

CANADA / JUDGMENT

R. v. G.T.P.

2020 BCSC 1191

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Supreme Court of British Columbia

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2020 BCSC 1191 R. v. G.T.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. G.T.P.,

2020 BCSC 1191

Date: 20200810

Docket: 68571

Registry: Chilliwack

Regina

v.

G.T.P.

Restriction on publication: A publication ban has been ordered under s. 486.4(2) of the Criminal Code prohibiting publication, broadcast or transmission in any way of information that could identify the complainant or a witness. This publication ban applies indefinitely.

Subsequent to delivery of these reasons orally, the Court ordered that the reasons may be published subject to s. 278.95(1)(d)(ii) of the Criminal Code.

Note: These reasons have been redacted for publication purposes on November 4, 2020.

Before: The Honourable Mr. Justice Verhoeven

Oral Reasons for Judgment re s. 276 Application

Crown Counsel:

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Counsel for the Accused:

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Counsel for the Complainant:

G. Allison

Place and Dates of Hearing:

New Westminster, B.C.

July 23, 24, 2020

Place and Date of Judgment:

New Westminster, B.C.

August 10, 2020

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I. Introduction

- [1] The accused, G.T.P., applies for orders pursuant to ss. 276, 278.93 and 278.94 of the Criminal Code, R.S.C., 1985, c. C-46 [Code], granting leave to adduce evidence that the complainant S.D. has engaged in sexual activity other than sexual activity that forms the subject matter of the charge. Specifically, the accused seeks leave to cross-examine the complainant and to adduce evidence concerning two incidents of kissing, cuddling, hugging, or embracing engaged in by the accused and the complainant, that he alleges occurred shortly before sexual intercourse between them.

- [2] The accused is charged with sexual assault of S.D. that occurred in the early morning hours of July 31, 2018 at S.D.'s residence in [content redacted]. A jury trial is scheduled to commence September 28, 2020. I have been assigned as case management judge pursuant to s. 551.1 of the Code.

II. Background

- [3] The Crown alleges that the accused and S.D. were in a casual dating relationship that began in late June 2018. The accused and the complainant had connected through an online dating website some weeks prior to that.
- [4] The Crown alleges that the accused and the complainant were together at her home on the evening of Monday, July 30, 2018. The Crown alleges that sometime after midnight (therefore on July 31) the accused entered the complainant's bedroom and had sexual intercourse with her after she fell asleep, against her will.
- [5] The Crown's case will consist primarily of the evidence the complainant. In addition, the Crown will call evidence from the complainant's sister, A.D., and her sister's husband, J.S., both of whom saw and spoke with the complainant shortly after the events in question.
- [6] The accused is expected to contend that the sexual intercourse was consensual. It is expected that the only issue at trial will be that of consent; specifically, whether the Crown can prove beyond a reasonable doubt that the complainant did not consent to the sexual intercourse that occurred.
- [7] At the hearing of the application, the accused did not foreclose the possibility of raising an alternative defence based upon honest but mistaken belief in communicated consent ("HBMB"). However, his affidavit in support of his application provides no basis for any such defence. He provides no evidence as to his version of what occurred after he entered the complainant's bedroom. His application states that the primary issue is that of consent. On the hearing of the application, counsel for the accused quite properly conceded that the application materials are insufficient to support the ruling sought, if the application were based upon a potential HBMB defence.

A. The Evidence of the Complainant

- [8] On the application the expected evidence of S.D. at trial is provided by two sources: (1) a transcript of her interview with [content redacted] police that took place on the afternoon of July 31, 2018, and, (2) a transcript of the proceedings at the preliminary inquiry ("P.I.") held in the Provincial Court April 3, 2019.
- [9] From these sources, it is possible to provide an outline of the complainant's version of the events.

- [10] At the material time, the complainant was residing in the basement suite of a residence owned by her sister, A.D., and her sister's husband, J.S., who resided upstairs, and were her landlords. The complainant resided with her two young children, then aged four and one.
- [11] The complainant and the accused connected through the dating website in late April or early May 2018. The first actual date was in late June when they went to the movies together. Over the ensuing weeks the accused was at her home approximately five times, and in addition they had gone out on dates approximately three or four times. He had stayed overnight on two occasions.
- [12] On Monday July 30, the complainant went to the beach with her children, and her friend and her friend's children. During the day she exchanged text messages with the accused. She agreed to pick him up at his work at around 7 p.m. She drove him to his home where he said he wanted to get something. They ran some errands together, and picked up food for her children at McDonald's, returning to her home at about 8:00 or 8:30 p.m. The children were fed, and went to bed. The complainant and the accused ate a meal together thereafter, in the kitchen.
- [13] After the meal, they went outside to the backyard. They each drank a cooler (an alcoholic mixed drink). They shared a marijuana joint at around 9:30 p.m. They were lying on the trampoline together, looking at the stars and talking, for a long time. The complainant began falling asleep, but was suddenly jolted awake when a large insect landed on her chest. She said it was time to go inside. She stayed outside to have a cigarette. The accused went inside to use the bathroom. When she came inside the residence, he was still in the bathroom. Although she needed to use the bathroom, she decided to go straight to bed, instead.
- [14] She remembers seeing him come into the bedroom. She fell asleep. The next thing she recalls was feeling him on top of her, and waking up to him having sex with her. She pretended to continue sleeping. She did not want him to know that she was awake. She waited for him to finish. After doing so he tried to kiss her while she continued to feign sleep, then he rolled over and went to sleep. She remained in bed for 10 or 15 minutes until she believed him to be sleeping.
- [15] She took her phone to the bathroom and sent text messages to a friend in Australia about what happened. Then she went outside the residence. She tried to text and call her brother-in-law, upstairs. There was no response. She called her sister, who answered the phone. She asked her brother-in-law, J.S., to wake up the accused and tell him to leave. He did so, and the accused left the residence. After discussions with J.S. she decided to contact the police and make a report. After speaking to the police she went to the hospital for examination and gave a statement to the police. Her subsequent police interview made later in the day says that the first police statement was made at about 4 a.m.

