IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Regular*, 2026 NLCA 1
Date: January 26, 2026
Docket Number: 202401H0057

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BETWEEN:

	HIS MAJESTY THE KING	APPELLANT
AND:		
	ROBERT REGULAR	RESPONDENT

Coram: L.R. Hoegg, F.J. Knickle and G.L.C. Noel JJ.A.

Court Appealed From:	Supreme Court of Newfoundland and Labrador, General Division 202201G1230 (2024 NLSC 100)
Appeal Heard:	May 14-15, 2025
Judgment Rendered:	January 26, 2026
Reasons for Judgment by:	F.J. Knickle J.A.
Concurred in by: **(paras. 1-189)**	L.R. Hoegg J.A.
Dissenting Reasons by: **(paras. 190-407)**	G.L.C. Noel J.A.

Counsel for the Appellant: Lisa Ann Joyal
Counsel for the Respondent: Jerome Kennedy K.C., Scott Hutchison and Rosellen Sullivan K.C.

Authorities Cited:

F.J. Knickle J.A. (L.R. Hoegg J.A. concurring):

CASES CITED: *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. Regular*, 2024 NLSC 31; *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443; *R. v. Riley*, 1992 CarswellOnt 707 (ONCA), 1992 CanLII 7448, leave to appeal to SCC refused, 23386 (27 May 1993); *R. v. B. (A.R.)*, 1998 CarswellOnt 3590 (ONCA), 1998 CanLII 14603, aff'd 2000 SCC 30; *R. v. M.T.*, 2012 ONCA 511; *R. v. J.H.*, 2014 NLCA 25 (CanLII); *R. v. W. (B.A.)*, [1992] 3 S.C.R. 811; *R. v. Regular*, 2024 NLSC 100; *R. v. G.G.*, 2025 ONCA 574, appeal as of right to the SCC (41963); *R. v. Snelgrove*, 2023 NLCA 12, leave to appeal to SCC refused, 40789 (29 February 2024); *R. v. J.H.*, 2013 ONCA 693; *R. v. Meddoui*, 1990 ABCA 168 (CanLII), aff'd [1991] 3 S.C.R. 320; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788; *R. v. F. (J.E.)*, 1993 CarswellOnt 137 (ONCA), 1993 CanLII 3384; *R. v. Langan*, 2019 BCCA 467, rev'd 2020 SCC 33; *R. v. Langan*, 2020 SCC 33, [2020] 3 S.C.R. 499; *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272; *R. v. Lawlor*, 2025 NLCA 2; *R. v. K.A.*, 2024 BCCA 251; *R. v. C.L.*, 2022 NLCA 53; *R. v. Rioux*, 2025 SCC 34; *R. v. Bik*, 2025 QCCA 340; *R. v. Lacombe*, 2019 ONCA 938; *R. v. S.B.*, 2016 NLCA 20, rev'd 2017 SCC 16; *R. v. Kruk*, 2024 SCC 7; *R. v. D.R.*, 2022 NLCA 2, aff'd 2022 SCC 50; *R. v. E.S.*, 2024 NLCA 12; *R v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368.

STATUTES CONSIDERED: *Criminal Code*, RSC 1985, c. C-46, sections 276, 278.94, 540, 646; *Canada Evidence Act*, RSC 1985, c. C-5, sections 14(1), 16, 16.1.

OTHER: Law Society of Newfoundland and Labrador, *Code of Professional Conduct*, (27 September 2024), chapter 5.2-1[1].

G.L.C. Noel J.A. (dissenting):

CASES CITED: *R. v. Regular*, 2024 NLSC 100; *R. v. Regular*, 2024 NLSC 31; *R. v. Samaniego*, 2022 SCC 9, [2022] 1 S.C.R. 71; *R. v. T.W.W.*, 2024 SCC 19; *R. v. Darrach,* 2000 SCC 46, [2000] 2 S.C.R. 443; *R. v. Riley*, 1992 CarswellOnt 707 (ONCA), 1992 CanLII 7448, leave to appeal to SCC refused, 23386 (27 May 1993); *R. v. B. (A.R.)*, 1998 CarswellOnt 3590 (ONCA), 1998 CanLII 14603, aff'd 2000

SCC 30; *R. v. M.T.*, 2012 ONCA 511; *R. v. A.G. and E.K.*, 2015 ONSC 923; *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237; *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3; *R. v. Hanrahan*, 2024 NLCA 9, aff'd 2025 SCC 1; *R. v. Arp*, [1998] 3 S.C.R. 339; *R. v. W. (B.A.)*, [1992] 3 S.C.R. 811; *R. v. A.G.*, 2000 SCC 17, [2000] 1 S.C.R. 439; *R. v. Kruk*, 2024 SCC 7; *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298; *R. v. Schneider*, 2022 SCC 34, [2022] 2 S.C.R. 619; *R. v. J.H.*, 2014 NLCA 25 (CanLII); *R. v. J.H.*, 2012 NLTD(G) 32, aff'd 2014 NLCA 25; *R. v. G.G.*, 2025 ONCA 574, appeal as of right to the SCC (41963); *R. v. Layman*, 2024 NLCA 16; *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3; *R. v. S.B.*, 2016 NLCA 20, rev'd 2017 SCC 16; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Amin*, 2024 ONCA 237; *R. v. Percy*, 2020 NSCA 11; *R. v. Grant*, 2015 SCC 9, [2015] 1 S.C.R. 475; *R. v. S.B.,* 2017 SCC 16, [2017] 1 S.C.R. 248; *R. v. C.F.*, 2017 ONCA 480; *R. v. A.C.*, 2018 ONCA 333; *R. v M.A.*, 2022 NLCA 41; *R. v. Regular*, 2024 NLSC 64; *R. v. J.H.*, 2013 ONCA 693; *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908; *R. v. D.B.*, 2013 ONCA 578; *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788; *R. v. Best*, 2016 NLCA 10; *R. v. G.C.*, 2006 CanLII 18984 (ONCA); *R. v. Langan*, 2019 BCCA 467, rev'd 2020 SCC 33; *R. v. Khan*, 2017 ONCA 114, leave to appeal to SCC refused, 37534 (3 August 2017); *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. Hodgson*, 2024 SCC 25; *R. v. Rioux*, 2025 SCC 34; *R. v. Cowan*, 2021 SCC 45, [2021] 3 S.C.R. 323; *R. v. W.(D.)*, [1991] 1 S.C.R. 742; *R. v. C.L.*, 2022 NLCA 53; *R. v. Lacombe*, 2019 ONCA 938; *R. v. Bik*, 2025 QCCA 340.

STATUTES CONSIDERED: *Criminal Code*, RSC 1985, c. C-46, sections 276, 278.92-278.94; *Law Society Act, 1999*, SNL 1999, c. L-9.1, sections 33(2), 34(4).

F.J. Knickle J.A. (L.R. Hoegg J.A. concurring):

INTRODUCTION

[1] This appeal addresses the admissibility of evidence in the context of a sexual assault trial. There are three central evidentiary issues: the admissibility of other sexual activity of the complainant, JT, with another individual; of collateral evidence used to discredit JT; and of evidence of prior consistent statements by JT to rebut an allegation that she fabricated the allegations against the accused, Mr. Regular.

[2] This appeal also addresses whether Mr. Regular, a practicing lawyer, ought to have been required to swear an oath or make a solemn affirmation when he testified in his defence at trial.

[3] Finally, this appeal addresses whether the errors, if established, warrant a new trial.

BACKGROUND

[4] The evidence is reviewed as needed in addressing each issue. However, to help put the issues on appeal in context, a summary description of the allegations and Mr. Regular's response follows.

Summary of the allegations

[5] No one witnessed the alleged assaults. This meant that the credibility of both JT and Mr. Regular was central to the determination of whether the offences had been proven beyond a reasonable doubt.

[6] JT alleged the first offence to have occurred when she was a child between the ages of 12 and 14 and while her mother was a client of Mr. Regular. The other offences were alleged to have occurred when JT was an adult. The last alleged offence occurred in 2012. JT made a complaint to the police in 2020. By the time of the trial in 2024, over ten years had passed since the last alleged offence.

[7] The first incident (the "Car Incident") was alleged to have occurred when JT was between 12 and 14 years of age. JT had been removed by child protection authorities from her mother's care and her mother had retained Mr. Regular to represent her in the matter. JT testified that despite being removed from her mother's care, her mother picked her up from school one day in her car and drove her to a parking lot where JT met with Mr. Regular in the car. JT's mother left the car while the two met. JT stated Mr. Regular assaulted her by touching her while in the car with her. After he left, JT's mother got back in the car and returned her to school. JT testified that she told her mother, but was inconsistent as to when. Mr. Regular confirmed that he had represented JT's mother, but denied that a meeting occurred between him and JT. Mr. Regular testified that if he had met with JT, he would not have met her in a car in a parking lot without her mother being present.

[8] The next incident (the "CP Incident") occurred after JT had her first child. JT would have been 19 years old. She recounted going with her supervised access worker, CP, to meet with Mr. Regular at his office to retain his services respecting child protection concerns with her child. JT stated that while meeting with Mr. Regular in his office, he sexually assaulted her by touching her in her vaginal area.

[9] JT stated that when she left the office, CP asked what was wrong and JT told her what happened. CP, whose recall was not good, testified that JT made a comment something like "all men are alike" and gestured toward her upper leg. There were inconsistencies between CP's and JT's recollections on certain details, however, CP confirmed that she was with JT on this visit and that JT was upset after meeting with Mr. Regular. CP testified that she told her supervisor, LG, what JT had disclosed. LG testified and confirmed that CP told her about the incident with Mr. Regular. LG also observed JT tear up Mr. Regular's business card. The torn business card was an exhibit at trial. Mr. Regular agreed that there was a meeting, but stated that it did not occur in his office and that he did not assault JT. One of Mr. Regular's employees also testified that Mr. Regular did not meet with JT in his office but in the reception area. Mr. Regular testified that JT became upset because he told her that as long as she was with her current boyfriend there would be issues with child protection authorities.

[10] JT testified to a third incident when she retained Mr. Regular to represent her after she was charged with shoplifting from an Ultramar gas station (the "Shoplifting" incident). JT alleged that while meeting with Mr. Regular at his office, he had sexual intercourse with her. Mr. Regular denied that any sexual contact occurred, but did not dispute that there had been a meeting. Documentary evidence confirmed that JT met with Mr. Regular.

[11] The fourth and last incident also involved an allegation of sexual intercourse in Mr. Regular's office. This incident occurred after a meeting had been arranged with police who were investigating an assault to which JT was a witness. The police interviewed JT at Mr. Regular's office and JT alleged that after this interview and the police had left, he sexually assaulted her. Mr. Regular denied this allegation but did not dispute that there was a meeting. The two police officers who were investigating the assault also confirmed the meeting but had little recall of what happened.

[12] Apart from the allegations, the Crown intended to have JT testify as to her last encounter with Mr. Regular. However, after objection from Mr. Regular on the basis

that this testimony was irrelevant and would be evidence of bad character, JT was not permitted to testify to all of the details of the encounter with Mr. Regular. Nor was the Crown permitted to cross-examine Mr. Regular about his recollection and details of this event, even though there was no dispute that the encounter had occurred.

Mr. Regular's position at trial

[13] Mr. Regular's defence at trial was that no sexual contact occurred between him and JT, and that she was not credible and had fabricated the allegations.

[14] To support his assertion that JT was not credible and had fabricated the allegations, Mr. Regular successfully applied to cross-examine JT on details of sexual activity with another individual, who was a police officer. Mr. Regular submitted that JT fabricated allegations against this police officer and that this evidence of fabrication was relevant to her credibility and whether the offences against Mr. Regular occurred. Mr. Regular also argued that this evidence demonstrated that JT was an unreliable historian about this period in her life. The Crown opposed this application on the basis that the evidence was irrelevant and collateral to whether Mr. Regular committed sexual offences against JT.

[15] The trial judge permitted Mr. Regular to cross-examine JT, and then tender details of the shoplifting offence to which JT pleaded guilty, including tendering an official report of the weather, from 2012, the day the shoplifting occurred, on the basis that this evidence was relevant to JT's credibility. The Crown also objected to this evidence on the basis that it was irrelevant and collateral.

[16] Mr. Regular also tendered evidence of his calendars and billings regarding his legal services to JT around the times of the alleged offences, as well as evidence from a medical practitioner regarding his difficulties with maintaining an erection. Two of his support staff testified as to their recollections of the layout or location of Mr. Regular's offices, and contradicted JT's recollection on these points. One of the support staff also testified to Mr. Regular's attempts to obtain payment from JT for his legal services.

[17] In his reasons for acquittal, the trial judge concluded that JT was not a credible witness, and that he believed Mr. Regular's evidence.

[18] The Crown now appeals the acquittals on the basis that the trial judge erred in the above evidentiary rulings and erred in failing to require Mr. Regular to swear an oath or make a solemn affirmation before testifying.

[19] The Crown asserts that the trial judge's errors in admitting inadmissible evidence of JT's other sexual activity and collateral evidence of the shoplifting offence, in refusing to allow JT to testify about the details of her last encounter with Mr. Regular, and in failing to have Mr. Regular take an oath prior to testifying, had a material bearing on the verdict. The Crown submits that these errors might reasonably be thought, in the concrete reality of the case, to have a material bearing on the acquittal.

[20] The Crown asks this Court to set aside the verdict of acquittal and remit the matter for a new trial.

ISSUES

[21] The issues to be addressed are whether:

1) the trial judge erred in admitting the evidence of JT's other sexual activity;

2) the trial judge erred in permitting Mr. Regular to cross-examine JT and then tender evidence of the details around JT's shoplifting offence to contradict her responses;

3) the trial judge erred in refusing to permit JT to testify as to the details of her last encounter with Mr. Regular and the Crown to cross-examine Mr. Regular about this encounter;

4) the trial judge erred in permitting Mr. Regular to give his evidence without swearing an oath or by solemn affirmation; and

5) the test under *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, to set aside the acquittals and order a new trial has been met.

ISSUE 1: Did the trial judge err in admitting evidence of JT's other sexual activity?

The evidence of the other sexual activity

[22] After Mr. Regular was charged with the offences, he hired a private investigator to investigate JT. The investigator spoke to JT's mother, who among other things, disclosed that JT had told her in the past that she had had a sexual relationship with a police officer (the subject officer, "SO"). At the time JT's mother stated this to Mr. Regular's private investigator, JT had made no complaint to any investigative body regarding SO.

[23] Mr. Regular turned the information from JT's mother over to the police force where SO was employed, who then engaged the Province's independent investigative body, the Serious Incident Response Team, or SIRT, to investigate the information.

[24] When first approached by the SIRT investigators, JT was reluctant to provide any information. However, she did eventually provide two statements which were recorded. In those statements she confirmed a sexual relationship with SO starting when she was around 15 years old.

[25] There were differences in her two statements regarding her accounts of the relationship. As well, the investigators could not reconcile JT's account of when she interacted with SO in his capacity as a police officer with police records. There were records that supported that SO had interactions with JT or her boyfriend, but not in the manner she described. Most important, the investigation established that JT could not have been 15 years old when she first had sexual relations with SO as she described, because he was not yet a police officer. JT would have been 15 in 2004. SO did not become a police officer until 2006.

[26] As well, potential witnesses who JT stated were present on occasions when she encountered SO were not interviewed, or did not confirm JT's account. In particular, two civilian witnesses to whom JT referred in her statements told the investigators that JT was a liar and a troublemaker (Appeal Book, Vol. II, Tab 2(B), at pages 21-23).

[27] SO declined to participate in the investigation. He neither denied nor confirmed any relationship with JT.

[28] The Director of SIRT, who decided whether charges would be laid, stated in his report (Appeal Book, Vol. II, Tab 2(A), at page 12), that because of inconsistencies between JT's statements and other evidence, he was unable to:

> attribute sufficient credibility or reliability to her allegations and I have not formed reasonable grounds to believe [SO] committed a sexual offence.

[29] The investigation was concluded without any charges being laid.

[30] Mr. Regular first made a third-party record application at trial to obtain a copy of the SIRT report. The Crown did not object to disclosure of the report but did not concede that it was admissible evidence. Upon receiving a copy, Mr. Regular then made application to cross-examine JT and admit the details of the investigation. Mr. Regular argued that, as per section 276(2)(b) of the *Criminal Code*, RSC 1985, c. C-46, the evidence from the SIRT investigation of SO was "relevant to an issue at trial", namely, JT's credibility.

[31] Mr. Regular argued, firstly that JT's allegations against SO were fabricated and this fabrication showed a pattern that JT had a propensity for making false allegations. Mr. Regular argued that this evidence supported his defence that the allegations against him were fabricated and that there were enough similarities between the two sets of allegations to suspect that they were both false.

[32] Secondly, Mr. Regular submitted that even if the allegations against SO were not fabricated, the inconsistencies between JT's statements and other evidence from the SIRT investigation demonstrated that JT was an "unreliable historian" regarding this period of her life. Because this period in her life covered part of the time period for the offences, Mr. Regular argued that her poor memory of what happened with SO undermined the reliability of her recollection of what happened with Mr. Regular.

[33] The trial judge allowed the application (Appeal Book, Vol. I, Tab 5, *R. v. Regular*, 2024 NLSC 31 ("Decision on Admissibility")). Mr. Regular was permitted to not only cross-examine JT on the details of her encounters with SO, but also to call the investigators to testify to the results of their investigation.

Summary of my decision on whether the trial judge erred in admitting the evidence

[34] In my respectful view, the trial judge erred in concluding that this evidence was admissible.

[35] In my view, the trial judge applied the wrong legal analysis in determining whether the evidence was relevant to an issue at trial. If the trial judge had correctly applied the legal principles, Mr. Regular would not have been able to establish relevance under section 276(2)(b) and the evidence would not have been admissible. As well, this error impacted the trial judge's assessment of whether the probative value of the evidence was substantially outweighed by its prejudicial effect on the proper administration of justice under section 276(2)(d).

[36] The evidence on the application did not establish that the allegations were fabricated. Further, the evidence was collateral to the issues at trial and did no more than permit a wide ranging attack on JT's general character. The evidence invoked or came dangerously close to invoking one of the twin myths that because of her other sexual activity, JT was less worthy of belief. Further, by allowing JT to be cross-examined about the veracity of her assertion that she had a sexual relationship with SO, the trial judge subjected JT to a trial within a trial without the matter being properly before the court for adjudication. There was no complaint by JT, no charge laid against SO, and no presentation of a case by the Crown, including no direct-examination of JT on the allegations. Allowing such an adjudication within Mr. Regular's trial was an affront to JT's privacy and dignity, and improperly coloured the trial judge's assessment of her credibility.

[37] Let me explain.

The admissibility of evidence of other sexual assault allegations under section 276(2)

[38] Prior to the establishment of the section 276 regime, the range of questioning of a complainant in a sexual assault trial often went well beyond what would be expected in a criminal trial and often attacked the character of the complainant on the basis of what are now considered impermissible myths and stereotypes. As stated in *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, at paragraph 33:

> Historically, no limits were placed on the defence's ability to adduce evidence of a complainant's prior sexual activities. Such evidence was routinely used to malign "the

> character of the complainant, distort the trial process, and undermine the ability of the criminal justice system to effectively and fairly try sexual allegations" (*R. v. L.S.*, 2017 ONCA 685, 354 C.C.C. (3d) 71, at para. 79). Subjecting the complainant to humiliating or prolonged examination and exploiting assumptions about "communication, dress, revenge, marriage, prior sexual history, therapy, lack of resistance and delayed disclosure" was commonplace (D. M. Tanovich, "'Whack' No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases" (2015), 45 *Ottawa L. Rev.* 495, at pp. 498-99). These tactics shifted the focus away from the accused and essentially put the *complainant* on trial.
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> (Footnote omitted, emphasis in original.)

See also *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at paragraph 55.

[39] It is now well established that the myths that a complainant is more likely to have consented or is less worthy of belief because of their sexual history, are prohibited bases upon which to tender evidence of a complainant's sexual history. Evidence used for these two prohibited purposes (the commonly referred to "twin myths") is prohibited under section 276 of the *Criminal Code*.

[40] The bar on evidence of other sexual activity is not absolute. As explained in *Barton*, at paragraph 61, evidence of other sexual activity of a complainant is admissible if it meets the requirements of the "three-fold test" under section 276(2) of the *Criminal Code*:

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

[41] Although section 276 has been amended to describe the test as fourfold, the additional criterion is a reiteration of the prohibition of such evidence for the purposes of invoking one or both of the twin myths. That the evidence is not being used to invoke either of the twin myths is always a consideration.

[42] Assuming that hurdle is passed, a central concern is the relevance of the evidence. As stated by the Supreme Court of Canada in *R. v. R.V.*, 2019 SCC 41,

[2019] 3 S.C.R. 237, at paragraph 56, an application under section 276 must identify the relevance of the other sexual activity and establish its connection to the sexual assault before the court. This criterion is what the evidence proffered by Mr. Regular failed to meet.

[43] Sexual activity between a complainant and another individual will "rarely" be relevant to whether a sexual assault has occurred. As stated in *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443, at paragraph 58:

> It is common for the defence in sexual offence cases to deny that the assault occurred, to challenge the identity of the assailant, to allege consent or to claim an honest but mistaken belief in consent. Evidence of prior sexual activity will rarely be relevant to support a denial that sexual activity took place or to establish consent (see Sopinka, Lederman and Bryant, *supra*, at para. 10.108). As the Court affirmed in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 27, the determination of consent is "only concerned with the complainant's perspective. The approach is purely subjective." Actual consent must be given for each instance of sexual activity.

[44] More importantly, other allegations of sexual assault will be even less relevant to whether sexual activity occurred between an accused and a complainant, particularly in the case of a denial. This is logical. If an accused denies that anything occurred between an accused and a complainant, what happened between the complainant and another individual, including an unproven allegation, has no bearing on that denial.

