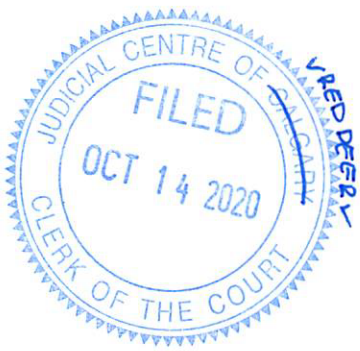

Court of Queen's Bench of Alberta

Citation: R v [redacted] 2020 ABQB 611

Date
Docket: 181110446Q1
Registry: Red Deer

Between:

Her Majesty the Queen

Respondent

- and -

[redacted]

Applicant

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.
By Court Order, information that may identify the victim or any witness must not be published, broadcast, or transmitted in any way.
NOTE: This judgment is intended to comply with the identification ban.

Ruling on admissibility of evidence
pursuant to section 276(3) of the *Criminal Code*
of the
Honourable Mr. Justice N. Devlin

I. Overview

[1] The accused is charged with sexual assault. The complainant is a woman with whom he had a casual, intermittent sexual relationship over the preceding two years. He has applied

pursuant to section 278.93 of the *Criminal Code* to lead evidence of that relationship on the basis that it is essential to his full answer and defence.

[2] The accused argues that his version of events will present as incoherent and unbelievable if his pre-existing relationship with the complainant is not known to the trier of fact. He therefore asks that evidence of this sexual relationship be admitted under s 276(2) to permit him to face trial on a level playing field.

[3] For the reasons that follow, a brief agreed statement of facts describing the existence of the parties' previous relationship is ruled admissible for the limited purposes described.

II. The proceedings

[4] The accused supported his application with an affidavit detailing his sexual history with the complainant. The Crown chose not to cross-examine him. Defence counsel subsequently provided more specific written and oral representations as to the anticipated evidence. There was no objection to this approach and it permitted the hearing to proceed efficiently. The written application, together with defence counsel's statements, form the factual basis for this application.[1]

[5] The initial materials did not contain any summary of the allegations the accused is facing. At the Court's invitation, counsel provided a transcript of the complainant's statement to police, which was made Exhibit 1 on this *voir dire* by consent. All applications for the admission of evidence of other sexual activity under s 276 should contain a detailed summary of the case the accused faces. The relevance of the proposed evidence cannot be meaningfully analysed without this information.

[6] By agreement, both stages of the admissibility process were heard together. The complainant was given notice of this application and her right to be represented by counsel. The Crown advised that she did not wish to appear or make submissions.

[7] After a full hearing canvassing the factors relevant to admissibility enumerated in section 267.2, I reserved my decision. While these reasons were on reserve, the accused re-elected to be tried by judge alone.[2]

III. Anticipated Evidence

[8] The anticipated evidence is that the accused let himself into a home where the complainant was staying with a friend (RT), using a door keypad code that had been given for this purpose. He came at night, relying on a broad-ranging invitation to attend. He will contend that he messaged the complainant in advance of his attendance. The record is silent on the complainant's version of their correspondence on the evening in question, and whether she replied.

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[1] The initial affidavit did not sufficiently particularize the evidence sought to be admitted or the mechanism of relevancy. The subsequent representations by defence counsel, both written and oral, brought the application into compliance with s 278.93(2).

[2] A summary of my conclusion on this application was provided to the parties to facilitate trial preparation before the reasons were released for publication.

[9] Inside the residence, the accused found the complainant asleep in a bed beside RT. The complainant's version is that the accused crawled into bed beside her. She believed it to be someone else and spoke words to that effect. He proceeded with intimate contact. The complainant says she did not consent. She told police that she "was trying to make myself sleep" when he penetrated her, first digitally and then through penile intercourse.

[10] She says she woke up and said to him "what the hell?" After this, she claims to have confronted the accused in the kitchen, where he was having a beer. She recounts him saying that their encounter was consensual and that she had been saying his name. She told him to "to get the fuck out", after which he left and the complainant awoke her friend and reported the assault.

[11] The complainant's statement is slightly confusing, in that she describes being asleep, or thinking she was asleep, but also relates to events that took place in that state, including conversation between her and the accused. The Crown did not seek to supplement the record as to the complainant's version of events. Consequently, the full contours of the case against the accused will only be made clear at trial.

[12] The accused's affidavit detailed his sexual history with the complainant. It recounted a series of instances on which they had came together for casual sexual encounters. On a number of those occasions, the complainant arrived unannounced at his home, late at night, and they proceeded to have sex. The key portions states that:

> On June 9, 2018, in keeping with our casual open sexual relationship, I attended RT's residence where [the complainant] was staying. I did so by using a code I had been given so I could come and go as and when I pleased. [The complainant]) and I had sex (oral and vaginal intercourse) on at least two occasions at that residence prior to June 9, 2018.
>
> I got into bed with [the complainant]'s and engaged in consensual vaginal intercourse.

