



SUPREME COURT OF CANADA

CITATION: R. v. T.W.W., 2024
SCC 19

APPEAL HEARD: November 10,
2023

JUDGMENT RENDERED: May 24,
2024

DOCKET: 40406

BETWEEN:

T.W.W.
Appellant

and

His Majesty The King
Respondent

- and -

Attorney General of Alberta
Intervener

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal,
O'Bonsawin and Moreau JJ.

**REASONS FOR
JUDGMENT:**
(paras. 1 to 82)

O'Bonsawin J. (Wagner C.J. and Karakatsanis, Rowe, Martin,
Kasirer and Jamal JJ. concurring)

JOINT DISSENTING Côté and Moreau JJ.

REASONS:

(paras. 83 to 131)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

T.W.W.

Appellant

v.

His Majesty The King

Respondent

and

Attorney General of Alberta

Intervener

Indexed as: R. v. T.W.W.

2024 SCC 19

File No.: 40406.

2023: November 10; 2024: May 24.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O’Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Evidence — Admissibility — Complainant’s sexual activity — Accused charged with sexual assault — Accused and complainant married but separated at time of alleged assault — Accused applying to adduce evidence of

sexual activity between himself and complainant on evening prior to alleged assault — Application dismissed — Accused convicted — Whether trial judge erred in refusing to admit evidence of prior sexual activity — Criminal Code, R.S.C. 1985, c. C-46, s. 276.

Courts — Open court principle — Publication bans — Accused charged with sexual assault — Accused bringing application to adduce evidence of complainant's prior sexual activity — Whether statutory provision prohibiting publication of information and evidence relating to accused's application extends to appellate proceedings — If not, whether discretionary limits on court openness justified — Criminal Code, R.S.C. 1985, c. C-46, s. 278.95.

The accused and the complainant were in a romantic relationship for over twenty years. In February 2018, they separated and the accused moved into the basement of the family home. According to a statement made to police by the complainant, she and the accused had consensual intercourse on the evening of April 1, 2018, and the accused sexually assaulted her the following morning. The accused brought a pre-trial application to adduce evidence of the sexual activity from the evening of April 1, pursuant to ss. 276 and 278.93 of the *Criminal Code*. The application stated that the accused's defence was consent. The trial judge dismissed the application. He held that the events of April 1 were not relevant to the issue of consent on April 2, and rejected the accused's argument that the events on April 1 formed a continuous event with the events on April 2. He also concluded that the evidence was sought to be adduced for the prohibited purpose of arguing that the complainant was

more likely to have consented to the alleged sexual activity or that she was less worthy of belief.

The accused was convicted of sexual assault and appealed his conviction. The appeal proceeded *in camera* and the appeal record was sealed. The majority of the Court of Appeal held that the accused failed to establish how evidence of the April 1 sexual activity was fundamental to his defence, which was not, in fact, a defence of consent as set out in his application, but was rather a complete denial that the assault occurred. In its view, evidence of consensual sex on April 1 could not support a defence that a sexual assault on April 2 did not occur. The dissenting judge held that the evidence of prior sexual activity was essential to challenging the complainant's credibility and the Crown's theory that the sexual assault occurred in the context of a complete breakdown in the accused and complainant's relationship. The accused appealed to the Court as of right. The Crown brought a motion for the appeal to be held *in camera*, for filed materials to be sealed, and for any other order necessary to protect the information covered by ss. 276 and 278.93 to 278.95 of the *Criminal Code*, on the basis that the procedural protections prohibiting publication put in place at the trial level under ss. 278.94 and 278.95 should extend to the appeal before the Court.

Held (Côté and Moreau JJ. dissenting on the appeal): The appeal should be dismissed and the Crown's motion should be allowed in part.

Per Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.: The accused failed to sufficiently identify a specific use for the prior

sexual activity evidence that did not invoke twin-myth reasoning and that was essential to his ability to make full answer and defence. Accordingly, the trial judge did not err in denying the application. With respect to the Crown's motion, the mandatory publication ban under s. 278.95 of the *Criminal Code* does not extend to this appeal. Rather, the Court's power to make an order limiting court openness in the instant case is derived from the implied jurisdiction of courts to control their own processes and records. The Court's discretion should be exercised in a way that maintains court openness as far as practicable while protecting the complainant's personal dignity and privacy and the accused's fair trial rights. Applying the test set out in *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 75, the circumstances of the instant case do not justify all of the measures requested by the Crown. Banning publication of any information about or reference to the nature of the sexual activity other than that which forms the subject-matter of the charge is sufficient.

