

CANADA / JUDGMENT

R. v. Sakawsky

2023 BCSC 2012

COURT

Supreme Court of British Columbia

DECIDED

5 October 2023

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

2023 BCSC 2012 R. v. Sakawsky

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sakawsky

2023 BCSC 2012

Date: 20231005

Docket: 32921

Registry: Vancouver

Rex

v.

Eric Drumond Sakawsky

Restriction on Publication: a publication ban has been mandatorily imposed under s. 486.4(1) of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness, referred to this judgment by initials.

This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Madam Justice Morellato

Oral Reasons for Judgment on Voir Dire #1

Re Section 276 Application

Counsel for the Crown:

D. Pruim

Counsel for the Accused:

B. Martland, K.C.

A. Glouberman

Counsel for the Complainant:

E. Bolger

Place and Date of Hearing:

Vancouver, B.C.

July 21, 2023

Place and Date of Judgment:

Vancouver, B.C.

October 5, 2023

I. Introduction

- [1] The accused, Eric Drumond Sakawsky, is charged with sexually assaulting the complainant, M.S., on October 2, 2020. Counsel for the accused bring this application under s. 276 of the Criminal Code, R.S.C. 1985, c. C-46, for an order regarding the admissibility of a portion of a statement made to the police by the complainant's best friend regarding a telephone conversation with the complainant. The evidence in question describes, in part, what the complainant apparently said to her best friend, over the phone, the morning after the alleged sexual assault. Counsel for the accused have also proposed related questions they wish to ask to both the complainant and her best friend.
- [2] Counsel for the accused submit this application has been brought "out of an abundance of caution" since the accused takes the primary position that the evidence is not actually captured by s. 276 of the Criminal Code. They submit that the evidence in question involves the complainant speaking specifically about the sexual conduct that is the subject of this proceeding; therefore, s. 276 is not applicable.
- [3] In the alternative, counsel for the accused submit that if the Court were to find the evidence at issue does imply "other sexual activity" on the part of the complainant, they seek express approval for the defence to adduce this evidence. They submit that the evidence is not being tendered for any impermissible use and, further, that its introduction is necessary for both the trier of fact to properly understand the facts and for the accused to have a fair trial. Counsel submit that "an open question exists as to the complainant's actual subjective consent (the actus reus) as well as the perception of the communicated consent (the mens rea)".

- [4] Counsel for the Crown submit that the evidence sought to be introduced is not about the sexual activity in question in this proceeding, and further, it does not form part of, or refer exclusively to, the actus reus of the alleged offence. Rather, argues the Crown, the evidence in question refers to "other sexual activity" that is "outside the subject matter of the charge" and predates the actus reus of the offence. The Crown further submits that the evidence sought to be adduced by the defence is "replete with prohibited myth" and, while it may constitute circumstantial evidence on the issue of consent (the actus reus), it impinges significantly on the complainant's privacy, dignity and security, does not constitute a specific instance of sexual activity, refers to general reputation, and has minimal probative value that is substantially outweighed by the danger to the proper administration of justice.
- [5] The issues before me may be summarized as follows:
- (1) Does the proposed evidence refer to prior sexual activity thereby invoking the application of s. 276 of the Criminal Code?
 - (2) Is the proposed evidence admissible under s. 276 of the Criminal Code? Subsumed within this question is:
 - (a) the threshold analysis under s. 278.93 regarding the issue of consent;
 - (b) the threshold analysis under s. 278.93 regarding the defence of honest but mistaken belief in communicated consent; and
 - (c) the second stage of the s. 276 analysis regarding the admissibility of the proposed evidence.
- [6] In addition, counsel for the accused also set out proposed cross-examination questions for the Court to consider and address.
- [7] Before addressing each of these issues, I will briefly review the applicable Criminal Code provisions, as well as the background facts and the legal authorities that guide the Court's analysis in this application.

II. Section 276 Procedure

- [8] Section 276 of the Criminal Code governs the admission of evidence related to a complainant's prior sexual history; it makes such evidence presumptively inadmissible. Section 276(1) provides that:

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.

- [9] While presumptively inadmissible, such evidence may be admitted but only if the following criteria are satisfied, as set out in s. 276(2):
- (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.
- [10] In assessing the admissibility of such evidence, the Court must also consider the following factors, as set out in s. 276 (3) of the Criminal Code:
- (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.
- [11] The Criminal Code addresses the meaning of "sexual activity" in s. 276 applications at s. 276 (4):
- (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.

[12] Further, the Criminal Code expressly prohibits the admissibility of reputation evidence at s. 277 for the purpose of assessing the credibility of a complainant.

[13] The procedure governing applications such as this one is set out in s. 278.93 and s. 278.94 of the Criminal Code, and involves a two-stage process.

[14] Section 278.93 is the first stage of an application to admit evidence of the sexual conduct of the complainant that is unrelated to the sexual activity that forms the subject matter of the charge. This provision involves essentially a preliminary screening process and states:

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).

[15] Simply stated, this section requires a timely written application that sets out both the particulars of the evidence sought to be adduced by the accused and the possible relevance of that evidence. The Court then determines whether the formal requirements set out in the provision have been met and whether the evidence is capable of being admissible.

[16] Notably, at this first stage, the Court need not determine that the evidence is admissible, only that it may be admissible. Doubt as to the admissibility of the evidence is left for determination at the second stage of analysis: *R. v. Kapustinsky*, 2020 ABQB 611 at para. 25; *R. v. S.L.*, 2018 ABQB 889 at para. 9; *R. v. A.M.*, 2020 ONSC 4541; *R. v. Comin*, 2022 BCSC 530 at para. 61. The focus of this threshold step is on insuring the proper materials are filed and presented in a timely way, and that they address the possible relevance of the evidence in question as well as the basis for its admissibility.

[17] If the requirements of s. 278.93 are met, then the second stage of the s. 276 application is engaged where the accused is entitled to an evidentiary hearing, guided by s. 278.94, that is focused on determining whether the evidence in question is to be admitted at trial. Section 278.94 states:

278.94 (1) The jury and the public shall be excluded from a hearing to determine whether evidence is admissible under subsection 276(2) or 278.92(2).