B. Defence Application

[16] The notice of application of the accused states that the specific evidence to be adduced is as follows:

1. On or around [July 30], 2018, the parties engaged in intimate kissing while outside on the trampoline located at the complainant's residence between the hours of approximately 9 p.m. to midnight; and
2. The parties engaged in intimate kissing outside the complainant's bathroom immediately prior to entering the complainant's bedroom, where the alleged assault is said to have occurred.

[17] In support of the application, the accused deposes as follows:

3. On the evening of July 31, 2018, the Complainant [S.D.] and I engaged in intimate kissing, cuddling and hugging while laying on the trampoline outside of her residence between the hours of approximately 9 p.m. and midnight. In particular, the Complainant and I kissed shortly after getting on the trampoline. The Complainant was actively engaged in this kiss. On the second occasion, the Complainant and I kissed again on the trampoline shortly before we went inside. I was laying on my back and the Complainant leaned over me and rested on top of me and kissed me. The Complainant was actively engaged in this kiss.
4. On the evening of July 31, 2018, the [Complainant] and I embraced outside of the washroom in her residence. The embrace was mutual. We engaged in a mutual kiss. Thereafter, I joined the Complainant in the bedroom.

[18] The references to July 31 may be in error, based on the evidence of the complainant that the date was July 30, prior to midnight. It is clear that S.D. reported the matters to the police on July 31.

[19] The accused's affidavit says nothing about what occurred in the bedroom, except to say that he denies the allegations, and he anticipates "that the complainant and I will provide a different version of what occurred on July 31, 2018 and which forms the subject matter of the charge".

[20] The application states that the proposed evidence is not adduced to support an inference that because of the sexual nature of the activity, the complainant is more likely to have consented to the sexual activity that forms the subject matter of the charge, or is less worthy of belief. The application states that the evidence is being adduced to support the inference that because the complainant has provided inconsistent statements, she is less worthy of belief.

[21] The accused argues that the credibility of the parties will be a critical issue to be decided by the trier of fact, and that the ability to test the credibility of the complainant is central to his ability to make a full answer and defence.

- [22] The accused contends that the complainant gave inconsistent statements regarding interactions between the parties outside the residence on the trampoline between 9 and 12 p.m.
- [23] The accused argues that the embrace and kiss that he says occurred outside the complainant's bathroom falls outside the ambit of s. 276, because it forms the subject matter of the charge. In the alternative, the accused argues that this evidence is relevant to the proceedings because the complainant's evidence is expected to be inconsistent to that of the accused.
- [24] In that respect, the evidence of the complainant in both her police statement and in her testimony on the P.I. was that she avoided interacting with the accused outside the bathroom. As noted, she stated that when she came into the house, he was still in the bathroom, so she went straight to bed, even though she needed to urinate. Therefore the complainant can be expected to deny any interaction outside the bathroom.
- [25] The application sets out the following evidence relied upon for the application:
1. The statement provided by the Complainant on July 31, 2018 to Cst. T. Earle ("TE") of the [Content Redacted] Police Department, stating the following:

SD:... we went inside uh he went in before me 'cause I stayed outside to have a cigarette and when I came in, he was in the bathroom so I went straight to my room and curled up under the blankets and went to sleep.

(Interview #2 SD, page 3:8-10)

TE: Uh walk me through going into the house and to the bed.

SD:... so he went in before me, probably by a few minutes. I was finished my smoke, uh came inside. I needed to pee. I remember that but he was in the bathroom and I didn't want anything to happen so I was like if he comes out of the bathroom and sees me standing here, he's gonna try and make out with me and I just don't wanna deal with that right now 'cause I'm too tired.

(Interview #2 SD, page 5:1-5)

TE: So Monday night, you guys were on the trampoline together. What were you talking about at that point?