On appeal from a trial judge's determination to admit or refuse evidence of other sexual activity, an appellate court must ensure that the trial judge applied the correct legal principles, considered all the evidence they should have, did not admit irrelevant evidence, and did not otherwise err in law; no deference is owed in this regard. However, as to the trial judge's determination that the evidence's prejudicial effect substantially outweighed its probative value, appellate courts should defer. In reviewing a trial judge's initial s. 276 ruling, the appellate court must only consider the evidence that was before the trial judge at the time of the determination on admissibility.

Other sexual activity evidence may be admissible in relation to issues of credibility or context, but the applicant must establish a specific use for this information that is permitted by the s. 276 regime, and the applicant bears the burden of establishing that any such probative value is not substantially outweighed by prejudicial effect. Specificity is required so judges can apply the scheme in a way that protects the rights of the complainant and ensures trial fairness, and there must be a sufficient factual and evidentiary basis for the trial judge to properly consider and weigh the factors set out in s. 276. The applicant must demonstrate that, in the absence of the evidence, their position would be untenable or utterly improbable.

The relevance and probative value of prior sexual activity evidence may not crystallize until witnesses have begun their testimony and the evidence, or the inconsistency or materiality thereof, becomes apparent. Where the evolution of a witness' testimony at trial results in a material change in circumstances, the trial judge may, either on their own initiative or by request from either party, revisit an earlier s. 276 ruling in light of the new evidence or information. The possibility of reconsideration of a pre-trial ruling in no way relieves the defence of its responsibility, in the majority of cases, to make a request for reconsideration and articulate the permissible purposes of the evidence in light of the changed circumstances. However, if the nature of the evidence at trial cries out for a reconsideration, an appellate court may find that a trial judge was required to revisit their prior s. 276 ruling of their own motion even without being specifically asked to do so.

In the instant case, there could be no use for the April 1 evidence beyond twin-myth reasoning. The proposed evidence could not provide any greater context for understanding the complainant's actions on April 2, or whether she did or did not consent, beyond unequivocally impermissible reasoning. Even if the evidence had some relevance to either context or credibility, the trial judge made no error in weighing its probative value against its prejudicial effect, and his conclusion on this point is entitled to deference. As for the issue of whether the trial judge ought to have revisited his pre-trial ruling, addressed by Côté and Moreau JJ., it is beyond the proper scope of the appeal to the Court. The scope of an appeal to the Court under s. 691(1)(a) of the *Criminal Code* is limited to those questions of law on which a judge of the court of appeal dissents. Although in ascertaining the real ground upon which dissent is based the Court may look to the written reasons of the dissenting judges, in the instant case the formal judgment of the Court of Appeal plainly stated that the issue of dissent was whether there was an error in the pre-trial ruling; it was not whether the trial judge should have revisited his initial ruling. Those are separate questions.

With respect to the Crown's motion, it requires consideration of the source of the Court's powers to make orders limiting court openness on appeals of s. 276 determinations. This issue engages an exercise in statutory interpretation. The words of s. 278.95 are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Section 278.95 prohibits the publication of information and evidence adduced for applications and admissibility hearings pursuant to ss. 278.93 and 278.94,

but provides trial judges with a discretion to permit the publication of their decision or determination under s. 278.93(4) or 278.94 by others after considering the complainant's right of privacy and the interests of justice. A plain reading of the text suggests that it is aimed not at courts but at other entities who would otherwise publish a court's decisions, such as law reporters, media outlets and reporters, and the general public. The wording of s. 278.95 also limits the power to displace the presumptive statutory publication ban to the judge or justice who has the ability to make orders under ss. 278.93(4) or 278.94(4) in trial proceedings. Section 278.95 is situated among a procedural scheme, the objects of which are to keep improper evidence out of trial proceedings. The scheme contemplates the appeal of such evidentiary determinations but it does not explicitly extend the trial protections to appellate proceedings or otherwise indicate the appropriate procedure on appeal. Had Parliament intended for s. 278.95 to apply to reviewing courts, it could have explicitly stated so.