- (2) The complainant is not a compellable witness at the hearing but may appear and make submissions.
- (3) The judge shall, as soon as feasible, inform the complainant who participates in the hearing of their right to be represented by counsel.
- (4) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part of it, is admissible under subsection 276(2) or 278.92(2) and shall provide reasons for that determination, and
 - (a) if not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;
 - (b) the reasons must state the factors referred to in subsection 276(3) or 278.92(3) that affected the determination; and
 - (c) if all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.
- (5) The reasons provided under subsection (4) shall be entered in the record of the proceedings or, if the proceedings are not recorded, shall be provided in writing.

[18] In the instant case, at counsel's request and with their agreement, counsel spoke to both the threshold hearing and the subsequent admissibility hearing or second stage at one sitting. This was done for practical reasons; that is, to ensure that that the complainant, who has counsel, could hear the entirety of the defence submissions, thereby avoiding the necessity of bifurcating the process and requiring the Crown and counsel for the accused to re-argue and repeat the same submissions.

[19] Both the initial threshold hearing and the admissibility hearing took place in camera. While the complainant and her complainant's counsel had participatory rights at the second stage of the s. 276 admissibility hearing, they did not participate at the first step, threshold hearing, consistent with the procedural requirements in such applications.

III. Background Facts

[20] For purposes of this application, the background facts may be summarized as follows.

- [21] After attending a bowling alley and then a restaurant with a group of friends, the complainant invited her friends, C.L., E.S., G.C., G.D. and G.D.'s friend, the accused, to her apartment in Vancouver. At the restaurant and the apartment, all six adults consumed various alcoholic drinks. In addition to drinking heavily, some of the group also consumed drugs such as cocaine and "magic" mushrooms pills during the evening in question.
- [22] In the early morning hours, the complainant became tired and went to her bedroom to sleep. She shut the door. The complainant recalls waking-up to find the accused on top of her with his penis exposed. He ejaculated onto her stomach, obtained a paper towel, wiped his semen off of her stomach and threw the paper towel on the floor. The complainant fell back to sleep. The accused later left the apartment.
- [23] The following morning, the complainant spoke to everyone who had been present at her home the night before, other than the accused. She also spoke to her close friend, C.L., about the sexual encounter with the accused. In a statement to the police, C.L., said that during her conversation with the complainant that morning, the complainant told her that "it was super weird, like she doesn't feel like it was consensual or anything, and she just feels like super uncomfortable this morning." C.L. also stated to the police that the complainant felt "super disappointed"; that the complainant was "so upset" and that she "didn't want anything like this to happen"; that the complainant wanted to wait until "she actually got to know the guy first." I will set out the precise portion of C.L.'s police statement that the accused wishes to have admitted into evidence later in these Reasons.
- [24] The day after the sexual encounter with the accused, the complainant reported the matter to the police, and attended Vancouver General Hospital. She participated in a sexual assault examination. A forensic swab from her vagina contained a mixed DNA profile originating from the complainant and an unknown male. The police obtained a DNA warrant for the accused and obtained a DNA sample from him. The DNA from the accused was an exact match to the DNA found in the complainant's vagina.
- [25] The trial of this matter was heard before a jury between December 5 and 18, 2022, but it resulted in a mistrial. The jury could not reach a unanimous verdict. Accordingly, this matter is before me as a second trial on the same allegation of sexual assault. The present s. 276 application was not pursued in the course of the first trial.

IV. Legal Framework in Sexual Assault Cases

- [26] Section 276 applications are informed by Supreme Court of Canada cases that clarify the components of sexual assault. Accordingly, I will briefly review key principles in this regard.
- [27] In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, the Supreme Court of Canada succinctly clarified the components of a sexual assault, at para. 23, as follows:

23 A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the actus reus and that he had the necessary mens rea. The actus reus of assault is unwanted sexual touching. The mens rea is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.

- [28] Section 273.1(1) of the Criminal Code defines "consent" as "the voluntary agreement of the complainant to engage in the sexual activity in question," and s. 273.1(2) set out a non-exhaustive list of circumstances where no consent may be obtained. One of these circumstances, set out in subsection 273.1(2)(a.1) confirms that no consent is obtained where "the complainant is unconscious". In the same vein, in *R. v. J.A.*, 2011 SCC 28 at para. 31, the Court reasoned that "Parliament viewed consent as the conscious agreement of the complainant to engage in every sexual act in a particular encounter." Such consent must be "freely given" at the time of each sexual activity in question (*Ewanchuk*, at paras. 26 and 36; *R. v. Barton*, [2019] 2 S.C.R. 579 at para. 88).
- [29] Furthermore, the law does not recognize a broad-based or general form of consent; consent must relate to the specific sexual activity in question. In *Barton*, Justice Moldaver reasons:
- [88] as s. 273.1(1) makes clear, "consent" is not considered in the abstract. Rather, it must be linked to the "sexual activity in question", which encompasses "the specific physical sex act", "the sexual nature of the activity", and "the identity of the partner", though it does not include "conditions or qualities of the physical act, such as birth control measures or the presence of sexually transmitted diseases" (*R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at paras. 55 and 57).
- [30] The law also does not recognize implied consent. The Court in *Ewanchuk* makes it clear at para. 48, that for purposes of the actus reus component of the offence of sexual assault, consent means that the "complainant in her mind wanted the sexual touching to take place" (*Ewanchuk*, at para. 48). At the actus reus stage of analysis, the focus is exclusively on the complainant's state of mind; that is, the accused's perception of that state of mind is irrelevant. In *Barton*, the Court reasons at para. 89 that:
- if the complainant testifies that she did not consent, and the trier of fact accepts this evidence, then there is no consent - plain and simple. At this point the actus reus is complete. The complainant need not express her lack of consent, or revocation of consent, for the actus reus to be established.
- [31] In *R. v. Goldfinch*, [2019] 3 S.C.R. 3, at para. 44, Justice Karakatsanis clarifies that "contemporaneous, affirmative communicated consent must be given for each and every sexual act."