[45] The irrelevance of evidence of other sexual assault allegations, where the defence was denial, was considered in *R. v. Riley*, 1992 CarswellOnt 707 (ONCA), 1992 CanLII 7448, leave to appeal to SCC refused, 23386 (27 May 1993). In *Riley*, the accused wished to cross-examine the complainant on allegations made against another accused. The other alleged perpetrator had been acquitted after a trial. Mr. Riley intended to call the other accused to testify that the allegations she made against him did not happen, thereby showing that the complainant had a propensity to make false allegations.

[46] The Ontario Court of Appeal upheld the trial judge's refusal to allow the defence to call such evidence and stated that evidence of other sexual assault allegations by another person was irrelevant to an accused's defence of denial at trial - except in one narrow context. The Court explained, at paragraph 9:

> The only legal basis of which we are aware that would justify the cross-examination of this complainant along the lines suggested would be in order to lay the foundation for a pattern of fabrication by the complainant of similar allegations of sexual assault against other men. This should not be encouraged unless the defence is in a position to establish that the complainant has recanted her earlier accusations or that they are demonstrably false.

[47] Although the Court in *Riley* did not go on to explain what might satisfy the requirement that allegations are demonstrably false, it did conclude that the acquittal of the other accused, standing alone, did not demonstrate that the other allegations were false or fabricated. The complainant had not recanted the allegations and it would be the complainant's word against the other accused. There was no record of the trial proceedings available to suggest otherwise.

[48] In the absence of evidence showing that the allegations were fabricated or demonstrably false, the Court in *Riley* concluded that the evidence was collateral and was no more than an attack on the complainant's general character.

[49] In *R. v. B. (A.R.)*, 1998 CarswellOnt 3590 (ONCA), 1998 CanLII 14603, aff'd 2000 SCC 30, the Ontario Court of Appeal again considered the admissibility of evidence of other sexual assault allegations (the defence was denial). The accused, who was the adoptive father of the complainant, wanted to cross-examine her on the unproven allegations and then call the other alleged perpetrators (members of the family) from the household who were expected to deny those allegations. The accused in *B. (A.R.)* argued that the evidence was not collateral because the case against him turned on credibility. The Court disagreed.

[50] As in *Riley*, the Court upheld the trial judge's refusal to permit the complainant to be challenged with unproven allegations she had made against other members of the household, holding that the evidence was irrelevant and collateral and therefore inadmissible. The Court in *B. (A.R.)* described the evidence as creating confusion for a jury by having them consider not one criminal case, but "four or five, in the hope that by discrediting at least one of her allegations of sexual abuse, he can raise a reasonable doubt as to the Crown's case…". The Court stated, at paragraph 10:

> … The fact that others had sexually assaulted the complainant is irrelevant to the charges against the appellant and to any defence he might have to the charges. It is an attempt to pit the complainant against her whole family and others instead of simply against her father. It is inimical to the spirit of the principle underlying s. 276...

[51] The irrelevance of evidence of other sexual assault allegations to an accused's denial that sexual activity occurred, as explained in *B. (A.R.)* and *Riley*, was affirmed in *R. v. M.T.*, 2012 ONCA 511. As in *Riley* and *B. (A.R.)*, the accused in *M.T.* sought to cross-examine the complainant on sexual assault allegations she made against her biological father that were disclosed at the time she made allegations against M.T. However, unlike *Rile*y and *B. (A.R.)*, M.T. did not intend to call the father to testify that the abuse did not occur to prove that the allegations were false, but argued that the other allegations were similar enough to the allegations against him that the Court should have a reasonable doubt as to whether or not the offences occurred, or whether M.T. was the perpetrator (similar to what Mr. Regular has argued here). The trial judge refused to allow the cross-examination, and the Court of Appeal upheld the exclusion of the evidence. At paragraphs 49 and 50, Watt J.A., stated:

> [49] As it relates to the first issue, the proposed evidence was simply not relevant to the appellant's denial that the sexual activity took place. Evidence of non-consensual sexual activity with one person is not probative of the falsity of an allegation of non-consensual activity with another: *Darrach*, at para. 58; *B. (A.R.)*, at p. 365.
>
> [50] This evidence could only be relevant if the allegations of abuse against E.G.'s father were in fact false: *R. v. Riley* (1992), 11 O.R. (3d) 151 (C.A.), at p. 154, leave to appeal to S.C.C. refused [1993] 2 S.C.R. x. And, as the appellant has taken pains to point out, he had no intention of demonstrating the falsity of the allegations. He simply wanted to adduce evidence relating to the nature of the allegations and their disclosure.

[52] In the absence of evidence that the other allegations were fabricated or demonstrably false, or as described by Watt, J.A., "in fact false", they were irrelevant.

[53] This Court has also refused the admissibility of other sexual assault allegations, where it has not been shown that the allegations were fabricated or demonstrably false. The evidence was determined to be collateral and properly excluded: *R. v. J.H.*, 2014 NLCA 25 (CanLII) ("*J.H. NLCA*").

[54] Finally, in *R. v. W. (B.A.)*, [1992] 3 S.C.R. 811, in a brief judgment confirming the lower court decision, the Supreme Court of Canada stated that in the absence of establishing that other allegations on collateral matters might be false, their relevance was "tenuous". The Court did not elaborate on what kind of evidence would be required to show that other allegations "might be false".

[55] In my view, as occurred in *Riley*, and as endorsed by our Court, evidence of other sexual assault allegations is irrelevant to a denial that a sexual assault occurred, unless it is clear that the other allegations are fabricated and support an inference that the complainant has a propensity to fabricate such allegations.

[56] Evidence that other sexual assault allegations are fabricated must be unequivocal, or as described in *Riley*, "demonstrably false". As stated, the Court in *Riley* did not elaborate on what it meant by "demonstrably false", but did provide the example of the kind of evidence that might satisfy the requirement of fabrication would be a recantation by a complainant. The recantation of an allegation is evidence that a complainant concedes that what was originally alleged was not true. In other words, unequivocal evidence that a complainant admits they intentionally lied about another sexual assault allegation. In my view, this is what demonstrably false means.

[57] In so saying, it is critical to keep the purpose of this kind of evidence in focus: the assertion is that because complainant deliberately fabricated allegations against another individual, the Court should be concerned that the complainant is deliberately fabricating allegations against the accused.

[58] In the absence of evidence like a recantation, it may be very difficult to prove that allegations are false. If it is only necessary to establish that allegations "may" be false because of inconsistencies to be admissible, this will result in a complainant being subjected to having the veracity of the allegations tested as if she were at trial for those allegations. Evidence that only illustrates that a complainant is incorrect on certain details, such as timing or location, is not evidence that a complainant fabricated allegations. Such evidence is merely collateral evidence, as explained in *B. (A.R.)*. This is because the fact that a complainant's evidence may be unreliable in relation to one allegation, because of incorrect details, does not mean that the complainant's evidence is unreliable in relation to another allegation, including allegations against the accused who is being tried before the Court.

[59] Although *Riley* did not determine the relevance of the other sexual assault allegations under the rubric of the section 276 regime, the reasoning is apposite. That the evidence here is assessed under the section 276 regime does not change the assessment of relevance. Relevance has no special meaning under the 276 regime. As stated in *Darrach*, at paragraph 37, an accused has never had the right to adduce irrelevant evidence.

[60] The difference in assessing the relevance under the section 276 regime is that relevance is not enough for admissibility. Even if the evidence is established as relevant, its probative value must be significant and not be substantially outweighed by its prejudicial effect. As stated in *Darrach* at paragraph 41:

> In light of the purposes of s. 276, the use of the word "significant" is consistent with both the majority and the minority reasons in *Seaboyer*. Section 276 is designed to prevent the use of evidence of prior sexual activity for improper purposes. The requirement of "significant probative value" serves to exclude evidence of trifling relevance that, even though not used to support the two forbidden inferences, would still endanger the "proper administration of justice". The Court has recognized that there are inherent "damages and disadvantages presented by the admission of such evidence" (*Seaboyer*, *supra*, at p. 634). As Morden A.C.J.O. puts it, evidence of sexual activity must be significantly probative if it is to overcome its prejudicial effect. The *Criminal Code* codifies this reality.

[61] In light of the above, before admitting the evidence from the SIRT investigation, the trial judge had to be satisfied that JT fabricated allegations of sexual assault against SO and that this fabrication showed a pattern by JT to fabricate allegations of sexual assault. This was the sole basis of its relevance.

Application of the principles to the circumstances

[62] The trial judge failed to apply the above analytical framework in determining the relevance of the evidence of JT's other sexual activity. The trial judge did not conclude that the evidence was relevant because the allegations against SO were fabricated and showed a pattern of fabrication by JT as established in *Riley*, *B. (A.R.)*, and *M.T.* He admitted the evidence because he was satisfied they were similar to the allegations against Mr. Regular and, because of this similarity, Mr. Regular should be able to cross-examine JT and then call evidence from the SIRT investigation to establish their falsity. Respectfully, this was an error. That the trial judge was satisfied that the allegations were similar was an insufficient basis for relevance.

[63] Mr. Regular submits that when the trial judge's reasons for admitting the evidence are read as a whole, it is evident that he was satisfied that the allegations were fabricated or demonstrably false as he was required to do. I disagree.

[64] When the trial judge's reasons for admitting the evidence are read not only as a whole, but with his reasons for verdict together with the trial record showing how the evidence was permitted to be used and assessed, it is clear that in admitting the evidence, the trial judge had not concluded that the allegations were fabricated or

demonstrably false. The trial judge admitted the evidence of the other allegations because he was satisfied that they were similar to those made against Mr. Regular and, if proven false, could be relevant to JT's credibility.

[65] Nowhere in his reasons for admitting the evidence did the trial judge state that he was satisfied that the allegations against SO were fabricated. To the contrary, in his reasons for admitting the evidence, the trial judge framed the very issues to be decided as, firstly, whether JT should be permitted to be cross-examined on the other allegations and, secondly, "is the [defence] estopped from further inquiry *in the event* that [JT], in cross-examination, does not recant her allegations against SO?" (emphasis added, Decision on Admissibility, at page 16).

[66] The manner in which the trial judge framed the issues in his Decision on Admissibility shows that he did not view admissibility as being determined on the basis that the allegations were fabricated, but viewed the question of admissibility as whether Mr. Regular should be able to prove that the allegations were fabricated through cross-examination of JT and then by producing evidence to contradict her.

[67] Further, at paragraph 29 of his Decision on Admissibility, the trial judge stated that denying Mr. Regular the "ability to *test the veracity* of [JT's] allegations" against SO (emphasis added) would result in significant prejudice to the proper administration of justice. The trial judge's view that Mr. Regular should be given the opportunity to "test the veracity" of JT's allegations against SO, shows that in the trial judge's view, Mr. Regular ought to be permitted to attempt to prove the falsity of the allegations as part of his trial.

[68] Further, at paragraph 34 of his Decision on Admissibility, in explaining why he was satisfied there was a pattern of possible false allegations, the trial judge stated:

> I do not agree with counsel for [JT's] suggestion that a pattern of behavior must, of necessity, require more than one other instance of similar behavior. In my opinion if it can be shown that another allegation is remarkably similar to the facts alleged in the case before the Court, a pattern exists. The same can be said in cases where similar facts are sought to be tendered in support of a unique *modus operandii* to support, for example, an inference of identity.

[69] Further, at paragraph 38 of his Decision on Admissibility, the trial judge stated:

> There are enough similarities to convince me that it is appropriate that [JT] be cross-examined in relation to her allegations concerning SO. The heart of the issue is whether [JT] had a motive to fabricate and, of course, *whether she did fabricate the allegations against SO* and [Mr. Regular]. This is not an inquiry into a collateral fact – it is the very essence of the defence – that [JT] had made unfounded allegations against [Mr. Regular] – as she has done with other persons in authority. If I were to deny [Mr. Regular] the ability to lead evidence of similar fact I would be eviscerating his defence and significantly impacting upon his right to make full answer and defence. This I am not prepared to do.

(Emphasis added.)

[70] Mr. Regular points to paragraph 39 of the Decision on Admissibility as support for his view that the trial judge was satisfied that the allegations were false:

> The Crown, in impeaching a witness, is not allowed to lead rebuttal evidence in relation to collateral facts. This is known as "splitting one's case". The same rule does not apply to an accused if he impeaches a Crown witness. So long as the Accused complies with the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.), he is allowed to lead evidence to the contrary where, as here, it goes to the heart of the case. In other words, the fact that [JT] made false allegations against another goes directly to the issue of whether she made false allegations against [Mr. Regular] and is highly relevant to her credibility.

[71] Paragraph 39 must be read with the whole of the trial judge's decision and, in particular, with the preceding paragraph 38 cited above. Placed in context, and given his earlier language, paragraph 39 is not a statement that he was satisfied that the allegations were false but a reiteration that he was satisfied that Mr. Regular should be able to contradict JT, as part of his defence, and that to so do would not offend the rule in *Browne and Dunn*.

[72] However, it is not only the trial judge's Decision on Admissibility that shows that the trial judge had not concluded that the other sexual assault allegations were demonstrably false when he admitted the evidence.

[73] It is also clear from the trial judge's written reasons for verdict that the basis for the admission of the evidence was because the evidence was similar to the allegations against Mr. Regular and not because he was satisfied that the allegations were demonstrably false. Indeed, the trial judge titled the evidence as "similar fact" evidence (*R. v. Regular*, 2024 NLSC 100, at page 8 ("Decision on Verdict")). At paragraph 34 in his Decision on Verdict, the trial judge stated:

> At paragraph 34 of my decision allowing the Defence's Application to adduce similar fact evidence, I held that there were sufficient similarities between the case before me and the allegations against [SO] to allow [JT] to be cross-examined in relation to that relationship.

[74] The Decision on Verdict also illustrates that it was *after* JT was cross-examined on the allegations and the evidence from the SIRT investigation was tendered, that the trial judge concluded that the allegations against SO were fabricated. At paragraphs 36 and 37 of his Decision on Verdict, the trial judge stated:

> *I am satisfied, having heard the evidence of the SIRT investigators*, that their conclusion that there were no reasonable and probable grounds to believe that an offence had been committed by [SO] was appropriate.
>
> *I am satisfied that the incident described by [JT]* which, she indicated, kick-started a sexual relationship with [SO] never occurred, and could not have happened because [SO] was not a police officer until several years after the alleged event.

(Emphasis added.)

[75] Using the language that he was "satisfied" that there were no reasonable grounds to lay the charges, and that the encounters between JT and SO never occurred, shows that it was after hearing the SIRT evidence at trial, and in particular, the cross-examination of JT, that the trial judge determined that the allegations respecting SO were fabricated. To reiterate, no such language was used in his reasons for admitting the evidence.

[76] Finally, a review of the trial transcript itself shows that the trial judge intended to determine if JT's allegations against SO were false as part of Mr. Regular's trial, and not as part of why he was satisfied the evidence was admissible. A few examples follow.

[77] During the testimony of one of the SIRT investigators at trial, the trial judge prevented defence counsel from seeking an opinion from the officer as to the veracity of JT's allegations against SO on the basis that the Court was doing its "own investigation" (Transcript, 17 April 2024, at pages 131-132). The trial judge also referred to not wanting to hear the officer's conclusions about JT's credibility in the SIRT investigation because that is what he, the trial judge, was going to determine (Transcript, 17 April 2024, at page 135). When the Crown objected to the SIRT investigator responding that he concluded that no sexual encounters occurred, the

Crown submitted that it was the trial judge (as per his ruling) who had to determine whether the sexual encounters between JT and SO occurred. The trial judge stated he would not assess the officer's conclusion as fact (Transcript, 17 April 2024, at page 153). Defence counsel himself submitted to the trial judge during his examination of the investigator during the trial, not as part of any *voir dire*, that what he was trying to establish in his questioning was that JT fabricated the alleged sexual encounters against SO (Transcript, 17 April 2024, at page 157, lines 18-20).

[78] In summary, it is patent from the above excerpts from the trial transcript, in the Decision on Verdict, and the Decision on Admissibility, that when the trial judge admitted the evidence of the allegations against SO, it was because he concluded they were similar to the allegations against Mr. Regular, not because they were fabricated. That determination was made after JT was cross-examined and other witnesses involved in the SIRT investigation testified at the trial proper.

[79] Respectfully, in my view, this was an error. The trial judge permitted the evidence of the allegations of other sexual offences by JT without its relevance to the issues at trial having been first established.

[80] As stated, to be admissible, Mr. Regular had to establish that the allegations were fabricated and that this could have shown a pattern by JT to fabricate, their only relevance, *before* raising them with JT. The falsity of the allegations had to be established as part of the *voir dire* to admit the evidence; *not* through cross-examination of JT during the trial.

[81] Instead, the trial judge allowed Mr. Regular to test the veracity of the allegations and based on that cross-examination and the evidence from the SIRT investigation - as part of the trial - concluded that what JT stated had happened between her and SO was false.

[82] This approach was contrary to the *Criminal Code*. Not only did relevance have to be established for the evidence to be admissible, the *Criminal Code* prohibits cross-examination of a complainant on an application to admit evidence of their other sexual activity. JT was not a compellable witness at the hearing of Mr. Regular's application and could not be cross-examined as part of the means to establish the admissibility of the evidence (*Criminal Code*, at s. 278.94(2)). Yet, JT was cross-examined and then contradicted on the evidence of the other alleged sexual activity to prove that the allegations were false, exactly what had to be shown to establish the relevance of the evidence.

[83] The trial judge's approach exposed JT to the very thing that the section 276 regime was designed to minimize. As stated in *Darrach*, at paragraph 68:

> … To compel the complainant to be examined on her sexual history before the subject has been found to be relevant to the trial would defeat two of the three purposes of the law, as articulated and upheld in *Seaboyer* (at p. 606). It is an invasion of the complainant's privacy and discourages the reporting of crimes of sexual violence. As the Ontario Court of Appeal points out, the accused must know what evidence he wants to introduce on his own; the *voir dire* is not to be a "fishing expedition" (p. 21). The evidence is tested at the *voir dire* and if it meets the criteria in s. 276(2), it may be introduced at trial. The complainant can then be compelled to testify or if the Crown, as it is most likely to do, calls her as a witness, be cross-examined on it.

[84] Failing to observe the mandatory requirements of section 278.94 was a serious error. In *Barton*, at paragraph 83, Moldaver J. observed that the failure to comply with the requirements of section 276, while possibly advantageous to the accused, was prejudicial to the victim; and:

> … came at the expense of [the victim's] dignity and privacy (which continued despite her death), the truth-seeking process, and trial fairness, which must be assessed "from both the perspective of the accused <u>and of society more broadly</u>" (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 22)…
>
> (Underlining in original.)

[85] Put another way, whether JT had fabricated allegations was a pre-condition to admitting the evidence. As *Darrach* clearly states, the evidence is tested at the *voir dire* stage, not as part of the trial. An accused cannot engage in a parallel trial within a trial to prove relevance of other sexual activity. But this is exactly what happened in this trial. To have allowed Mr. Regular to attempt to prove that the allegations against SO were demonstrably false as part of the trial, including by cross-examining JT, turned section 276 and its admissibility requirement of establishing the relevance of other sexual activity on its head and permitted a trial within a trial of a matter not before the trial judge.

Mr. Regular did not establish that the SIRT sexual assault allegations were fabricated or demonstrably false

[86] If the proper legal analysis had been applied at the *voir dire* stage, the evidence would not have been admitted. The evidence did not establish that JT's account of

her sexual encounters with SO were fabricated or demonstrably false and showed no pattern or propensity by her to fabricate sexual assault allegations.

[87] That the Director of the SIRT investigation concluded that he did not have reasonable grounds to lay a charge, did not mean the allegations were fabricated or demonstrably false. The investigator's conclusions were his opinion, based on his view of the circumstances. Opinions are not evidence that allegations are fabricated or demonstrably false. For example, another investigator was asked early in the SIRT investigation to analyze JT's initial interview with the SIRT investigators for its "veracity". After reviewing the interview, the investigator opined that:

> Despite the lack of detail (potentially due to her resistance in pursuing the matter), the witness is unequivocal in her allegation regarding [SO]. She shows little sensitivity or reluctance in making the allegation which bodes well for her in terms of the overall veracity of the account.

(Appeal Book, Vol. III, Tab 2(H), at page 117.)

[88] This investigator's opinion that JT's initial statement boded well for the "veracity" of her account was no more evidence that the allegations were true, than the opinion of the Director of SIRT that he could not lay charges was evidence that the allegations were false.

[89] While the Director expressed concern with inconsistencies and contradictions between JT's description and other evidence, these inconsistences and contradictions did not mean that JT had fabricated allegations in the sense ascribed by *Riley*, or that the evidence showed a pattern of fabrication by JT.

[90] Leaving aside for the moment that it is undisputed that JT could not have been 15 years old when she had her first encounter with SO, the contradictions with which the investigators were concerned did not relate to the circumstances of the actual sexual encounters but to peripheral details. The encounters themselves were not witnessed by anyone, and as stated, at no point did JT recant that she had sexual encounters with SO. It would be her word against SO (if he were to speak to the matter) as to whether anything occurred. This is exactly the same as in *Riley*, *B. (A.R.)*, and *M.T.*

[91] Even the fact that JT could not have been 15 years old when she had her first encounter with SO, as she had stated, did not mean that JT had fabricated sexual

allegations against SO. JT's incorrect recall as to when the first encounter occurred did not mean she fabricated the encounter. JT could simply be wrong about when the encounter occurred and her age (see for example, *R. v. G.G.*, 2025 ONCA 574, appeal as of right to the SCC (41963)).

[92] Although JT stated that her first encounter with SO was in 2004, or when she was 15 years old, JT also stated that the first encounter could have been 2005 (when she would have been 16), or 2006 (when she would have been 17) (Appeal Book, Vol. II, Tab 2(F), at pages 87-88, 99, 102 ("Second SIRT Interview")). As discussed later in this decision, JT was frank that she was not good with dates or timing of events (see for example, Appeal Book, Vol. II, Tab 2(E), at page 72 ("First SIRT Interview")).

[93] Confusion is not fabrication. Confusion over when events occurred or who was where and when may impact the credibility of JT in a trial of those allegations against SO, and even possibly raise a reasonable doubt that SO is guilty of the alleged offences (see *G.G.*, at paras. 72, 74-75). But it is not fabrication. As squarely pointed out in *Riley*, even reasonable doubt does not mean that other allegations are demonstrably false.