In the absence of a legislatively imposed exception to the open court principle, the presumption of court openness persists. The Court has implied jurisdiction to make orders limiting court openness, including orders that a hearing proceed *in camera* and for the sealing of filed materials, derived from its jurisdiction to control its own processes and records. This discretion is not to be exercised lightly, but while court openness is the rule, it is not an absolute or overriding principle. In appeals concerning a sexual offence, the application of the *Sherman Estate* test draws upon the legislative context and objectives of the s. 276 regime and the two analytical factors set out under s. 278.95 — the complainant's right of privacy and the interests

of justice. Privacy and personal dignity are important public interests, and protection of the dignity and privacy of complainants is not limited to the trial process. An applicant seeking a limiting order must articulate why the serious risk to the complainant's privacy and dignity warrants a greater restriction on court openness than would be occasioned by an alternative measure. Sealing orders and *in camera* hearings are greater incursions on court openness compared to publication bans. The benefits of the requested orders must also outweigh their negative effects, bearing in mind the interests of justice in the case. Courts of appeal should also consider what orders were previously made in courts below. Furthermore, the Court has a responsibility to provide clear and authoritative statements of law and guidance to lower courts, which supports judicial accountability in sexual offence trials. Reasons from, and hearings before, the Court provide not only an explanation of an appeal's resolution to the parties but also give meaning to the judgment's precedential value.

The sexual nature of the evidence in the instant case touches on the complainant's dignity and right of privacy, and publication of this type of information gives rise to a serious risk to the public interests of personal privacy and dignity. However, the Crown has not established that the risk to the complainant's privacy and dignity requires a sealing order or *in camera* hearing. It can be addressed by banning publication of any information about or reference to the nature of the sexual activity other than that which forms the subject-matter of the charge. The request to hold the hearing *in camera* is a greater restriction than is necessary. As the appeal deals with a question of law, counsel were able to argue their case without heavy reliance on

sensitive information and evidence. In view of the alternative measures available, the benefits of the requested orders do not outweigh their negative effects on court openness.

Per Côté and Moreau JJ. (dissenting on the appeal): The appeal should be allowed, the accused's conviction quashed, and a new trial ordered. There is agreement with the majority on the disposition of the Crown's motion, and there is further agreement that the trial judge did not err in his initial pre-trial determination on the *voir dire* under s. 276. However, the evolution of the evidence should have prompted the trial judge to revisit the *voir dire* ruling made at the pre-trial stage, and he should have allowed the accused to cross-examine the complainant about the April 1 consensual sexual activity for limited purposes. In failing to do so, the trial judge committed a reviewable error.

An appeal under s. 691(1)(a) of the *Criminal Code* is limited to the questions of law on which a judge of a court of appeal dissents, but it is important to maintain some flexibility in identifying what is at the heart of the dissent. An appellate court that raises new issues on appeal must allow the parties to make submissions on those matters, but only when the issue was not raised by the parties or cannot reasonably be said to stem from the issues as framed by the parties. Criminal appeals on questions of law are based in part on the desire to ensure that criminal convictions are the product of error-free trials. An unduly rigid approach to characterizing the question on which a

judge dissents would prevent the Court from addressing the substance of their disagreement.

Section 278.97 of the *Criminal Code* states that admissibility determinations under s. 276 are deemed to be questions of law. While appellate courts owe deference to the factual conclusions that underpin the analysis, the standard of review on the question of whether sexual activity evidence is admissible under s. 276 is correctness. This gives appellate courts a more active role in overseeing decisions made under s. 276, allowing them to step in more easily to give the proper interpretation to these provisions.

Pre-trial rulings are not set in stone. An order related to the conduct of trial may be varied or revoked if there is a material change of circumstances. Counsel plays an important role in bringing such evidentiary shifts to the trial judge's attention, but trial judges have the ability to revisit s. 276 rulings even in cases where counsel has not made a formal request or application. Trial judges have an obligation to remain alert to the evidentiary developments that warrant revisiting s. 276 rulings. Where the evidence cries out for a reconsideration of a prior ruling, the trial judge has an obligation, at the very least, to invite submissions on the issue. This contributes to maintaining trial fairness and avoiding a miscarriage of justice: trial judges' responsibility to ensure that s. 276 is properly applied is crucial not only to evidence that may need to be screened out, but also to evidence that may need to be admitted for the accused to be afforded the opportunity to make full answer and defence.