[13] This also somewhat vague recounting of events reflects the accused's desire not to entirely disclose his defence prior to trial. On the accused's behalf, Mr. Fagan further particularized the application at the hearing by stating that the accused would take the stand[3] and would provide greater detail as to the communication that took place between him and the complainant. The accused will testify that he suggested to the complainant that they move to another room, given that RT was asleep beside them, but that the complainant said something to the effect of "let's do it here."

(i) The accused's specific request to admit evidence

[14] At the first stage of the hearing, Mr. Fagan disclaimed reliance on any of the specific sexual activity detailed in his client's affidavit and made clear that he does not he seek to lead evidence of those prior sexual encounters, including those at RT's home. Rather, he particularized the accused's evidentiary ask as follows:

> *That the trier of fact be permitted to learn that the accused and complainant were known to each other and had had a sexual relationship,*

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[3] While short of an undertaking to call the accused, which would be of questionable value in a criminal matter in any event, Mr. Fagan told the Court his client would be testifying, barring unforeseen developments in the Crown's case.

consisting of casual, spontaneous, and sporadic encounters, over the two years preceding the alleged assaults.

[15] The accused argues that, unless the trier of fact knows this about his relationship with the complainant, evidence that he showed up at this person's bedside, and proceeded to seek and obtain consent, will be seen as implausible and even predatory. This would unfairly, if not fatally, impair the credibility of his version of events, including the critical consent-obtaining interaction he will say took place.

[16] The accused also maintains that, without this background, his potential alternate claim to an honest but mistaken belief in communicated consent could be judged on the wrong standard of what amounted to "reasonable steps" to ascertain consent and/or be unfairly found to lack an air of reality.

[17] Mr. Fagan disclaimed any reliance on the suggestion that the complainant's consent to sexual activity on other occasions, or the mode and circumstances in which that consent was previously given, constituted or supported consent on this occasion.

[18] While the Crown originally opposed the application also as lacking particulars and constituting a broad sweep of inadmissible evidence useful only promote prohibited inferences, he ultimately agreed that Mr. Fagan's oral particularization narrowed and focussed the application sufficiently for the matter to proceed to a full hearing. The Crown nevertheless maintained that the accused's situation was indistinguishable from ***R v Goldfinch***, 2019 SCC 38, and that the proposed evidence remained essentially a propagation of the inferences prohibited by s 276(1).

IV. The legislative scheme and governing principles

[19] Section 276 of the *Criminal Code* governs the admissibility of evidence of the complainant's sexual activity, other than the events for which the accused is charged ["other sexual activity"]. These provisions establish a rigourous process through which this proposed evidence is screened to ensure that it is truly relevant and is not being admitted for improper purposes.

(i) The admissibility procedure

[20] The admissibility of other sexual evidence is examined in a two-stage proceeding. The first stage is a preliminary screening of the application under section 278.93(2). The defence initiates the process by filing materials that particularize the evidence it seeks to adduce and the mechanism of relevance to an issue at trial. The application materials must provide the information necessary to permit the judge to evaluate the claim of relevance and understand its potential operation within the specific context of the trial. These materials typically include an affidavit from the accused and a summary of the allegations he is facing, whether in the form of a synopsis, a transcript of a statement, or prior testimony by the complainant.

[21] The first stage does not determine ultimate admissibility under 276(3). This preliminary step is meant to screen out those requests to raise other sexual activity which, on their face, are clearly brought for an impermissible purpose: ***R v JE***, 2019 NLSC 134 at paras 47-51. At this point in the process, the Court must be satisfied that the evidence tendered with the application "is capable of being admissible under section 276 (2)". (s 278.93(4)) [emphasis added]

[22] Only those applications which pass this threshold are sent to a full hearing under s 278.94. Applications which lack sufficient detail risk being summarily dismissed: ***R v LeBrocq***, 2011 ONCA 405 at paras 9 & 10.

[23] The guiding jurisprudence identifies two key questions the Court must ask at the first stage: (i) is the proposed evidence sufficiently well-defined and circumscribed to serve a proper purpose; and (ii) can the accused articulate the mechanism of relevance to which those specific facts relate. A detailed examination of the relevance mechanism, and the overall balancing of interests the probative and prejudicial value of the evidence, are reserved for the full hearing.

[24] The preliminary screening is designed to weed-out meritless uses of other sexual activity evidence which are simply manifestations of the increasingly well-defined archetypes of prohibited reasoning. These are meant to be eliminated summarily, without disruption to the trial process, and without needlessly traversing these sensitive matters.