TE: Was there any kissing or cuddling at that point?

SD: Uh, again, I think he tried to kiss me, no, I know he tried to kiss me a couple of times on the trampoline but I, good thing about a trampoline is you can just roll away so uhm I know like at one point before I fell asleep, I did get really cold so I like rolled over and cuddled into him with my back to him uhm but before that, I remember like we were laying in link a V so that my toes were under his legs 'cause my toes were cold but I was probably like this distance away, listening to my music.

(Interview #2 SD, page 11:1-2, 16-23)

2. A preliminary inquiry was convened on April 3, 2019 wherein the Complainant gave the following evidence:

Q: And can you describe for me what your interactions were on the trampoline?

A: We were talking. He kissed me a few times. I rolled away most of the time. A lot of the time, we were sitting like in a V-position, apart.

(preliminary inquiry transcript, pg 31:14-21)

Q: And so after entering the house, can you just walk me through again what happened from there?

A: He was still in the washroom, so I decided to go lay down in my bed and that's when I started to fall asleep.

(preliminary inquiry transcript, pg 32:22-26)

[Emphasis in original.]

[26] The parties agree that the proposed evidence of "intimate kissing, cuddling and hugging" is "sexual activity" within the meaning of s. 276, in the circumstances of this case. I note that in *R. v. R.M.R.*, 2018 BCSC 2042, at para. 16, kissing (described in that case by the Crown as "passionate kissing") that took place approximately two weeks before the matter forming the subject matter of the charge was considered to fall within s. 276.

[27] The Crown takes no position on the application. The Crown concedes that the evidence is relevant to an issue at trial.

[28] The complainant concedes (and the Crown does not disagree) that the proposed evidence qualifies as "specific instances of sexual activity" within the meaning of s. 276(2)(c).

[29] Through legal counsel, the complainant opposes the application.

III. Legal Principles

[30] Section 276 of the Code is as follows:

276 (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

- (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
- (b) is less worthy of belief.

- (2) In proceedings in respect of an offence referred to in subsection (1), evidence shall not be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 278.93 and 278.94, that the evidence
- (a) is not being adduced for the purpose of supporting an inference described in subsection (1);
 - (b) is relevant to an issue at trial; and
 - (c) is of specific instances of sexual activity; and
 - (d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
- (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account
- (a) the interests of justice, including the right of the accused to make a full answer and defence;
 - (b) society's interest in encouraging the reporting of sexual assault offences;
 - (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
 - (d) the need to remove from the fact-finding process any discriminatory belief or bias;
 - (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
 - (f) the potential prejudice to the complainant's personal dignity and right of privacy;
 - (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
 - (h) any other factor that the judge, provincial court judge or justice considers relevant.
- (4) For the purpose of this section, sexual activity includes any communication made for a sexual purpose or whose content is of a sexual nature.
- [31] Procedures for the application and other stipulations are set out in ss. 278.93 through 278.97 of the Code.

[32] Section 278.93 is as follows:

278.93 (1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 278.94 to determine whether evidence is admissible under subsection 276(2) or 278.92(2).

- (2) An application referred to in subsection (1) must be made in writing, setting out detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial, and a copy of the application must be given to the prosecutor and to the clerk of the court.
- (3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.
- (4) If the judge, provincial court judge or justice is satisfied that the application was made in accordance with subsection (2), that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice and that the evidence sought to be adduced is capable of being admissible under subsection 276(2), the judge, provincial court judge or justice shall grant the application and hold a hearing under section 278.94 to determine whether the evidence is admissible under subsection 276(2) or 278.92(2).
- [33] Section 278.93 sets out a two-stage proceeding. At the first stage, in addition to the procedural requirements, the judge must be satisfied that the evidence sought to be adduced is capable of being admissible under s. 276(2). If so, the judge must grant the application and hold a hearing under s. 278.94 to determine whether the evidence is admissible. If the application reaches the second stage, the complainant may participate in the hearing and has the right to be represented by counsel.
- [34] In this case, the first stage and second stage applications were heard at the same time, with the prior agreement of the applicant and the Crown.
- [35] The complainant contends that the evidence is not capable of being admitted under s. 276(2), therefore the application should fail at the first stage. Alternatively, the complainant submits that the evidence should not be admitted, in view of s. 276 and the applicable legal principles. In particular the complainant argues that the evidence is not relevant to an issue at trial (s. 276(2)(b)).
- [36] Section 276 has been the subject of considerable recent attention at the Supreme Court of Canada, in three important decisions:
1. R. v. Barton, 2019 SCC 33 [Barton], released May 24, 2019;
 2. R. v. Goldfinch, 2019 SCC 38 [Goldfinch], released June 28, 2019, and
 3. R. v. R.V., 2019 SCC 41 [R.V.], released July 31, 2019.
- [37] These decisions all reference the Code provisions in effect prior to the amendments to s. 276 enacted by bill C-51 on December 13, 2018. The amendments are not inconsistent with the principles set out in these decisions, as noted by Karakatsanis J. in R.V., at para. 35.