- [32] In regard to the defence of honest but mistaken belief in communicated consent; that is, the mens rea component of the offence, the focus shifts to the mental state of the accused. In Barton, the Court reasons that the question becomes whether the accused "honestly believes the complainant effectively said 'yes' through words and/or actions." More specifically, Justice Moldaver provides the following guidance on the necessity of having an honest belief in communicated consent in order for this defence to succeed:
- [91] This Court has consistently referred to the relevant defence as being premised on an "honest but mistaken belief in consent" [citations omitted] and the Code itself refers to the accused's "belief in consent" (s. 273.2(b) (heading)). However, this Court's jurisprudence is clear that in order to make out the relevant defence, the accused must have an honest but mistaken belief that the complainant actually communicated consent, whether by words or conduct [citations omitted]. As L'Heureux-Dubé J. stated in Park, "[a]s a practical matter, therefore, the principal considerations that are relevant to this defence are (1) the complainant's actual communicative behaviour, and (2) the totality of the admissible and relevant evidence explaining how the accused perceived that behaviour to communicate consent. Everything else is ancillary" (para. 44 (emphasis in original)).
- [92] Therefore, in my view, it is appropriate to refine the judicial lexicon and refer to the defence more accurately as an "honest but mistaken belief in communicated consent". This refinement is intended to focus all justice system participants on the crucial question of communication of consent and avoid inadvertently straying into the forbidden territory of assumed or implied consent.

[Emphasis in original.]

V. The Evidence in Question

- [33] As noted earlier in these Reasons, the proposed evidence which the accused wishes to have admitted into evidence forms part of a statement C.L. provided to the police about what the complainant had apparently stated to her the morning after her sexual contact with the accused. Counsel for the Crown takes issue with the proposed evidence for a number of reasons, including that C.L.'s statement is taken out of context and is therefore misleading.

A. Proposed Evidence

- [34] Specifically, the portion of the statement that the accused wishes to have admitted into evidence is the following statement of C.L. to the police on October 27, 2020:

I do know then we were talking, as well, how it's just like, while she was crying, she was saying that it's like, she just feels super disappointed because she was not wanting, um, like because we'd had conversations before this how it was like, she was wanting to not sleep with like, like a guy right away, like she was wanting to wait until like they established more of a relationship. So, she was, um, trying to like work on that now and not do anything like that. And so, that like also added to like why she was so upset because she was just like, like she didn't want anything like

that to happen, like she was just wanting to wait until she actually got to know a guy first. And so, that was more conversation we had while she was upset on the phone.

[35] Counsel for the accused submit that the contents of this passage, "is what [they] seek to have ruled admissible for use at trial by the defence." I will refer to the above passage as the "Proposed Evidence".

[36] Counsel for the accused further submit that the proposed questions they wish to ask C.L. "are to this effect":

- (1) "The next morning did you speak by phone with M.S. about the sexual contact she had with the accused on the previous night?
- (2) Did she tell you that she felt disappointed in herself, because she wanted to wait until she had established more of a relationship before sleeping with the accused?"

[37] Counsel also submit that the proposed cross-examination questions for the complainant are "in essence", as follows:

- (3) "The next morning did you speak by phone with C.L. about the sexual contact with the accused?
- (4) Did you tell her that you felt disappointed, because you wanted to wait until you had established more of a relationship before sleeping with the accused?
- (5) I am not asking about any other relationships or people; only on what you said the next morning to your friend, by phone. You were expressing regret that you had sex with [the accused] on basically the first night, were you not?"

("Related Questions")

[38] As noted earlier in these Reasons, the accused asserts the Proposed Evidence is not caught by s. 276 and is subject to the ordinary rules of evidence. Counsel for the Crown takes issue with the Proposed Evidence asserting that s. 276 precludes its admission.

B. Proposed Evidence and Related Questions in Context

[39] More specifically, counsel for the Crown underscores that the Proposed Evidence which the accused wishes to have admitted into evidence is an incomplete statement by C.L. that has been taken out of context. He notes that the Proposed Evidence omits an adjacent passage of C.L.'s statement to the police. Counsel also points out that in the Proposed Evidence, C.L. expressly states that during their conversation, the complainant "added to like why she was so upset." Crown counsel submits this "added" statement clarifies that the complainant had previously stated she was upset about the sexual activity not being consensual. Crown counsel also notes that C.L. had also stated to the police that the complainant had started to cry and told her "she doesn't feel like it was consensual or anything."

[40] Crown counsel's concerns are well-taken. In the portion of C.L.'s statement, immediately preceding the Proposed Evidence, C.L. also states as follows about her telephone conversation with the complainant the morning after the alleged sexual assault:

Yeah, like it was like super quiet, and then like, like a sh-, like shaky voice, like, oh, 'cause she did start crying on the phone at one point, too, which I forgot to say that. Because I could almost tell from the start that it sounded like she like wanted to cry the whole time, so it was like sort of like shaky, like trying to hold back. And, um, and then she started to cry when she said, where like she felt like it was super weird, like she doesn't feel like it was consensual or anything, and she just feels like super uncomfortable this morning. Oh, and there is more from that phone call, sorry, it's coming back to me now...

[Emphasis added.]

[41] Crown counsel underscores that the Proposed Evidence that the accused applies to have admitted was made after and not before the above-quoted statement by C.L. Counsel submits that the ability of the Proposed Evidence and Related Questions to bear on the issue of the absence of consent is significantly minimized once it is recognized that the concern addressed in the Proposed Evidence is an additional reason that the complainant was so upset, beyond her lack of consent.

[42] I also agree with counsel for the Crown that the Proposed Evidence and Related Questions could be misleading if they are premised on an incomplete version of the conversation between C.L. and the complainant.

[43] Having considered this contextual framework, including the applicable legal principles, I now address the issues before me.

VI. Analysis

A. Does the Proposed Evidence Refer to Prior Sexual Activity Thereby Invoking the Application of s. 276 of the Criminal Code?