[94] Similarly, the fact that JT told the investigator in the Second SIRT Interview that the child protection authorities had documented what she had told them about her relationship with SO, and the investigators could not confirm the existence of a file, did not mean that JT fabricated that she had a sexual relationship with SO. JT had a long history with child protection in relation to not only her childhood, but her own children. JT may genuinely have believed there would be a file. She would have no way of knowing one way or the other. This was a peripheral detail that did not establish that JT had fabricated allegations against SO.

[95] The Director of SIRT was also troubled because JT's accounts of her encounters with SO in his capacity as a police officer could not be reconciled with the police files that could be reviewed. However, the lack of documentation in police records does not necessarily mean that SO did not have sexual contact with JT. For example, in *R. v. Snelgrove*, 2023 NLCA 12, leave to appeal to SCC refused, 40789 (29 February 2024), a police officer sexually assaulted a civilian after offering her a drive home in his capacity as an officer. He did not record or document that he was with the victim (*Snelgrove*, at para. 4).

[96] Further, the records did show a connection between JT and SO, in his capacity as a police officer, on two occasions: over the course of May and June, 2009, and March 2011 (Appeal Book, Vol. III, Tab 2(H), at pages 111-112, 133-135, 141, 143, 148-149, 156-162, 204-206, 215-216, 273, 275, 279, 283). The first connection was in relation to a domestic matter between JT and her boyfriend in which SO served a court order on the boyfriend and then arrested and charged him with breach of that order. The connection in 2011 related to an assault in which SO could not locate JT to be interviewed. Although there is no reference to SO speaking with JT, as stated above, this did not mean that SO did not speak to her or have contact with her.

[97] The lack of corroboration in the police records as to the timing of encounters was not evidence that JT had fabricated allegations.

[98] More troubling is the SIRT report's reference to the two witnesses who described JT as a troublemaker and a liar. That other civilians identified by JT did not support JT, but expressed their own personal opinions about her credibility, is not evidence that JT fabricated sexual assault allegations against SO. There could be many reasons why a witness denies what another witness has said, and they themselves could be lying.

[99] Finally, significantly but unfortunately not referred to by the trial judge in his Decision on Admissibility, the circumstances of JT's disclosure of her sexual relationship with SO could hardly be described as a pattern or a propensity to fabricate allegations. Unlike the allegations made against Mr. Regular, JT made no complaint about SO to the police - or anyone. The only reason her encounters with SO came to light was because a private investigator hired by Mr. Regular interviewed JT's mother, who was not always on good terms with JT. She, not JT, first disclosed that JT had sexual relations with SO.

[100] When asked by the SIRT investigator during the first interview about what her mother had disclosed, JT repeatedly stated (no less than 10 times) over the course of the interview that she did not want to discuss what happened with SO. While she was more forthcoming with details in a second interview, and specifically referred to incidents of sexual contact to which she did not consent, she was still concerned with saying anything further if an investigation might involve one of her children.

[101] That JT did not want to discuss what happened with SO, and was not the one who made the complaint, contradicts that she was "prone" to making false allegations or that there was a "pattern" of fabrication. The details of what JT stated

happened between her and SO had to be pried out of her and it took two interviews to do it (see also, Appeal Book, Vol. III, Tab 2(H), at pages 104, 108). Even under cross-examination JT reiterated that she had never wanted to press charges or have to say anything about SO (Transcript, 10 April 2024, at pages 52-54). In the transcript of April 10, 2024, at page 62, JT testified:

> JT: Again, I'm not sure, and I have honestly blocked this whole thing out. I'm not ready to talk about it. It's–this was my experience, and it wasn't something that I wanted out. I didn't want to share it with anyone, and my mother gave this information without me knowing about it or consenting to it, and I just feel betrayed with it, so I can honestly say I don't have much to say about this. I'll answer the best I can.

[102] How JT's statements about SO came to light in no way resembles how her complaints against Mr. Regular were made. There was no pattern when compared with the allegations against Mr. Regular.

[103] For the above reasons, the evidence from the SIRT investigation did not meet the narrow basis for relevance, as established in *Riley* and subsequent jurisprudence, namely, that the allegations against SO were fabricated or demonstrably false and could show a pattern of fabrication by JT. The opinions of the SIRT investigators and the evidence they relied upon for those opinions were no more evidence that JT had fabricated allegations than the evidence of the acquittal proffered in *Riley*.

[104] Mr. Regular submitted that the fact that JT was wrong that she was 15 years old when her first encounter with SO occurred was enough to establish that her allegations were "demonstrably false" or that JT had fabricated the allegations. He submitted that the Court must be careful to not set the bar too high to prevent an accused from genuinely challenging a complainant about other allegations. I disagree.

[105] As explained, earlier in these reasons, the route for establishing relevance of this kind of other sexual activity is narrow, and with good reason. As stated in *Riley*, cross-examination of a complainant about other sexual assault allegations "should not be encouraged" (at para. 9).

[106] Such evidence is almost always irrelevant and opens a complainant to facing a trial on multiple fronts without that other allegation being properly before the court for trial. Only when it is clear that a complainant has fabricated allegations, and shows a pattern of false allegations, does such evidence become relevant, and even then this does not mean that a complainant has fabricated allegations against the

accused. It only means that the accused has established a basis to cross-examine a complainant on the issue.

[107] Further, to allow evidence of other allegations to be admitted on any lesser standard than that they are demonstrably false brings the rationale for the admission of such evidence, as observed in *M.T.,* uncomfortably close to the twin myth that a complainant is not believable because of her other sexual activity. As stated in *M.T.* at paragraph 52:

> Reduced to its essence, the appellant's argument is that a complainant who accuses *two* persons of sexual impropriety occurring at different times and different circumstances is more likely to be lying about either or both than a complainant who accuses only one person. This reasoning brushes uncomfortably close to what s. 276(1)(b) proscribes and is countermanded by binding precedent: *Riley*, at p. 154.

(Emphasis in original.)

Such a lesser standard also opens up a complainant to exactly the kind of broad attack on their character that the section 276 regime was enacted to minimize.

[108] In summary, the trial judge erred in concluding that the proffered evidence from the SIRT investigation was relevant to an issue at trial under section 276(2)(b), namely JT's credibility. The only legal basis on which the other sexual assault allegations could be relevant to JT's credibility was if they were fabricated and or demonstrably false and showed a pattern of fabrication by JT, which the evidence did not establish. JT never recanted what happened between her and SO, and whether or not she was inconsistent or wrong as to her age when the encounters occurred was not evidence that she fabricated allegations. This evidence fell far short of establishing the narrow basis upon which it could be relevant.

The proposed use of the evidence to show that JT was an "unreliable historian" was irrelevant and inadmissible as collateral evidence

[109] In the absence of establishing that the allegations were relevant because they were fabricated, the evidence was inadmissible as collateral evidence, as explained in *Riley* and *B. (A.R.).*

[110] However, Mr. Regular argued that the evidence from the SIRT investigation was not collateral because the alleged inconsistencies related to JT's memory of events as disclosed in the investigation occurred around the same time as the events

relating to Mr. Regular. The argument was that if she was an unreliable historian on the matters involving SO, she was an unreliable historian regarding Mr. Regular. The trial judge agreed that the evidence was not collateral given that it related to JT's credibility. At paragraph 25 of his Decision on Admissibility, the trial judge stated:

> I am satisfied that the evidence sought to be adduced relates directly to the credibility of [JT]. This is, perhaps, the most significant issue at trial because, based upon my understanding of the Crown's case and submissions of counsel for [Mr. Regular], I will be confronted with a "he said/she said" scenario at trial – with one party alleging that sexual assaults occurred and the other party denying them in their entirety. The credibility of [JT] and [Mr. Regular] are critical to the eventual outcome of the trial. This satisfies the requirements of section 276(2)(b) of the *Criminal Code*.

[111] However, that JT might be shown to be inconsistent on matters not before the Court was an inadequate basis upon which to conclude that this collateral evidence was relevant and admissible. Bare attacks on the credibility of a complainant are not a sufficient basis upon which to admit evidence of the other sexual activity. As stated *Goldfinch*, at paragraph 56:

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

(Footnote omitted.)

[112] As explained in *Darrach*, credibility will almost always be the issue in a sexual assault trial. It was not enough to say the non-sexual feature of evidence of other sexual activity was relevant to JT's credibility because of inconsistencies. Whether JT was a poor or unreliable historian on unrelated matters was no more than a classic violation of the rule against collateral evidence. This Court described the rule against collateral evidence in *J.H. (NLCA)*, at paragraph 33:

> Collateral evidence is evidence which depends for its relevance on the fact that it contradicts a witness. (See *A.G. v. Hitchcock* (1847), 154 E.R. 38 (Ex. Ch.).) The mischief the collateral evidence rule seeks to avoid was discussed in *A.R.B.* and described at paragraph 9 of *Riley* as follows:

> ... The problem of proving falsity in these circumstances is considerable. To have [a third party] testify that her complaint to the authorities about him was false, would only introduce a collateral issue of credibility which would be as difficult to resolve as those contained in the complaints of which the trial judge was seized. Even if we had a proper record of [the third party]'s trial, a not guilty verdict, standing by itself, could not establish that the prosecution was based on fabricated testimony by the complainant.

[113] As concluded in *Riley*, *B. (A.R.)*, *M.T.*, and *J.H. (NLCA),* this evidence did no more than contradict JT on matters that were not before the Court (see also for example, *R. v. J.H.*, 2013 ONCA 693 ("*J.H. (ONCA)*"), where the accused was not permitted to tender evidence and impeach a complainant in a sexual assault trial on whether she had made or encouraged a false complaint of a motor vehicle accident for offending the collateral fact rule). See also *R. v. Meddoui*, 1990 ABCA 168 (CanLII), aff'd [1991] 3 S.C.R. 320. As stated in *B. (A.R.)*, at paragraphs 13 and 14:

> Furthermore, the general rule is that one cannot impugn a witness's credibility by contradicting the witness on matters which are collateral even in a case where the "core" issue is credibility. As stated in *Phipson*, *supra*, at § 12-33:
>
>> A party may not, in general, impeach the credit of his opponent's witness by calling witnesses to contradict him as to matters of credit or other collateral matters, and his answers thereon will be conclusive. This rule is not absolute. The test whether a matter is collateral or not is this: "if the answer of a witness is a matter which you would be allowed on your own to prove in evidence−if it had such a connection with the issues, that you would be allowed to give it in evidence−then it is a matter on which you may contradict him".
>
> There is no suggestion that the appellant in this case could have led this evidence without laying the groundwork for it in the cross-examination of the complainant. In *Wigmore on Evidence*, Chad. Rev. Vol IIIA at ss. 1004 *et seque*, the authors set out two classes of fact that are not collateral: "(1) facts relevant to some issue in the case, and (2) facts relevant to the discrediting of a witness". In the latter category the author lists moral character, bias, corruption, skill, intoxication and illness, opportunity of observing the events, recollection, narration and prior statements. There is no provision for rebutting accusations of criminal conduct against persons other than the accused.

[114] As in *B. (A.R.)*, here, the non-sexual features of the evidence of the other sexual encounters between JT and SO was not evidence that Mr. Regular would have been permitted to raise on his own. He would have had to first establish the groundwork in cross-examining JT, and how the evidence was relevant to the issues at trial beyond the credibility of JT. That the inconsistencies on which JT was to be

cross-examined covered some of the same time period as the allegations against Mr. Regular did not change the collateral feature of the evidence.

[115] This is not to suggest that the rule against collateral evidence is absolute. It is not, as explained in *J.H. (ONCA)* and *B. (A.R.)*. However, in the context of sexual assault trials, as explained in *M.T.*, and referred to earlier in these reasons, cross-examination of complainants and calling evidence to contradict them regarding alleged inconsistencies related to unrelated sexual assault allegations creates the very real risk of prohibited reasoning via the myth that a complainant is less worthy of belief because of their sexual history.

The probative value of the evidence was substantially outweighed by the prejudicial effect

[116] The trial judge's error in concluding that the evidence was relevant impacted his balancing of its probative value against its prejudicial effect. As collateral evidence, its probative value, namely that JT had been inconsistent on other occasions, as explained by the Supreme Court in *W. (B.A.)*, was at best, tenuous. In contrast the tenuous value of this kind of evidence was substantially outweighed by its prejudicial effect on the proper administration of justice (*J.H.* (*NLCA)*, at paras. 32-37). Whether there is prejudice includes the assessment of prejudice to the trial process "in addition to the prejudice that might arise with respect to any party or witness to the proceeding" (*B. (A.R.),* at para. 16).

[117] The evidence was prejudicial to the proper administration of justice because JT had to respond to a trial on multiple aspects of her life, not just whether she was sexually assaulted by Mr. Regular. As stated in *B. (A.R.)*, putting the complainant on trial for every failing in her life is inimical to the spirit of section 276 which seeks to ensure that a complainant is cross-examined only on matters that are relevant to the trial and not on matters that are not before the court.

[118] To allow such evidence is to render section 276 meaningless in its attempt to streamline cross-examination to only those aspects of the evidence that have a bearing on whether the offences occurred. As stated earlier, that it could be shown that JT was inconsistent, maybe even unreliable on matters not before the Court, did not mean she was unreliable in relation to what may have happened between her and Mr. Regular.

[119] Further, there was already a basis in the evidence to challenge JT's recall without having to resort to collateral evidence related to other sexual activity. JT was frank in her statements to the police regarding Mr. Regular, and in her testimony, that she had trouble recalling dates and the timing of events. See for example, Transcript, 8 April 2024, at page 103, regarding her use of drugs, at pages 83 and 105, regarding her age, or the timing of events, or pages 91, 97, 99, 102, regarding what she told CP. It was also clear from the evidence that JT wrongly remembered that the shoplifting incident as having occurred prior to the witness interview incident. The documented police reports showed the reverse.

[120] Mr. Regular cross-examined JT at length on these and other alleged inconsistencies within her statements and with the evidence of other witnesses. In other words, JT's recall and memory of the events was squarely before the trial judge without having to also put to JT her recollection of the peripheral details of the alleged sexual encounters with SO. As stated in *Goldfinch*, at paragraph 69, "the relative value of sexual history evidence will be significantly reduced if the accused can advance a particular theory *without* referring to that history" (emphasis in original).

Conclusion regarding the error in admitting the evidence from the SIRT investigation

[121] In summary, the evidence from the SIRT investigation did not meet the threshold of relevance under section 276(2)(b). The evidence did not establish that JT had fabricated allegations or showed a pattern of fabrication and was collateral to the issues at trial. As collateral evidence, its probative value was substantially outweighed by its prejudicial effect on the proper administration of justice under section 276(2)(d). The trial judge erred by both applying the incorrect legal framework to assess the evidence and in admitting this evidence. This opened up the complainant to cross-examination on the evidence before its relevance had been established. The trial judge treated the other allegations against SO as if they were before him for trial. They were not, and approaching the evidence in this way created serious unfairness towards not only JT, but also the Crown.

[122] I would allow the appeal on the basis of the above errors alone, however, these were not the only errors committed by the trial judge.

ISSUE 2: Did the trial judge err in permitting Mr. Regular to cross-examine JT and then tender evidence of the details of JT's shoplifting offence to contradict her responses?

[123] For similar reasons, the trial judge erred in admitting certain details from JT's shoplifting offence. This was inadmissible collateral evidence.

[124] In October 2012, JT, while under the influence of drugs, aided her friend who stole an eight-pack of beer from an Ultramar gas station. JT was charged with the offence and pleaded guilty. She received an absolute discharge. Mr. Regular represented JT on this matter in Court. The only relevance of this incident was its timing. JT stated to police that one of the alleged sexual offences occurred during a meeting she had with Mr. Regular about the shoplifting charges.

[125] However, Mr. Regular was permitted to question JT not only about the timing of this incident, but about the weather on the day the offence was committed, the gender of the police officers who attended and where she was exactly when she confessed to participating in the theft. Mr. Regular was then permitted to contradict JT on her responses to these questions by calling evidence, including filing an official report of the weather on the date the shoplifting occurred.

[126] Like the SIRT investigation, the evidence of the details of the shoplifting incident, such as the weather on that date, did no more than permit Mr. Regular to attempt to contradict JT on matters that were not before the Court.

[127] Contrary to Mr. Regular's submissions on appeal, in my view, the details of the shoplifting incident were not put in issue at trial by JT. JT's evidence on direct-examination of the issue was brief and without details regarding the weather or who the officers were. The most she stated as to where she was when arrested was that she "stayed there" and the police "showed up" (Transcript, 8 April 2024, at pages 100-101). The fact that JT may have referred to details of the weather or the officers in her statements to the police did not mean that she had put these matters at issue in Mr. Regular's trial. Witnesses often recount details in witness statements that may have nothing to do with the relevant evidence that they may give at a trial. This does not put such details at issue in a trial.

[128] While Mr. Regular may have been permitted to question JT on these details, that should have been the limit of such questioning. The trial judge erred by permitting Mr. Regular to contradict JT by tendering irrelevant and collateral

evidence. This error compounded the error of permitting JT to be cross-examined on the inadmissible and collateral evidence of her sexual activity related to SO.

[129] The two errors combined resulted in unfairness to JT by exposing her to cross-examination that should not have been permitted and distorted the truth seeking function of the trial. Rather than focusing on the issue that had to be decided, whether Mr. Regular had committed criminal offences, the trial judge permitted wide-ranging cross-examination of JT that had no bearing on that ultimate issue.

ISSUE 3: Did the trial judge err in refusing to permit JT to testify as to the details of her last encounter with Mr. Regular, or permit the Crown to cross-examine Mr. Regular about this encounter?

[130] While allowing JT to be cross-examined on irrelevant details, the trial judge further erred by refusing to permit JT to testify to the relevant details of her last encounter with Mr. Regular.

[131] The Crown attempted to have JT recount evidence of her last encounter with Mr. Regular, to which Mr. Regular objected. The Crown advised the trial judge that JT was anticipated to say that after having no communication with Mr. Regular for several years, at the request of her sister, she and her sister met with Mr. Regular at a local storage unit facility where Mr. Regular rented a unit. During that encounter, Mr. Regular propositioned both her and her sister to have sex with his clients in exchange for money. JT was anticipated to say that, because of the circumstances of that encounter, she formed the belief that Mr. Regular may have been engaging in sexual conduct with her sister, whom she would testify was addicted to drugs. JT would say that she became so upset by him propositioning not only her, but her sister, that she confronted and assaulted Mr. Regular, and told him she would go to the police. JT's sister was not a witness at trial.

[132] Mr. Regular submitted that the details were evidence of bad character and were inadmissible. The trial judge agreed with defence counsel that the evidence was inadmissible and irrelevant. At page 138 of the Transcript, 8 April 2024, the trial judge stated:

> Well, if [JT] were to say he propositioned me again, I got upset with him, and if it's left at that, without all of the other stuff about where they were, and storage units, and [JT's sister], and drugs, and all of that, I would go along with that, that's relevant.

[133] JT's recounting of how she came to make the complaint to the police fell within the rubric of a prior consistent statement. Prior consistent statements are generally inadmissible. The fact that someone told someone about allegations, including the police, is not probative of whether those allegations occurred (*R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 36).

[134] However, it may be permissible for complainants to recount how they came to make a complaint, as part of the overall narrative of the circumstances, especially if the circumstances of the allegations come to light after a long period of time, as was the case here. Such evidence is not admissible for its truth, but the fact and the timing of the declaration, and may include details of the allegations. There may be an event that causes a complainant to come forward. The fact and timing of how a complainant came to make a complaint can provide logical cohesion to the complainant's narrative. As stated in *Dinardo*, at paragraph 37:

> In some circumstances, prior consistent statements may be admissible as part of the narrative. Once admitted, the statements may be used for the limited purpose of helping the trier of fact to understand how the complainant's story was initially disclosed. The challenge is to distinguish between "using narrative evidence for the impermissible purpose of 'confirm[ing] the truthfulness of the sworn allegation'" and "using narrative evidence for the permissible purpose of showing the fact and timing of a complaint, which may then *assist the trier of fact in the assessment* of truthfulness or credibility" *McWilliams' Canadian Criminal Evidence* (4th ed. (loose-leaf)), at pp. 11-44 and 11-45 (emphasis in original); see also *R. v. F. (J.E.)* (1993), 85 C.C.C. (3d) 457 (Ont. C.A.), at p. 476).

(Emphasis in original.)

[135] The Court in *Dinardo* stated that how a complainant came to disclose allegations can provide "important context" for assessing a complainant's credibility (at para. 39). And as stated in *R. v. F. (J.E.)*, 1993 CarswellOnt 137 (ONCA), 1993 CanLII 3384, at paragraph 37:

> The second aspect of the rationale for the rule against admitting previous consistent statements is that such evidence has little, if any, probative value. However, narrative is justified as providing background to the story − to provide chronological cohesion and eliminate gaps which would divert the mind of the listener from the central issue. It may be supportive of the central allegation in the sense of creating a logical framework for its presentation − but it cannot be used, and the jury must be warned of this, as confirmation of the truthfulness of the sworn allegation.

[136] What happened between JT and Mr. Regular when they met at the storage lockers, the "other stuff" the trial judge refused to hear, was the "why" behind JT's complaint to the police. Given the historical nature of the allegations, knowing the details of how the complaints came to be made to the police could assist the trial judge in assessing JT's credibility. See the dissent in *R. v. Langan*, 2019 BCCA 467, at paragraphs 90-95, rev'd 2020 SCC 33 (the dissent was adopted by the Supreme Court of Canada in *R. v. Langan*, 2020 SCC 33, [2020] 3 S.C.R. 499).

[137] This was not the only reason the details of the last encounter were relevant. As stated, Mr. Regular's defence to the allegations was denial that any sexual activity occurred and that JT had fabricated the allegations. JT's evidence as to how she came to make a complaint to the police was relevant as her response to this assertion.