- [38] On this application, all parties referenced the amended provisions. No party took the position that the former provisions should apply.
- [39] The s. 276 regime, including its history and purposes, was discussed in Barton at paras. 59-65. I need not repeat those comments here.
- [40] A concise summary set out in R.V. is as follows:
- [2] Parliament enacted s. 276 of the Criminal Code, R.S.C. 1985, c. C-46, to govern the accused's right to introduce evidence regarding the complainant's prior sexual activity. Such evidence is never admissible to support the twin myths that the complainant is less worthy of belief or more likely to have consented to the sexual activity in question. In order to respect the presumption of innocence, evidence may be adduced for other relevant purposes but must satisfy rigorous criteria to ensure it does not undermine the integrity of the trial or the complainant's dignity and privacy.
- [41] On his application, the accused highlighted paras. 38-44 of R.V., which are as follows:
- [38] Individuals charged with criminal offences are presumed innocent until proven guilty. As a result, an accused has the right to call the evidence necessary to establish a defence and to challenge the prosecution's evidence: *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 663. "Full answer and defence" is a principle of fundamental justice, protected by s. 7 of the Canadian Charter of Rights and Freedoms. In *Seaboyer*, [*R. v. Seaboyer* [1991] 2 S.C.R. 577] McLachlin J. explained, at p. 608:

The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution.

...

In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled.

- [39] Generally, a key element of the right to make full answer and defence is the right to cross-examine the Crown's witnesses without significant and unwarranted restraint: *R. v. Lytle*, 2004 SCC 5, [2004] 1 S.C.R. 193, at paras. 1 and 41; *Osolin*, at pp. 664-65; *Seaboyer*, at p. 608. The right to cross-examine is protected by both ss. 7 and 11 (d) of the Charter. In certain circumstances, cross-examination may be the only way to get at the truth. The fundamental importance of cross-examination is reflected in the general rule that counsel is permitted to ask any question for which they have a good faith basis -- an independent evidentiary foundation is not required: *Lytle*, at paras. 46-48.
- [40] However, the right to cross-examine is not unlimited. As a general rule, cross-examination questions must be relevant and their prejudicial effect must not outweigh their probative value: *Lytle*, at paras. 44-45. In sexual assault cases, s. 276 specifically restricts the defence's ability to ask questions about the complainant's sexual history. By virtue of s. 276(3), full

answer and defence is only one of the factors to be considered by the trial judge; it must be balanced against the danger to the other interests protected by s. 276(3). These additional limits are necessary to protect the complainant's dignity, privacy and equality interests: Osolin, at p. 669; see also R. v. Mills, [1999] 3 S.C.R. 668, at paras. 61-68. They also aim to achieve important societal objectives, including encouraging the reporting of sexual assault offences: s. 276(3)(b).

- [41] Thus, the fact that the accused's ability to make full answer and defence requires that the complainant be cross-examined is not the end of the analysis. The scope of the permissible questioning must also be balanced with the danger to the other interests protected by s. 276(3), including the dignity and privacy interests of the complainant.
- [42] Here, the Crown introduced evidence of the complainant's pregnancy and virginity to corroborate her testimony that the assault occurred. In his s. 276 application, R.V. sought to challenge that inference by questioning the complainant about her sexual activity from June 1st to July 1st, 2013 in order to determine "whether any other individual could have impregnated the complainant" (A.R., vol. II, at pp. 3-4).
- [43] When the accused seeks to inquire into the complainant's sexual history, the three subsections of s. 276 work together to achieve the provision's objectives.
- [44] Section 276(1) sets out an absolute bar against introducing evidence for the purpose of drawing twin-myth inferences. Here, R.V.'s request to challenge the inference that the pregnancy resulted from the alleged assault did not engage the twin myths. As such, the application judge correctly concluded that the cross-examination was not barred by s. 276(1).
- [42] Another in-depth discussion of s. 276, its history and objectives, is found in Goldfinch at paras. 28-38.

IV. Analysis

- [43] I am satisfied that the form and content of the application satisfies the requirements of s. 278.93(2).
- [44] As noted, the accused argues that the activities that he alleges occurred outside the bathroom immediately prior to the alleged assault falls outside the ambit of s. 276 because it forms the subject matter of the charge. I disagree.
- [45] In this case it is clear that the subject matter of the charge is the alleged non-consensual sexual intercourse that occurred in the bedroom, after the complainant fell asleep, not the matters occurring before they entered the bedroom. In fact, the complainant does not even allege that she was kissed outside the bathroom, so obviously that does not form part of her complaint.