In general, whether or not a relationship has previously included a sexual component is not relevant to determining whether a complainant has consented to a particular instance of sexual activity, and an accused must not be allowed to suggest that the complainant was more likely to have consented to the sexual activity in question because she had previously consented in the context of the same relationship. However, when the evidence suggests that, because of the platonic nature of a particular relationship, the complainant would be unlikely to consent, challenging that depiction of the relationship is fundamental to the coherence of the defence narrative.

In the instant case, the question on which the dissenting judge in the Court of Appeal dissented is whether or not the trial judge erred in refusing to admit the evidence of the parties' sexual activity on April 1. The question of whether the trial judge should have revisited the pre-trial ruling can be said to stem from the issue framed by the accused and the Crown, in this case, the admissibility of prior consensual sexual activity. The complainant's trial testimony suggested that, according to her, consent was improbable in the context of separation, transforming the neutral fact of separation into an element that supported the conclusion that she did not consent. This testimony created a material change in circumstances that triggered the trial judge's obligation to revisit his pre-trial ruling. The testimony should have opened the door to cross examination of the complainant regarding her consensual sexual activity with the accused on April 1 for two limited purposes: to neutralize the suggestion that the complainant was unlikely to consent after the separation, and to test her credibility on this point.

Cases Cited

By O'Bonsawin J.

Applied: *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3; *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 75; **distinguished:** *R. v. Crosby*, [1995] 2 S.C.R. 912; *R. v. Harris* (1997), 118 C.C.C. (3d) 498; *R. v. Temertzoglou* (2002), 11 C.R. (6th) 179; **considered:** *Dunlop v. The Queen*, [1979] 2 S.C.R. 881; **referred to:** *R. v. Ravelo-Corvo*, 2022 BCCA 19, 79 C.R. (7th) 128; *R. v. I. (C.)*, 2023 ONCA 576, 168 O.R. (3d) 575; *R. v. Graham*, 2019 SKCA 63, [2019] 12 W.W.R. 207; *R. v. T. (M.)*, 2012 ONCA 511, 289 C.C.C. (3d) 115; *R. v. Schneider*, 2022 SCC 34; *R. v. Araya*, 2015 SCC 11, [2015] 1 S.C.R. 581; *R. v. Clayton*, 2021 BCCA 24, 399 C.C.C. (3d) 283; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237; *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440; *R. v. Keegstra*, [1995] 2 S.C.R. 381; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *R. v. L.S.*, 2017 ONCA 685, 354 C.C.C. (3d) 71; *Browne v. Dunn* (1893), 6 R. 67; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Kruk*, 2024 SCC 7; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *R. v. Garofoli*, [1990] 2 S.C.R. 1421; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *R. v. Davies*, 2022 BCCA 103, 412 C.C.C. (3d) 375; *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122; *Fedeli v. Brown*, 2020 ONSC 994, 60 C.P.C. (8th) 417; *R. v. Jarvis*, 2019 SCC 10, [2019] 1 S.C.R. 488; *R. v. Kirkpatrick*,

2022 SCC 33.

By Côté and Moreau JJ. (dissenting)

R. v. Goldfinch, 2019 SCC 38, [2019] 3 S.C.R. 3; *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237; *R. v. Arens*, 2016 ABCA 20, 334 C.C.C. (3d) 379; *R. v. Farrah*, 2011 MBCA 49, 87 C.R. (6th) 93; *R. v. Adams*, [1995] 4 S.C.R. 707; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *R. v. L.S.*, 2017 ONCA 685, 354 C.C.C. (3d) 71; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. Hodgson*, [1998] 2 S.C.R. 449; *R. v. Swezey* (1974), 20 C.C.C. (2d) 400; *R. v. Kahsai*, 2023 SCC 20; *Amell v. The Queen*, 2013 SKCA 48, 2013 D.T.C. 5102; *R. v. Harris* (1997), 118 C.C.C. (3d) 498; *R. v. Edmundson*, 2023 ONSC 4236; *R. v. Keegstra*, [1995] 2 S.C.R. 381; *R. v. Downes*, 2023 SCC 6; *Dunlop v. The Queen*, [1979] 2 S.C.R. 881; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689; *Browne v. Dunn* (1893), 6 R. 67.

Statutes and Regulations Cited

Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act, S.C. 2018, c. 29.

Act to amend the Criminal Code (sexual assault), S.C. 1992, c. 38.

Canadian Charter of Rights and Freedoms.

Criminal Code, R.S.C. 1985, c. C-46, ss. 2 “court of appeal”, “every one, person and owner”, 276, 276.3 [ad. 1992, c. 38, s. 2; rep. 2018, c. 29, s. 22], 278.1 to 278.98, 486.4, 691(1), 693(1)(a).