[138] As stated in *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272, at paragraph 10, evidence of prior consistent statements can remove a "potential motive to lie". At paragraphs 11 and 12 of *Stirling*, the Court explained:

> … What is clear from all of these sources is that credibility is necessarily impacted — in a positive way — where admission of prior consistent statements removes a motive for fabrication. Although it would clearly be flawed reasoning to conclude that removal of this motive leads to a conclusion that the witness is telling the truth, it is permissible for this factor to be taken into account as part of the larger assessment of credibility.
>
> It is therefore not entirely accurate to submit, as the appellant contends, that prior consistent statements cannot be used to "bolster" or "support" the credibility of a witness generally. This argument attempts to insulate the impact of the prior consistent statements from the remainder of the credibility analysis and suggests that "general" credibility can somehow be hived off from the specific credibility question to which the statements relate. Such a fine parsing of the notion of credibility is impractical and artificial. Further, while it would clearly be an error to conclude that because someone has been saying the same thing repeatedly their evidence is more likely to be correct, there is no error in finding that because there is no evidence that an individual has a motive to lie, their evidence is more likely to be honest.

[139] The trial judge stated that "[t]he heart of the issue" was whether JT had a motive to fabricate (Decision on Admissibility, at para. 38). In acquitting Mr. Regular, the trial judge concluded that he believed Mr. Regular and that none of the allegations occurred. By implication, this conclusion means that he found that the allegations were fabricated. Yet, he reached this conclusion without providing JT

the opportunity to respond to this assertion by explaining her reasons for coming forward.

[140] Knowing why JT went to the police was relevant to assessing the defence that she fabricated the allegations. JT's explanation to the police of what happened at the storage unit could illustrate that she had no motive for making a false complaint.

[141] Mr. Regular's further assertion that the details of the encounter were prejudicial as bad character evidence was overstated. While JT's belief that Mr. Regular might be engaging in inappropriate sexual conduct with her sister was evidence of bad character in respect of Mr. Regular, the Crown was clear the evidence was not being tendered for its truth. Whether or not Mr. Regular was actually engaging in sexual conduct with JT's sister was irrelevant. What was relevant was that it was JT's belief, rightly or wrongly, that such was occurring and that this belief provided an explanation for the timing of the complaint to the police.

[142] The trial judge was readily able to distinguish between assessing this evidence for its relevant purpose without improperly accepting that it was true or relying on it as bad character evidence as stated by the defence. The trial judge did not have to accept the evidence as true in order to accept it as JT's explanation. Indeed, the trial judge relied on his capability to so reason when he addressed why the evidence of the other sexual activity was admissible (Decision on Admissibility, at para. 29(e)).

[143] Mr. Regular also argues that JT was permitted to adequately recount the circumstances necessary to explain why she went to the police. I disagree. JT was so limited as to what she could say that her explanation for why she went to the police when she did, was meaningless. As submitted by the Crown, all JT could say was that at some unknown place, with some unknown persons present, there was an encounter with Mr. Regular in which he propositioned her and she assaulted him (Transcript, 8 April 2024, at page 141). This explanation, according to JT, was incomplete, and the limitations placed on her distorted her evidence and the truth seeking function of the trial. One need only review JT's answers to the questions, once advised of these limitations, that JT did not know how to respond (Transcript, 8 April 2024, at pages 142-145):

Court: [JT], the Crown is going to ask you a question. I'm going to ask you to listen to it very carefully and only answer what you're asked, okay.

Crown: Thank you, Justice. Okay. So, [JT], before we took a break I was asking you some questions about your last meeting with Mr. Regular. I don't want to know where it

took place, okay. So, you indicated that you had one final meeting with Mr. Regular, okay. I don't want to know where you were at all. So, let's be clear on that, okay. So, take me through that interaction with Mr. Regular, when you first start speaking to him and see him.

JT: So, you don't want to know who was there, or anything like that?

Crown: No.

JT: Okay.

Crown: The court has made a ruling, and I'm asking you very specific questions about it… but I want to just know that last time you met with Mr. Regular, take me through your specific discussions with Mr. Regular, okay.

JT: I just said a few things to him about –

Crown: What did you say to him?

JT: I told him I didn't want him hurting anyone else, that I didn't want him to be around my sister.

Defence: Justice -

Court: Stop.

JT: I don't understand.

Crown: We don't want to hear about your sister, okay.

JT: Um-hm.

Crown: So, you said you said things to him.

JT: Yes.

Crown: Okay. What kinds of things are you saying to him? Don't tell me about your sister. What words were you saying? "I said a few things to him"; what kind of words?

JT: I called him disgusting.

Crown: Okay.

JT: I called him a pig. I don't really remember the exact words I was calling, saying to him, but I was pretty upset with him, and I was letting him know that I was upset.

Crown: Do you remember the words Mr. Regular said to you, if he said anything?

JT: I don't think he said anything to me.

Crown: Did you hear him say anything at all?

JT: Not towards me, no.

Crown: Okay, was it loud enough that you could hear it? My point is, why are you calling him disgusting? Why are you calling him a pig?

JT: I can't say a name or anything.

Court: If it involves another person I don't want to hear about it, okay.

JT: Okay, I'm sorry that's just confusing to me.

[144] JT's confusion is understandable. She was asked to recount the details of her last encounter with Mr. Regular, to explain how she came to make the complaint to the police, but was not permitted to give the very details that explained her motivation for so doing.

[145] Finally, the details of the encounter were admissible because it was during this encounter that JT confronted Mr. Regular about what she alleged happened between them. His response to this confrontation was admissible and relevant. Mr. Regular admitted in his statement to the police that there was an encounter between him and JT at the storage lockers, but relayed a different version of what happened. The Crown reasonably wanted to cross-examine Mr. Regular on his statement about these differences. The trial judge's assessment of such differences could be relevant to the overall assessment of both JT's and Mr. Regular's credibility. But the trial judge could not make such an assessment without hearing the details of JT's version of what happened. Instead, the trial judge found this line of questioning to be irrelevant.

[146] It is also inexplicable why the trial judge prohibited JT from testifying as to the location of the last encounter given that Mr. Regular referred to the location of the storage lockers himself in his statement to the police. The admissibility of Mr. Regular's statement to police was not contested. There was no prejudice in hearing these details. The trial judge erred in concluding otherwise.

[147] In summary, the details of how and why JT came to make the complaint to the police were relevant and JT should have been permitted to testify to these details. They were relevant to the overall narrative but, more importantly, could rebut whether JT had a motive to fabricate the allegations. Whether JT had a motive to fabricate the allegations was relevant to whether she did fabricate the allegations as alleged by Mr. Regular and as concluded by the trial judge. While certain details may have cast Mr. Regular in a negative light, these details were not tendered for their truth but to explain JT's motive for going to the police. The trial judge erred in not permitting JT to testify to these details. The trial judge further erred in preventing the Crown from cross-examining Mr. Regular on these details and his recollection of this event. These errors further distorted the truth seeking function of the trial.

ISSUE 4: Did the trial judge err in permitting Mr. Regular to give his evidence without swearing an oath or by solemn affirmation?

[148] The trial judge permitted Mr. Regular to testify without swearing the oath or making a solemn affirmation. The court clerk was about to administer the oath to Mr. Regular when the trial judge interjected and stated "No, he's a lawyer, doesn't need to be sworn" (Transcript, 18 April 2024, at page 1).

[149] The trial judge erred in allowing Mr. Regular to testify without swearing an oath or affirming his testimony. That Mr. Regular was a lawyer and member of this province's law society did not relieve him from the obligation to swear an oath or proceed by way of solemn affirmation before testifying at his trial.

[150] Neither the *Criminal Code* nor the *Canada Evidence Act*, RSC 1985, c. C-5, permits an exception to testifying under oath at a criminal trial on the basis that the witness is a lawyer. Section 540(1)(a) of the *Criminal Code* requires that *viva voce* evidence at a preliminary inquiry be under oath, and section 646 of the *Criminal Code* applies section 540 to the evidence of witnesses for both the Crown and the accused in a trial for indictable matters. Section 540 states:

> 540(1) Where an accused is before a justice holding a preliminary inquiry, the justice shall
>
> > (a) take the evidence under oath of the witnesses called on the part of the prosecution, subject to subsection 537(1.01), and allow the accused or counsel for the accused to cross-examine them;

[151] Section 646 states:

> On the trial of an accused for an indictable offence, the evidence of the witnesses for the prosecutor and the accused and the addresses of the prosecutor and the accused or counsel for the accused by way of summing up shall be taken in accordance with the provisions of Part XVIII, other than subsections 540(7) to (9), relating to the taking of evidence at preliminary inquiries.

[152] Section 14(1) of the *Canada Evidence Act* permits a witness to make a solemn affirmation instead of taking an oath. The *Canada Evidence Act* allows two exceptions: under section 16, where mental capacity to take an oath or affirm is in question for persons 14 years or older, and under section 16.1, which presumes that persons under 14 years of age are incapable of taking the oath or solemn affirmation. In these two circumstances, the witness may be permitted to testify by promising to tell the truth. Neither exception applied to Mr. Regular.

[153] Courts do not always require a lawyer to swear the oath or affirm their evidence because, as officers of the Court, they are considered to be already under an ethical duty to be truthful.

[154] In this regard, *R. v. Lawlor*, 2025 NLCA 2 is distinguishable from the present circumstances. The lawyer in *Lawlor*, who testified at an appeal hearing for Mr. Lawlor without being required to take the oath, did so in his professional capacity, in response to Mr. Lawlor's ground of appeal of ineffective assistance of counsel. Further, given that the lawyer in *Lawlor* was responding to cross-examination on his affidavit, a sworn written statement, his testimony was under oath. The oath the lawyer in *Lawlor* swore in attesting to the truthfulness of his affidavit continued when he was cross-examined.

[155] In contrast, Mr. Regular gave evidence in his own defence against allegations of criminal conduct. He was not testifying in his professional capacity and he was in no position different than any witness or accused in a criminal trial. Mr. Regular was

not testifying in his capacity as a lawyer, but in his personal capacity as an accused person.

[156] As submitted by the Crown, the commentary attached to this Province's Law Society's *Code of Professional Conduct* states that a lawyer should not expect to be treated differently than other witnesses because of their status as a lawyer:

> A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not, in effect, appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, *and the lawyer who does appear as a witness should not expect or receive special treatment because of professional status*.
>
> (Emphasis added, Law Society of Newfoundland and Labrador, *Code of Professional Conduct*, (27 September 2024), ch. 5.2-1[1].)

[157] Although the chapter is aimed at ensuring that lawyers do not act as both advocate and witness in a proceeding, the direction is apposite to the lawyer who testifies in a personal capacity. In such circumstances, being relieved of the obligation to take an oath or solemn affirmation in a criminal matter, because of one's status as a lawyer, is to receive exactly the kind of special treatment that the above commentary in the *Code of Professional Conduct* discourages.

[158] Finally, notwithstanding that the Crown raised no objection and the parties proceeded as if Mr. Regular's testimony had been taken under oath or by affirmation, I cannot agree with Mr. Regular that there was no risk of prejudice or unfairness. To the contrary, to have required JT to testify under oath, but not Mr. Regular, created a risk of an appearance of unfairness between the two.

[159] This litigation was for all intents and purposes, a "he said - she said trial". Credibility of both witnesses was central to the determination of the verdicts. That Mr. Regular did not have to take an oath or affirm implied that Mr. Regular would be a truthful witness without the need for an oath. In contrast, because JT was required to so do, the implication was that she could not be expected to be truthful in the absence of the oath. This unequal treatment of the complainant and the accused could leave the impression with an observer, including JT, that the trial judge concluded that Mr. Regular would be the more reliable witness.

[160] While the expectation is that all witnesses will be truthful, the point of having witnesses provide evidence under oath or by affirmation is to impress upon them the importance of telling the truth. It is one of the hallmarks of trial testimony and one of the criteria for assessing the reliability of hearsay evidence. Both the Crown and Mr. Regular filed several examples where a verdict or decision was set aside and a new proceeding ordered because of a failure to have *viva voce* testimony taken under oath.

[161] In summary, when a lawyer testifies in their personal capacity at a criminal trial, whether as accused or witness, they should be treated no differently than any other witness or accused and must either swear an oath or be solemnly affirmed as required by the *Criminal Code* and the *Canada Evidence Act*.

[162] Having said that, standing alone, this error is not one that would warrant a new trial. As submitted by Mr. Regular, the Crown did not object. Notwithstanding the risk of a perceived unfairness, the parties proceeded no differently because of the failure by the trial judge. While the failure to administer the oath properly can result in appellate intervention, this is not necessarily the case (*R. v. K.A.*, 2024 BCCA 251, at paras. 21-22). I would not disturb the acquittals if this were the only error. However, this error amplified the impact of other errors resulting in the risk of the appearance of overall unfairness to JT in this trial.

ISSUE 5: Is the test under *Graveline* to set aside the acquittals and order a new trial met?

[163] In an appeal from acquittal, it is not enough to establish that the trial judge made legal errors. The errors must be such that if they had not occurred, one could reasonably expect "in the concrete reality of the case" that the verdict might have been different. The test was articulated in *Graveline*, at paragraph 14:

> It has been long established, however, that an appeal by the Attorney General cannot succeed on an abstract or purely hypothetical possibility that the accused would have been convicted but for the error of law. Something more must be shown. It is the duty of the Crown in order to obtain a new trial to satisfy the appellate court that the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal. The Attorney General is not required, however, to persuade us that the verdict would necessarily have been different.

[164] Mr. Regular argues that if this Court accepts that any or all of the alleged errors were committed by the trial judge, the Crown cannot establish that the errors had a material bearing on the verdict of acquittal. Mr. Regular argues that because the trial judge believed his evidence after hearing the evidence at trial, the absence of the evidence of the SIRT investigation and the shoplifting incident would have made no difference to the trial judge's view of Mr. Regular's credibility or whether the evidence established his guilt beyond a reasonable doubt. Mr. Regular submits that even if the evidence had not been admitted, the verdict would still have been an acquittal.

[165] In my view, the errors in this case were fundamental to the verdicts of acquittal. The trial judge's reasons for acquitting Mr. Regular rested on his credibility findings respecting JT and Mr. Regular and his reasoning as to these credibility findings was influenced by the inadmissible evidence and the failure to hear relevant evidence.

[166] There is no doubt that the inadmissible evidence influenced the trial judge's assessment of JT. The trial judge was clear that it was because of the SIRT evidence he had significant doubts about JT's evidence. At paragraph 42 of his Decision on Verdict, the trial judge stated that it was because of inconsistences in JT's evidence regarding the SIRT investigation and with whom she was around at the times of her encounters with SO, that the trial judge concluded that her recollections regarding SO constituted "flights of fancy", and that her recollections "cast a pall of suspicion over all of her testimony".

[167] At paragraph 44 of his Decision on Verdict regarding the whole of the inaccuracies in her statements raised in the SIRT investigation, the trial judge stated:

> These inaccuracies are serious. When taken into consideration along with all of the inconsistencies relating to [JT's] evidence against [Mr. Regular], they create significant doubt about [JT's] ability to remember events and her motivation in relating them. The inconsistencies give me considerable doubt about the veracity of her allegations. I will discuss these matters in greater length later in this decision.

[168] That the trial judge's references to JT's inconsistencies having "cast a pall" on the entirety of her evidence, and that the evidence was "taken into consideration along with all" of her other evidence, could not be clearer language that the trial judge relied on the evidence from the SIRT investigation in assessing JT's credibility regarding the allegations against Mr. Regular.

[169] Further, the trial judge's explicit reliance on this inadmissible evidence in assessing JT's credibility does not mean that this reliance did not impact his assessment of Mr. Regular's credibility. The trial judge's credibility assessment of Mr. Regular including his conclusion that he believed Mr. Regular's evidence is inextricably linked to his erroneous credibility assessment of JT.

[170] Mr. Regular's credibility was not assessed in a silo. Both JT's and Mr. Regular's credibility was assessed within the context of all the evidence including the inadmissible evidence from the SIRT investigation and the shoplifting incident. As stated in *R. v. C.L.*, 2022 NLCA 53, at paragraph 50, the assessment of the accused's evidence is "part of a dynamic in which the trial judge considered and rejected the complainant's evidence".

[171] The Supreme Court of Canada recently acknowledged the dynamic relationship between the assessment of credibility of a complainant and an accused in *R. v. Rioux*, 2025 SCC 34. At paragraphs 134-141, the Court was satisfied there was a nexus between the errors the trial judge made in assessing the credibility of the complainant which, in turn, impacted the trial judge's assessment of the accused's credibility, notwithstanding that the trial judge found the accused to be honest and credible. At paragraph 135, the majority stated:

> Failing to consider all of the admissible evidence also undermined the trial judge's credibility assessment of the appellant, as his analysis of the appellant's evidence was tainted by his multiple compounding legal errors (see, e.g., *T.J.F.*, at paras. 116-17). Further, given that the trial judge was required to consider the appellant's evidence in light of all the evidence, including the complainant's contradictory evidence, as well as her circumstantial evidence of incapacity, it is not possible to separate the trial judge's acquittal of the appellant from his flawed reasoning. The verdict would not necessarily have been the same in the absence of the trial judge's legal errors.

[172] Here, the acceptance of Mr. Regular's evidence was part of the dynamic at trial in which all of the evidence was reviewed through the lens of the inadmissible evidence and absence of relevant evidence. It was on this incorrect basis that the trial judge rejected JT's evidence *and* accepted Mr. Regular's evidence (see *R. v. Bik*, 2025 QCCA 340, at paras. 27-32; and *R. v. Lacombe*, 2019 ONCA 938, at paras. 58-62).

[173] For example, and without making any statement as to how the evidence should be weighed, I observe that with respect to the first allegation, the trial judge's acceptance of Mr. Regular's denial of committing an offence and his evidence that

he would not have met alone with JT in a parking lot, relies, in part, on his rejection of JT's evidence − that Mr. Regular did meet with her in the absence of her mother in a parking lot.

[174] The rejection of JT's evidence was through the lens of the inadmissible evidence which affected JT's credibility. I say this because there was uncontradicted evidence that could support the plausibility of JT's version – that JT had been apprehended by child protection authorities. This evidence supported that Mr. Regular may have had a reason to not be seen with JT and her mother together. Had the trial judge not been influenced by the inadmissible evidence, he may have viewed the plausibility of JT's version differently, and all of the evidence regarding that allegation differently.

[175] The same can be said for the CP Incident. The trial judge rejected JT's version of events, but a trial judge assessing this evidence without the influence of the inadmissible evidence, may have assessed the evidence related to this incident differently. A reasonable and possible view of the evidence was that JT was corroborated on aspects of her testimony. CP confirmed that JT was upset when she came out of the office and that she disclosed that something had happened between her and Mr. Regular.

[176] For this reason, I cannot accept that in these circumstances, where the verdicts turned on the credibility of JT and Mr. Regular, that the trial judge's conclusion that he believed Mr. Regular, insulates his credibility assessment of Mr. Regular from the flawed reasoning relied upon to reject JT's evidence.

[177] Mr. Regular further submitted that the frailties of JT's evidence alone meant that the errors had no bearing on the acquittal. Mr. Regular submits that there were many inconsistencies in JT's evidence, not only with previous statements, but with other witnesses and documentary evidence. Mr. Regular submits a new trial with the exclusion of the inadmissible evidence will not change the fact that these inconsistencies might undermine the reliability and credibility of JT's evidence. I disagree.

[178] This argument is similar to what was argued in *R. v. S.B.*, 2016 NLCA 20, rev'd 2017 SCC 16. In *S.B.*, the trial judge had improperly admitted evidence of the complainant's other sexual activity before the jury, and also, similar to here, excluded evidence from the jury of the complainant's rebuttal to the assertion that the allegations were fabricated. S.B. was acquitted. Counsel for S.B. argued on

appeal by the Crown that even if the errors had not occurred, the complainant's evidence was so replete with frailties the result would have nonetheless been an acquittal.

[179] Green C.J.N.L. (as he then was), speaking in dissent, which was adopted by the Supreme Court of Canada in overturning the acquittal, rejected this argument and stated, at paragraph 104:

> … The trouble with this submission is that it invites this Court to embark on an assessment of the remaining evidence, without having seen or heard the witnesses in context, and to reach a conclusion – on an evidentiary record that is different from what the jury had before it – that the jury would nevertheless had to have had a reasonable doubt and acquitted. Furthermore, it would require this Court to attempt to assess the weight and significance of the evidence rebutting recent fabrication and its potential impact on the jury without having heard it. That effectively involves placing this Court in the position of the jury and requiring it to make its own assessment of the evidence or potential evidence. This is the very thing that appellate courts in other contexts have been admonished for doing. (See, e.g., in the context of determining whether a verdict is unreasonable, *R. v. W.H.*, 2013 SCC 22, [2013] 2 S.C.R. 180.)

[180] It is not for this Court to assess the credibility of JT and Mr. Regular or to weigh the evidence and make factual findings on properly admissible evidence. It is for a trial judge at a new trial to make such determinations by assessing the properly admissible evidence.

[181] JT was never challenged on the circumstances of the sexual contact. The inconsistencies that were raised (such as whether one of the assaults could have occurred on a coffee table, whether there was a boardroom in Mr. Regular's office, or at what point JT told her mother about the first incident), were magnified by the irrelevant and unrelated inconsistencies from the SIRT investigation and the shoplifting incident. As stated by the trial judge, the SIRT evidence "cast a pall" on the entirety of her testimony.

[182] Mr. Regular submitted in his Factum at paragraph 10, that an appellate court may only intervene where a trial judge relied on improper reasoning in assessing evidence. In this case, the trial judge relied on improper reasoning in assessing the evidence by relying on inadmissible evidence that impacted his credibility assessments and refusing to receive relevant evidence.

[183] Recently, in *R. v. Kruk*, 2024 SCC 7, at paragraph 85, the Supreme Court reaffirmed that appeal courts must show deference to the credibility assessments of

the trial judge in the absence of palpable and overriding error. In this case, in my respectful view, the trial judge's reliance on inadmissible evidence in assessing the credibility of the witness was a palpable and overriding error that permits this Court to intervene. It was the trial judge's reliance on the inadmissible evidence, and his failure to hear relevant evidence, which was central to his conclusion that JT fabricated the allegations and that acquittals would ensue.