- [46] On the evidence of the complainant, which is the only specific evidence about this, the sexual intercourse in the bedroom is discrete from the matters occurring before she went into the bedroom and fell asleep.
- [47] At the P.I., she testified that she got into bed shortly after midnight. She remembered seeing the accused come into the room some time thereafter. Then she fell asleep. She thought she was awoken by him at approximately 12:30 a.m., with the accused on top of her, having sexual intercourse with her.
- [48] The next question to be addressed is whether the proposed evidence is "capable of being admissible under section 276(2)" as required by the first stage of the analysis, under s. 278.93(4). If not, then the application should be dismissed and no hearing under s. 278.94 is required, although in fact the hearing has already taken place. Nevertheless, the first stage issue must be addressed.
- [49] The test on the first stage is obviously lower than on the second stage. The applicant need only present an application that is "capable" of succeeding. The complainant argues that the applicant's contention that the evidence is being led in order to test the complainant's credibility as a witness is insufficient; he has not specified how the evidence is relevant to a matter at trial. She submits that the evidence is only capable of being admitted to support an inference that the prior sexual activity made it more likely that she would have consented to the sexual activity forming the subject-matter of the charge, or that she is less worthy of belief, and thus the application should be dismissed at the first stage.
- [50] I accept that the proposed evidence is capable of being admissible and therefore the application should proceed to the second stage.
- [51] The applicant does not argue that the proposed evidence is itself relevant to what did or did not take place later, in the bedroom. He denies that the evidence is sought to be adduced in order to support twin myth reasoning. He argues that credibility of the complainant and the accused is central to the case, and that is clearly true. The matters the accused wishes to cross-examine and testify about are very closely connected in time and place to the alleged sexual assault. They relate to certain details of the interactions between the parties in the time immediately leading up to the events in question. The threshold is low. Bearing in mind that I cannot predict precisely how the evidence could play out in the trial, in my view, it is fairly arguable that these matters could affect the general credibility of the parties as it relates to the relevant issues.
- [52] With respect to the application itself, on the application as presented, I am not satisfied that the proposed evidence should be admitted. However, as I will explain, I am concerned about whether the evidence of the complainant could itself raise s. 276 type issues, and whether in that event the accused would need to rebut that evidence.
- [53] At this time, I am required to deal with the application as presented.

- [54] As noted, the accused does not attempt to link the evidence to the issue of consent, or to HBMB. The application does not rely upon a potential HBMB defence. On the evidence available to me, there is no air of reality to that defence. The accused has not provided evidence which might conceivably support such a defence. Thus, the only argument is that the proposed evidence relates to the general credibility of the complainant and the accused, insofar as the evidence could relate to the consent issue.
- [55] That Code requires that I determine all four matters set out in s. 276(2), having regard to the factors set out in subsection 3.
- [56] In relation to the issues of avoiding the prohibited inferences, and relevance to an issue at trial, [s. 276(2)(a) and (b), respectively], I adopt the following comments of Blok J. in *R. v. T.A.H.*, 2019 BCSC 1614, regarding Goldfinch:
- [39] The principles relating to these types of applications were thoroughly canvassed in *R. v. Goldfinch*, 2019 SCC 38, a case where the accused sought to adduce evidence that his relationship with the complainant was one of "friends with benefits".
- [40] Justice Karakatsanis, for the majority, began with an articulation of the "twin myths" of sexual assault cases:
- [1] Our system of justice strives to protect the ability of triers of fact to get at the truth. In cases of sexual assault, evidence of a complainant's prior sexual history -- if relied upon to suggest that the complainant was more likely to have consented to the sexual activity in question or is generally less worthy of belief -- undermines this truth-seeking function and threatens the equality, privacy and security rights of complainants.
- [41] If a matter does not involve twin-myth reasoning, then the court may go on to consider the admissibility of the evidence under s. 276(2) of the Criminal Code:
- [5] A s. 276 application requires the accused to positively identify a use of the proposed evidence that does not invoke twin-myth reasoning. In other words, relevance is the key which unlocks the evidentiary bar, allowing a judge to consider the s. 276(3) factors and to decide whether to admit the evidence. Bare assertions that such evidence will be relevant to context, narrative or credibility cannot satisfy s. 276.
- [42] The court described the purpose of s. 276 and the need to balance the privacy interests of the complainant against the accused's right, in proper circumstances, to make full answer and defence:
- [48] Taken as a whole, s. 276 seeks to protect the privacy of complainants, encourage the reporting of sexual offences and exclude evidence which fuels propensity reasoning. In pursuit of these goals, s. 276(2) presumptively bars evidence of the complainant's previous sexual activity.

[49] However, in certain circumstances, the accused's right to make full answer and defence requires that such evidence be admitted. Under s. 276(2), the accused must demonstrate that the evidence:

- (a) is of specific instances of sexual activity;
- (b) is relevant to an issue at trial; and
- (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[43] The court then expanded upon each of those requirements. As to "specific instances of sexual activity", the court said:

[53] The words "specific instances of sexual activity" must be read in light of the scheme and broader purposes of s. 276. The requirement that evidence be "specific" prevents aimless or sweeping inquiries into the complainant's sexual history. The accused must point to identifiable activity, but the degree of specificity required in a particular case will depend on the nature of the evidence, how the accused intends to use it, and its potential to prejudice the proper administration of justice. As Doherty J.A. noted in L.S., specificity is required so that judges may apply the scheme in a way that effectively protects the rights of the complainant and ensures trial fairness. A purposive interpretation thus calls for evidence that is sufficiently specific to support a fully informed analysis, allowing the judge to circumscribe what evidence may be adduced and how it may be used.