[44] While the Proposed Evidence refers to the complainant's feelings and views regarding the sexual contact with the accused (and therefore relates to the subject matter of the charge), it also references her sexual activity other than the sexual activity that forms the subject matter of the charge. Indeed, the Proposed Evidence imports and addresses her sexual activity with other partners at other times.

[45] Subsection 276 (4), reproduced earlier in these Reasons, expressly provides that for the purposes of that section, "sexual activity includes any communication whose content is of a sexual nature." The Proposed Evidence includes a conversation between the complainant and C.L. that clearly refers to the complainant's sexual history, prior to the alleged sexual assault in this case. In the Proposed Evidence, C.L. states:

we'd had conversations before this how it was like, [the complainant] was wanting to not sleep with like, like a guy right away ".

[46] C.L. also states in the Proposed Evidence:

So, she was, um, trying to work on that now and not doing anything like that, she didn't want anything like that to happen, like she wanted to wait until she actually got to know the guy first.

[47] Clearly, as C.L. is referring to conversations about the complainant's sexual activity that predates the accused's alleged sexual assault, the language of s.276(2) is engaged; this is so simply because the complainant's sexual history constitutes "sexual activity other than the sexual activity that forms the subject matter of the charge."

[48] I agree with counsel for the Crown that the suggestion in the Proposed Evidence that the complainant was trying to "work on establishing more of a relationship" before "sleeping with a guy" incorporates not only communications of a sexual nature that predates the allegation, but also imputes a strong inference regarding the sexual activity of the complainant with other individuals that falls outside the subject matter of the charge. In this context, it is imperative that this Court ensure that the Proposed Evidence is not being adduced to support the inference that by reasons of her prior sexual history, the complainant is:

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

[49] In this light, I have no difficulty concluding that s. 276 is engaged in this application.

B. Is the Proposed Evidence Admissible Under s. 276 of the Criminal Code as it Relates to Issue of Consent (Actus Reus)?

[50] As discussed earlier in these Reasons, subsumed within this question is a two-part analysis. At the threshold stage under s. 278.93, I must assess whether the Proposed Evidence and detailed particulars may be admissible. In this case, counsel for the accused submit the threshold analysis relates to the issue of the actus reus or subjective consent, as well the mens rea and the defence of honest but mistaken belief in communicated consent.

(a) Threshold Analysis Regarding the Issue of Subjective Consent

[51] Counsel for the accused submit that the Proposed Evidence is relevant to issues at trial that do not draw their relevance from the twin myths. As regards the issue of consent, counsel for the accused argue that the Proposed Evidence is admissible as circumstantial evidence. They rely on the following passage in R. v. Garciacruz, 2015 ONCA 27, where the Court of Appeal for Ontario reasons:

[69] In the absence of direct evidence on the issue of consent, a court can draw inferences from a complainant's pre-existing attitudes and assumptions regarding the period during which she has no recollection. In appropriate cases, the court can conclude that the complainant must have been incapable of consenting at the time of the sexual interaction because, had she been capable of consenting, she clearly would have refused to consent. This type of inference would support the trial judge's finding of that the complainant was asleep and incapable of consenting.

[52] Counsel for the accused submit that "courts have entertained evidence from a complainant that she 'would not have' consented as circumstantial evidence of actual consent on numerous occasions." Counsel also cite Justice Presser in *R. v. Le Goff*, 2022 ONSC 609, at para. 175 as follows:

The weight assigned to this circumstantial evidence, and the strength of the inferences that will be drawn from it, often depend on:

- whether there is other evidence supporting the complainant's testimony about what she would not do: see, for example, *Mugabo*, [2019 ONSC 4308], at para 75; *R. v. Carpov*, 2018 ONSC 6650, at para. 90; *R. v. Olotu*, 2016 SKCA 84, at paras. 59-60, *affd* 2017 SCC 11;
- whether there was evidence of the complainant's actions that contradicted her testimony about what she would not do: see, for example, *Garciacruz*, at paras. 77, 80-81; *Meikle* [2011 ONSC 650], at para. 43; and
- whether the complainant had specific and compelling reasons for which she said she would not have consented or whether her evidence that she would not have consented depended on her general attitudes, character, or personal code of conduct: see, for example, *J. R.* [2006 CanLII 22658 (ONSC)], at paras. 31-35.

[53] Counsel for the accused add that circumstantial evidence relevant to consent does not need to be contemporaneous with the act itself. They rely on the reasoning of the Court of Appeal of Alberta in *R. v. McKnight*, 2022 ABCA 251, at para. 261, where the Court reasons as follows:

[261] The Crown in this case disputes such an example as being inconsistent with the law of consent, which requires that consent be obtained for every sexual act in a particular encounter: see *R. v. GF*, 2021 SCC 20 [GF] at para. 29. However, this objection (in addition to being inconsistent with its prior concession) conflates the law of consent with the law of evidence. As Dufraimont notes at 328, "the fact that consent must be contemporaneous does not mean that evidence relevant to the factual question of consent must also be contemporaneous". Moreover, while consent as part of the *actus reus* of sexual assault is determined by the complainant's subjective state of mind (GF at para 25), "[evidence relevant to consent can include circumstantial evidence, including evidence of 'the complainant's words and actions, before and during the incident'" (Dufraimont at 329, citing *Ewanchuk* at para. 29).

[54] Counsel for the accused argue that the surrounding circumstances are relevant to the factual question of consent as the trier of fact is required to consider and weigh a sexual assault complainant's testimonial claim of non-consent: see *R. v. Paulette*, 2020 NWTTC 13 at para. 39. Counsel assert that the Proposed Evidence meets the requisite standard of relevant circumstantial evidence that informs the testimonial claim of non-consent.

[55] More specifically, counsel for the accused argue the Proposed Evidence is:

evidence relevant to determining whether the complainant, in her own mind at the time, did consent to the sexual contact. Her statement to her friend is a statement about having consented to sexual activity with the applicant [Mr. Sakawsky]. This gives the [Proposed Evidence] high relevance and importance to the defence. Its introduction is necessary to ensure a fair trial and to preserve the integrity of the trial process.

