investigative nexus between the Abbotsford counts and the Kamloops counts. Temporally, the Abbotsford counts involve allegations between 1 January 2013 and 31 December 2016, whereas the Kamloops counts span from 1 March 2017 to 31 January 2020. So, to state the obvious, the Abbotsford counts relate to allegations at a different place and in a different time frame than the Kamloops counts. The allegations were also investigated by different police agencies. The defence says that the conduct of the lead investigator in the Abbotsford counts will be called into question, and that officer will be a necessary witness. If the Crown does not call that officer, the defence will. This officer would have nothing to say about the Kamloops counts.
- [26] Above and beyond the differences in dates and locations, the defence submits that the Kamloops counts arise in an entirely different milieu from the Abbotsford counts. In particular, the defence says that all of the Kamloops counts have to do with a social milieu which counsel describes as the local club scene. Defence counsel referred to an establishment called the Duchess. The accused is alleged to have met or come into contact with the Kamloops complainants through this milieu. Further, recall defence counsel's assertion that a number of the Kamloops complainants posted about the accused on a discussion thread on a forum called Facebook Roastpower. The defence says the basis for challenging the credibility of the Kamloops complainants will come from these two sources, none of which have anything to do with the Abbotsford complainants.
- [27] The defence further submits that the Abbotsford allegations arise out of a fundamentally different dynamic, namely that of established relationships between Mr. Carlson and each of the two Abbotsford complainants. Mr. Carlson is said to have been in a relationship with one of the Abbotsford complainants (NR) for several years, and had a dating relationship with the other Abbotsford complainant (CW) for several months. The significance of this, says defence counsel, has nothing to do with any potential sexual component to the relationships, which would be presumptively irrelevant and could not be referred to in evidence due to the limitations imposed by s. 276 of the Criminal Code. Rather, the defence says that by virtue of the fact that Mr. Carlson was in established, ongoing relationships with each of the Abbotsford complainants, defence counsel has more information (emanating from Mr. Carlson) to work with in cross-examining these two complainants. Again, the point

here is not that defence counsel intends to address sexual activity that is not the subject of the allegations on the indictment, since that kind of evidence would clearly be inadmissible under s. 276. Defence counsel's point is that she simply has more detailed information about these two complainants than she does about the Kamloops complainants, many of whom Mr. Carlson is alleged to have interacted with only on a handful of occasions. Defence counsel adds and acknowledges that this is not necessarily the case with all of the Kamloops complainants. Indeed, the witness statements tendered in evidence on this application indicate that Mr. Carlson was in a three to four year relationship with one of the Kamloops complainants (KT), and had a relationship of several months duration with another Kamloops complainant (AA). Still, the defence position is that the Kamloops counts arise out of a different milieu or a different social scene than the Abbotsford counts.

- [28] In the course of submissions, the Crown clarified that most or all of the Kamloops complainants actually became acquainted with the accused through a social media app called Tinder. The Crown's written summary of the evidence of the complainants indicates that at least five of the seven Kamloops complainants met him on Tinder. The Crown does not necessarily dispute that the accused and some or perhaps all of the Kamloops complainants may have frequented the Duchess night club or were involved in what the defence calls the Kamloops "club scene", but says this does not have any factual or legal significance to the allegations.
- [29] The defence also submits that there is no legal nexus between the Abbotsford counts and the Kamloops counts. All of the counts involve the same charge, namely sexual assault, but that is where the legal similarities end. The defence submits that in relation to one or perhaps both of the Abbotsford counts, there is a possibility that Mr. Carlson would re-elect trial by judge alone. The basis for this election is that the complainants in the Abbotsford counts made allegations of extrinsic misconduct that might not be appropriate to place before a jury. The defence says there is ample scope for cross-examination of these complainants about the extrinsic allegations, but the accused is much less likely to do so in a jury trial than in a judge alone trial where the trier of fact would be able to disabuse him or herself of the prejudicial effect of the allegations themselves, while still considering the probative value of any cross-examination on these issues and how it might impact on the credibility of the complainants.
- [30] Crown counsel submits that there is in fact a "strong legal and factual nexus" between the counts. The Crown's submission is that the difference in date and location as between the Abbotsford counts and the Kamloops counts has little significance. With respect to the difference in investigative agencies, Crown counsel says that there is no intention on the part of the Crown to lead any evidence as to "investigative matters", and the officers who interviewed the complainants have "no evidence to give that is not hearsay".
- [31] With respect to legal nexus, Crown counsel says all of the counts on the Indictment involve "the exact same crime", namely sexual assault. Further, the legal issues are likely to be similar. Identity is not in issue in any of the counts. The Crown says the key issues are likely