[44] As to relevance to an issue at trial, the court said:

[56] It goes without saying that the "relevant issue" cannot be one of the twin myths prohibited by s. 276(1). Neither will generic references to the credibility of the accused or the complainant suffice. Credibility is an issue that pervades most trials, and "[e]vidence of prior sexual activity will rarely be relevant to support a denial that sexual activity took place or to establish consent" (Darrach, at para. 58; see also Handy, at paras. 115-16). Arguments for relevance must be scrutinized to ensure "context" is not simply a disguised myth.

[Endnote omitted.]

[45] Still dealing with relevance to an issue at trial, the majority of the court added the following:

- a) prior sexual activity may be particularly relevant to a defence of honest but mistaken belief in communicated consent (para. 62);
- b) evidence of a sexual relationship may also be relevant when complainants have offered inconsistent statements regarding the very existence of a sexual relationship with the accused (para. 63); and
- c) general arguments that the sexual nature of a relationship is relevant to context, narrative or credibility will not suffice to bring the evidence within the purview of s. 276(2) (para. 65).

- [46] As to the third requirement, balancing probative value against the danger of prejudice to the proper administration of justice, the majority of the court said:
- [69] Balancing the s. 276(3) factors ultimately depends on the nature of the evidence being adduced and the factual matrix of the case. It will depend, in part, on how important the evidence is to the accused's right to make full answer and defence. For example, the relative value of sexual history evidence will be significantly reduced if the accused can advance a particular theory without referring to that history. In contrast, where that evidence directly implicates the accused's ability to raise a reasonable doubt, the evidence is obviously fundamental to full answer and defence (Mills, at paras. 71 and 94).
- [47] The majority concluded with these comments:
- [73] Evidence of sexual relationships must be handled with care in sexual assault trials.
- [74] Where a trial judge is concerned that the jury may improperly speculate about past sexual activity, it may be helpful to give an instruction specifying that the jury will not hear any evidence about whether the relationship included a sexual aspect. The instruction should explain that the details of previous sexual interactions are simply not relevant to the determination of whether the complainant consented to the act in question. No means no, and only yes means yes: even in the context of an established relationship, even part way through a sexual encounter, and even if the act is one the complainant has routinely consented to in the past. Giving such an instruction would both reinforce the principles which guide a proper analysis of consent and mitigate the risk that jurors will rely on their own conceptions of what sexual activity is "typical" in a given relationship.
- [57] As to s. 276(2)(a), despite the assertions of the accused to the contrary on this application, I am not persuaded that the evidence is not being adduced for the purpose of supporting the prohibited inference described in subsection 1, namely, that it is more likely that the complainant consented to the sexual activity that forms the subject matter of the charge.
- [58] "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".
- [59] Consent must exist at the time the sexual activity occurs, and it must be linked to the "sexual activity in question", which encompasses "the specific physical sex act", and "the sexual nature of the activity": Barton, at para. 88.
- [60] Therefore whether the complainant did or did not kiss or hug the accused prior to the sexual intercourse that later took place in the bedroom has no bearing on whether she consented to that sexual activity. The applicant does not argue otherwise.
- [61] As I previously stated, credibility will be the central issue at trial. In the abstract, evidence and questions that go to credibility are relevant to that issue. However, arguments that such evidence goes to credibility must be treated with caution. The point is emphasized in Goldfinch at paras. 5, 51, 56, 65, and 124.

- [62] However, on this application, the nature and description of the proposed evidence suggests that it is in fact being adduced for the purpose of supporting a prohibited inference, and that the asserted relevance to credibility is actually secondary. I refer to the description of the evidence given by the accused, in saying such things as that they engaged in "intimate kissing, cuddling and hugging" and that the complainant "was actively engaged" in a kiss. Further, he states that when he was laying on his back "the complainant leaned over and rested on top of me and kissed me. The complainant was actively engaged in this kiss". He describes the subsequent incident outside the washroom as being a "mutual" embrace and a mutual kiss. Finally, he simply says, "Thereafter, I joined the complainant in the bedroom", which tends to suggest the link that he denies.
- [63] On the face of the application I am not persuaded as to the true purpose of the evidence. The nature of the proposed evidence does not overcome my perception. Therefore I am not satisfied that the proposed evidence is not being adduced to support a prohibited inference.
- [64] I turn to the issue of relevance to an issue at trial: s. 276(2)(b).
- [65] In themselves, the incidents are immaterial. The assertion that they do or could relate to credibility is unpersuasive.
- [66] First, the alleged inconsistency in the complainant's evidence about kissing on the trampoline is weak, at best, in my view.
- [67] In her police statement she said " I think he tried to kiss me, no, I know he tried to kiss me a couple of times on the trampoline but I, good thing about a trampoline is you can just roll away ". She does not deny "cuddling" in some sense. At the P.I. she said, "he kissed me a few times. I rolled away most of the time". The difference between "I know he tried to kiss me a couple of times" and "he kissed me a few times" is insignificant. It is highly unlikely that the jury would place any weight on this questionable difference, which is essentially just a matter of interpretation or characterization of the intent and behaviour of the accused.
- [68] Second, there is no inconsistency in the complainant's testimony about the bathroom. In both instances she says that the accused went inside before she did; she stayed outside to have a cigarette; when she entered the residence he was still in the bathroom, so she went straight to bed.
- [69] In effect the accused simply wishes to put a different gloss on the nature of their interactions prior to the incident in question than that given by the complainant. I am not persuaded that this would have any significant potential effect on the credibility of the complainant, or the parties.