[56] While counsel for the Crown takes serious issue with the proposed inference of subjective consent that the accused argues must be drawn from the Proposed Evidence, he acknowledges that the accused's main contention is that the Proposed Evidence is circumstantial evidence that relates to the complainant's subjective consent. The Crown acknowledges that "it could be argued that some comments attributed to [the complainant] in C.L.'s statement are being offered for non-prohibited purposes."

[57] The Crown has taken a principled stance on whether the Proposed Evidence may be admissible. Without deciding that the Proposed Evidence is admissible at this juncture, in light of the authorities I have addressed earlier in these Reasons, I conclude that some of the Proposed Evidence may be admissible; as such, the accused's s. 276 application, as it relates to the complainant's subjective consent, should move to the second stage of the admissibility inquiry.

(b) Threshold Analysis Regarding the Defence of Honest but Mistaken Belief in Communicated Consent

[58] While counsel for the Crown concedes the accused met the requirements of the threshold test as it relates to the issue of the complainant's subjective consent, he takes issue with the accused's application to admit the Proposed Evidence as capable of being admitted to support the defence of honest but mistaken belief in communicated consent. I agree that this aspect of the accused's application is problematic.

[59] Crown counsel underscores that the accused did not provide a personal affidavit at the threshold hearing to support this aspect of his application. He is, of course, entitled to not do so (see *R. v. J.J.*, 2022 SCC 28 at para. 150). Nevertheless, to pass the threshold stage, I must be satisfied that there is some evidence in this application, regarding the defence of honest but mistaken belief in communicated consent, that may be admissible to support this defence.

- [60] The Proposed Evidence relates to the complainant's sexual history with other men, prior to her sexual contact with the accused on October 2, 2020; the Proposed Evidence also addresses her feelings about her sexual contact with the accused, as understood by C.L. the following morning. This may conceivably relate to the issue of her subjective consent, or the actus reus. However, I do not see a reasonable inference or link in the application materials before me, or the accused's submissions, which supports the conclusion that the Proposed Evidence is capable of being admissible under subsection 276(2) to support the defence of an honest but mistaken belief in communicated consent.
- [61] Accordingly, I find that this portion of the application does not meet the threshold test under s. 278.93. Therefore, no admissibility inquiry is necessary under s. 278.94 in regard to the defence of honest but mistaken belief in communicated consent.
- (c) Second Stage of s. 276 application: Is the Proposed Evidence Admissible as it Relates to the Complainant's Subjective Consent (Actus Reus)?
- [62] Having found that the Proposed Evidence meets the threshold test under s. 278.93, I must now engage the admissibility inquiry under s. 278.94. At this stage of the inquiry, the complainant has standing under s. 278.94(2). She was in fact given standing and was represented by legal counsel.
- [63] As discussed earlier in these submissions, the Criminal Code and the related jurisprudence provide considerable guidance in making this admissibility assessment.
- (1) Section 276 (2) of the Criminal Code
- [64] Section 276 (2) requires that I consider the follow specific factors.
- (i) Is the Proposed Evidence being adduced for the purpose of supporting an inference described in subsection 276(1)?
- [65] Counsel for the accused submit that the Proposed Evidence is being adduced solely for the purpose of presenting circumstantial evidence relating to the complainant's subjective consent at the time of the alleged sexual assault but not for the purpose of supporting the twin myths set out in s. 276(1).
- [66] Counsel for the Crown takes issue with this submission, arguing that the Proposed Evidence refers to the complainant "working on" not sleeping with men when she first meets them. In a similar vein, counsel for the complainant contends that the Proposed Evidence "strongly implies" that the complainant was trying to do something different that she had done in the past. Counsel for the complainant and the Crown further submit that this type of evidence draws on prohibited myths rooted in promiscuity and, further, that it implies: 1) that the complainant is more likely to have consented because she is the type of person who engages in sexual activity with someone she barely knows, such as the accused; and 2) her regret or upset results from her having consented to such sexual activity. In addition, counsel further argue that the former is a myth prohibited by s. 276(1) and the latter is another myth with

very little, if any, probative value in this case.

- [67] Notably, counsel for the accused submit that the defence would not cross-examine the Crown's witnesses on the issue of whether the complainant had sexual activity with a different man on a first encounter. They acknowledge this would be a prohibited line of inquiry under s. 276.
- [68] I agree with counsel that no evidence should be adduced (either through cross-examination, the Proposed Evidence, or otherwise) that evokes the twin myths or other myths or stereotypes and that is irrelevant to the question of whether the complainant consented to the specific sexual contact with the accused.
- [69] Furthermore, I am troubled by the suggested inference that because the complainant expressed regret about sleeping with other men in the past, in whatever set of circumstances, that her feeling of regret per se constitutes circumstantial evidence that she consented. In the context of this case, I agree with counsel for the Crown and counsel for the complainant that this is stereotypical thinking, laden with myth.
- [70] The reasoning of the Court in *R. v. J.D.N.*, 2019 SKQB 92, at para. 59, is also instructive:
- [59] J.N. argues that regret, shame, or anger about sexual encounters with other men are relevant to S.N.'s motive to fabricate the allegations. This argument directly implicates the myth that "by reason of the sexual nature of that activity, the complainant ... is less worthy of belief" (s. 276(1)(b)).
- [71] One of the difficulties with the Proposed Evidence is that it embodies statements, attributed to the complainant by C.L., that are rooted in evidence about the complainant's past sexual encounters. Furthermore, the statements attributed to the complainant do not inform the question of whether she was conscious at the time of the alleged sexual assault in this case, or whether she consented to a sexual encounter with the accused at that time and place of their sexual contact. However, evidence of the complainant's past sexual conduct is precisely the sort of evidence that engenders twin myth reasoning.
- [72] As affirmed by Justice Moldaver in *Barton* at para. 60, and the court in *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at p. 630, the twin myths have no place in a rational and just system of law. Further, "great care must be taken not to slip into impermissible propensity reasoning": *Barton* at para. 94 and *Seaboyer* at p. 615. Furthermore, disappointment and remorse on the part of a complainant following a sexual encounter should not be equated or confused with the complainant's subjective consent; this too would be a prejudicial presumption or stereotypical thinking.