[184] In the same way that a trial judge would not be permitted to rely on myths or stereotypes to ground a credibility assessment because it would be an error in principle (*R. v. D.R.*, 2022 NLCA 2, at para. 17, aff'd 2022 SCC 50), it was a legal error for the trial judge to rely on the inadmissible evidence from the SIRT investigation and the shoplifting incident while refusing to allow evidence relating to both JT and Mr. Regular's credibility. These errors supported the trial judge's ultimate conclusion that Mr. Regular was not guilty (see also *R. v. E.S.*, 2024 NLCA 12, at paras. 24-25).

[185] As stated by Binnie J. in *R v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368, at paragraph 76:

> No party to this appeal contends — or could contend — that the Crown can appeal what it may regard as an unreasonable acquittal. On the other hand, the Crown has every right to an appeal on errors of law giving rise to the acquittal. Where, as here, such errors of law are established on the record, the acquittal must be set aside, not because it is unreasonable but because the verdict is founded on legal error.

[186] In my view, the verdicts of acquittal are founded on legal errors. The trial judge's reliance on inadmissible evidence and the failure to admit admissible evidence, cumulatively, in the concrete reality of this case, could reasonably be thought to have had a material bearing on the acquittal.

[187] In *Goldfinch*, evidence of other sexual activity of a complainant had been admitted in a jury trial without being properly "vetted" before its admission. In concurring with the majority that a new trial should be ordered, Moldaver J. stated, at paragraph 144 that, in the circumstances of that case:

> .. the public interest in a trial that is conducted properly according to the law and the need to protect the integrity of the justice system militate in favour of a new trial (see *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 142).

[188] Similarly in this case, the public interest in a trial that is conducted properly and according to the law militates in favour of a new trial.

DISPOSITION

[189] I would allow the appeal and remit the matter to Supreme Court for a new trial.

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F.J. Knickle J.A.

I Concur**:** ______________________________

L.R. Hoegg J.A.

G.L.C. Noel J.A. (dissenting):

OVERVIEW

[190] I have had the benefit of reading my colleague Justice Knickle's reasons. I respectfully disagree with her conclusion that the trial judge erred regarding certain evidentiary rulings and that the errors warrant a new trial.

[191] Since the Crown appeals Mr. Regular's acquittal after trial, the Crown can only succeed if the trial judge committed an error or errors of law that had a material bearing on the acquittal.

[192] The trial turned on credibility. In his detailed reasons, the trial judge thoroughly explained his credibility and reliability findings (*R. v. Regular*, 2024 NLSC 100 ("Decision on Verdict")). The trial judge did not believe the Complainant ("JT"). He believed the Accused's ("Mr. Regular's") evidence that the alleged sexual assaults did not happen. He accepted evidence from other witnesses that

refuted aspects of JT's evidence. The trial judge assessed the totality of all the evidence and concluded the evidence left him with reasonable doubt on each count.

[193] I do agree the trial judge erred by:

- Mischaracterizing Mr. Regular's *Criminal Code*, RSC 1985, c. C-46, section 276 application to admit JT's other sexual activity, in his Decision on Verdict, as similar fact evidence;

- Refusing to permit the Crown to cross-examine Mr. Regular about the details of JT's last encounter with him; and

- Permitting Mr. Regular to testify without being sworn or affirmed.

[194] The Crown has not shown that the errors I identified and the other errors it has asserted, when viewed separately or together, had a material impact on the acquittal.

[195] For the reasons below, I would dismiss the Crown's appeal and uphold the acquittal.

ANALYSIS OF THE ISSUES

[196] My colleague, at paragraph 21 of her reasons, has outlined the issues in dispute. I will address each in turn.

ISSUE 1: Did the trial judge err in admitting the evidence of JT's other sexual activity?

[197] The trial judge did not err in law in admitting the evidence of JT's other sexual assault allegations for the dual purpose of cross-examining JT and adducing evidence to establish the prior false statements (Appeal Book, Vol. I, Tab 5, *R. v. Regular*, 2024 NLSC 31 ("Decision on Admissibility")). The trial judge's ruling:

(1) correctly applied the criteria for admissibility under section 276(2) of the *Criminal Code*; and

(2) did not violate the rule against collateral evidence.

Standard of Review

[198] The standard of review on this issue as well as other evidentiary errors is correctness, while deference is owed to trial management decisions. The Supreme Court of Canada confirmed "that trial management does not provide a safe haven for erroneous evidentiary rulings" (*R. v. Samaniego*, 2022 SCC 9, [2022] 1 S.C.R. 71, at paras. 24-25).

[199] The question of relevance then is reviewable on a standard of correctness (*R. v. T.W.W.*, 2024 SCC 19, at para. 21). Mr. Regular never had the right to adduce irrelevant evidence (*R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443, at para. 37). This Court must ensure that the trial judge did not admit irrelevant evidence and no deference is owed in this regard.

[200] Not all relevant evidence is automatically admissible. The general rule is that relevant evidence is admissible unless a specific legal rule or policy excludes it, such as when the evidence's probative value is outweighed by its prejudicial effect. The trial judge's conclusion on whether the evidence's probative value is outweighed (or, as here for defence-led evidence, substantially outweighed) by its prejudicial effect involves the exercise of discretion. Absent reliance on improper legal principles, the trial judge's conclusion is owed deference and the appellate court "should defer" to that determination (*T.W.W.*, at paras. 20, 22).

[201] In reviewing the trial judge's Decision on Admissibility, this Court must only consider the evidence that was before the trial judge at the time of his determination on admissibility (*T.W.W.*, at para. 23).

(1) Criteria for Admissibility Established under Section 276

[202] My colleague states, at paragraph 35, that the trial judge applied the wrong legal analysis in determining the evidence of an earlier sexual assault allegation made by JT against the subject officer of the SIRT investigation ("SO") was relevant. I am of the view the trial judge applied the correct legal analysis and no error of law arises. The trial judge determined the evidence was relevant and he considered all pertinent factors under section 276(3) on whether to nevertheless exclude relevant evidence. In the circumstances, the trial judge made no error, and I would defer to his decision to admit the evidence.

[203] The context is that Mr. Regular sought an order pursuant to section 278.92-278.94 of the *Criminal Code*, allowing him to adduce into evidence and to cross-examine JT on the contents of the SIRT investigation and report.

[204] Section 276 is engaged because the records in question involve a prior allegation of sexual assault involving the complainant.

[205] It is important to set out the legal and evidentiary basis that Mr. Regular advanced to ground his application under section 276(2)(a-d).

(a) Twin Myths not Engaged

[206] In advancing his position on the relevance of JT's prior allegations, Mr. Regular did not rely on either of the two prohibited inferences (the "twin myths"), namely, that the evidence might indicate that JT was more likely to consent or less worthy of belief.

[207] Consent to the alleged sexual activity with Mr. Regular was never an issue. There was no suggestion that because JT had consented to sexual activity with SO, she was more likely to have consented with Mr. Regular. Neither was Mr. Regular arguing that JT's prior sexual activity made her less worthy of belief. To the contrary, Mr. Regular denied all the allegations and relied on the falsity of the other allegations to support his position.

(b) Relevant to an Issue at Trial

[208] Mr. Regular accepted that prior allegations made by JT against a person other than the accused are usually not relevant in a sexual assault trial against an accused, as they tend to offend the collateral fact rule and often risk engaging in impermissible myths and stereotypes about the kind of person who makes more than one complaint of sexual assault. However, Mr. Regular argued that there is an exception to this rule in instances where the party seeking to cross-examine the complainant on prior allegations can show that they are "demonstrably false". Mr. Regular relied upon the unanimous decision of the Court of Appeal for Ontario in *R. v. Riley*, 1992 CarswellOnt 707 (ONCA), 1992 CanLII 7448, leave to appeal to SCC refused, 23386 (27 May 1993). See also *R. v. B. (A.R.)*, 1998 CarswellOnt 3590 (ONCA), 1998 CanLII 14603, aff'd 2000 SCC 30, *R. v. M.T.*, 2012 ONCA 511, and *R. v. A.G. and E.K.*, 2015 ONSC 923.

[209] Mr. Regular submitted the SIRT records are relevant because they are the only way that he can establish a pattern of fabrication or that JT was an unreliable historian on prior sexual assault allegations. The investigation and supporting documents revealed that significant details of her prior allegations were demonstrably false.

[210] Mr. Regular's application asserted that both sets of allegations involve historical sexual assaults during overlapping time periods by persons in positions of authority. JT told the SIRT investigator, Cst. Greene, that she had been involved with Mr. Regular and SO at the same time (Supplementary Appeal Book, Vol. I, Tab 12, at page 102; and Appeal Book, Vol. II, Tab 2(F), at page 104).

[211] The relevance of the "demonstrably false" allegations was not an attack on JT's general credibility but went to the specific defence theory that JT either had a propensity to fabricate (deliberately lie), or alternatively, her memory of events (reliability) was false.

(c) Specific Instances of Sexual Activity

[212] Mr. Regular confirmed (and cited in support *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237, at paras. 48-49) that there would be no attempt to use "general reputation evidence to discredit the complainant and distort the trial process". The "detailed particulars" of the "specific instances of sexual activity" between JT and SO related only to the dates JT alleged that sexual contact had occurred with SO, and that sexual contact could not have happened or did not happen on those dates with SO. There would be no probing questions about the specifics of the sexual activity in question.

(d) Probative Value versus Prejudicial Effect on the Administration of Justice

[213] Mr. Regular's application detailed the evidentiary foundation for the factors under section 276(3) that the trial judge had to consider in balancing the probative value versus the prejudicial effect.

SIRT Application Ruling (Decision on Admissibility)

[214] In his pre-trial ruling, the trial judge granted the application permitting Mr. Regular to cross-examine JT in relation to the SIRT investigation and report. Mr.

Regular was also permitted to call SO and such other witnesses who JT indicated knew of the sexual relationship with SO "with a view to varying or contradicting the claims of [JT] in relation to SO" (Decision on Admissibility, at para. 40).

[215] The trial judge's Decision on Admissibility demonstrates he applied the proper statutory criteria, addressing each factor in section 276(2). He found that:

- The twin myths of more likely to consent and less worthy of belief under section 276(2)(a) were not engaged (at paras. 23-24).

- The evidence was relevant to an issue at trial - JT's credibility and reliability - meeting the requirements of section 276(2)(b) (at paras. 25-26).

- The cross-examination of JT would be limited to the specific instances of sexual activity included in her statements to SIRT investigators concerning SO, satisfying section 276(2)(c) (at para. 27).

- In accordance with section 276(2)(d) and the factors in section 276(3), the proposed cross-examination of JT had significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice (at paras. 28-29).

Relevance of the Other Sexual Assault Allegations

Submissions of the Parties

[216] In his appeal submissions, Mr. Regular argued that there is no strict requirement to show that a prior allegation is "demonstrably false" for it to be admissible under section 276. He argues an alleged "pattern of fabrication" can be established more broadly, provided the trial judge is satisfied that the criteria under section 276 are met (see *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, at paras. 49-50).

[217] Both the Crown and counsel for JT on the application argued that the evidence tendered did not establish the other sexual assault allegations were "demonstrably false". They also argued the allegations against SO did not constitute a pattern of fabrication (Decision on Admissibility, at paras. 13-21).

[218] The Crown submits the trial judge admitted the evidence of the other sexual assault allegation based on the wrong legal test. The Crown argues the trial judge erred in law by, first failing to determine whether Mr. Regular had met the "demonstrably false" threshold at the time of the section 276 application (which the Crown says Mr. Regular did not), and second by granting the section 276 application to *permit* Mr. Regular to *explore* and *investigate whether* the "demonstrably false" threshold *could* be met (emphasis added as in Crown's Factum, at para. 44). As such, the Crown contends, in admitting the evidence, the trial judge authorized a fishing expedition.

[219] Mr. Regular submits such a narrow reading of the applicable legal requirements for establishing relevance under section 276(2)(b) is not justified. He argues there can be no dispute that "[o]ther sexual activity evidence may be admissible for issues of credibility or context" as long as the applicant can establish "a specific use for this information that is permitted by the s. 276 regime". While "[b]are assertions" of relevance "to context, narrative or credibility" will not suffice, the evidence may be admissible if it responds to "a specific issue at trial that could not be addressed or resolved in the absence of that evidence" (*T.W.W.*, at para. 27).

[220] The jurisprudence, counsel for Mr. Regular submits, is replete with examples in which evidence of other sexual activity was admitted as relevant to a specific credibility-related issue, for example, "where the complainant makes inconsistent statements about the very existence of a sexual relationship, or where the evidence goes to the fundamental coherence of the defence narrative" (*T.W.W.*, at para. 35, citing *Goldfinch*, at paras. 63, 65-66). The Supreme Court in *Darrach* stated, "[i]f evidence of sexual activity is proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement, it may be permitted" (at para. 35). The admission of the evidence in these cases is justified by the accused's right to make full answer and defence.

[221] Finally, Mr. Regular submits that *R. v. Hanrahan*, 2024 NLCA 9, aff'd 2025 SCC 1, supports the admissibility of prior sexual activity for its non-sexual features to show JT made several inconsistent statements in the SIRT investigation (Mr. Regular's Addendum to Factum, at paras. 11-16; and *Hanrahan*, at paras. 65, 68, 85). The Crown, on the other hand, submits *Hanrahan* is both factually and legally distinguishable from Mr. Regular's case (Crown's Reply to Addendum, at paras. 5-7).

Narrow Exception for Establishing Relevance Dispositive

[222] I would dispose of the issue based on the narrow exception that Mr. Regular advanced in his application to establish the threshold for relevance under section 276(2)(b). Mr. Regular relied on the "demonstrably false" standard recognized in *Riley* and subsequent authorities.

[223] Relevance depends directly on the facts in issue in the case. The facts in issue in turn are determined by the essential elements of the offences that the Crown must prove, and any defence raised by Mr. Regular (*R. v. Arp*, [1998] 3 S.C.R. 339, at para. 38). The key issue here was credibility, and Mr. Regular raised as part of his defence the propensity of JT to either fabricate or present false information against persons in authority covering the time period of the charges against him.

[224] The defence in *Riley* sought to challenge the complainant under cross-examination about a complaint she made against another person who had been found not guilty of the charges after a trial, and to call that person to rebut the complainant's testimony. *Riley* did not involve a section 276 application. The Court decided that to have another person testify that her complaint to the authorities about him was false, "would only introduce a collateral issue of credibility" (at para. 10).

[225] In *Riley*, the Court stated:

> [11] We do not propose to embark upon a review of authority <u>on this troublesome area of the law</u> because we are satisfied that it has no application to the facts of this case. We agree with counsel for the Crown that this cross-examination was on a collateral matter in that it was essentially an attack on the general character of the complainant. The trial judge, on the record before him, properly exercised his discretion in curtailing the cross-examination. Accordingly it was not proper to confront her on her denial of fabrication.

(Underlining added.)

[226] *B. (A.R.)* is a 2-1 split decision of the Ontario Court of Appeal with Moldaver J.A. (as he then was) dissenting. Justice Moldaver would have allowed the evidence concerning the complainant's allegations of abuse by others as it was relevant to a live issue at trial in assessing the complainant's credibility. Unlike here, where JT's statements formed part of the record, he observed, "the complainant's statement to the police containing the allegations against her step-brothers and others does not form part of the record" (at para. 60).

[227] The majority stated, "[t]here is no provision for rebutting accusations of criminal conduct against persons other than the accused. In…*Riley*…this court appears to have introduced another exception, albeit one too narrow to assist the [accused]" (underlining added, at paras. 14-15). They note in *Riley* the "defence wished to continue a line of cross-examination of the complainant directed to a complaint of a sexual assault she had made against another-person at a time much removed from the assault under investigation" (underlining added, at para. 15).

[228] The majority in *B. (A.R.)* held that the trial judge properly excluded evidence on the issue of whether the complainant was sexually assaulted on other occasions by other persons. They held that resort to section 276 is not necessary because the type of evidence proposed engages the rule against collateral facts and is subject to the general discretion of a trial judge to exclude evidence where its probative value is outweighed by its prejudicial effect (at paras. 10, 16).

[229] Watt J.A. in *M.T.*, writing for a unanimous panel, held that evidence of a complainant's non-consensual sexual activity with another person is not relevant to the accused's denial of the sexual assaults with which he is charged, unless the other allegations "were in fact false", citing *Riley* (at para. 50). Most importantly, Watt J.A. stated, the accused in *M.T.*, "had no intention of demonstrating the falsity of the allegations. He simply wanted to adduce evidence relating to the nature of the allegations and their disclosure" (at para. 50).

[230] While I agree with my colleague that the "demonstrably false" standard is narrow and an exception to the inadmissibility of evidence of this nature, I differ with my colleague's interpretation of what the "demonstrably false" standard entails, and her conclusion that the standard was not met.

[231] My colleague states, at paragraphs 56 and 107, the evidence that the other allegations are fabricated "must be unequivocal", or as described in *Riley* "demonstrably false". As support for her view that Mr. Regular had to establish that the allegations were fabricated or false, she relies on what the Supreme Court of Canada stated in *R. v. W. (B. A.)*, [1992] 3 S.C.R. 811. The Supreme Court stated: "In the absence of an indication that the complainant's evidence on collateral matters might be false, the claim for its relevance was tenuous" (underlining added, at page 812).

What the "Demonstrably False" Standard Entails

[232] The formulation of what the "demonstrably false" standard entails involves consideration of the broadly established admissibility of evidence principles, in the context of the recognized prevalence of myths and stereotypes about sexual assault complainants.

[233] The narrow exception standard in *Riley* nevertheless mandates that the evidentiary burden on the accused is a high one. This is necessary to protect complainants from the myth and stereotype "that complainants in sexual assault cases have a higher tendency than other complainants to fabricate stories based on "ulterior motives" and are therefore less worthy of belief" (*R. v. A.G.*, 2000 SCC 17, [2000] 1 S.C.R. 439, at para. 3, cited with approval in *R. v. Kruk*, 2024 SCC 7, at para. 36).

[234] Placing the evidentiary burden at a high bar recognizes the standard brushes "uncomfortably close" to the second twin myth, that Watt J.A. expressed in *M.T.*, at paragraph 52, "that a complainant who accuses *two* persons of sexual impropriety occurring at different times and in different circumstances is more likely to be lying about either or both than a complainant who accuses only one person".

[235] Accordingly, the indicia of falsity must be compelling and significant for the evidence to satisfy the "demonstrably false" standard. Bare denials (such as she said, but the other person will say) will fall short of meeting the standard. I explain further below.

[236] The "demonstrably false" standard must also be consistent with the Supreme Court of Canada's statement in *Arp* that "an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue"" (underlining added, at para. 38; see also *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298, at para. 30; and *R. v. Schneider*, 2022 SCC 34, [2022] 2 S.C.R. 619, at para. 40).

[237] Further, this interpretation of the "demonstrably false" standard is consistent with this Court's decision in *R. v. J.H.*, 2014 NLCA 25 (CanLII) ("*J.H. NLCA*"), that confirms other allegations against another person are collateral and irrelevant, unless grounded with a sufficient factual foundation of falsity prior to admissibility. The accused made a section 276 application for permission to adduce evidence

pertaining to an allegation of sexual assault which the complainant made the previous year. The evidence in support of the application was that the complainant had sought an emergency protection order ("EPO") in relation to her former husband because he had sexually assaulted her. The accused applied for permission to cross-examine the complainant about the circumstances surrounding the EPO and to call the complainant's former husband to refute her anticipated testimony.

[238] The trial judge in *R. v. J.H.*, 2012 NLTD(G) 32, aff'd 2014 NLCA 25, denied the accused's request because it amounted to collateral evidence not relevant to the allegations against the accused or, alternatively, it failed to meet "the test of relevancy" under section 276, as the "striking similarities" identified by the accused "were either not striking or of limited value when comparing the actual offences alleged" (at paras. 21, 36).

[239] Importantly, the trial judge's reasons highlighted that the EPO record did not establish that the allegations against the former husband were false (*J.H. NLCA*, at para. 18).

[240] Harrington and Hoegg JJ.A. (with separate concurring reasons by Rowe J.A.) in *J.H. NLCA*, upheld the trial judge's admissibility ruling, pointing out:

> [33] Collateral evidence is evidence which depends for its relevance on the fact that it contradicts a witness. (See *A.G. v. Hitchcock* (1847), 154 E.R. 38 (Ex. Ch.).) The mischief the collateral evidence rule seeks to avoid was discussed in *A.R.B.* and described at paragraph 9 of *Riley* as follows:
>
>> ... The problem of proving falsity in these circumstances is considerable. To have [a third party] testify that her complaint to the authorities about him was false, would only introduce a collateral issue of credibility which would be as difficult to resolve as those contained in the complaints of which the trial judge was seized. Even if we had a proper record of [the third party]'s trial, a not guilty verdict, standing by itself, could not establish that the prosecution was based on fabricated testimony by the complainant.
>
> (Underlining added.)

[241] This Court's holding in *J.H. NLCA* referenced Watt J.A.'s reasoning in *M.T.* and turned on the conclusion that there was no proper evidentiary foundation to support J.H.'s contention that the complainant, L.P., was motivated to fabricate the

allegations against him. To the contrary, the evidence completely rebutted any assertion that her allegations were false:

> [38] In this case there was no support for the notion that L.P. was motivated to falsely charge J.H. with criminal offences in order to terminate their relationship, and no support for such a motive has been advanced on appeal. L.P.'s evidence that J.H. beat, confined and sexually assaulted her, corroborated by photographs of her injuries, her ripped clothing, the testimony of the police witnesses who took her to the hospital, the testimony of L.P.'s mother, and J.H.'s admissions to carrying L.P. back into the apartment against her will and to slapping her face, strongly contradict J.H.'s motive argument.

[242] Taken together this means that where there is a sufficient factual foundation establishing the falsity of the allegations and such falsity is sufficiently relevant to the context of the trial (e.g. a defence advanced) then it may be admitted, subject to appropriate screening for prejudicial effect versus probative value.