[25] The threshold for the accused to overcome at the first stage is low. The Court conducts only a facial consideration of the matter, with any doubts that exist as to the admissibility of the evidence best left to the second stage *voir dire*: ***R v SL***, 2018 ABQB 889 at para 9; ***R v AM***, 2020 ONSC 4541 at para 32. This first stage takes place *in camera*: s 278.93(3).

[26] At the second stage, a more fulsome *voir dire* is held, again *in camera*: s 278.94(1). Evidence may be called and more extensive submissions may be made: s 278.93(4). The complainant is not a compellable witness (s 278.94(2)), but has a right to participate and make submissions through counsel: s 278.94 (3).

(ii) The purpose and principles of section 276(2)

[27] Section 276 is designed to respect both the accused's right to full answer and defence and the complainant's right to a respectful judicial process not infected by sexist myths: ***Goldfinch*** at para 2. In past times, prosecutions for sexual assault were often marked by demeaning dissections of the complainant's intimate history, designed to leverage sexist fallacies about individuals (almost invariably women) who exercised autonomy and self-determination over their sexuality: ***R v LS***, 2017 ONCA 685 at para 79. As the majority of the Supreme Court stated in ***R v Mills***, [1999] 3 SCR 668 at para. 90:

> Equality concerns must also inform the contextual circumstances in which the rights of full answer and defence and privacy will come into play. In this respect, an appreciation of myths and stereotypes in the context of sexual violence is essential to delineate properly the boundaries of full answer and defence. As we have already discussed, the right to make full answer and defence does not include the right to information that would only distort the truth-seeking goal of the trial process. [...]The accused is not permitted to "whack the complainant" through the use of stereotypes regarding victims of sexual assault.

[28] The evidentiary regime established by section 276, and the body of jurisprudence interpreting it, seeks to end these odious practices, promote the integrity of the trial process, and enhance the public's faith in the criminal justice system: ***Goldfinch*** at paras 28, 37, 81 and 82; ***R v RV*, 2019 SCC 41** at paras 34-35.

[29] In particular, section 276(1) makes any evidence of prior sexual activity by the complainant with the accused or anyone else, inadmissible to support an inference that 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. Evidence directly or indirectly designed to have this effect is not relevant and not permitted.

[30] Moreover, under section 276(2), no evidence of a complainant's other sexual activity is admissible unless the Court determines that the proposed 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;
>
> (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.

[31] The provisions go on to enumerate in detail the factors the Court must consider when determining admissibility: (section 276(3))

> (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.

[32] Where evidence of other sexual activity is found to be admissible under these principles, trial judges must still carefully control the scope and manner of its admission to minimize the risk to the complainant's dignity and privacy: ***R V*** at para 8.

[33] In the case of a jury trial, a clear, strong caution limiting the use of this evidence must be given. This instruction must define the narrow, specific facet of the fact-finding process to which this evidence is relevant, together with a direction on what uses cannot be made of this evidence: s 278.96. Where s 276(2) evidence is received by a trial judge sitting alone, the administration of justice is also enhanced by overt consideration of these principles.

[34] The stricture of these limits on evidence of other sexual activity is consistent with an accused person's right to make full answer and defence under sections 7 and 11(d) of the *Charter* because it leaves room for the accused to call evidence of sexual activity where it is shown to be necessary to establish a defence and challenge the prosecution evidence on proper, non-discriminatory grounds: ***R v Darrach***, 2000 SCC 46 at para 71.

(iii) Establishing relevance

[35] Establishing the relevance of the proposed evidence is the linchpin of any section 276 application. To establish relevance, the accused must demonstrate "a connection between the complainant's sexual history and the accused's defence": ***Darrach*** at para 56; ***Goldfinch*** at para 113 (per Moldaver J. concurring). Explicit identification of the link between the evidence of other sexual activity and the accused's defence is essential to avoid "twin-myth reasoning slipping into the courtroom in the guise of context": ***Goldfinch*** at para 119.

[36] The meaning of "relevance" was helpfully reviewed by Watt JA in ***R v Jackson***, 2015 ONCA 832, leave to appeal to SCC refused 36829 (June 30, 2016), where Watt JA highlighted three key characteristics of the concept at paragraphs 120-122:

> Relevance is not a legal concept. It is a matter of everyday experience and common sense. It is not an inherent characteristic of any item of evidence. Some have it. Others lack it.
>
> Relevance is relative. It posits a relationship between an item of evidence and the proposition of fact the proponent of the evidence seeks to prove (or disprove) by its introduction. There is no relevance in the air [...]
>
> Relevance is also contextual. It is assessed in the context of the entire case and the positions of counsel. Relevance demands a determination of whether, as a matter of human experience and logic, the existence of a particular fact, directly or indirectly, makes the existence or non-existence of another fact more probable than it would be otherwise [...]. [citations omitted]

[37] The task of the applicant under section 276(2) is to articulate the chain of reasoning by which the evidence of other sexual activity becomes properly probative. The tighter and more precise that relationship of relevance is, the less risk the other sexual activity evidence will be misused. The Court must guard against this evidence being admitted on the strength of "generic references to the credibility of the accused.... Credibility is an issue that pervades most trials", and vague reference to this issue will not suffice to satisfy section 276(2): ***Goldfinch*** at para 56.