[70] Pursuant to s. 276(2)(d), I must determine that the proposed evidence has: (1) significant probative value, and (2) that is not substantially outweighed by the danger of prejudice to the proper administration of justice. This is the balancing exercise referred to in Goldfinch at paras. 31 and 69-70 (majority decision), and paras. 128-133 (concurring reasons of Moldaver J.) I am required to consider the factors set out in s. 276(3) in the balancing exercise required by s. 276(2): Goldfinch, at para. 69.

[71] In relation to the balancing exercise I am required to undertake, in Goldfinch Moldaver J. emphasized the critical need for the application to set out specifically how the evidence will be relevant to the issues, within the context of the expected evidence at trial:

124 To be clear, however, just as generic references to "context" or "narrative" will not suffice to justify the admission of sexual activity evidence under s. 276(2), bare invocations of "credibility" will not be enough. Credibility is a key issue in almost every sexual assault trial -- the centrality of credibility assessments does not, however, allow the accused to bypass the rigours of s. 276. Instead, where credibility is concerned, the accused must identify specific facts or issues that require reference to the sexual activity evidence to be understood and that could have a material impact on a credibility assessment.

131 To enable the trial judge to properly assess whether sexual activity evidence sought to be adduced has significant probative value that substantially outweighs its potential prejudicial effect, the accused must situate the evidence within the particular factual matrix of the case at hand. It is only through awareness of specific facts or issues that require the admission of the evidence that the trial judge can determine whether the danger of prejudice to the proper administration of justice presented by the evidence is outweighed by its probative value. The trial judge tasked with performing this balancing exercise will not be aided by generic references to "context", "narrative", or potential "misapprehensions"; more is needed.

132 This conclusion is underscored by the fact that the trial judge must consider a number of factors under s. 276(3) when making a determination under s. 276(2). These factors are specific in nature and require that the trial judge be in a position to evaluate the precise impact that the exclusion of the evidence would have on the accused's ability to make full answer and defence. The accused must provide the trial judge with the necessary tools to perform this inquiry, including a precise and clearly articulated connection between the sexual activity evidence and specific facts or issues relating to his defence. Unfortunately, that was not done here.

133 For these reasons, although Mr. Goldfinch's application satisfied the "specific instances of sexual activity" requirement under s. 276(2)(a), it satisfied neither the relevance requirement under s. 276(2)(b) nor the balancing exercise required by s. 276(2)(c). As such, it was a legal error for the trial judge to admit the sexual activity evidence under s. 276(2).

[72] As I have just explained, I am not satisfied the evidence has significant probative value. The accused has not identified any specific manner in which the evidence could be used by him in the context of the expected evidence at trial, beyond the assertions as to general credibility. In any event, its minimal potential probative value is substantially outweighed by

the danger of prejudice to the proper administration of justice, in that the focus of the trial and the focus of the jury's attention may be diverted from the real issue in the case. Also, even if the jury is properly instructed, the risk remains that it will engage in prohibited twin myth reasoning.

- [73] Subject to my comments below in relation to potential use as rebuttal evidence, in my view disallowing the proposed evidence does not impair the right of the accused to make full answer and defence. This follows naturally from my conclusions that it has minimal probative value. The accused has full latitude to cross-examine on relevant matters including matters relating to credibility not related to other sexual activity, and to give evidence in his own defence.
- [74] Society's interest in encouraging the reporting of sexual assault offences militates in favour of ensuring that sexual assault trials such as this remain within proper bounds, as reflected in the policy underlying s. 276 itself and the ample case-law in this area. On the basis of my earlier comments, in my view there is no reasonable prospect the evidence will assist in arriving at a just determination in the case. On the other hand, the proposed evidence raises the risk of introducing improper beliefs, biases, and prejudices among the jury. Given the nature of the proposed evidence - that is, kissing and hugging, the potential prejudice to the complainant's personal dignity and right of privacy is minimal in this case, so that is not a weighty consideration. However, once again, the "right of the complainant and of every individual to personal security and to the full protection and benefit of the law" [s. 276(3)(g)] militates in favour of keeping the trial within proper bounds.
- [75] The application is dismissed.