The Trial Judge Properly Applied the "Demonstrably False" Exception

[243] In this case, the trial judge's legal analysis conformed with these governing legal principles. First, the application record provided sufficient support for the trial judge to conclude the allegations were "demonstrably false". Secondly, the trial judge was alive to and applied the "demonstrably false" standard. The trial judge did not use the cross-examination of JT before deciding relevance. But rather, he correctly left the assessment of JT's credibility and reliability after hearing her trial testimony in the context of all the evidence. Third, I would defer to the trial judge's conclusion that the evidence had significant probative value not substantially outweighed by its prejudicial effect for the threshold determination of a relevant issue at trial, namely, whether JT had a propensity to make "false" allegations against persons in authority.

Record Supporting Allegations "Demonstrably False"

[244] The particulars of the SIRT investigation demonstrate that the allegations against SO met the "demonstrably false" standard. It was not one isolated inconsistency but the cumulative effect of all the external and internal inconsistencies that supported the relevance of this evidence.

[245] The investigation demonstrated that JT was either fabricating or seriously unreliable, about the specifics of her sexual activity with SO. I see no inherent

contradiction in Mr. Regular's proposed alternative route to establish that the allegations were false - either JT was deliberately lying or an unreliable historian. Someone can believe and perceive something to be true when in fact it is false because it is wholly unreliable.

[246] The factual foundation that the SIRT investigation produced is entirely different than the situation in the authorities relied upon by my colleague. In those cases, the accused sought to cross-examine a complainant and lead evidence from another person or persons stating that a prior allegation against that other person or persons was false. Mr. Regular's application would have failed if he attempted to cross-examine JT based solely on the foundation that the other person, in this case SO, would testify that the allegations were untrue. Unlike the authorities analyzed where a proper factual foundation was absent, Mr. Regular's application was grounded with compelling and significant details that demonstrated the falsity of JT's allegations.

[247] SIRT-NL is a civilian-led oversight agency responsible for conducting independent investigations into, among other things, sexual offences that may have arisen from the actions of a police officer in the province. The trial judge made no comment, or more importantly, no finding that questioned the integrity or the thoroughness of the SIRT investigation.

[248] The Director of SIRT explained in his report that the issue for consideration was whether there were grounds to believe SO committed a sexual offence against JT. Not surprisingly, as with most sexual assault allegations, the only evidence of a sexual offence came from JT herself. Consequently, grounds to lay a charge had to be based on the credibility and reliability of JT's statements.

[249] The Director of SIRT concluded, "there are several inconsistencies between [JT's] statements as well as inconsistencies between her statements and other evidence (other witness statements, CSSD records and RNC records)". He stated, "there are major inconsistencies in [JT's] evidence on several important points". He was "not able to attribute sufficient credibility or reliability to her allegations" to form reasonable grounds to believe that SO committed a sexual offence (Appeal Book, Vol. II, Tab 2(A), at page 12).

[250] I will turn now to the inconsistences and contradictions that demonstrated that the allegations against SO were "demonstrably false". In summary:

External Inconsistencies:

1. JT's timeline was directly contradicted by the fact that SO was not a police officer at the relevant time.

2. JT's outline of events is contradicted by an absence of corroborative records, criminal records, and police reports.

    a. The arrest and conviction of persons she was with in a car concerning drugs.

    b. SO reporting to calls involving JT's domestic partner.

Internal Inconsistencies:

1. JT's describing different first encounters with SO that varied in respect of the time and location.

[251] The SIRT report noted the importance of establishing a timeline for the alleged sexual incidents. Because JT stated her first encounters with SO occurred while she was under 16, she was not capable of consenting to the sexual activity. This is one of the exceptions to the overarching rule that time is not material to proof of an offence, i.e., where the date or date range constitutes an essential element of the offence (*R. v. G.G.*, 2025 ONCA 574, at paras. 45-46, appeal as of right to the SCC (41963)).

[252] The judge noted he had evidence before him that JT made allegations of sexual impropriety against two individuals who occupied positions of authority – SO and Mr. Regular, and that JT told the SIRT investigators she was first abused by SO when she was 15 years of age (Decision on Admissibility, at para. 35).

[253] I do not share my colleague's opinion that JT simply may have been confused about her age and dates. I acknowledge sexual assault victims who have suffered the trauma of abuse can certainly be mistaken about times and dates. JT was adamant in her two statements to SIRT investigative officers that the sexual activity with SO started at age 15. What she was confused about was the year in which she was 15, not that it happened when she was 15.

[254] In her first interview with Sgt. Guinchard (RNC), she stated she was 15. She was asked: “And do you know what year that would’ve been?” She answered: “I’m thirty-two now I’m not good with math” (Appeal Book, Vol. II, Tab 2(E), at pages 66, 72).

[255] In her second interview with Cst. Greene (RCMP), she stated repeatedly that it happened when she was 15 and tied it to specific events in her life at that time. She was sure about her age but not the date or year, stating: “I’m really bad with dates and years” (Appeal Book, Vol. II, Tab 2(F), at pages 87-88, 96, 102).

[256] The trial judge was not mistaken in his assessment of JT’s SIRT statements that she was 15 when the abuse by SO started. Although, as an appellate court, we must only consider the evidence that was before the trial judge at the time of his determination on admissibility, when JT was presented with the opportunity on cross-examination at trial to clarify when the abuse by SO started, she reiterated that it occurred when she was age 15 (Transcript, 10 April 2024, at pages 50-51).

[257] The SIRT investigation confirmed SO did not become a police officer until 2006, when JT would have been 17 years old. This means JT’s allegation that she was 15 years old when she met and had sexual intercourse with SO was, in fact, false.

[258] The SIRT investigation demonstrated there were internal inconsistencies in JT’s statements as to when and where the first sexual encounter with SO started. External inconsistencies contradicted JT’s very detailed account of how the relationship started. The investigative steps outlined in the record showed there were no police files in relation to the arrests, charges and convictions stemming from the traffic stop that was alleged to have started the relationship.

[259] The record also contradicted JT’s allegation that the sexual encounters would occur when SO responded to calls for police services involving JT and her domestic partner. The investigators looked for any files connecting JT and SO and whether they involved the domestic partner of JT. The first encounter in May and June 2009, involving SO serving a court order on and arresting JT’s boyfriend, revealed no involvement between JT and SO. The other record in existence involving SO and JT concerned a March 2011 allegation, when JT would have been 22 years old, that JT had allegedly assaulted another female. SO attended with another officer and JT was no longer at the scene. Whether SO spoke or had contact with JT during these two occasions is not confirmed by the police records and is otherwise mere speculation.

[260] Just as "speculation does not properly inform a conclusion of reasonable doubt", the Crown cannot rely on speculation or "pure conjecture" to erode the evidentiary foundation that supports that the allegations are "demonstrably false" (see *R. v. Layman*, 2024 NLCA 16, at paras. 22, 26, 28).

[261] These inconsistencies and contradictions could very well be related to the trauma that JT has endured in her life from abusive relationships, family violence and dysfunction, drug abuse, and the alleged sexual assaults. That was a matter for the trial judge's credibility and reliability assessment at trial, as JT, when she testified at trial, spoke of the serious trauma she has endured. These inconsistencies and contradictions were sufficient however, at the gatekeeping stage of section 276, to establish that the SO allegations were "demonstrably false".

The Trial Judge Applied the "Demonstrably False" Standard

[262] It is not the role of this Court to "finely parse the trial judge's reasons in a search for error" (*R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 69). Appellate review of the trial judge's reasons "must assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way" (*G.F.*, at para. 69). That context includes "the evidence, the submissions of counsel and the history of how the trial unfolded" (*R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 17).

[263] While the trial judge did not specifically use the clear and unequivocal words – "I find the other allegations demonstrably false" - that conclusion is readily apparent from a functional and contextual reading of his reasons. The trial judge, in his reasons, clearly stated, "the heart of the case" here is "the fact that [JT] made false allegations against another goes directly to the issue of whether she made false allegations against [Mr. Regular] and is highly relevant to her credibility" (underlining added, Decision on Admissibility, at para. 39).

[264] The trial judge also directly addressed and rejected the Crown's and JT's arguments that the allegations against SO did not constitute a "pattern" of fabrication. He held that when "another allegation is remarkably similar to the facts alleged … a pattern exists" (Decision on Admissibility, at para. 34).

[265] These findings were open to the trial judge on the record before him, and on a Crown appeal, in the absence of a demonstrated error of law, there is no justification to interfere with his findings.

[266] My colleague, at paragraph 99, takes a view at odds with the trial judge's finding on a pattern of fabrication.

[267] The trial judge would have been aware of JT's reluctance to pursue allegations against SO, and how her statements about SO came to light. He nevertheless found, for the purpose of establishing relevance on the "demonstrably false" standard, that there were sufficient factual indicia to resemble a pattern of fabrication.

[268] The trial judge did not adopt the credibility findings from the SIRT report as his own. The trial judge's admissibility ruling made it clear that he would be making his "own assessments of credibility" and he would "not be relying on any assessments made by third parties such as SIRT" (at para. 41). He acknowledged that credibility of the parties would be critical to the eventual outcome of the trial but remained mindful that the trial is not a credibility contest, and the ultimate issue is always whether the Crown has satisfied its obligation to prove the charges beyond a reasonable doubt (at paras. 25-26).

[269] The demonstrably false standard is applied to the evidence that is sought to be admitted; it cannot usurp the function of the trier of fact to make credibility and reliability assessments after considering all of the evidence. I find no error in the trial judge's approach to leave final determination of the trial issue of "whether she did fabricate the allegations against SO and [Mr. Regular]" (Decision on Admissibility, at para. 38) until after all the trial evidence was assessed. This is exactly what he did in reserving the evaluation of the evidence until trial. To do otherwise, would have meant the trial judge pre-determined the trial issue of fabrication before JT even got the opportunity to speak to whether the allegations against SO "might be false" (*W. (B.A.)*, at page 812).

[270] The trial judge accepted that the proffered evidence of JT's allegations against SO were "false". He did not otherwise assess the credibility of the evidence or make other findings on the application to admit the evidence.

Probative Value Versus Prejudicial Effect

[271] Section 276(2)(d) is a prescribed screening mechanism that provides the judge with discretion to exclude evidence determined by the judge to be relevant to an issue at trial (*R. v. S.B.*, 2016 NLCA 20, at paras. 32-34, rev'd on other grounds 2017 SCC 16). The trial judge's discretion in screening the evidence must be exercised judicially in accordance with the factors set out in section 276(3).

[272] The trial judge had to ensure the proposed evidence "has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice" (underlining added, *Criminal Code*, at s. 276(2)(d)). The adverb "substantially" serves to protect Mr. Regular by raising the standard for the trial judge to exclude evidence once Mr. Regular has shown it to have significant probative value. The requirement of "significant probative value" serves to exclude evidence of "trifling relevance" that would still endanger the "proper administration of justice" (*Darrach*, at paras. 40-41).

[273] Probative value is the capacity of the evidence to establish the fact of which it is offered in proof. Prejudicial effect relates to "the proper administration of justice" and such trial fairness matters as the necessary court time required, potential confusion of issues, and fairness to the witness (*M.T.*, at para. 43; and *S.B.*, at para. 33).

[274] It is in the probative value versus prejudicial effect analysis that balances the unfairness to a complainant of having to address the truth of other prior sexual allegations with the accused's right to full answer on defence. In *R. v. Seaboyer* [1991] 2 S.C.R. 577, L'Heureux-Dubé J. at page 690¸ dissenting in part, highlighted that in reference to prior false allegations of sexual assault, "such evidence is admissible…since this evidence does not involve the admission of [a complainant's] previous sexual history". This does not conflict with the majority's characterization of how section 276 protects victims from the flawed reasoning of the twin myths (*Seaboyer*, at page 604). The brushing against while not being squarely in the realm of sexual history informs the probative versus prejudicial analysis.

[275] The trial judge's Decision on Admissibility stated:

> [29] I have considered, in accordance with section 276(3) of the *Criminal Code* the following factors in determining whether the proposed evidence is admissible:
>
> a. There is a danger that the trial could get side-tracked as a result of [JT] maintaining her position *vis à vis* her sexual relationship with SO. I would be more concerned about it if this were a jury trial. It is not. In my view denying [Mr. Regular] the ability to test the veracity of [JT's] allegations would result in significant prejudice to the proper administration of justice. The interests of justice require, at the forefront, the right of an accused to make full answer and defence.
>
> b. I have been urged to consider that allowing a cross-examination of [JT] on what her counsel, and Crown counsel, consider is a collateral matter

will be a disincentive to sexual assault victims in the reporting of sexual assault offences. I truly hope that that is not the case. However, in the course of making reports of sexual assault, complainants must understand that they are entering an adversarial, legal forum in which they will be placed under great scrutiny. It cannot be avoided so long as accused persons have the right to defend themselves and the Crown retains the onus to prove the allegations beyond a reasonable doubt.

c. I am satisfied that there is a reasonable prospect that the evidence will assist in arriving at a just determination in this case. It is my opinion that refusing to allow the evidence would, in fact, have a deleterious effect on [Mr. Regular's] ability to make full answer and defence - and this could, potentially, result in an unjust determination.

d. In my opinion there are no discriminatory beliefs or biases at play in this case. It is not a factor that I need consider in arriving at my decision.

e. Since this is a trial before a judge sitting alone, I need not consider what effect the granting of the ability to cross-examine [JT] with respect to her alleged sexual relationship with SO might have on a jury. I can say that the evidence will not unduly arouse any sentiments of prejudice, sympathy or hostility in me.

f. [JT's] personal dignity and right to privacy is assaulted each time there is an application under section 276(2) of the *Criminal Code* in this, and every, trial. I must balance the effect of that assault against [Mr. Regular's] right to make full answer and defence. Hanging in the balance are the affront that [JT] must feel against the possibility that [Mr. Regular] will be wrongfully convicted. The choice is stark and, ultimately, must be made in favour of probative value against prejudicial effect.

g. Complainants have a right to personal security and to the full protection and benefit of the law. They also have an obligation to provide relevant evidence concerning their allegations against an accused. In the course of doing so, they can rest assured that they will not be abused and that the Court, and all of its officers, including Crown counsel and Defence counsel, will do their jobs fairly and with due consideration of their position in a trying process. This does not make the process easier for complainants - who must still navigate the gauntlet of an adversarial process. It may assist in making the road a little less rocky.

[276] Since the trial judge considered and weighed all the pertinent statutory factors, and did not rely on improper legal principles, I would defer to the trial judge's discretion to admit the evidence under section 276(2)(d).

Trial Judge's Reference to "Similar Fact Evidence"

[277] Despite not erring in the application of the "demonstrably false" standard, the trial judge erred by mischaracterizing in his Decision on Verdict that Mr. Regular made an application "to adduce similar fact evidence" (at para. 33). Mr. Regular grounded his application to establish relevance on the *Riley* "demonstrably false" exception and standard, and not on the admissibility rules for "similar fact evidence". However, a fundamental aspect of the "demonstrably false" standard specifically incorporates reference to "a pattern of fabrication" of "similar allegations of sexual assault against other men" (*Riley*, at para. 9).

[278] Similar fact evidence has a defined legal meaning with prescribed rules for admission. It is a form of character evidence. Most commonly, it is led by the Crown to establish the accused's previous misconduct is similar or closely related to the conduct charged. It is sometimes called "other bad act evidence" (*R. v. Amin*, 2024 ONCA 237, at paras. 27, 34, 65; and *R. v. Percy*, 2020 NSCA 11, at para. 40). The Crown may also lead similar fact evidence to establish "the *identity of the perpetrator*", where the Crown can satisfy "on a balance of probabilities" that "the same person committed the alleged similar acts" (emphasis in original, *R. v. Grant*, 2015 SCC 9, [2015] 1 S.C.R. 475, at para. 31).

[279] It is understandable why the trial judge characterized it as "similar fact evidence" and performed a "similar fact evidence" analysis both in his Decision on Admissibility (at paras. 34-38) and Decision on Verdict (at paras. 33-45). He was not wrong to do so, but he should have confined and characterized his discussion of similarities in the context of applying the "demonstrably false" standard.

[280] In *Grant*, at paragraphs 32 and 37, the Supreme Court confirmed the appropriate framework when the defence leads evidence "akin to similar-fact evidence" is "the broader, principled approach to the admission of evidence found in *Seaboyer*". Once the evidence has been found to be relevant, the evidence will be admitted unless its prejudicial effects substantially outweigh its probative value (*Grant*, at para. 37).

[281] Further, the majority for the Ontario Court of Appeal in *B. (A.R.)* spoke of "a rule of evidence in civil cases relating to similar fact evidence that has considerable application to what is proposed here" (at para. 11). Likewise, Moldaver J.A. (in his dissenting opinion), when discussing prejudicial effect versus probative value of the evidence observed that: "In this respect, the principles are no different from those which govern the admissibility of similar fact evidence" (at para. 62).

[282] The trial judge's focus on the similarities of the allegations in his Decision on Admissibility was not misplaced. He addressed the requirement for Mr. Regular to show "that another allegation is remarkably similar to the facts alleged" to establish a pattern (at para. 34). He noted allegations "against two persons who occupied positions of authority" during an overlapping time period (at para. 35), sexual activity during work hours and associated with workplaces (at para. 36), and that others knew of the existence of a sexual relationship (at para. 37).

[283] When the evidence of the SIRT investigation is considered in the context of the positions of the parties argued before the trial judge on the application, together with a holistic reading of the trial judge's reasons, it is apparent that the trial judge applied the correct "demonstrably false" standard and made no reversible error.

(2) No Violation of Collateral Evidence Rule

[284] The trial judge's legal analysis under section 276(2) specifically required a determination "that the evidence … (b) is relevant to an issue at trial". Once the trial judge properly determined the evidence was relevant to an issue at trial, it could not be collateral. As Rowe J.A. (as he then was) stated in *S.B.*: "Viewed properly, the collateral fact rule is a particular application of the general rule that evidence should be relevant. By definition, what is collateral is not relevant and what is relevant is not collateral" (at para. 16). He explained that "the test of probative value and prejudice to the proper administration of justice is a screen to be applied to evidence that is "relevant" (and, therefore, not collateral)" (at para. 26).

[285] Green C.J.N.L. (as he then was) dissented for other reasons in *S.B.* but agreed with Rowe J.A.'s analysis and conclusion on the collateral fact rule interplay with section 276 (at paras. 90-91). The Supreme Court allowed the appeal and ordered a new trial on all the charges, for the reasons of Green C.J.N.L. pertaining to materiality of the errors of law on the acquittal verdict (*R. v. S.B.*, 2017 SCC 16, [2017] 1 S.C.R. 248).

[286] In this case, there was no violation of the collateral evidence rule because the trial judge applied the correct legal principles in his determination that the evidence was relevant. The trial judge duly assessed, in his subsections 276(2)(d) and 276(3) analysis, the concern of "a danger that the trial could get side-tracked" (Decision on Admissibility, at para. 29(a)).

[287] The trial judge's management of the trial demonstrates he did not let the trial become unduly side-tracked by the other allegations and the SIRT investigation. The cross-examination of JT was constrained to the inconsistencies necessary to make out the falsity of the other allegation. Likewise, the defence restricted the SIRT evidence to calling two witnesses, officers Tom Warren and William Miller, and did not call SO to testify.

[288] My colleague states, at paragraph 117 of her reasons, that "JT had to respond to a trial on multiple aspects of her life". The defence sought and was granted permission under section 278.92-278.94 to have JT respond to the "demonstrably false" allegations. In my view, it was a narrow and confined inquiry into the falsity of the allegations. It was not a tactic, in the words of *Goldfinch*, to "put the *complainant* on trial" for her "prior sexual history" (emphasis in original, at para. 33).

[289] The focus of the defence was on the inconsistencies and non-sexual features of JT's allegations against SO for the limited purpose of establishing the defence theory that JT was lying or unreliable about the allegations. JT, in her trial testimony, admitted many aspects of her allegations were untrue. The trial judge was tasked with assessing her evidence and making credibility and reliability findings considering her admission. When he assessed all the evidence, he found the "inaccuracies are serious" and "they create significant doubt about [JT's] ability to remember events and her motivation in relating them". The inconsistencies gave him "considerable doubt about the veracity of her allegations" (Decision on Verdict, at para. 44).

[290] There being no error of law in the trial judge's admission of JT's allegations against SO, I would defer to his trial management in preventing the SO allegations from becoming a trial within a trial. The trial judge permitted the defence to cross-examine JT and admit other evidence from the SIRT investigation only to the extent necessary to ensure Mr. Regular had the right to make full answer and defence.

ISSUE 2: Did the trial judge err in permitting Mr. Regular to cross-examine JT and then tender evidence of the details of JT's shoplifting offence to contradict her responses?

[291] The Crown argues the trial judge violated the "collateral fact rule" by permitting Mr. Regular to cross-examine JT and then tender evidence on the details of JT's shoplifting offence to contradict her responses. The shoplifting offence was also referred to at trial as the "Ultramar Incident". JT was charged with the theft of an eight-pack of beer from an Ultramar gas station.

The Collateral Fact Rule

[292] The collateral fact rule prohibits calling evidence solely to contradict a witness on a collateral fact. The rule does not impact the scope of cross-examination but rather limits what contradictory evidence can be called to refute a witness's answer (*R. v. C.F.*, 2017 ONCA 480, at para. 58). The rule seeks to preserve trial efficiency and avoid confusion and distraction on non-essential issues (*R. v. A.C.*, 2018 ONCA 333, at para. 46).

[293] The collateral fact rule is not absolute, and "evidence that undermines a witness's credibility may escape the exclusionary reach of the collateral fact rule if credibility is central to the case against an accused" (*C.F.*, at para. 60).

[294] This Court confirmed that the collateral fact "rule does not, however, preclude the trial judge from using collateral evidence for purposes of assessing credibility" (*R. v. M.A.*, 2022 NLCA 41, at para. 11). Rather, the rule is concerned with limiting rebuttal evidence (*M.A.*, at para. 10).