(iv) Relevant to what? Elements of the defences in play

[38] The relevance analysis in s 276 applications will often require an examination of the elements of the offence, and elements of potential defences, at play in the specific case. A clear focus on those guiding principles will assist in either dispelling the claim of relevance or better identifying its operation.

[39] In this case, the accused's materials, as supplemented by defence counsel's submissions, demonstrate that he will assert that the complainant consented, or that he honestly but mistakenly believed that she did. The elements and attributes of these concepts inform the s 276 analysis.

a. Consent

[40] What "consent" means, and how it operates in sexual assault trials, can be summarized from the Supreme Court's recent jurisprudence as follows. Specifically, consent:

- is the conscious, voluntary agreement of the complainant to engage in every sexual act in a particular encounter: ***R v JA***, 2011 SCC 28 at para 31; see also s 273.1(1) of the *Criminal Code*;
- must be freely given: ***R v Ewanchuk***, [1999] 1 SCR 330 at para 36;
- must exist at the time the sexual activity in question occurs: ***JA*** at para 34, citing ***Ewanchuk*** at para 26;
- can be revoked at any time; ***JA***, at paras 40 and 43; s. 273.1(2)(e) of the *Criminal Code*; and
- is not considered in the abstract and 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": ***R v Hutchinson***, 2014 SCC 19 at paras 54 and 57.

[41] Importantly, consent is subjective to the complainant: ***Ewanchuk*** at paras 26-30. Therefore, consent cannot be found in external factors such as the relationship between the parties or the complainant's words or conduct on a different occasion: ***JA*** at para 47.

b. Honest but mistaken belief in consent

[42] A number of key principles guide the operation of the defence of honest but mistaken belief in communicated consent. These include that:

- the accused must demonstrate an air of reality to this defence before it will be considered by the trier of fact: ***Barton***, at para 121;
- the accused must take reasonable steps to determine the presence of consent: s 273.2(b);
- the accused's belief must be about communicated consent. The analysis asks whether the accused honestly believed "the complainant effectively said 'yes' through her words and/or actions": ***Barton*** at para 90 citing ***Ewanchuk*** at para 47;
- this defence is not available to the accused where "there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct": s 273.2 (c);
- the test for whether an accused took reasonable steps to ascertain consent is an objective/subjective one. The steps taken by the accused must be objectively reasonable in light of what he personally knew at the time ***Barton*** at para 104; and
- passivity is not consent and a belief in silence as consent is a mistake of law and no defence: ***Ewanchuk*** at para 51; ***Barton*** at paras 105-107.

(v) The ultimate balance of probative versus prejudicial benefit

[43] The final condition of admissibility in s 276(2) is that the evidence have "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice" considering the factors set out in s 276(3): ***Goldfinch*** at paras 69 and 128: ***R V*** at para 60. This ultimate balance requires a court to determine whether the proposed evidence would unfairly and improperly skew the trial by promoting "twin myth" reasoning, despite the presence of at least tangential relevance: ***Darrach*** at para 41. It provides the Court with a final, overall look at the balance of interests in play to ensure that the administration of justice is properly served.

V. Application to this case

[44] Both phases of the admissibility process were conducted together in a single hearing. This was possible because of the complainant's advance decision not to participate if a substantive hearing were granted.

(i) Stage I analysis

[45] The application materials met the procedural and temporal requirements for holding of a hearing under section 278.93. The requirement that the proposed evidence constitute "specific instances of sexual activity" is also met. It is now well settled that evidence describing a relationship between the complainant which implies past sexual conduct satisfies this definition.

> Evidence of a relationship that implies sexual activity, such as "friends with benefits", as defined by the accused here, inherently encompasses specific sexual instances of sexual activity. Requiring further details would unnecessarily invade the complainant's privacy, defeating an important objective of the provision. I agree with the statement in *L.S.* that specifying the parties to the relationship, the nature of that relationship in the relevant time period satisfies the purposes of trial fairness (para. 83). Those criteria are met in this case. ***Goldfinch*** at para 54.

[46] In this case, the accused's submissions identify two pathways to relevance. The first is in relation to the credibility of his evidence that he sought consent. The second is in relation to the honesty of his belief that consent was given.