to revolve around arguments about consent and honest but mistaken belief in communicated consent. Crown counsel also points out that whether or not the Abbotsford and Kamloops counts are tried together, the issue of similar fact evidence is going to arise and, if the application is successful, the jury will have to be instructed on the use that can be made of the similar fact evidence.

- [32] I agree with the defence that there is little in the way of a factual nexus between the Abbotsford counts and the Kamloops counts. The two sets of allegations do not overlap in time or in place, nor are they bound together as part of a unifying context or set of common relationships. I agree with the defence submission that the trier of fact would not need to know about one set of allegations in order to properly understand the other set of allegations.
- [33] I do, however, accept the Crown's submission that there is a degree of artificiality to the defence distinction between the nature of the relationships underlying the Abbotsford counts and the nature of the relationships underlying the Kamloops counts. Mr. Carlson was in established or ongoing relationships with both of the Abbotsford complainants and two of the Kamloops complainants. Mr. Carlson is not alleged to be a stranger to any of the complainants. Identity will not be in issue. In most if not all of the counts, the case is likely to focus on two broad issues, namely the question of consent or honest but mistaken belief in communicated consent, and issues of witness credibility and reliability.
- [34] On the other hand, I accept that from the perspective of the accused, his approach to the credibility and reliability of the Abbotsford complainants may be quite different from his approach to the credibility and reliability of the Kamloops complainants. In relation to the Kamloops complainants, the defence may focus on evidence of potential collusion arising from the Facebook Roastpower posts, and possibly on the interactions between various complainants and Mr. Carlson at the local club scene. By contrast, in relation to the Abbotsford complainants, the defence may focus on details emerging from the lengthier history of interactions between the complainants and Mr. Carlson, and possibly on the contamination of their statements by the investigating officer. Still, I do not see these two approaches that defence counsel has articulated as necessarily mutually inconsistent. I see no reason why both sets of concerns could not be raised in a single trial. There are clearly going to be differences in the factual issues arising in the assessment of witness credibility of each complainant, as there would be in any trial involving allegations from more than one complainant. In this case, the accused does not suggest that a joint trial on all of the Kamloops counts would be unjust on that basis alone, even though some of the Kamloops counts originate from complainants who had known the accused for months or years, and others only interacted with him on a handful of occasions.

- [35] The Crown submits that when it comes to assessing the credibility of each complainant's evidence, one significant component of its case will be the similar fact evidence of the other complainants. Once again, this shows the inter-relatedness of the factors the Court must consider in determining whether severance is required in the interests of justice.
- [36] Summing all of this up, my conclusion is that but for the similar fact evidence component of the case, the factual and legal nexus between the Abbotsford and Kamloops counts is not strong. There is certainly no compelling factual nexus between the allegations, except for the fact that even if the Abbotsford counts were severed, the Crown would apply to adduce the evidence of the Abbotsford complainants as similar fact evidence in the trial on the Kamloops counts. But for the similar fact evidence component of the analysis, which I will deal with separately below, the relatively weak factual and legal nexus between the counts would favour severance.