Background to this Issue

[295] Cst. Percey, in her direct evidence, testified that she relied on specific interactions JT had with the police to confirm dates on which Mr. Regular would have had the opportunity to interact with JT. One such interaction was JT's retention of Mr. Regular to provide legal representation for theft charges arising from the Ultramar Incident. The police report of that incident recorded the date as October 9, 2012 (Decision on Verdict, at para. 182). Cst. Percey indicated the Ultramar Incident assisted the investigation by isolating the date when JT alleged Mr. Regular sexually assaulted her by having sexual intercourse on a coffee table in his office ("Count 4") (Transcript, 8 April 2024, at pages 30, 59-63).

[296] JT, on direct examination, in speaking of occasions she had contact with Mr. Regular, stated she retained Mr. Regular to represent her on the Ultramar Incident theft charge because, “I just knew that if I had sex with … him, he’d be my lawyer”. She described that she and a friend went to Ultramar. Her friend stole the beer and ran out. She stayed there and the police showed up (Transcript, 8 April 2024, at pages 100-102).

[297] JT confirmed on cross-examination that the Ultramar Incident was the first time that Mr. Regular had sexual intercourse with her (Transcript, 9 April 2024, at page 114).

[298] Defence counsel cross-examined JT on her police statement dated March 4, 2020, specifically about the incident. JT confirmed that, in her statement, she advised Cst. Percey it was snowing heavily the night of the beer theft and she was soaking wet. She stated the police officers, a male and a female, asked her if she was cold and invited her into the police car to warm up.

[299] Defence counsel confirmed with JT that her police statement went into a lot of details about the Ultramar Incident and that she had a “very explicit memory of this”. When asked if she thought her recollection of the details was “clear as day”, she replied, “I do”. Despite it being put to her that she was charged at her apartment, she maintained she stayed at the Ultramar and waited for police (Transcript, 9 April 2024, at pages 116-121).

[300] When defence counsel was about to show JT the Environment Canada weather report for the night of the incident, Crown counsel objected on the basis that the defence’s attempt to impeach the witness was in contravention of the collateral fact rule. The Crown submitted to the trial judge that “it is not a live issue at trial”. While credibility is always a live issue, the Crown argued the answers JT gave were final and the collateral fact rule prohibited the calling of evidence to contradict her on collateral matters (Transcript, 9 April 2024, at pages 122-123).

[301] The trial judge held a *voir dire*, took submissions from counsel on caselaw authorities, and rendered oral reasons the following day.

[302] Before the trial judge, the defence argued JT completely fabricated a story in her police statement to make herself more credible to the investigating officer. The level of detail in the police statement gave the impression that JT had a clear and

detailed memory of an event that occurred almost 10 years before the date of her police statement.

The Trial Judge's Collateral Fact Rule Reasons

[303] In ruling that Mr. Regular could pursue this line of cross-examination, introduce evidence of the weather report and call evidence from the responding police officer, the trial judge stated that three recognized exceptions to the collateral fact rule were in issue: (1) honesty or history of lying; (2) motive to fabricate; and (3) memory. He stated JT's honesty or history of lying was directly in issue because, in the defence's view, JT was "a person who is prone to fabrication and has a history of lying" (Appeal Book, Vol. I, Tab 6, *R. v. Regular*, 2024 NLSC 64, at paras. 21-22, 26-27 (the "Decision on Collateral Fact Rule")).

[304] The trial judge held: "We have ample time set aside for this trial. Allowing the defence to introduce rebuttal evidence will not derail the trial or confound the trier of fact with respect to the determinations that are required to be made". Disallowing the defence from calling rebuttal evidence would, under the circumstances, he reasoned "be tantamount to impairing [Mr. Regular's] right to make a full answer and defence" (Decision on Collateral Fact Rule, at paras. 28-29).

The Collateral Fact Evidence Permitted

[305] Cst. Rogers was called to give evidence. His evidence is contained in 23 pages of the transcript. I accept Mr. Regular's assertion that the evidence took approximately 20-30 minutes. Cst. Rogers confirmed that he and another male officer attended at the Ultramar in response to the shoplifting call. He further confirmed it was not snowing that night, he attended an apartment where he arrested JT and, at no time, was she placed in the police car.

[306] Defence counsel also presented Affidavit evidence from David Neal, an official at Environment Canada, as noted in the Decision on Verdict: "Mr. Neal testified that there was no precipitation at that address between 1:00 a.m. and 2:00 a.m. on October 9, 2012, and that the ambient temperature, at that time, was 10°-12°C. He indicated that there may have been some rain in the area between 9:30 p.m. and 10:30 p.m., but no snow" (at para. 218). The Crown consented to entering the Affidavit.

Analysis of this Collateral Fact Evidence Issue

[307] In his reasons, the trial judge reviewed the evidence of Cst. Rogers and David Neal and found "it goes to [JT's] honesty" (Decision on Verdict, at para. 30). Whether the trial judge should have permitted this rebuttal evidence, as the authorities referenced above support, was a trial management issue and does not constitute an error of law. Having permitted the contradictory rebuttal evidence, it was then a matter squarely for the trial judge to determine what, if any, weight he put on the contradictory evidence.

[308] The Crown, in its Factum, at paragraph 68, describes what Cst. Rogers testified to as "minor evidentiary points, remote in time". I agree they were both minor and remote, but in JT's evidence when asked if her memory was "clear as day", she affirmed that it was. The trial judge was in the best position to assess the materiality of this evidence, in the totality of all the evidence, when assessing JT's honesty. In the absence of an error of law, I am required to defer to his credibility assessment.

[309] The Crown relies on *R. v. J.H.*, 2013 ONCA 693 ("*J.H. ONCA*"), to support its position on the collateral fact evidence. In *J.H. ONCA*, the offender appealed his conviction for sexual assault against his ex-spouse. At trial, his counsel attempted to lead evidence through him "for the sole purpose of impeaching the complainant's credibility". The evidence related to "whether the complainant had ever made or encouraged a false motor vehicle accident report on some other occasion". The appellate court agreed with the lower court that this evidence was relevant only to the complainant's credibility as a witness at trial, contrary to the collateral fact rule (at para. 3).

[310] Two things distinguish *J.H. ONCA* from the circumstances of this case. First, JT gave direct evidence on the Ultramar Incident, as did Cst. Percey. Second, the evidence in this case relates directly to the circumstances giving rise to her interaction with Mr. Regular and forming the grounds of Count 4.

[311] The trial judge in his Decision on Collateral Fact Rule reviewed the applicable law and considered the guiding principles in the context of the trial evidence and Mr. Regular's purpose for adducing the evidence. There was no error of law in his determination that the evidence was relevant to a live issue at trial, and no error in principle in exercising his discretion to permit the limited contradictory rebuttal evidence. I would dismiss this ground of appeal.

ISSUE 3: Did the trial judge err in refusing to permit JT to testify as to the details of her last encounter with Mr. Regular, or permit the Crown to cross-examine Mr. Regular about this encounter?

[312] The Crown argues that the trial judge erred by refusing to allow JT to testify in detail about what happened during her last meeting with Mr. Regular, or to permit the Crown to cross-examine Mr. Regular about this encounter at the storage unit (the "Storage Unit Incident").

Background to this Issue

[313] The use of the Storage Unit Incident evidence first arose during the direct examination of Cst. Percey. Defence counsel objected based on the relevance of this evidence to the charges before the court. The Crown submitted that the evidence would be relevant to show the investigative steps Cst. Percey took in relation to the storage unit, and to permit the Crown to cross-examine Mr. Regular on aspects of it should he testify. The trial judge allowed the questioning (Transcript, 8 April 2024, at pages 26-29).

[314] Dispute over the storage unit evidence re-emerged when the Crown commenced questioning JT on her last meeting with Mr. Regular. Defence counsel objected on the basis that the Crown was attempting to lead evidence of bad character, which was from far outside the timeframe of the indictment and irrelevant (Transcript, 8 April 2024, at page 122)

Voir Dire Submissions and Judge's Ruling on Storage Unit Evidence

[315] A *voir dire* was held and the Crown outlined the evidence it wished to elicit from JT regarding her last meeting with Mr. Regular. In Mr. Regular's Factum, at paragraph 133, he noted that the Crown proposed to elicit the following:

> 133. As outlined by Crown counsel, she wanted to have [JT] testify about her last meeting with [Mr. Regular] and her sister in 2019 at a storage unit in Donovan's owned by [Mr. Regular]. The Crown proposed to elicit the following evidence from [JT]:
>
> - [JT] and her sister… met [Mr. Regular] at a storage unit which had filing cabinets, dressers and a mattress;

- [JT] believed that her sister… who was addicted to drugs was having sex with [Mr. Regular] for money so that she could buy drugs;

- during this meeting there was discussion about [JT] and her sister performing sexual acts with clients for money;

- [JT] said that she called [Mr. Regular] names such as a pig and a pervert;

- [JT] physically attacked [Mr. Regular] and pushed him and scratched his neck

- when [JT's sister] returned to the car she had cash in her possession, the inference being that she had sex with [Mr. Regular] for money

- she could not believe that [Mr. Regular] was doing this to her sister and she decided to go to the police

- [Mr. Regular] did not say anything

- this occurred in 2019

Submission of Crown Counsel on *voir dire*, April 8, 2024 at pp. 124-127

[316] Crown counsel on the *voir dire* argued the purpose of questioning JT on the storage unit evidence was to establish the timing and her reason for coming forward in 2020 with the complaints against Mr. Regular and to rebut the anticipated defence motive that she was looking for financial compensation from Mr. Regular.

[317] During submissions on the *voir dire*, defence counsel submitted no motive was put forward, nor is there an obligation on the defence to put forward a motive. The defence position was that this evidence had no relevance to a fact in issue, relying on the three-part test for admissibility in *Schneider*, at paragraph 36:

(a) whether the evidence is relevant;

(b) whether it is subject to an exclusionary rule; and

(c) whether to exercise the judge's discretion to exclude the evidence.

[318] Defence counsel submitted it had no relevance because this event was seven years after the last allegation of sexual assault in 2012. The evidence, counsel argued, was for one reason only – to show Mr. Regular was the type of person who will engage in discreditable conduct, taking advantage of JT and now her sister. Defence counsel stated the evidence involving the sister was for the "clear implication being that Mr. Regular was providing money to [JT's sister] in exchange for sex so she could buy drugs" (Transcript, 8 April 2024, at pages 130-131).

[319] Defence counsel, in submissions, conceded that JT could testify that the last time she saw Mr. Regular was in 2019 in the presence of her sister and that she confronted him on what he did to her. The other evidence about the sister and what occurred at the storage unit concerning drugs, money, and sex was not relevant and its prejudicial effect outweighed its probative value (Transcript, 8 April 2024, at pages 133-136).

[320] Crown counsel clarified in reply argument that the Crown was not trying to lead similar fact evidence with the sister but, rather, that JT went with her sister to the storage unit and "Mr. Regular propositioned them". The Crown submitted that it was not something she was learning from her sister, but through him. The Crown argued it was relevant and probative because JT got so angry with Mr. Regular that she decided to go to the police. Without the opportunity to lead this evidence, the Crown submitted the Court would be left with a hole about why she came forward and, the defence version of it, without JT being able to explain her version (Transcript, 8 April 2024, at pages 136-138).

[321] The trial judge ruled that the Crown could elicit evidence from JT about her last meeting with Mr. Regular, what happened and what prompted her at that meeting to make a complaint. The trial judge ruled that JT could not testify about her sister, the storage unit, drugs, or money (Transcript, 8 April 2024, at pages 136-142).

JT's Evidence

[322] Following the Judge's ruling, JT continued her direct examination and stated that, in her last meeting with Mr. Regular in 2019, she told him that he was disgusting. She testified she "called him a pig" and was letting him know she was "pretty upset with him". She testified that she did not think Mr. Regular said anything to her. She pushed him and scratched his neck. She further stated that it was this incident that "gave [her] the courage to go and tell somebody the truth" (Transcript, 8 April 2024, at pages 144-147).

Analysis of the Parties Positions

[323] The Crown submits the trial judge erred in law by excluding evidence the Crown sought to admit of the circumstances respecting the last meeting between JT and Mr. Regular. The Crown argues the evidence was admissible under exceptions to the rule against prior consistent statements, including as a rebuttal to the allegation of recent fabrication, and as "narrative" and "narrative as circumstantial evidence".

[324] The Crown's assertion, at paragraph 77 of its Factum, that the "trial judge ruled virtually all the evidence about the last meeting between JT and [Mr. Regular] at the storage unit was inadmissible", is incorrect. The trial judge did allow JT to testify about her last meeting with Mr. Regular. The trial judge simply limited and curtailed the details of what JT could say about that last meeting to prevent the admission of discreditable conduct evidence.

[325] The trial judge was correct to have limited and curtailed JT's testimony on the Storage Unit Incident. I do agree with my colleague (at paragraph 146 of her reasons) that there was no principled reason to exclude JT from speaking to the location of the last encounter with Mr. Regular. As I will explain, nothing material turns on the trial judge excluding JT from testifying that the encounter happened at a storage unit where Mr. Regular had household items stored.

[326] Evidence of misconduct, beyond what is alleged in the indictment, which does no more than blacken Mr. Regular's character, is inadmissible. The exclusion of discreditable conduct evidence "prohibits character evidence to be used as circumstantial proof of conduct, i.e., to allow an inference from the "similar facts" that the accused has the propensity or disposition to do the type of acts charged and is therefore guilty of the offence" (*R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at para. 31).

[327] The Crown's position on appeal for admission of the evidence was not the same position taken by Crown counsel during the *voir dire*. Crown counsel at trial clearly submitted that the evidence was admissible to contradict the anticipated defence position that JT was fabricating her story for financial gain (Transcript, 8 April 2024, at page 122, line 21 to page 124, line 20, and page 128, lines 12-17). This motive was never put forward by the defence at trial. If defence counsel had raised the issue of fabrication for money with JT on cross-examination, then that would have constituted "a material change of circumstances" and the Crown could

have asked the trial judge to reconsider his ruling and permit the Crown to explore, more fully, the storage unit evidence with JT on re-direct (*R.V.*, at para. 74).

Use of the Prior Consistent Statements to Rebut the Defence of Recent Fabrication

[328] The Crown now contends, at paragraph 79 of its Factum, that JT's statements on the Storage Unit Incident were admissible to rebut the defence position that JT's 2020 complaint to the police was a recent fabrication.

[329] Prior consistent statements are declarations made by a witness before they testify that are consistent with the testimony they provide to the court. JT's statements about the Storge Unit Incident are, therefore, prior consistent statements.

[330] Prior consistent statements are generally inadmissible. There are two primary justifications for the exclusion of such statements: first, they lack probative value because repetition does not enhance the value or truth of the witness's testimony and, second, they constitute hearsay when adduced for the truth of their contents. There are exceptions to the general exclusionary rule and one of these exceptions is that prior consistent statements can be admitted where it has been suggested that a witness has recently fabricated portions of their evidence (*R. v. D.B.*, 2013 ONCA 578, at paras. 30-32; *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272, at paras. 5, 7; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 36; and *R. v. Best*, 2016 NLCA 10, at paras. 20-22).

[331] The Supreme Court of Canada explained in *Stirling*:

> [5] … Admission on the basis of this exception does not require that an allegation of recent fabrication be expressly made — it is sufficient that the circumstances of the case reveal that the "apparent position of the opposing party is that there has been a prior contrivance" … It is also not necessary that a fabrication be particularly "recent", as the issue is not the recency of the fabrication but rather whether the witness made up a false story at some point after the event that is the subject of his or her testimony actually occurred …. Prior consistent statements have probative value in this context where they can illustrate that the witness's story was the same even before a motivation to fabricate arose.

(Citations omitted.)

[332] The purpose of a prior consistent statement is to show that the witness gave the same account before the alleged reason or motive to fabricate. The statement is not admitted to prove the truth of its contents. It is admitted to rebut the suggestion of recent fabrication (*Stirling*, at paras. 6-7; and *Best*, at para. 23).

[333] The statement can also serve a credibility purpose "where admission of prior consistent statements removes a motive for fabrication" (*Stirling*, at para. 11). The court further explained in *Stirling*, "while it would clearly be an error to conclude that because someone has been saying the same thing repeatedly their evidence is more likely to be correct, there is no error in finding that because there is no evidence that an individual has a motive to lie, their evidence is more likely to be honest" (at para. 12).

[334] Further, the Crown argues, at paragraph 84 of its Factum, that although the defence theory was that JT fabricated her allegation to the police, the trial judge refused to hear JT's own testimony of the circumstances that led to her decision to go to the police. The Crown submits that the excluded evidence could have been capable of rebutting the allegation that JT was fabricating and that this factor could have been considered as part of a larger assessment of credibility.

[335] It is incorrect to say that the trial judge refused to hear JT's testimony of the circumstances that led to her decision to go to the police. The trial judge permitted JT to give that evidence and his ruling specifically stated this evidence was permitted: "if she were to say he propositioned me again, I got upset with him, and if it's left at that, without all of the other stuff … that's relevant" (Transcript, 8 April 2024, at page 138).

[336] I accept Mr. Regular's appeal submission that the exception – admission to rebut an allegation of recent fabrication – did not apply in this case. A prior consistent statement gains its value to rebut an allegation of recent fabrication because it shows that the witness's story did not change because of a new motive to fabricate (e.g., an intervening event between the two statements that creates a motive). A prior consistent statement cannot be admitted to show that the witness's initial statement is not a fabrication.

[337] The Supreme Court cautioned against the use of prior consistent statements in *Stirling*:

> [7] … Importantly, it is impermissible to assume that because a witness has made the same statement in the past, he or she is more likely to be telling the truth, and any admitted prior consistent statements should not be assessed for the truth of their contents. … There thus remains the very real possibility that the evidence was fabricated … and this potential motive is not in any way rebutted by the consistency of [the] story.

[338] Mr. Regular relied on the same "very real possibility" that JT's initial claims made to the police were fabricated. As in *Stirling*, this allegation of fabrication was not in any way rebutted by the consistency of her story.

Use of Prior Statements to Rebut Defence Allegation of Fabrication

[339] The Crown argues the trial judge, in his assessment of JT's credibility, could have relied on JT's storage unit evidence to rebut the defence allegation of fabrication. Mr. Regular, at paragraph 141 of his Factum, argues the prior statements were not capable of rebutting the allegation of fabrication writ large, as this would be tantamount to using it for the truth of its contents and not permissible.

[340] I view the Crown's position on admissibility of the prior statements as properly going to the "narrative" and "narrative as circumstantial evidence" exceptions.

Prior Statements Admissible under the "Narrative" and "Narrative as Circumstantial Evidence" Exceptions

[341] The Crown submits as pure narrative, the facts, timing, and circumstances of the statements were admissible as part of the unfolding of events from the alleged offences to their prosecution. The evidence would have "eliminated gaps" and provided "chronological cohesion" to the narrative of how the complaint came to the attention of the police and would have also been an aid in understanding the case as a whole. In *Dinardo*, the Supreme Court stated:

> [37] In some circumstances, prior consistent statements may be admissible as part of the narrative. Once admitted, the statements may be used for the limited purpose of helping the trier of fact to understand how the complainant's story was initially disclosed. The challenge is to distinguish between "using narrative evidence for the

> impermissible purpose of 'confirm[ing] the truthfulness of the sworn allegation'" and "using narrative evidence for the permissible purpose of showing the fact and timing of a complaint, which may then *assist the trier of fact in the assessment* of truthfulness or credibility"… .

(Citations omitted, emphasis in original.)

[342] More importantly, the Crown submits the circumstances of the statements were admissible under the "narrative as circumstantial evidence" exception. Admissibility on this basis does not hinge on the repetition of the statements. Rather, the content of the statements, their timing, their context, and surrounding circumstances could have aided in the evaluation of the credibility, reliability, and truthfulness of JT's in-court testimony.

[343] On the other hand, Mr. Regular argues the "narrative" or "narrative as circumstantial evidence" exceptions could not have applied, distinguishing the authorities that the Crown relied on (*R. v. G.C.*, 2006 CanLII 18984 (ONCA), cited in *Dinardo*, at para. 38; *R. v. Langan*, 2019 BCCA 467, at paras. 94-95 (per Bauman C.J.B.C., dissenting), rev'd 2020 SCC 33; and *R. v. Khan*, 2017 ONCA 114, at paras. 29-34, leave to appeal to SCC refused, 37534 (3 August 2017)). Mr. Regular's Factum, at paragraph 142, states the Crown did not rely on these exceptions at trial. That is not correct. The Crown at trial, without specifically labeling these two legal exceptions by name, did say the purpose of the proposed evidence was to establish the timing and JT's reason for coming forward with her allegations.

[344] This Court's decision in *Best* is instructive:

> [22] Although Mr. Best did not specifically allege recent fabrication, his entire defence was based on allegations that the complainant contrived her evidence respecting all of the alleged assaults in order to have him convicted. The doctor's chart and any related testimony concerning what the Complainant told her therefore fits squarely within the exception addressed in *Stirling*, making the evidence properly admissible.
>
> [23] Once admitted though, the use of such evidence is circumscribed, as *Stirling* and *Dinardo* point out. Charron J. put it this way at paragraph 37 of *Dinardo*:
>
> > … The challenge is to distinguish between "using narrative evidence for the impermissible purpose of 'confirm[ing] the truthfulness of the sworn allegation'" and "using narrative evidence for the permissible purpose of

> showing the fact and timing of a complaint, which may then assist the trier of fact in the assessment of truthfulness or credibility" …

[345] The trial judge's ruling did not restrict the Crown from establishing, through JT, the timing and her reason for coming forward in 2020 with the complaints against Mr. Regular. JT was permitted to give the year of the incident (2019) and the necessary details on her last encounter with Mr. Regular, including:

- why she was angry at Mr. Regular ("told [Mr. Regular] that I didn't want him hurting anyone else", excluding the details pertaining to JT's sister (Transcript, 8 April 2024, at pages 138, 144));

- how she reacted (called him disgusting and derogatory names, pushed and scratched him (Transcript, 8 April 2024, at pages 139-140, 144-148)); and

- what that did was give her "the courage to go and tell [the police] the truth" (Transcript, 8 April 2024, at pages 141, 147).