(ii) Relevance to the accused's credibility

[47] At this initial juncture, it is sufficient that the accused's exculpatory version of events is capable of casting him "in an unfavourable light" that makes his evidence "untenable or utterly improbable" if his words and actions are judged absent the information sought to be admitted under s 276: ***Goldfinch*** at para 68 per Karakatsanis J; see also ***R v Temertzoglou***, [2002] OJ No 4951 (SC) at para 27. I find that this threshold is met.

[48] The accused entered a home that was not his, at night, while the occupants were asleep. At this point there is no evidence they knew he was coming. He approached the sleeping complainant for the sole and express purpose of commencing a sexual encounter. These bare facts raise obvious questions about what he was thinking, and how he will explain his actions as other than a frightening and predatory incursion into a vulnerable and protected space.

[49] The fact of the parties' relationship is, on its face, capable of changing the lens through which the accused's actions and beliefs will be judged. It is easy to conceive of the accused being subjected to a devastating cross-examination if the trial were to proceed on the basis that his sexual foray was into the bedchamber of a mere acquaintance, or even a close platonic friend. This would leave the trier with the impression that the accused has a distorted and unreasonable conception of how consensual intimate relationships are formed.[4]

[50] It is essential to re-iterate that a belief by the accused that the complainant might be receptive to his advances because of their existing sexual relationship does nothing to establish that consent was actually given that night: ***JA*** at paras 47 and 64. Consent must be found in what specifically passed between the accused and complainant on this occasion.[5]

[51] The relationship evidence could, however, impact the trier's overall perception of the accused, his relationship to reality, and the credibility of his testimony. This specific articulable link between the relationship evidence, the accused's state of mind, and how the trier of fact views him as a result, is sufficient to satisfy the first-stage threshold and trigger the requirement for a full hearing on the issue of admissibility.

[52] The more challenging question of whether the differential in the accused's credibility, as viewed with and without the relationship evidence, outweighs the risk that this information would feed prohibited inferences about consent is addressed in the more fulsome second stage analysis.

(iii) Relevance to a potential defence of honest but mistaken belief in communicated consent

[53] The facts advanced by the accused on this application do not establish the basis for a defence of honest but mistaken belief in communicated consent. This may change once the parties testify at trial and greater detail about their interaction on the night in question is revealed. However, the mere potential that a defence of mistaken believe in communicated consent may yet arise does not satisfy s 278.93(4).

[54] An accused may choose how much detail to lead on an application to admit other sexual activity evidence. By holding their cards to their chest, however, they run the risk of failing to meet the threshold for a full hearing. If relevance to an honest but mistaken belief in communicated consent is the sole basis on which admission of other sexual activity evidence is sought, the accused must provide the Court with a specific set of facts that give this defence an air of reality. Vagueness in both parties' version of events does not satisfy this requirement.

(iv) Stage II – the admissibility hearing

[55] The accused's first task in the admissibility hearing is to articulate how the other sexual activity is relevant to a specific feature of the evidentiary landscape, and satisfy the Court that

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[4] If trier before a jury, these questions would pervade the jurors' mind even in the absence of cross-examination highlighting the unorthodox nature of the accused's conduct and the thought process driving it.

[5] The objective reasonable steps requirement in s 273.2(b) equally guards against an accused relying on his personal belief in the twin-myths as the basis of an honest but mistaken belief in communicated consent: see ***Barton*** at para 94.

this mechanism of relevance is not directly or indirectly an attempt to alter the trier's perspective on consent – namely the subjective state of mind of the complainant towards the sexual activity in question: ***Ewanchuk*** at para 48.

a. Relevance to the accused's credibility

[56] Relevance is contextual, as Watt JA emphasized in ***Jackson***. In the context of this case, without the relationship evidence the accused would be judged on a set of facts whereby he let himself into a home that was not his, during the night, while the occupants were sleeping, and approached their bed with sex on his mind.

[57] On the bare facts the accused's story is incoherent. It begs but does not answer the question: *what was he thinking?* Moreover, as a matter of logic, why would one have worried about consent in a situation where there is no logical expectation that it be forthcoming? His story is also improbable. People operating under a commonplace conception of how consensual relationships take shape do not ordinarily find themselves at the beside of a sleeping acquaintance in search of sex.[6] Consent is simply not in the air. Indeed, the accused was initially also charged with Break and Enter with Intent for what he had done.[7]

[58] The relationship evidence serves to dispel the cloud of scepticism and disbelief that would otherwise hang over the accused's claim that he came with good faith intentions to have a consensual sexual encounter. It transmutes his story from untenable to at least coherent.