Intention of the Accused to Testify on Some Counts but not on Others

- [37] An accused's stated intention to testify on some but not all counts is a factor to be considered and balanced with all of the others. This factor can carry significant weight but is not determinative on the question of severance: Last at para. 27. Further, a rote or formulaic expression of subjective intent to testify on some counts but not others will not suffice. As a "threshold", the accused must establish an objective "rationale" for testifying on some counts but not others. In other words, there must be "substance" to the accused's statement of testimonial intention, although this does not mean that the trial judge is entitled to substitute his or her view for that of the accused or defence counsel: Last at para. 26.
- [38] In the case at bar, defence counsel says Mr. Carlson intends to testify on the Abbotsford counts but not on the Kamloops counts. Counsel explains that this intention is based on the differences in the nature of the case against Mr. Carlson on the two sets of counts, as described above. Without repeating everything said under the prior headings, defence counsel submits that there is greater scope for Mr. Carlson to testify about aspects of his dealings with the two Abbotsford complainants (both of whom had established, ongoing relationships with him), as opposed to the Kamloops complainants (many but not all of whom he had only interacted with casually or sporadically). Further, defence counsel maintains that there is a foothold for challenging the credibility of the Kamloops complainants based on alleged collusion relating to the Facebook Roastpower posts, such that, tactically, there may be a much lower likelihood that Mr. Carlson would have to testify in answer to the Kamloops allegations. I hasten to add that the accused has a right to silence and need not testify, and his decision not to testify could never be the subject of comment before the jury. However, to state the obvious, if the accused chooses to testify in response to the allegations on some counts, he would clearly be subject to cross-examination on all the counts, and practically speaking, he would therefore have to give evidence in response to all of the allegations. Thus, in a joint trial, the accused's decision to testify or not testify is an all-or-nothing proposition.

- [39] The Crown submits that the defence position is contrived, and that when the circumstances are assessed from an objective standpoint there are no material differences in the nature and quality of the evidence as between the two sets of counts. The Crown says that defence counsel's effort to draw a distinction between the two sets of counts based on differences in the relationships in issue simply does not hold water. Defence counsel suggests that the Kamloops counts arose out of casual relationships emerging from a local "club scene", whereas the Abbotsford counts arose out of long-term relationships. In fact, two of the seven Kamloops complainants had established or ongoing relationships with Mr. Carlson. This is an indication, Crown counsel submits, that the defence position is contrived or artificial. The Crown says the defence is basing its position on factual distinctions which do not exist.
- [40] I agree with the Crown that this particular aspect of defence counsel's position does not fit with the record. There is no discernible pattern in or significance to the duration of the relationships between Mr. Carlson and the complainants in the two groups of counts. Certainly, it is not the case that all of the Abbotsford counts spring from ongoing relationships, whereas all of the Kamloops counts spring from more casual interactions. Further, the nature of the relationship between Mr. Carlson and each of the complainants is not directly relevant to anything, particularly considering the limitations imposed by s. 276 of the Criminal Code.
- [41] Nevertheless, there is still some objective support in the record for defence counsel's submission that the case to be met on the Kamloops counts is different from and may well auger for a different response than the case to be met on the Abbotsford counts. It is not for the Court to step into the shoes of defence counsel by second-guessing the optimal or preferred approach in responding to the specific allegations in each count. All that is required is that the defence articulate an objective rationale or objectively justifiable basis for its position regarding the intention to call evidence on some counts and not on others. While I do not accept everything defence counsel has said about the differences between the two sets of counts, I do accept that there are factual differences and that those factual differences provide an objectively justifiable basis for a different response in terms of the accused's election about whether to testify or not testify.
- [42] Both of the Abbotsford counts involve individuals with whom Mr. Carlson had a relationship spanning multiple months or years. The point here is not about any sexual aspect of those relationships, which is presumptively out of bounds under s. 276, but rather that Mr. Carlson may well be in a position to testify about various aspects of his dealings with these two complainants that he would not be in a position to testify about in relation to most, though perhaps not all of the Kamloops complainants. Perhaps just as importantly, the considered position of Mr. Carlson appears to be that he would be able to challenge the credibility of the Kamloops complainants by resort to the Facebook Roastpower posts, without having to testify.

[43] I therefore conclude that Mr. Carlson has articulated an objectively reasonable basis for his stated intention to testify on the Abbotsford counts but not on the Kamloops counts. Severance would clear the way for Mr. Carlson not to testify on the Kamloops counts, while preserving his right to testify in his own defence in a separate trial on the Abbotsford counts. By contrast, if severance is refused, Mr. Carlson will not have an unfettered choice about whether to call evidence on some counts but not on others. He would be forced to make the decision to testify on all of the counts, or testify on none of them. Considered in isolation, this factor weighs in favour of severance. As with the other factors in the analysis, it is not dispositive. It is a factor that must be weighed together with all of the others to determine whether, when considered cumulatively, severance is required in the interests of justice.