(ii) Is the Proposed Evidence Relevant to an Issue at Trial?

- [73] Counsel for the accused assert that challenging the Crown's evidence of the complainant's sexual history directly implicates the accused's ability to raise a reasonable doubt. As I address later in these Reasons, I agree that the ability of the accused to cross-examine

witnesses and to make full answer and defence is a very important and key consideration. Nevertheless, one of the difficulties with this particular submission, regarding the ability of the accused to challenge the Crown's evidence about the complainant's sexual history, is that the materials before me do not indicate or suggest that the Crown intends to adduce such evidence.

- [74] Counsel for the accused further assert that the complainant's credibility may require use of the Proposed Evidence since the creditworthiness of the complainant is a key assessment of the trier of fact in such cases. The credibility of the complainant is clearly a critical assessment in sexual assault cases. However generic references to the credibility of the complainant do not suffice: *Goldfinch*, at para. 56.
- [75] An additional difficulty with the accused's submission is that the Proposed Evidence does not reveal an inconsistency in the complainant's evidence. C.L.'s statement regarding her conversation with the complainant, the morning after the sexual contact with the accused, describes how the complainant was upset and crying and that she reported being "super uncomfortable"; this is not inconsistent with the complainant not consenting. Moreover, C.L.'s statement in the Proposed Evidence, that the complainant did not want to sleep with a guy "right away" and that this "added" to why the complainant was so upset, is also not inconsistent with a lack of consent.
- [76] I also agree with Crown counsel's submission that the probative value of the Proposed Evidence is significantly reduced because "not knowing a guy" was expressly stated to be an additional reason why the complainant was so upset. C.L.'s statement should not be taken out of context or redacted in a way that misleads or recasts the conversation between the two women. However, the selective nature of the Proposed Evidence does precisely that.
- [77] I agree with counsel for the Crown that the probative value of the Proposed Evidence is further compromised because it consists entirely of C.L.'s hearsay recollection of her conversation with the complainant. As such, the Proposed Evidence is clearly an interpretation of what the complainant expressed to C.L. Hearsay evidence, by its nature, risks attributing views and feelings to the complainant, as well as misinterpreting what was said by her. This also may lessen the probative value of questions that could be put to the Crown witnesses about the Proposed Evidence.

(iii) Does the Proposed Evidence refer to specific instances of sexual activity?

- [78] This is another factor that militates against the admissibility of the Proposed Evidence. Patently, the Proposed Evidence as it relates to the complainant's sexual history with "other guys" does not refer to specific instances of sexual activity.
- [79] The reasoning of Justice Karakatsanis in *Goldfinch* at para. 53 is instructive in regard to this factor:

- [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.
- [80] At para. 54 of *Goldfinch*, Justice Karakatsanis adopts the reasoning of the Ontario Court of Appeal decision in *R. v. L.S.*, 2017 ONCA 685 at para. 83 and reasons that:
- [54] specifying the parties to the relationship, the nature of that relationship and the relevant time period satisfies the purposes of trial fairness (para. 83). Those criteria are met in this case.
- [81] In the instant case, those criteria have not been met. There is no evidence of a prior sexual relationship between the accused and the complainant. Furthermore, the references to the complainant's sexual history in the Proposed Evidence were general and non-specific.
- [82] In this light, the specificity factor has clearly not been satisfied.
- [83] Nevertheless, I should note, that the complainant may be cross-examined about the specifics concerning her state of mind immediately before the sexual contact with the accused, and also about her state of mind and views relating to that sexual contact after the fact. I do not mean to suggest that the rape shield provisions bar such an inquiry. However, as I have discussed, reference to the Proposed Evidence, is problematic.
- (iv) Does the Proposed Evidence have significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice?
- [84] Counsel for the accused acknowledge that it is intrusive to inquire into a complainant's sexual history in sexual assault trials. Further, they submit that the threat to a complainant's dignity and privacy becomes greater the more explicit the inquiry becomes. They add that the degree of detail that is being adduced is a consideration in assessing the potential prejudice to the complainant: *R. v. R.V.*, 2019 SCC 41 at para. 68. While I appreciate this point, cross-examining a complainant generally about her sexual history and about her feelings surrounding that history is, nevertheless, highly intrusive and personal. It is difficult to see how such cross-examination questions would not impact a complainant's dignity and privacy.

- [85] I am also of the view that when considered in its proper context, the Proposed Evidence is problematic not only because of its marginal probative value. Its probative value is also outweighed by the danger of prejudice to the proper administration of justice. I have specific concerns in this regard because the Proposed Evidence incorporates prejudicial misconceptions (e.g., statements taken out of context), as well as myths and stereotypes into the fact-seeking process.
- [86] As noted earlier, when assessing the relative probative value of the Proposed Evidence, the Court cannot overlook C.L.'s statement to the police that indicated both that the complainant was upset because the sexual contact with the accused was not consensual and also because the complainant did not know the accused and this "added" to why she was so upset. When C.L.'s statement to the police is considered in its entirety, the Proposed Evidence is considerably less probative.
- [87] In addition, the Proposed Evidence contains references to irrelevant facts and a combination of myth and stereotypical thinking. In Seaboyer, the reasons of Justice L'Heureux-Dube (dissenting in part) refers to passages in L. Holmstrom and A. Burgess, *The Victim of Rape: Institutional Reactions*, at pp. 174-99; these passages set out and explain the most common myths and stereotypes of sexual assault. At para. 141 of her decision, Justice L'Heureux-Dube, provides the following examples:

[141]

7. Woman as Fickle and Full of Spite. Another stereotype is that the feminine character is especially filled with malice. Woman is seen as fickle and as seeking revenge on past lovers.
8. The Female Under Surveillance: Is the Victim Trying to Escape Punishment? ... It is assumed that the female's sexual behavior, depending on her age, is under the surveillance of her parents or her husband, and also more generally of the community. Thus, the defense argues, if a woman says she was raped it must be because she consented to sex that she was not supposed to have. She got caught, and now she wants to get back in the good graces of whomever's surveillance she is under.