[59] Examining whether a person's claimed behaviour accords with common sense, life experience, and reasonable assumptions about how ordinary people can be expected to act, is one of the core mechanisms by which credibility is assessed: ***R v PFJ***, 2018 ABCA 322 at para 14; ***R v Delmas***, 2020 ABCA 152 at para 31, application for leave to SCC filed 39163 (May 14, 2020).

[60] The relationship evidence is thus relevant to the accused's credibility because it increases the correspondence between his actions and beliefs and the prevailing understanding of how humans normally behave, in a way that overcomes an unfair burden of general disbelief that may infect all facets his testimony.

b. This use of other sexual activity evidence is contemplated in *Goldfinch*

[61] The Supreme Court's decision in ***Goldfinch*** affirms that evidence "fundamental to the coherence of the defence narrative"[8] can and should be admitted: at paras 66 & 69. Each sets of reasons in ***Goldfinch*** averts to the concern that, in some circumstances, an accused's version of

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[6] While potential prior communications between the parties that evening was alluded to at the hearing, neither Crown nor defence led evidence on this application which would suggest that communications will be presented at trial which would make the accused's presence understandable.

[7] The Crown advised of these facts during the course of the hearing and told the Court that the terms of the accused's invitation to attend the residence undercut the viability of that charge. The record on the hearing provided no basis to find that information about the accused's license to be in the residence would alter the negative perception the accused's actions without getting into the sexual dimension of the pre-existing relationships in this case.

[8] The concept of necessity in this context means that the accused needs this evidence to have a fair trial, not as a matter of tactical convenience or advantage: ***Mills*** at para 72.

the events may give rise to an unfair negative impression as to his intentions and credibility unless he can explain it through evidence to which section 276 applies.

[62] The majority's test for admission of evidence on this basis can be discerned from their reasons for finding that Mr. Goldfinch had not satisfied it:

> 68 In my view, there is nothing about Goldfinch's testimony that casts him in an unfavourable light or renders his narrative untenable or utterly improbable absent the information that the two were "friends with benefits". The complainant's request for "birthday sex" does not reflect on Goldfinch's character or behaviour. As well, her reaction to his comment was a smile -- hardly an indication that this behaviour was beyond the pale of their relationship. Tellingly, the complainant did not deny the call, Goldfinch's comment or the smile. [emphasis added]

[63] The accused in this case falls squarely within Karakatsanis J's description of someone whose testimony would be "untenable" and "utterly improbable" if the relationship evidence is withheld, making it fundamental to full answer and defence (*Mills*, at paras 71 and 94).

[64] In his concurrence at para 123, Moldaver J similarly held that relationship evidence should be permitted where the accused's testimony as to his actions and words would otherwise come across as unbelievable:

> Evidence that the complainant and Mr. Goldfinch were in a "friends with benefits" relationship at the time of these events may have provided necessary context to aid the jury in assessing Mr. Goldfinch's testimony that he mouthed the words "I'm going to fuck you" to the complainant. If the jury lacked the knowledge that the two were in a sexual relationship at the time, this statement by Mr. Goldfinch might have seemed bizarre or even menacing. Furthermore, Mr. Goldfinch's testimony that he made this statement to the complainant may itself have seemed implausible. In this way, withholding the "friends with benefits" evidence from the jury could have led them to make an adverse credibility determination against Mr. Goldfinch that they otherwise would not have made. [emphasis added]

[65] The dissent of Justice Brown echoed this concern with equal force (at para 194):

> ...without this evidence, his actions (including his words and gestures) will have appeared to have arisen out of nowhere, creating a completely misleading impression on the jury. His right to make full answer and defence would be reduced to painting a picture of himself as (at best) crude and reckless, or (at worst) predatory. [emphasis added]

[66] The unifying theme that emerges from each set of reasons in ***Goldfinch*** is that the exclusionary rule in section 276 must not be used to place the accused, and his evidence, in an artificially worsened light. The sharp split between judges at all levels of court in ***Goldfinch*** illustrates the difficulty in defining when an unfair burden of disbelief will arise. Those courts were unanimous, however, that other sexual activity evidence may become relevant when it does.

[67] I find that this accused would face such an unfair burden, and that the relationship is relevant to him making full answer to it.

c. The evidence operates on the accused's credibility, not the likelihood of consent by the complaint

[68] Crucially, the mechanism of relevance in this case operates on the trier's perception of the accused, rather than by altering perceptions of the complainant, which is where the twin-myths take hold.[9]

[69] The accused's knowledge that the complainant had been open to spontaneous sexual encounters in the past does not assist him in establishing instance-specific consent. However, this knowledge is capable of changing the nature and quality of his actions in the eyes of the trier of fact. This evidence counteracts the sense of menace and concern that his story would otherwise engender, and is necessary for him to begin the trial on a level playing field in terms of his credibility.