Desire to Avoid Multiplicity of Proceedings, and the Length of Trial(s)

- [44] If severance were granted, there would have to be two trials. On its own, this would not create any substantial inefficiency or inconvenience to the justice system, because each of the complainants have made allegations that are discrete as opposed to interrelated. Thus, viewed in isolation, there are few if any common witnesses between counts. In other words, there is no obvious or necessary overlap in the evidence.
- [45] However, once again the Crown's intention to adduce similar fact evidence complicates matters. If the Court were to grant severance, and the Crown were to then proceed with a trial on the Kamloops counts alone, followed by a separate trial on the Abbotsford counts, all of the complainants would have to testify at least twice.
- [46] Indeed, it is probable that at least some of the complainants would have to testify three times. To explain:
- (a) In the trial on the Kamloops counts, the Abbotsford complainants would very likely have to testify in a similar fact evidence voir dire in the absence of the jury, and if their evidence was ruled admissible they would then have to testify a second time, in front of the jury, in the trial proper. The Kamloops complainants would obviously also have to testify on the Kamloops counts.
 - (b) In the trial on the Abbotsford counts, if the matter proceeded by judge and jury, then the Kamloops complainants would have to testify in a similar fact evidence voir dire, and then again in the trial proper if their evidence was ruled admissible. If the accused re-elected to judge alone, then the Kamloops complainants would only have to testify once on the trial of the Abbotsford counts. Either way, the Crown would also call the Abbotsford complainants on the trial of the Abbotsford counts.
- [47] In the result, if severance is granted and the Crown proceeds with similar fact evidence applications in both trials, the Abbotsford complainants would potentially have to testify three times, and the Kamloops complainants would have to testify at least twice.

- [48] Defence counsel states that if severance is granted, the accused will re-elect to be tried by judge alone on the Abbotsford counts. This is certainly relevant as it would likely reduce the trial time required for that matter. It would also likely mean that the similar fact evidence of the Kamloops complainants would only have to be led once in the trial on the Abbotsford counts, on a voir dire, without the need for its repetition if ruled admissible. However, even with re-election, this is a case where severance of counts could be expected to result in multiple proceedings in which the complainants would then have to testify multiple times. This creates inefficiency and would require additional court time and judicial resources. It would also represent an inconvenience to the complainant witnesses, who will be expected to testify multiple times about matters of a sensitive or highly personal nature.

Complexity of the Evidence

- [49] Defence counsel submits that the evidence with respect to both sets of counts will be complex, but for different reasons. Again, the defence submission is that the evidence of the complainants in relation to the Kamloops counts will be complicated by the issue of collusion relating to the Facebook Roastpower posts, while the evidence of the complainants on the Abbotsford counts will involve issues of "bad character evidence" relating to "two overlapping domestic relationships".
- [50] With respect, I do not agree on either point. Although there will clearly be factually contentious issues arising from the evidence, this does not make the case "complex". I agree with the Crown that the evidence in relation to each complainant will be relatively straightforward, viva voce, first-hand testimony. There is no indication that there will be any applications to tender hearsay statements for the truth of their contents. There are no wiretaps, no forensics, and no other forms of expert evidence. The Crown's case on one set of counts is certainly no more complex or technical than the Crown's case in relation to the other set of counts.
- [51] The central legal complexity in this case is likely to be the similar fact evidence application, which will arise whether severance is granted or refused. Indeed, the case is likely to be more complex if severance is granted, because then the similar fact evidence will relate to extrinsic or uncharged conduct from complainants whose evidence would not be the subject of particular counts before the jury. By contrast, if all the counts are tried together, then the question will simply be whether the jury will be permitted to consider the evidence of each count or each complainant when addressing specific issues of proof or credibility in relation to the allegations of the other complainants.