Interpretation Act, R.S.C. 1985, c. I-21, s. 35(1) “person”.

Authors Cited

- Brown, Daniel, and Jill Witkin. *Prosecuting and Defending Sexual Offence Cases*, 2nd ed., in Brian H. Greenspan and Vincenzo Rondinelli, eds., *Criminal Law Series*, vol. 4. Toronto: Emond Montgomery, 2020.
- Canada. House of Commons. *House of Commons Debates*, vol. VIII, 3rd Sess., 34th Parl., April 8, 1992, p. 9528.
- Canada. House of Commons. *House of Commons Debates*, vol. 148, No. 249, 1st Sess., 42nd Parl., December 11, 2017, pp. 16218-19.
- Canada. House of Commons. Legislative Committee on Bill C-49. *Minutes of Proceedings and Evidence of Legislative Committee on Bill C-49, An Act to amend the Criminal Code (sexual assault)*, No. 4, 3rd Sess., 34th Parl., May 20, 1992, pp. 25, 46.
- Canada. House of Commons. Legislative Committee on Bill C-49. *Minutes of Proceedings and Evidence of Legislative Committee on Bill C-49, An Act to amend the Criminal Code (sexual assault)*, No. 5, 3rd Sess., 34th Parl., May 21, 1992, pp. 17-18.
- Canada. House of Commons. Legislative Committee on Bill C-49. *Minutes of Proceedings and Evidence of Legislative Committee on Bill C-49, An Act to amend the Criminal Code (sexual assault)*, No. 6, 3rd Sess., 34th Parl., June 2, 1992, p. 46.
- Canada. Senate. Standing Senate Committee on Legal and Constitutional Affairs. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 48, 1st Sess., 42nd Parl., September 20, 2018, p. 73.
- Rossiter, James. *Law of Publication Bans, Private Hearings and Sealing Orders*. Toronto: Thomson Reuters, 2006 (loose-leaf updated May 2024, release 1).
- Lederman, Sidney N., Michelle K. Fuerst and Hamish C. Stewart. *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed. Toronto: LexisNexis, 2022.
- Vauclair, Martin, Tristan Desjardins and Pauline Lachance. *Traité général de preuve et de procédure pénales 2023*, 30th ed. Montréal: Yvon Blais, 2023.

APPEAL from a judgment of the British Columbia Court of Appeal
(Newbury, Frankel and Fitch JJ.A.), 2022 BCCA 312, 418 C.C.C. (3d) 169, 83 C.R.

(7th) 147, [2022] B.C.J. No. 1748 (Lexis), 2022 CarswellBC 2572 (WL), affirming the conviction of the accused for sexual assault. Appeal dismissed, Côté and Moreau JJ. dissenting.

MOTION for the appeal to be held *in camera*, for filed materials to be sealed, and for any other order necessary to protect the information covered by ss. 276 and 278.94 and 278.95 of the *Criminal Code*. Motion allowed in part.

Jaskarmdeep J. Mangat and Lisa Jean Helps, for the appellant.

Lauren A. Chu and Janet A. M. Dickie, for the respondent.

Joanne B. Dartana, K.C., for the intervener.

The judgment of Wagner C.J. and Karakatsanis, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ. was delivered by

O'BONSAWIN J. —

I. Overview

[1] This appeal offers an opportunity for this Court to reaffirm the proper use of other sexual activity evidence for credibility and context purposes and to consider

the powers of an appellate court to make orders that limit court openness in appeals of admissibility determinations under s. 276 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] The appellant was convicted of sexual assault against his spouse, the complainant. Prior to the trial, the appellant brought an application to adduce evidence of prior sexual activity pursuant to ss. 276 and 278.93 of the *Criminal Code*, more particularly, an incident of consensual intercourse the night before the sexual assault. The trial judge dismissed the application on the basis that the evidence was not being adduced for a purpose other than twin-myth reasoning. This determination was upheld by a majority of the Court of Appeal for British Columbia. The appellant now appeals to this Court as of right.

[3] The conduct of sexual offence trials calls for a delicate balance in order to uphold their truth-seeking function: the process must safeguard the fair trial rights of the accused while also respecting the complainant's dignity and right of privacy to achieve a result that is fair to all involved. Thus, while the open court principle and the protection of complainants' personal dignity and privacy present competing interests, they can operate harmoniously. An open court that protects complainants' personal dignity and privacy increases public confidence in the court process and administration of justice and encourages the reporting of sexual offences.