[70] This is not the sort of generic appeal to credibility flagged by the Supreme Court in ***Goldfinch***. There, the majority held that nothing about how the sought to initiate a consensual sexual encounter put him behind an evidentiary 8-ball. With the accused having no credibility deficit to overcome, the only work that the relationship evidence could logically do was to undermine the complainant's believability in precisely the prohibited manner: ***Goldfinch*** at paras 58-60. In simple terms, where there is no "unlikelihood of consent", why was the trier hearing the relationship evidence unless it was simply twin-myth reasoning in disguise?

[71] Properly understood in this way, s 276(2) operates to prevent complainants (mostly women in what remains a highly gendered crime: ***Goldfinch*** at para 37), from having to testify under their own unfair burden of general disbelief, derived from sexist notions about their previous decisions to engage in sexual activity. Put simply, having "said yes" in the past is not a make-weight against a person's evidence that they did not want sex on the occasion in question.

[72] Conversely, however, ***Goldfinch*** is not a command that courts ignore circumstances in which the accused's sexual advances or activities will seem inherently predatory, abusive, or driven by a distorted understanding of consensual intimate relationships *unless* he can point to some objective basis for believing that his actions would be welcomed. Section 276 does not condemn accused individuals to face trial under an equally unfair burden of general disbelief in such situations.

[73] For all of these reasons, I find that the relationship evidence is relevant to the accused's credibility in a manner that implicates trial fairness and satisfies the requirements of 276(2) for admission.

d. Relevance to honest but mistaken believe in communicated consent

[74] The accused also posits his potential invocation of an honest but mistaken belief in communicated consent as an alternative basis for the relationship evidence being relevant. As noted above, the record on this application does not provide sufficient detail about the parties'

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[9] "Consent" in s 276 refers to the condition whereby "the complainant in her mind wanted the sexual touching to take place": ***Ewanchuk*** at para 48. The prohibited inferences both operate to either question to complainant's description of her subjective state of mind vis-à-vis the sexual encounter, or to question her credibility about this topic generally. The classic marker sign of prohibited reasoning is that the evidence at issue is operating relevant to the complainant's state of mind.

interaction to show that this defence will arise. Therefore, the relationship evidence is not admissible on that basis at this point.

[75] However, if the accused meets his onus to establish an air of reality to this defence after the trial evidence has been heard, the proposed relationship evidence may become relevant to the standard on which the honesty of his mistaken belief will be judged. Therefore, I will consider its potential use *vis-à-vis* this defence to avoid any later interruption of the trial.

[76] Section 273.2(b) places the onus on a person claiming an honest but mistaken belief in communicated consent to show he or she took reasonable steps to ascertain that consent existed before commencing sexual activity. What constitutes reasonable steps will vary in proportion to the accused's knowledge of the circumstances: ***R v Shrivastava***, 2018 ABQB 998 at para 70, citing ***R v RG*** (1994), 38 CR (4th) 123, 1994 CanLII 8752 at para 29 (BCCA). A heightened level of clarity and certainty of consent is required where one party to the encounter is in a sleep-like state when the encounter commences (***Shrivastava*** at paras 70-72). If the accused succeeds in establishing an air of reality to an honest but mistaken belief in communicated consent, he will be judged on that standard.

[77] The demands of "reasonable steps" are, however, even more exacting where the parties have no intimate history: ***Shrivastava*** at para 72, citing Hill J in ***R v S(T)***, 1999 OJ No 268 (Gen Div) at para 160. That is not this accused's situation.

[78] It would be unfair for the honesty of the accused's state of mind to be judged on the artificial basis that he and the complainant were not intimately acquainted. A subsisting sexual relationship alone is not a basis for an honest but mistaken belief in communicated consent. It is, however relevant to whether an accused's mistaken belief in communicated consent could have been objectively reasonable, as the Supreme Court recognized in ***Goldfinch*** at para 62:

> Prior sexual activity may be particularly relevant to a defence of honest but mistaken belief in communicated consent (*Seaboyer*, at pp. 613-16; *Darrach*, at para. 59; *Barton*, at paras. 91 et seq.). However, an honest but mistaken belief cannot simply rest upon evidence that a person consented at "some point" in the past: that would be twin-myth reasoning.

[79] The relationship evidence in this case does not assist the accused in establishing that consent *was* communicated on this specific instance. However, I find that the absence of relationship evidence would be an almost insurmountable roadblock to establishing that *anything* which passed between the accused and the complainant in this case could reasonably be construed as free and willing consent. For this reason, the relationship evidence would be relevant to a defence of honest but mistaken belief in communicated consent, if it comes into play.