[346] Like in *Best*, Mr. Regular did not allege recent fabrication, his defence was based on the position that JT fabricated all the alleged sexual assaults to have him convicted. As Hoegg J.A. explained in *Best*, once prior consistent statements are admitted, use of such evidence is circumscribed. The trial judge could not use the evidence for the impermissible purpose of confirming the truthfulness of JT's sworn allegations. Nevertheless, it was open to the trial judge to consider JT's testimony on the Storage Unit Incident in assessing JT's credibility and whether she did or did not fabricate her evidence to support the charges.

[347] Even though there is no mention in the trial judge's reasons of JT's testimony of her last encounter with Mr. Regular, that does not mean he did not factor the evidence into his credibility assessment. There is no requirement for the trial judge's reasons to refer to every item of evidence considered or to detail the way each item of evidence was assessed (*R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at paras. 31-32). Considering the entire trial record, including the live issues at trial and the submissions of counsel, I am satisfied the trial judge sufficiently factored all of JT's testimony into his credibility assessment.

[348] No error is demonstrated in the trial judge's admission of JT's evidence on the Storage Unit Incident, and the restrictions he placed on JT's evidence.

Trial Judge's Refusal to Permit Cross-Examination of Mr. Regular on the Storage Unit Incident

[349] I do agree that the trial judge erred in prohibiting the Crown from cross-examining Mr. Regular on his voluntary out-of-court statement concerning his last encounter with JT at the storage unit and the absence of any reference in the statement to JT's reaction and assault of him. It was relevant evidence and the trial judge's ruling prohibited the Crown from exploring this with Mr. Regular. The defence did not object to JT being questioned by the Crown on Mr. Regular's last encounter with her, that she assaulted him, and that the Storage Unit Incident precipitated her going to the police. It was fair game for Mr. Regular to be cross-examined on the particulars of how JT reacted to him at the storage unit and why his statement made no reference to the assault.

[350] The Crown's position, at paragraph 89 of its Factum, was that it wanted to adduce any potential admissions from Mr. Regular about the Storage Unit Incident, identify the inconsistencies between JT and Mr. Regular, and challenge credibility. The Crown advised the trial judge that while JT's police statement spoke of her presence with her sister and Mr. Regular at the storage unit, as well as her accusation against him and her physical assault of him, Mr. Regular's own statement about the storage unit did not discuss her accusation or physical assault.

[351] Instead of prohibiting the Crown from questioning Mr. Regular on the Storage Unit Incident, the trial judge could have exercised his trial management power to ensure the cross-examination did not venture into discreditable conduct evidence. This power included the ability to restrict the Crown from engaging in "argumentative, misleading, or irrelevant" questioning (*Samaniego*, at para. 22).

[352] It was an error for the trial judge to prevent the Crown from asking any questions of Mr. Regular on the Storage Unit Incident. The exclusion of relevant evidence is an error of law.

[353] Yet, as I will explain under Issue 5, this error did not have a material bearing on the acquittal.

ISSUE 4: Did the trial judge err in permitting Mr. Regular to give his evidence without being under oath or by affirmation?

[354] I also agree with my colleague that the trial judge erred when he intervened and relieved Mr. Regular from the administration of the oath at the commencement of Mr. Regular's testimony.

[355] Mr. Regular was about to take the oath when the trial judge intervened to preclude the clerk from proceeding to administer the oath. Mr. Regular, or his counsel, did not seek to have him relieved of taking the oath or affirmation. No concern arises here over whether Mr. Regular understood the nature and consequences of the oath.

[356] The trial judge did not overlook administration of the oath but, instead, deemed it unnecessary. Mr. Regular, as practicing lawyer, is an officer of the court (*Law Society Act, 1999*, SNL 1999, c. L-9.1, at s. 33(2)). Mr. Regular would have also taken an oath or affirmation on enrollment as solicitor of the Supreme Court of Newfoundland and Labrador before a judge of the Supreme Court in open court to "truly and honestly conduct myself in the practice of a solicitor" (*Law Society Act, 1999*, at s. 34(4)).

[357] Mr. Regular's oath or affirmation upon enrollment as a solicitor, and designation as an officer of the court, did not provide the trial judge with the discretion to waive the necessity of taking an oath or affirmation at his criminal trial.

[358] The trial judge, without objection from the Crown or hearing submissions from the parties, fell into error when he deemed it unnecessary for Mr. Regular to take the oath.

[359] In the context of how the trial judge relieved Mr. Regular of his duty to take the oath or affirmation, the error was harmless. Mr. Regular would have willingly sworn the oath and he was fully aware of its purpose and consequences.

ISSUE 5: Is the test under *Graveline* met?

The Legal Standard to Overturn an Acquittal

[360] For this Court to interfere with Mr. Regular's acquittal and order a new trial, the Crown must meet the test enunciated by the Supreme Court in *R. v. Graveline*,

2006 SCC 16, [2006] 1 S.C.R. 609, and repeatedly endorsed since. The Crown must "satisfy the appellate court that the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal" (*Graveline*, at para. 14).

[361] At the foundation of criminal law lies the cardinal principle that no individual shall be placed in "double jeopardy" for the same matter. In the United States, accused persons acquitted after trial are constitutionally protected from retrials (*R. v. Hodgson*, 2024 SCC 25, at para. 29). As the Supreme Court pointed out in *Hodgson*, the Crown's right of appeal from acquittals is broader in Canada than most other common law jurisdictions (at para. 25). This underlies the rationale why the Crown can only appeal on an error of law and why, even when an error of law is identified, the burden on the Crown is a "very heavy" and "onerous" one. (*Hodgson*, at para. 36, citing *Graveline*, at paras. 14-15, 19; and *R. v. Rioux*, 2025 SCC 34, at para. 46).

[362] Accordingly, to meet the standard for the ordering of a new trial, the Crown must convince this Court "to a reasonable degree of certainty, that the verdict of acquittal would not necessarily have been the same had the error not occurred" (*Rioux*, at para. 130; and *Hodgson*, at para. 36, citing *Graveline*, at para. 15). That is, "the Crown must show that the verdict may well have been affected" by one or more errors (*R. v. Cowan*, 2021 SCC 45, [2021] 3 S.C.R. 323, at para. 46).

Applying the Requisite Standard

[363] On my analysis, the errors I have identified did not have a material bearing on the acquittal. Furthermore, I am not convinced "with a reasonable degree of certainty" that the errors the Crown asserted, and my colleague found, "in the concrete reality" of this case, had a material bearing on the acquittal.

[364] The essence of this Crown appeal is the assertion of legal errors on admissibility rulings to undermine and challenge the trial judge's credibility findings. In the case of convictions for sexual assaults, the Supreme Court of Canada has re-affirmed "the importance of approaching a trial judge's reasons with sensitivity to the trial judge's role and advantage in making findings of fact and credibility" (*G.F.*, at para. 5). The Court in *G.F.* made the following observation: "… we continue to encounter appellate court decisions that scrutinize the text of trial reasons in a search for error, particularly in sexual assault cases, where safe convictions after fair trials are being overturned not on the basis of legal error but on

the basis of parsing imperfect or summary expression on the part of the trial judge. Frequently, it is the findings of credibility that are challenged" (underlining added, at para. 76).

[365] The converse is equally true - "safe" acquittals are not to be disturbed on appeal after a fair trial. Just as an accused is not entitled to a "perfect trial", neither is the Crown. As is crucially required in every sexual assault trial, the trial judge and defence counsel treated JT respectfully without unnecessary violation of her dignity, equality and privacy (*Kruk*, at paras. 40, 203).

[366] Mr. Regular's acquittal is safe because the trial judge's findings of fact and findings on credibility were sufficient to raise reasonable doubt on all charges, despite the legal errors identified and asserted.

[367] Since Mr. Regular testified in his own defence, the trial judge was obliged, as he stated, at paragraph 11 of his Decision on Verdict, to apply the *W.(D.)* analysis (*R. v. W.(D.)*, [1991] 1 S.C.R. 742, at pages 757-758) . The first prong of *W.(D.)*. is "if you believe the evidence of the accused, obviously you must acquit" (at page 758). After considering the totality of the admissible evidence, the trial judge believed the testimony of Mr. Regular and did not believe the testimony of JT.

[368] This was not a case on consent like *Rioux*, where the legal analysis of the complainant's subjective state of mind to establish consent was in play. Rather, it was about whether the Crown had met its burden of proof on establishing whether any of the alleged sexual assaults happened. Since he believed Mr. Regular that the assaults did not happen, an acquittal had to follow.

[369] My colleague relies, at paragraphs 170 and 172, on this Court's decision in *R. v. C.L.*, 2022 NLCA 53, at paragraph 50, for the proposition that the accused's evidence is "part of a dynamic in which the trial judge considered and rejected the complainant's evidence", and the Ontario Court of Appeal decision in *R. v. Lacombe*, 2019 ONCA 938, at paragraphs 58-62. Consent lay at the heart of both these cases (*C.L.*, at para. 2; and *Lacombe*, at para. 5).

[370] Consent was also in play at the jury trial in *S.B.*, although the accused in that case denied the assaults occurred, he said that sexual intercourse had been with the complainant's consent (at para. 6). Green C.J.N.L. (as he then was), in his dissenting reasons, stated, "we do not know what, specifically, might have tipped the scales in the jury's minds towards acquittal" (at para. 111). He further observed that "the

credibility of the complainant appears to have been central to the verdicts on all charges" (at para. 113). Likewise, Rowe J.A. (as he then was) indicated, "the complainant, by her untruthfulness and the inconsistencies in several areas of her testimony, gravely undermined her credibility; <u>in a case that turned in very large measure on the complainant's testimony</u>, this undermining of her credibility could properly give rise to a reasonable doubt" (underlining added, at para. 88).

[371] Justice Rowe for the majority in *S.B.* held the Crown had not shown the requisite nexus between the legal errors and the verdict. Green C.J.N.L. expressed the contrary view and would have ordered a new trial on all charges. The Supreme Court of Canada allowed the Crown's appeal and ordered a new trial, for the reasons of Green C.J.N.L.

[372] What is clear about *S.B.* is that it was the complainant's credibility that was central. In Mr. Regular's trial, the trial judge had the duty and advantage of assessing both the credibility of JT and Mr. Regular. Although a criminal trial is never a contest of credibility, when the trier of fact believes the denials of the accused that the alleged sexual activity did not happen, the judge is entitled to acquit regardless of whether complainant is found to be credible or not. That was the very argument advanced in *R. v. Bik*, 2025 QCCA 340, that my colleague cites.

[373] In *Bik*, on a Crown appeal of a sexual assault acquittal, the respondent accused submitted that on the first prong of the *W.(D.)* analysis, the judge believed him. As such, he argued "that judge's analysis of the complainant's credibility is completely peripheral to her conclusion as her acceptance of his testimony was an independent pathway to acquittal" (at para. 27). The Quebec Court of Appeal stated "[t]his argument would be compelling if it were clear from the judgment that this is what the judge decided. However, that is not the case" (at para. 28).

[374] In my view, it is clear from the trial judge's reasons that he believed Mr. Regular and he did not believe JT. I disagree with my colleague's reasoning that the credibility of Mr. Regular's testimony was inextricably linked to the trial judge's assessment of JT's credibility. There was other independent evidence that also supported a finding of not guilty on certain of the counts.

[375] To show how the trial judge arrived at his verdict to acquit, I will review how he analyzed the evidence. Before the trial judge examined the evidence on each of the five counts, he reviewed the evidence relating to the SIRT investigation and its impact on JT's reliability and credibility.

Reference to the SIRT Investigation on Decision to Acquit

[376] In the Decision on Verdict, the trial judge's comments on the SIRT investigation evidence were erroneously referred to under the heading "Similar Fact Evidence". This evidence, as I have explained above, was duly adduced by Mr. Regular through his section 276 application and the admissibility order the trial judge made under sections 278.92-278.94. The evidence was not strictly speaking "similar fact evidence" within the meaning of that defined legal term.

[377] The trial judge was satisfied that the incident described by JT, which she indicated kick-started a sexual relationship with SO, never occurred and could not have happened because SO was not a police officer until well after the alleged event (Decision on Verdict, at para. 37). He used JT's evidence of how the relationship started as an example that she was "prone to pivoting when confronted by an inconsistency" (Decision on Verdict, at para. 40).

[378] An alternative explanation, given by JT as to when the relationship started with SO, was that he stopped a vehicle in which she was a passenger and arrested the individuals in the car for possession of drugs. JT gave names of specific individuals who she said were arrested, charged, and convicted. The SIRT investigation could not find any record of these people being arrested and none of them had any record for possession of drugs. The trial judge described this evidence of JT as "flights of fancy" and as casting "a pall of suspicion over all of her testimony" (Decision on Verdict, at paras. 38, 42).

[379] The trial judge found that these inconsistencies were serious. He stated, "[w]hen taken into consideration along with all of the inconsistencies relating to [JT's] evidence against [Mr. Regular], they create significant doubt about [JT's] ability to remember events and her motivation in relating them. The inconsistencies give me considerable doubt about the veracity of her allegations" (Decision on Verdict, at para. 44).

[380] The trial judge made no further reference to the SIRT investigation. He then went on to review and examine the evidence on the counts separately.

Counts 1 and 2 – The Parking Lot Incident

[381] The trial judge engaged in an extensive assessment of the evidence on Counts 1 and 2 - the "Parking Lot Incident". He reviewed the evidence of both JT and Mr.

Regular and made findings of fact and findings of credibility. He did not apply any stereotypical reasoning in assessing the evidence. He outlined his concern for how drug use and childhood trauma may have affected JT's memory, the lack of cohesion and inconsistencies in her testimony and other concerns with her version of what transpired. He found Mr. Regular's evidence logical and believable and accepted his version of events that he would not have met with JT in a vehicle in the parking lot.

[382] He stated even if he had not accepted Mr. Regular's version of events, he would not have been satisfied that the Crown had proven Counts 1 and 2 (Decision on Verdict, at para 86).

[383] My colleague, at paragraphs 173-174, opines that had the trial judge not been influenced by the inadmissible evidence, he may have viewed all her testimony regarding this incident differently. The trier of fact can accept all, some, or none of the evidence of a witness. The trial judge explained why he accepted Mr. Regular's version and rejected JT's version as implausible. He commented: "[T]he notion that a lawyer would drive from his office to a parked car, perhaps no more than 50 meters distant, to meet with a 12-year-old girl makes no logical sense. I believe [Mr. Regular] when he stated that he would not interview a young person in the absence of a parent" (Decision on Verdict, at para. 84).

[384] Mr. Regular was cross-examined quite extensively and vigorously on the Crown's assertion that he met JT in a vehicle, on the parking lot next to a McDonald's, to avoid JT being seen with her mother, because she was not lawfully permitted to be in the company of her mother (Transcript, 19 April 2024, at pages 43-54).

[385] The Supreme Court in *Kruk* stated that: "It is widely recognized that testimonial assessment *requires* triers of fact to rely on common-sense assumptions about the evidence. … Reasoning about how people *generally* tend to behave, and how things *tend* to happen, is not only permissible, it is often a necessary component of a complete testimonial assessment" (emphasis in original, at para. 72). Trial judges − "though of course not a substitute for evidence" − are permitted to use their life experience to enable them "to understand human behaviour, to weigh the evidence, and to determine credibility" (at para. 72).

[386] The trial judge's finding that it made "no logical sense" for Mr. Regular to meet JT on a parking lot in a vehicle was a finding squarely grounded in the evidence that he heard and accepted from Mr. Regular (Decision on Verdict, at para. 84). It

was also grounded in common sense and his own life experience on how, *generally*, a lawyer would not *tend* to see a minor as a client, for a first time visit, within 50 meters of his office. The Crown's cross-examination did not shake Mr. Regular's denial of meeting JT in a vehicle on the parking lot.

[387] For this Court to interfere with the trial judge's findings on Counts 1 and 2 is nothing more than a reassessment of the facts. That is not a proper basis to overturn an acquittal. This also holds true for the other counts, as I will explain.

Count 3 – The CP Incident

[388] The trial judge's discussion of Count 3 – the "CP Incident" – stretches from paragraphs 88 to 181 of the Decision on Verdict. In analyzing the evidence on this count, the trial judge described it as a "she said/he said" case with vastly differing accounts of what took place. He was able to find a definite date, July 24, 2008, for the alleged offence.

[389] There were other witnesses that gave details on surrounding circumstances, but who were not directly present to witness all interactions between JT and Mr. Regular on that day. The trial judge found the cumulative effect of the evidence undermined JT's credibility and reliability and supported Mr. Regular's credibility and reliability on the denial of sexual conduct.

[390] After reviewing the evidence in detail, the trial judge made the following factual findings, at paragraph 169 of the Decision on Verdict:

> [169] I find the following facts:
>
> a. [JT] attended [Mr. Regular's] law office for a meeting on July 24, 2008. The meeting was arranged by [LG];
>
> b. [CP] came to the meeting with [JT], but waited outside the building while [JT] went inside;
>
> c. [BM] was in [Mr. Regular's] office when [JT] arrived, late, for her interview;
>
> d. [Mr. Regular] interviewed [JT] at the entry wicket in the waiting room;

e. [Mr. Regular] met the persons noted in his diary on July 24, 2008, at the times noted, and attended to the execution of various documents;

f. [JT] did not disclose to [CP] that she had been sexually assaulted in [Mr. Regular's] office;

g. [CP's] recollection of what was said to her by [JT] is more accurate than the version offered by [JT]. To the extent that there are differences, I accept the evidence of [CP];

h. The description given by [CP] of the interaction between [JT] and [Mr. Regular] would not be sufficient to ground a charge of sexual assault;

i. [JT] and [CP] did not cross the Conception Bay Highway in order to meet with representatives of Child, Youth and Family Services – since [Mr. Regular's] office was, at that time, located next door to Child, Youth and Family Services. I find that [JT's] recollection in this regard is mistaken; and

j. [Mr. Regular] did not forbear the collection of outstanding invoices from [JT] as alleged by her. I find, instead, that he instructed his office staff to continue collection efforts for well over a year after the accounts were rendered.

[391] He accepted the evidence tendered on behalf of Mr. Regular and found that no sexual assault took place on July 24, 2008. He noted that the "serious concerns" he had with JT's memory of what took place on that date, together with inconsistencies in her evidence and the inconsistencies as against the evidence of others, "militate against accepting her version of what transpired" (at para. 178). He found that Mr. Regular did not interview JT in his office as she stated and "that no sexual assault could have taken place therein as alleged" (at para. 180).

Count 4 – The Ultramar Incident

[392] JT was charged with shoplifting on October 9, 2012 and sought legal advice from Mr. Regular shortly afterwards. She alleged that Mr. Regular had sexual intercourse with her on the coffee table in his office. The trial judge's detailed review of the evidence and fulsome analysis on this count is at paragraphs 182 to 280 of the Decision on Verdict.

[393] The trial judge's findings of fact and credibility on this alleged incident caused him to have a reasonable doubt that a sexual assault occurred in the manner as described by JT (Decision on Verdict, at para. 279). He accepted the evidence of Mr. Regular's Office Manager, RH, and Mr. Regular that he did not have a coffee table in his office. He found RH was "an honest, straightforward witness" and reliable; he "was struck by her independence" (Decision on Verdict, at paras. 270, 276).

[394] RH testified that the only table in Mr. Regular's office was a writing desk – somewhat akin to a dining room table. JT testified that she engaged in sexual intercourse with Mr. Regular on a coffee table. She described her legs being on the floor while sexual activity was taking place.

[395] The trial judge found "[i]t is obvious that sexual activity could not have occurred in the manner described if the table being utilized was the writing desk – since [JT's] feet could not have touched the floor while seated on the writing surface" (Decision on Verdict, at para. 271).

[396] He believed Mr. Regular "when he indicated that he did not sexually assault [JT] in his office" (Decision on Verdict, at para. 277).

Count 5 – The Party Incident

[397] The trial judge noted that the subject matter of Count 5 – the Party Incident – occurred before the matters alleged in Count 4. His examination of the evidence is from paragraphs 281 to 317 of the Decision on Verdict.

[398] JT had a party at her residence, which led the police wanting to interview her as a potential witness on an assault complaint they were investigating. On September 26, 2012, according to the notes of the police officers, the meeting occurred at Mr. Regular's office between 3:46 p.m. and 4:28 p.m.

[399] Mr. Regular testified that the meeting took place in his office space and denied sexually assaulting JT.

[400] The trial judge had "serious concerns" with JT's recollection of events concerning this count. JT was adamant that when the police officers left, Mr. Regular locked the doors to the boardroom and then proceeded to have sex with her at "a big boardroom table" (Decision on Verdict, at paras. 297, 313).

[401] RH testified that the office JT had referred to as the "boardroom" was always occupied as someone's office with a "U" shape desk with a computer located upon it and doors that did not lock (Decision on Verdict, at paras. 286, 289-290, 309-310).

[402] The trial judge found the meeting with JT and the police officers took place in Mr. Regular's office, not in a boardroom (Decision on Verdict, at para. 311). Upon the conclusion of the meeting, Mr. Regular attended to another client (Decision on Verdict, at para. 312). He also found there was no boardroom, no boardroom table and the office known as the "boardroom" had no locks (Decision on Verdict, at para. 314).

[403] He observed: "When a witness is adamant that some things were exactly so, and it is later discovered that the witness' recollection is not borne out by the facts and is wrong, the trier of fact has no option but to entertain reasonable doubts about the culpability of the Accused person" (Decision on Verdict, at para. 315).

[404] In dismissing this count, the trial judge stated, "I believe [Mr. Regular's] evidence that he did not sexually assault [JT]" (Decision on Verdict, at para. 316).

CONCLUSION

[405] The trial judge's errors of law that I have identified in these reasons did not, in my opinion, have a material bearing on the acquittal. Moreover, none of the errors of law the Crown asserted, either individually or collectively, had a material bearing on the verdict. Based on the trial judge's findings of fact and credibility, the Crown has failed to meet the *Graveline* test of showing with a reasonable degree of certainty that the errors affected the verdict.

[406] Mr. Regular is therefore entitled to an acquittal as pronounced by the trial judge.

DISPOSITION

[407] For all the above reasons, I would dismiss the Crown's appeal and uphold the verdict of acquittal on all counts.

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G.L.C. Noel J.A.