Similar Fact Evidence

- [52] While the potential for a similar fact evidence application is a highly relevant factor in determining whether severance is required in the interests of justice, the trial judge must be careful not to conflate the severance analysis with the merits of an anticipated similar fact evidence application. As explained in *Arp* at para. 52, "the trial judge should be careful not to

confuse admissibility with severance". There are several reasons for this. Principal among these is the fact that the accused bears the burden of establishing on a balance of probabilities that severance is required in the interests of justice, whereas in dealing with the merits of a similar fact evidence application, the Crown bears the burden of overcoming the rule of presumptive inadmissibility. Further, a trial judge dealing with a pre-trial severance application is in no position to make a definitive ruling on the admissibility of similar fact evidence. To quote again from Arp at para. 52: "The assessment of similar fact evidence and the determination of its probative value and admissibility places an onerous burden on the trial judge. It is a task that must be undertaken with great care."

- [53] Thus, on a severance application, all the trial judge can really do is preview or make a preliminary assessment as to the likely success of the similar fact evidence application. Sometimes this will be easy as the case for admissibility is so weak that the judge can say with confidence that it is clearly unlikely to succeed. But in many cases, it will be difficult for the judge to confidently predict the outcome on the future evidentiary ruling. The threshold at the severance stage is whether the test for admission of similar fact evidence "could 'possibly' be met in the future". This is a "considerably lower threshold" than the test for admissibility that the trial judge must apply in later deciding the similar fact evidence application on its merits: *Mastronardi* at para. 34, citing *R. v. Blacklaws*, 2012 BCCA 217 at para. 42, Finch C.J. dissenting, rev'd 2013 SCC 8 (aff'g dissent of Finch C.J.).
- [54] As for the principles governing the admissibility of similar fact evidence across counts in connection with multiple complainants in a sexual assault case, I take considerable guidance from Justice Schultes, who set out the contours of the law on similar fact evidence in *R. v. Sharma*, 2014 BCSC 658 at paras. 52-59. The review of the legal principles was cited and applied by Justice Donegan more recently *Zakuti* at para. 103. Without repeating all of what is said there, I will simply move to a consideration of how the relevant legal principles play out in this case.
- [55] To overcome the rule of presumptive inadmissibility, the Crown must establish that the similar fact evidence is relevant to an issue or issues other than impermissible propensity reasoning, and that its probative value exceeds its prejudicial effect. It is therefore important to identify the particular purpose or purposes for which the evidence is adduced by the Crown. In this case, the Crown says the evidence of the each complainant (including the two Abbotsford complainants) will be relevant to: (i) proving the mens rea of the offence of sexual assault, namely that Mr. Carlson knew each of the complainants was not consenting to the sexual activity that is the subject of the allegations, (ii) establishing a pattern of behaviour on the part of Mr. Carlson in terms of his dismissing communicated lack of consent by the complainants, (iii) rebutting any defence of honest but mistaken belief in communicated consent, and (iv) bolstering the credibility and reliability of each complainant's allegations.

- [56] As Justice Schultes aptly explained in Sharma at para. 52, the probative value of similar fact evidence arises from the "objective improbability that the similar acts to be relied upon are the product of coincidence". In this regard, the improbability of coincidence increases with the degree of distinctiveness and similarity of the evidence. However, the Crown also cites R. v. J.M., 2010 ONCA 117 at para. 91 for the proposition that "it is not an invariable requirement that there be a strong peculiarity or unusual distinctiveness" in the acts alleged. Further, the judge's task is not merely to "add up similarities and dissimilarities and then, like an accountant, derive a net balance": R. v. Shearing, 2002 SCC 58 at para. 60. The weight to be given to the similarities and dissimilarities will depend on their significance in relation to the issues or purposes for which the similar fact evidence is adduced.
- [57] In this case, the Crown says there is a "high degree of similarity" in the evidence of all nine complainants. The Crown submits, among other things, that all of the complainants were younger than the accused, that they all claim to have said "no" or told Mr. Carlson to "stop" or alternatively were asleep, that in each instance Mr. Carlson used a degree of force, and that each complainant alleges that Mr. Carlson had non-consensual intercourse with them. The Crown acknowledges that evidence of collusion can be a bar to the admissibility of similar fact evidence but says that any issues relating to collusion in relation to the Facebook Roastpower posts are not engaged in relation to the Abbotsford complainants, who had no exposure to the impugned Facebook thread pertaining to Mr. Carlson. The Crown says the probative value of the evidence is high, and the prejudicial effect is minimal and can be addressed by proper limiting instructions.
- [58] The defence responds by saying that contextually the allegations are different in that both of the Abbotsford complainants were in established relationships with Mr. Carlson whereas most (five of the seven) of the Kamloops complainants were not. Further, the defence submits that the sexual assaults or non-consensual sexual acts alleged by the complainants are by no means distinctive or unique. The defence also asserts that the two sets of counts will raise "vastly different issues". In relation to the Abbotsford counts, the defence position is more likely to focus on the reliability of the complainant testimony, given the passage of time. By contrast, in relation to the Kamloops counts, the defence is much more likely to focus on issues of credibility, collusion, and witness tainting arising from the Facebook Roastpower thread and the interactions between the complainant and Ms. Graham. Finally, with regard to the Abbotsford complainants, defence counsel submits that there are legitimate grounds to question whether there was inappropriate witness tainting by the lead investigator, Cst. Davidson, who allegedly shared information between the two complainants.
- [59] Dealing first with the issue of collusion or witness tainting, I agree with the Crown that the Facebook Roastpower evidence does not present a live issue with respect to the Abbotsford complainants. With regard to the Abbotsford complainants, the only evidence on the question of witness tainting comes from the transcript of Cst. Davidson's interview of the complainant CW. In that transcript, Cst. Davidson disclosed that the other Abbotsford