V. Possible Re-Opening of the Application

- [76] As this is a preliminary ruling, prior to commencement of the trial, and prior to the testimony of the complainant, I cannot be sure what her evidence at trial will be. On this application I did not receive clear guidance as to how the Crown proposes to adduce the evidence of the complainant at trial, and in particular, without itself running afoul of the principles underlying s. 276. I was simply given the police statement of the complainant and the preliminary inquiry transcript and left to infer that the evidence of the complainant at trial would be similar.
- [77] As explained by Moldaver J. in *Barton*, a s. 276 ruling is not necessarily final. There may be circumstances in which it would be appropriate for the trial judge to reopen a s. 276 ruling and hold a new hearing to reconsider the admissibility of prior sexual activity evidence. Moldaver J. stated:
- [65] Finally, a ruling on the admissibility of prior sexual activity evidence under s. 276 is not necessarily set in stone. There may be circumstances in which it would be appropriate for the trial judge to reopen a s. 276 ruling and hold a new hearing to reconsider the admissibility of prior sexual activity evidence. By way of illustration, where a complainant

makes a statement to the police that prior sexual activity occurred but later contradicts that evidence in her testimony at trial, that contradictory testimony would open the door to the defence bringing a renewed s. 276 application seeking to have the prior sexual activity evidence admitted for credibility purposes (see *R. v. Crosby*, [1995] 2 S.C.R. 912; *R. v. Harris* (1997), 118 C.C.C. (3d) 498 (Ont. C.A.)), despite an initial ruling of inadmissibility. This is but one example. There may be other circumstances in which it would be appropriate for the trial judge to reopen a s. 276 ruling and hold a new hearing to reconsider the admissibility of prior sexual activity evidence.

- [78] The Crown concedes that Crown led evidence of other sexual activity of the complainant is also governed by the principles set out in s. 276(1) and *Seaboyer: Goldfinch*, paras. 75, and 142, citing *Barton*, at paras. 68, 80 and 197. Therefore, Crown led evidence of kissing, or cuddling on the trampoline, or of other sexual activities with the accused or otherwise must also be the subject of pre-trial voir dire rulings by the court.
- [79] Certain aspects of the complainant's evidence could raise s. 276 type issues, and could lead to the need to revisit this ruling, or for other rulings.
- [80] In her police statement the complainant stated that on their first date she was uncomfortable because the accused was too physical. In her statement and in cross-examination on the P.I. she stated that after that she sent him a written list of her "boundaries". He seemed to accept this, until about a week and a half prior to the incident in question, when she somewhat reluctantly had sexual intercourse with him in her bedroom. Afterwards, she sent him a text message saying that she did not want that to happen ever again. Thereafter, he slept at her home a few days prior to the incident in question, without incident. She also stated that due to her concerns about unwanted sexual advances from the accused, she generally tried to keep him outside her suite after her children went to bed. This was the background for the evening in question.
- [81] The gist of the complainant's police statement and P.I. testimony was that she positively did not want to have sexual relations with the accused that evening. The evidence relied upon by the accused on this application about the complainant trying to avoid kissing the accused on the trampoline and avoiding physical interaction outside the bathroom is in this context. This or similar evidence could lead the jury to infer that because of the state of mind of the complainant, she was not likely to have consented to the sexual activity that forms the subject matter of the charge.
- [82] If evidence along these lines is heard by the jury at trial, this ruling may need to be revisited.
- [83] In addition, in her police statement, and her P.I. cross-examination, the complainant referred to a history of sexual abuse and assault when explaining why she pretended to be asleep during the assault. She said that she had learned that "fighting just gets you hurt worse".

- [84] In addition to these potential problems and concerns, the jury will probably need some instruction and/or carefully confined evidence to explain why the accused was at the home of the complainant in the first place, and what her expectation was as to sleeping arrangements, if they are not to be left to inappropriate speculation.
- [85] Therefore, I urge counsel to carefully consider and if possible agree on the manner in which the evidence of the parties is to be adduced at trial, and any necessary instructions in that regard, in order to avoid difficulties at trial, while ensuring a fair trial. See Goldfinch at paras. 14, 74, 75. There, the court refers to an agreed statement of facts as a method of achieving this.
- [86] I remain available pre-trial to deal with anticipated issues if necessary.

VI. Conclusion

- [87] As noted, the application is dismissed.

VII. Publication Restrictions and Orders

- [88] These proceedings were held in camera, in accordance with ss. 276.1(3) and 276.2(1) of the Code.
- [89] Pursuant to s. 486.4 of the Code, I order that no information that could identify a victim or a witness may be published in any document or broadcast or transmitted in any way.
- [90] [content redacted].
- "Verhoeven J."

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