[88] Justice L'Heureux -Dube adds at para. 155:

[155] ...Rape myths still present formidable obstacles for complainant in their dealings with the very system charged with discovering the truth. Their experience in this regard is illustrated by the following remarks

it is easy for a man intent upon his own desires to mistake the intentions of a woman or girl who may herself be in two minds about what to do. Even if he makes no mistake it is not unknown for a woman afterwards either to take fright or for some other reason to regret what has happened and seek to justify herself retrospectively by accusing the man of rape.

(Howard, *Criminal Law* (3rd ed. 1977), at p. 149.)

[Emphasis added.]

[89] The Proposed Evidence feeds into such myths or stereotypes. The Supreme Court of Canada has recently observed that such stereotypical, myth-based reasons are not relics of the past. In J.J., the Court noted that myths, beyond the twin myths identified in s.276(1), continue to plague sexual assault trials in Canada. The Court reasons:

[132] An important similarity between s. 276 evidence and private records is that they both seek to protect complainants against harmful myths and stereotypes. Specifically, a key purpose of s. 276 is to prevent the accused from adducing evidence that engages the "twin myths" about sexual offence complainants: that complainants are more likely to have consented or are less worthy of belief by reason of past sexual activity that they engaged in (Darrach, at para. 32). While the enumerated records in s. 278.1 do not necessarily engage the twin myths, which relate specifically to prior sexual activity, this Court has recognized that many other problematic myths and stereotypes may be at play

[Emphasis added.]

[90] My third concern is this: embedded in the Proposed Evidence is the presumption that there is a typical reaction by women to being sexually assaulted. The defence seems to be suggesting that the complainant in this case could not be upset both by the lack of consent and her unfamiliarity with the accused. As such, the Proposed Evidence and to some extent the Proposed Questions subsume stereotypical thinking that is inconsistent with the spirit and intent of s. 276(1). This, in turn, may mislead the trier of fact and distort the truth-seeking function at trial: see R. v. Darrach, 2000 SCC 46, at paras. 33 and 37. In this light, the danger of prejudice engendered by the Proposed Evidence and Proposed Questions goes beyond twin myth concerns and is heightened.

[91] Accordingly, I am satisfied that the marginal probative value of the Proposed Evidence is significantly outweighed by the danger of substantial prejudice to the administration of justice.

(2) Section 276(3) of the Criminal Code

[92] In addition to considering the factors set out in s. 276(2) of the Criminal Code, in determining whether evidence is admissible under subsection s. 276(2), I must also take into account the following factors, as set out in s. 276(3) of the Criminal Code:

(i) The interests of justice, including the right of the accused to make a full answer and defence

[93] The accused is presumed innocent until proven guilty beyond a reasonable doubt. For this key reason, his counsel have the right to call evidence to both challenge the Crown's evidence and to establish the accused's defence. Indeed, full answer and defence is a principle of fundamental justice that is protected by s. 7 of the Canadian Charter of Rights and Freedoms [Charter]: see Seaboyer at p. 608. Furthermore, the right to cross-examine the Crown's witnesses is an essential element of the right to make full answer and defence. In

R.V., at para. 39, Justice Karakatsanis affirms that the right to cross-examine is also protected by ss. 7 and 11 of the Charter. She also observes, at para. 39, the "general rule" that counsel is permitted to ask questions for which they have a good faith basis such that an independent evidentiary foundation is not required: see *R. v. Lyttle*, 2004 SCC 5 at paras. 1 and 41.

[94] Nevertheless, the Supreme Court has also made it clear that the right to cross-examine is not absolute. At paras. 40-41 of R.V., Justice Karakatsanis reasons:

[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: *Lyttle*, 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* [1993] 4 S.C.R. 595], 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.

[Emphasis added.]

[95] As such, the scope of permissible cross-examination is shaped not only by the right to make full answer and defence but also by other interests protected by s. 276(3) which include protecting the dignity and privacy interests of the complainant as well as the integrity of the trial process by ensuring the trial is not infected with myth, stereotypes, and prejudicial assumptions.

[96] Clearly, counsel for the accused must be able to properly marshal their defence. The complainant's state of mind and feelings surrounding the sexual contact with the accused constitutes circumstantial evidence that informs the issue of consent, and is the proper subject of cross-examination. Counsel for the Crown rightly concedes that counsel for the accused could ask the complainant if she told C.L. she was "super disappointed" that sexual contact had occurred the night before with the accused. This question does not refer to "other sexual activity" and is, therefore, not captured by s. 276. For the same reason, C.L. may be cross-examined on what she recalls of the conversation with the complainant the morning after the alleged sexual assault with the accused. Given the right to cross-examine these witnesses, I am also satisfied that the exclusion of the Proposed Evidence will not compromise the accused's ability to make full answer and defence.

[97] Caution is nonetheless necessary in conducting the cross-examination so that the scope of cross-examination does not disrupt the balance Justice Karakatsanis prescribes, as discussed in these Reasons.

(ii) Society's interest in encouraging the reporting of sexual assault offences

[98] The Proposed Evidence contains highly confidential, sensitive and personal information about the complainant's sexual history and relationships. Introducing such evidence at trial certainly would not encourage the reporting of sexual offences.

(iii) Whether there is a reasonable prospect that the Proposed Evidence will assist in arriving at a just determination in the case

[99] I have already found the probative value of the Proposed Evidence is marginal and substantially outweighed by the danger of prejudice to the administration of justice. In addition, I have found that the dangers of myths, prejudicial assumptions and stereotypes are subsumed within the Proposed Evidence. I am also of the view that proper direct and cross-examination of the complainant and C.L., rather than the admission of the Proposed Evidence, is what will assist in a just determination in this case. In this context, I am not of the view that there is a reasonable prospect that the Proposed Evidence will assist in arriving at a just determination.