complainant, NR, had also "come forward" to make a report against Mr. Carlson, but said nothing more than this. In the ensuing dialogue, CW told Cst. Davidson that she knew NR had a relationship with Mr. Carlson, but "we never got alone [sic]",^[1] because "[Mr. Carlson] was between us". I agree with the Crown that on the record before the Court at this stage there is no apparent air of reality to the allegation of witness tainting or contamination as between the two Abbotsford complainants.

- [60] I turn next to a consideration of the degree of similarity in the evidence of the two groups of complainants. I note the following similarities in their allegations. Both of the Abbotsford complainants and six of the seven Kamloops complainants allege that they expressly said "no" or told Mr. Carlson to stop, and that Mr. Carlson went on to sexually assault them. Both of the Abbotsford complainants and at least four of the seven Kamloops complainants allege that Mr. Carlson had non-consensual sexual intercourse with them, with some degree of physical force to overcome resistance. One of the Abbotsford complainants and four of the Kamloops complainants allege that there were occasions when they awoke to find Mr. Carlson performing non-consensual sexual acts upon them. I conclude that these corresponding details are capable of supporting a finding that the allegations advanced by the complainants are not the product of coincidence. Thus, in my view, based on the record as it stands now, the evidence of the two Abbotsford complainants would have probative force in addressing the four points of relevance identified by the Crown above, which I will not repeat.
- [61] When it comes to prejudicial effect, to begin with I assess that the risk of moral prejudice is not particularly high here, since the allegations of the Abbotsford complainants are not manifestly different or more serious in terms of the degree of moral turpitude involved. There is some risk of reasoning prejudice in terms of distracting the jury by adding into the case additional issues of credibility and reliability, and arguably a different milieu.
- [62] Further, one might suggest that if there are already seven complainants giving evidence against the accused on the Kamloops counts, there would at best be a marginal benefit to the evidence of further allegations by the two Abbotsford complainants. At this point at least, the answer to that concern is twofold.
- [63] First, certain specific allegations advanced by each of the Abbotsford complainants correspond with specific allegations advanced by some of the Kamloops complainants. For example, one of the Abbotsford complainants alleges that she awoke to find Mr. Carlson committing non-consensual sexual acts upon her. This corresponds with the allegations of four of the Kamloops complainants who allege that they also awoke or regained consciousness to find Mr. Carlson sexually assaulting them. This is just one example. The point I am making is that the Crown may credibly argue that there are features of the Abbotsford allegations tending to support or correspond with features of the Kamloops allegations in a manner that makes them particularly probative and more than a matter of marginal benefit.