VI. Balancing the prejudicial value of the evidence versus any prejudicial effect

[80] Once the relevance of other sexual activity evidence has been established, the Court must further consider whether it has "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice" (s 276(2)(d)). This balancing process is driven by the factors enumerated in s 276(3), and was explained in *Goldfinch* at para 69 in the following way:

> 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). [emphasis in original]

[81] The relationship evidence in this case meets the requisite threshold for probative value (ss 276(3)(3)(b-c). Its absence would materially and unfairly impede the accused's credibility as to his acts and state of mind: ***Darrach***, at paras 38-43. This evidence is required for the accused to face trial on a level playing field.

a. The dangers of admitting relationship evidence

[82] The countervailing risk of prejudice takes two forms: a continued risk of prohibited inferences taking hold where other sexual activity evidence is properly admitted, and incursions into the privacy and dignity of the complainant. Notwithstanding relevance, the Court must remain alive to the concern that the evidence of prior encounters will, albeit indirectly, invite the impermissible inference that the complainant more likely consented in the present instance: ***Goldfinch*** at paras 58-59.

[83] Equally, a person's sexual history, practices and preferences are intimate and private. Even the most sex-positive individuals would feel some degree of violation at these matters being aired in front of strangers in a public process. While the revelation of personal information is inevitable in many criminal cases (indeed is the *sine qua non* of an open, impartial justice process), subsections 276(2-3) mandates the Court to query the necessity of traversing this material in the context of sexual violence prosecutions.

[84] The overall proportionality analysis requires the Court to evaluate the magnitude of these risks and to mitigate them where the balance weighs in favour of the evidence being admitted.

b. Factors mitigating the risks of relationship evidence

[85] In this case, the risks associated with admission of the other sexual activity evidence are attenuated in three ways: (i) use of an agreed statement of fact; (ii) absence of any salacious details; and (iii) election to be tried by judge alone.

[86] The use of an agreed statement of facts, as suggested by the Supreme Court in ***Golfinch*** at para 75, gives the Court better control over the other sexual activity evidence by mitigating the risk that further problematic details may emerge in the normal flow of cross-examination. It also reduces the unnecessary stress on the complainant of having to describe their sexual history aloud and minimizes the risk of improper inferences arising from tone or innuendo. This mechanism of admission limits any unintentional creep and spread of the other sexual activity evidence. These dynamics address the concerns embodied in ss 276(3)(b,d,g).

[87] In cases where the relevance of the other sexual activity evidence relates to the accused's credibility or state of mind, an agreed statement of facts may often be the preferred route for this evidence to be introduced for exactly these reasons. Unless the complainant's credibility is directly implicated, it is difficult to see any advantage to this evidence being introduced through *viva voce* evidence.

[88] Specifically, I expect that the agreed statement of facts will be entered and is unlikely to be referenced again. It will serve as a silent backstop against the accused's version of events being seen as inherently unbelievable. This evidence will not, however, gain disproportionate prominence. This anticipated operation of the evidence satisfies the concerns embodied in s 276(3)(g).

[89] The neutral wording of the agreed statement of facts also removes any salacious element from the evidence in this case. This avoids any risk of distraction, undue embarrassment, or sensationalism surrounding the sexual nature of that evidence, and satisfies the concerns raised by sections 276(3)(b,d,g). It would also allay the concern about arousal of prejudice in the mind of the jury if the accused had maintained his original election (s 276(3)(e)).

[90] Perhaps even more importantly, nothing in the agreed statement of facts would suggest that the sexual activity between the complainant and accused was "routine" and "typical". Language of that nature was of particular concern to the majority in ***Goldfinch*** (at para 72), as it infers a straight line of reasoning from past consent to present consent, elevating the risk of prejudicial reasoning. The proposed statement of the evidence removes the "unfavourable light" in which the accused's evidence would otherwise be viewed in a way that does not tip over into inferring that the complainant was prone to consent based on their past relationship. I find that this is the correct balance for both of the individuals touched by this case to receive the full protection and benefit of the law: s 276(3)(g).

[91] Finally, the accused's re-election to trial by judge alone further limits the potential prejudice as it reduces the risk that the trier of fact might apply stereotypical or discriminatory reasoning. The availability of appellate review of judicial reasons offers a further check on this concern, answering ss 276(3)(d-e).

VII. Conclusion

[92] The accused is permitted to lead evidence to the effect that he and the complaint were acquainted and had a casual, sporadic sexual relationship for a period preceding the events that led to him being charged. Defence and Crown will cooperate to prepare an agreed statement of facts that will form part of the record before me at trial. This is the extent to which the prior sexual history of the parties is admissible.

Heard on the 3rd day of September, 2020.
Dated at Red Deer, Alberta this 14th day of October, 2020.

N. Devlin
J.C.Q.B.A.

Appearances:

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