(iv) The need to remove from the fact-finding process any discriminatory belief or bias

[100] The need to remove discriminatory beliefs or biases from the fact-finding process supports the exclusion of the Proposed Evidence. I have articulated my concerns in this regard earlier in these Reasons and these need not be repeated again. At this juncture, it is sufficient to observe the inherent bias in the presumption that there is a typical way that women react to being sexually assaulted. The Proposed Evidence and to some extent the Proposed Questions prejudicially assume that the complainant could not be upset with both a lack of consent and her unfamiliarity with the accused. Such beliefs are misleading and should in my view be removed from the fact-finding process.

[101] I wish to be clear that counsel are free to cross-examine the complainant and C.L. on the issue of consent, and C.L.'s statement that the complainant expressed disappointment or regret following sexual contact with the accused. The questions, however, ought not be based or rooted in discriminatory beliefs, biases, myths or stereotypes.

(v) The risk that the Proposed Evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury

[102] I am of the view that it is possible that the myths, prejudicial assumptions and stereotypes addressed above may unduly arouse sentiments of prejudice in the jury.

(vi) The potential prejudice to the complainant's personal dignity and right of privacy

[103] I have already concluded that the Proposed Evidence generates potential prejudice to the complainant's personal dignity and right of privacy.

(vii) The right of the complainant and of every individual to personal security and to the full protection and benefit of the law

[104] In the context of this case, I am of the view that this factor is best served by protecting the privacy, dignity and personal security of the complainant and others while also ensuring that the accused has the opportunity for a full answer and defence at a trial that is not infected or tainted with prejudicial assumptions, stereotypes or myths. This requires that the complainant's other sexual activity or history, and her confidential and private views about her sexual life prior to the alleged sexual assault, not be unnecessarily exposed or exploited.

[105] In my view, this factor and its implicit goals and protections can only be achieved in this case if the Proposed Evidence is excluded.

(viii) Any other factor that the Justice considers relevant

[106] While I fully support the accused's right to cross-examine the Crown witnesses, I remain mindful, as the Supreme Court reasoned in Darrach at para. 37, the accused does not have the right "to adduce misleading evidence to support illegitimate inferences" and thereby "distort the truth-seeking function of the trial process." This further supports my conclusion that the Proposed Evidence is not admissible.

[107] Earlier in these Reasons, I indicated that to some extent the Proposed Questions also subsume stereotypical thinking that is inconsistent with the spirit and intent of s. 276(1), which could mislead the trier of fact and distort truth-seeking function at trial: see Darrach, at paras. 33 and 37. For example, counsel for the accused's second Proposed Question to C.L. suggests that the complainant consented to the sexual contact with the accused and later felt disappointed in herself after consenting: i.e., Question 2 - "Did she tell you she felt disappointed in herself because she wanted to wait until she had established more of a relationship before sleeping with the accused." This proposed question does not simply refer back to the inadmissible Proposed Evidence but is also potentially misleading because it dismisses and recasts C.L.'s statement when considered in its entirety: C.L. told the police that the complainant was crying and upset and did not feel the sexual contact was consensual. Further, C.L. elaborated upon her statement by saying she understood that that "added" to why the complainant was "so upset because she she did not want anything like that to happen like she was just wanting to wait until she got to know the guy first." Importantly, C.L. does not state that the complainant said she was disappointed in herself. As noted earlier in these Reason, this difficulty highlights the problematic nature of hearsay evidence which, by its very nature, interprets and attributes feelings and reasoning to the complainant. This difficulty, however, does not just reduce the probative value of this Proposed Question, it elevates the danger that it will distort the fact-finding process.

[108] I have considered the proper scope of the permissible questioning in this instance, with a view to striking a balance between the accused's right to cross-examine and the danger to other interests protected by s. 276 (2) and (3), including the dignity and privacy interests of the complainant (as discussed by the authorities I have cited above, such as R.V., at para. 40, Osolin, at p. 669; and Mills at paras. 61-68). I have also considered the importance of ensuring the truth-seeking function at trial is not compromised: Darrach, at paras. 33-37. In this light, questions to C.L. to the following effect would in my view be aligned with these authorities:

- (1) The next morning did you speak by phone to the complainant about the sexual contact with the accused the previous night?
- (2) Did the complainant tell you she felt disappointed because she did not want anything like that to happen and she wanted to wait until she got to know someone first?

[109] As regards, the complainant, again with a view to the authorities and my Reasons above, questions to the following effect would be aligned with the authorities discussed above.

- (1) The next morning did you speak by phone to C.L. about the sexual contact with the accused the previous night?
- (2) Did you tell her that you felt disappointed because you did not want anything like that to happen and you also wanted to wait until you got to know someone first?
- (3) You were expressing disappointment that you had sexual contact with the accused because you did not know him, isn't that right?

[110] There may be other questions counsel may wish to ask that fall within the scope of permissible cross-examination, providing they are consistent with these Reasons and the applicable authorities.

VII. Conclusion

[111] Having considered the applicable jurisprudence, the specific factors set out in ss. 276 (2) and 276(3), as well as the able submissions of all counsel, I conclude the Proposed Evidence is not admissible.

[112] Again, I am not suggesting that the complainant cannot be cross-examined on her state of mind or her feelings at the time of the sexual contact with the accused. Counsel is free to cross-examine the complainant on her state of mind immediately before the alleged sexual assault, and the morning after.

- [113] Further, there is no bar regarding questions as to whether the complainant expressed disappointment to C.L. about the sexual contact with the accused. Such questions may be the only direct evidence on the issue of subjective consent, and that can only come from the complainant. Rape shield prohibitions do not attach to the questions counsel for the accused wishes to ask the complainant that relate to her state of mind at relevant times regarding the sexual contact with the accused.
- [114] Counsel may also cross-examine C.L. regarding her conversation with the complainant the morning after the alleged assault in the manner I have proposed above. As is apparent, I have slightly revised the Proposed Questions in line with the appropriate scope of cross-examination as discussed in these Reasons. These are set out above and need not be repeated again.

"Morellato J."

Source & reproduction note

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

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/23/20/2023BCSC2012.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-sakawsky-2023>

Prepared on 29 October 2026 · Esheria