- [64] Second, dealing with the issue of complainant credibility, if the defence intends to challenge the credibility of the Kamloops complainants on the basis of alleged collusion arising from the Facebook Roastpower posts, the Crown may well want the trier of fact to hear the evidence of two complainants who are completely unconnected to those Facebook posts, as a means of bolstering or reinforcing the credibility of the Kamloops complainants. This, of course, is a permissible purpose for admitting similar fact evidence, as discussed in *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717 at 738-739.
- [65] I conclude that the Crown's similar fact evidence application is arguable and stands a reasonable chance of success. To be clear, it is certainly possible that on a closer analysis, based on the testimony as it is elicited at trial, the application will fail. However, for the purposes of the severance analysis, I conclude that the threshold contemplated in *Mastronardi* and *Blacklaws* is met. There is a reasonable possibility that the Crown's similar fact evidence application will be granted. This factor weighs against severance because, as explained in *Last*, where the Crown has a good case for saying the evidence on each count would be relevant and admissible as evidence on all other counts in the indictment, there will generally be less prejudice to the accused associated with a joint trial. Nevertheless, I acknowledge that this factor cannot be allowed to overwhelm the analysis. It is a compelling consideration in favour of a joint trial, but all of the other relevant factors must be considered to determine whether, in totality, the interests of justice require severance.

Possibility of Inconsistent Verdicts

- [66] The risk of inconsistent verdicts arises only where there are multiple accused, and severance could result in inconsistent verdicts between them based on the same or substantially similar evidence, as contemplated in *R. v. Chol*, 2021 BCCA 279. This issue does not arise in the matter now before me.

Trial Within a Reasonable Time

- [67] I did not hear submissions from either party on this issue. I have not been given a detailed summary of the procedural history of the case and the possible implications of a severance order on Mr. Carlson's right to a trial within a reasonable time as guaranteed under s. 11(b) of the Charter. Although the overall burden is on the accused to establish that severance is in the interests of justice, I would expect the Crown, as the moving party, to identify any concerns about unreasonable delay arising from an order of severance. Given the absence of information, I would not consider this as a factor weighing against severance, and I will therefore treat it as a neutral consideration.

Conclusion

- [68] Balancing all of the relevant factors, I conclude that the interests of justice do not require an order of severance as to counts. I accept that, but for the similar fact evidence application, the factual and legal nexus between the two sets of counts is not strong. However, the two

Abbotsford counts will not add substantially to the factual or legal complexity of the case. Further, there is no superadded degree of moral turpitude and nothing distinctively inflammatory about the evidence in relation to the Abbotsford counts. The Crown's similar fact evidence application stands a reasonable likelihood of success, which favours the conclusion that it is in the interests of justice for all of the counts to be tried at once. By contrast, if severance were granted, the Crown would still have the right to call similar fact evidence from all nine complainants in two separate trials. This would mean that all of the complainants would have to testify at least twice. Further, if severance was granted and the Crown ultimately succeeded in its similar fact evidence application in the trial on the Kamloops counts, the jury would have to hear the evidence of the Abbotsford complainants as extrinsic similar fact evidence, without the Abbotsford counts being before them, which would add further complexity and potential prejudice to the proceedings. These particular concerns will not arise in a single trial on all of the counts.

[69] I accept that there is some prejudice to Mr. Carlson in requiring a joint trial on both the Abbotsford and the Kamloops counts. For one thing, I accept that Mr. Carlson has an objectively rational basis for his stated intention to testify on the Abbotsford counts but not on the Kamloops counts. A joint trial will mean that he must make that decision on an all-or-nothing basis. But the accused's right to a fair trial does not guarantee him the right to the most favourable possible procedure: *R. v. Mills*, [1999] 3 S.C.R. 668 at para 72. The interests of justice as contemplated in s. 591(3) of the Criminal Code require a balancing of all the relevant interests. There is also some risk of prejudice arising from the jury hearing from all nine complainants in circumstances where the Crown may not succeed in its similar fact evidence application. However, given my conclusion that a joint trial is in the interests of justice, the risk of prejudice in the event that the similar fact evidence application does not succeed is accounted for by the availability of careful limiting instructions to the jury.

"Riley J."

[1] The transcript is not entirely unclear. It states "we never got alone [sic]". I acknowledge that the complaint might actually have said "we never got along". Either way, it does not materially alter my analysis.

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Prepared on 25 October 2026 · Esheria