[4] Prior to the hearing before this Court, the Crown brought a motion requesting that this appeal be held *in camera*, a sealing order on all filed materials, and "any other order the Court deems necessary to protect information covered by sections

276 and 278.93-278.95 of the *Criminal Code*” (p. 1). It asserted that the procedural protections put in place at the trial level under ss. 278.94 and 278.95 should extend to the appeal before this Court. The Crown argued that either or both these provisions and a court’s implied jurisdiction to control its own processes grants this Court the authority to make the orders that it seeks. As I will explain, a court’s implied jurisdiction to control its own processes includes the discretionary ability to make those orders. However, the Court’s discretion should be exercised in a way that maintains court openness as far as practicable while protecting the complainant’s personal dignity and privacy and the accused’s fair trial rights.

[5] On appeal, the appellant argues that the trial judge erred in refusing to admit the evidence for context and credibility purposes. I disagree. As I will explain, the appellant failed to sufficiently identify a specific use for the evidence that did not invoke twin-myth reasoning and that was essential to his ability to make full answer and defence.

II. Facts

[6] The appellant and the complainant were in a romantic relationship for over 20 years. In February 2018, they took a trip, and on their return the couple separated. The appellant moved into the basement of the home he shared with the complainant and her son.

[7] The appellant sought to adduce evidence of sexual activity in the evening of April 1, 2018 and just after midnight on April 2, 2018. For ease of reference, I will refer to this event as occurring on April 1. The complainant alleged that in the morning of April 2, the appellant sexually assaulted her. The complainant's evidence was that she and the appellant had separated in February 2018, and that they had consensual intercourse on April 1.

[8] Throughout the trial proceedings, the appellant's defence evolved, but he ultimately advanced a defence of denial that the sexual assault occurred. He contested the complainant's version of events and testified that the complainant had consented to sexual intercourse in the afternoon of April 2.

III. Procedural History

A. *Oral Ruling on Voir Dire, 2021 BCSC 270 (Jenkins J.)*

[9] Justice Fitch, writing for the majority below, set out in detail the s. 276 application's procedural history, noting "the unfortunate way in which the s. 276 application was framed and presented in the trial court" (2022 BCCA 312, 418 C.C.C. (3d) 169, at para. 110; see paras. 110-42). I will therefore not repeat that history in depth here, but I make note of it as I agree with the majority that the manner in which the application unfolded "enable[s] a more informed assessment of the probative value of the evidence and its potential for prejudice" (para. 110), which I will turn to later in these reasons.

[10] There were three iterations of the appellant's application. The appellant initially sought the admission of prior sexual activity evidence between February 2018 and April 1, 2018 on the basis that it had "significant probative value as it highlights the nature of the relationship between the complainant and the accused" (A.R., vol. II, at p. 5). The application did not specify the defence being advanced.

[11] The appellant's amended notice of application sought only the admission of prior sexual activity evidence from April 1. The application stated that "[t]he evidence has significant probative value as it is relevant to the context of how the events transpired between the complainant and the accused from April 1, 2018 to April 2, 2018 from the accused's perspective" (A.R., vol. II, at pp. 6-7). The application stated that the appellant's defence was one of consent and that the context of the relationship and the complainant's credibility were factors in assessing this defence. The evidence was relevant to context and coherence in the defence narrative because the evidence was necessary to understand the nature of the relationship between the appellant and the complainant (including that their relationship was not platonic) and to challenge the complainant's credibility on the nature of their relationship.

[12] The appellant's further amended notice of application added only that the appellant was seeking the admission of evidence from events on April 2 as well as from April 1.

[13] The trial judge dismissed the application. He held that the complainant's statement to the police and her evidence on the preliminary inquiry were not

inconsistent. In any case, the events of April 1 were not relevant to the issue of consent on April 2. He rejected the appellant's argument that the events on April 1 formed a continuous event with the events on April 2. The trial judge concluded that the evidence was being adduced for the prohibited purpose of arguing that the complainant was more likely to have consented to the alleged sexual activity or that she was less worthy of belief.

B. *British Columbia Court of Appeal, 2022 BCCA 312, 418 C.C.C. (3d) 169 (Newbury and Fitch J.J.A., Frankel J.A. Dissenting)*

[14] The appeal before the Court of Appeal for British proceeded *in camera* and the record was sealed.

[15] The majority upheld the trial judge's decision, agreeing that the appellant's application had not satisfied the requirements for admissibility. The appellant failed to establish how evidence of the prior sexual activity was fundamental to his defence, which was not, in fact, a defence of consent as set out in the appellant's s. 276 applications, but was rather a complete denial that the assault occurred. In the majority's view, the evidence was not fundamental to this defence: evidence of consensual sex on April 1 could not support a defence that a sexual assault on April 2 did not occur. Further, based on the appellant's testimony at trial, it was clear that the evidence would have been adduced to support the myth that because they had consensual sex on April 1, she consented to sex on April 2 or it should not be believed that she did not consent on April 2. There was no inconsistency in the complainant's

evidence to the police and at the preliminary inquiry that could only be resolved by the prior sexual activity evidence, because it was not inconsistent for the complainant to state that she and the appellant separated in February but had consensual sex on April 1.

[16] Justice Frankel, dissenting, would have allowed the appeal, finding that it was an error for the trial judge to dismiss the application. In his view, the evidence of prior sexual activity was essential to challenging the complainant's credibility and the Crown's theory that the sexual assault occurred in the context of a "complete breakdown" in the appellant and complainant's relationship. Credibility was the central issue at trial and the appellant was entitled to explore the divergences in their accounts to challenge the complainant's credibility. The prejudice to the complainant would be minimized by the fact that she had already disclosed the prior sexual activity to the police, and her personal dignity would be protected by the publication ban.

IV. Issues

[17] The appellant argues that the majority of the Court of Appeal for British Columbia erred in finding that the trial judge made no error in dismissing the appellant's s. 276 application. The appellant submits that the evidence of prior sexual activity was necessary to challenge the complainant's credibility and to provide necessary context to the defence's case.

[18] The Court must also determine the Crown’s motion to conduct the hearing before this Court *in camera*, to seal the filed materials, and to make any other order necessary to protect the information protected by ss. 276 and 278.93 to 278.95 of the *Criminal Code*. This requires the Court to consider its authority to do so and whether this appeal warrants additional orders that would limit court openness in this case.

V. Analysis

A. *The Standard of Review of Section 276 Decisions*

[19] Section 278.97 of the *Criminal Code* states that an appeal from a trial judge’s determination to admit or refuse evidence of other sexual activity is a question of law. However, this provision only delimits the nature of the issues that can be raised on appeal; it does not prescribe a standard of review.

[20] Some courts have suggested that appellate review of s. 278.94 admissibility decisions attracts deference to the trial judge’s determination. Both the majority and dissent in the court below agreed with Fisher J.A.’s conclusion, in *R. v. Ravelo-Corvo*, 2022 BCCA 19, 79 C.R. (7th) 128, that “such a determination is a discretionary exercise that involves a fact-sensitive analysis guided by the factors enumerated in s. 276(3), and is entitled to substantial deference on appeal” (para. 29). The Court of Appeal for Ontario made a similar observation in *R. v. I. (C.)*, 2023 ONCA 576, 168 O.R. (3d) 575, at para. 102, speaking of determinations to admit an accused’s records about a complainant (which are subject to the same standard of review):

The admissibility of evidence under s. 278.92 is deemed to be a question of law for the purposes of determining appeal rights. Despite this characterization, the admissibility of evidence offered under s. 278.92 lies very much in the exercise of the trial judge's discretion. Assuming the trial judge correctly applies the applicable legal principles, does not misapprehend material evidence, does not fail to consider relevant evidence, and does not arrive at an unreasonable result, this court will defer to the trial judge's ruling. [Citations omitted.]

See also *R. v. Graham*, 2019 SKCA 63, [2019] 12 W.W.R. 207, at para. 69; *R. v. T. (M.)*, 2012 ONCA 511, 289 C.C.C. (3d) 115, at para. 54.

[21] There is no dispute that the question of relevance is reviewable on a standard of correctness (*R. v. Schneider*, 2022 SCC 34, at para. 39). However, in making a determination of whether to admit evidence of other sexual activity, the trial judge balances a number of considerations, both those enumerated in s. 276(3) and others that may arise in the specific circumstances of a case. The admissibility of prior sexual activity evidence is highly fact-specific and contextual, and the trial judge is best placed to assess probative value versus prejudice (*R. v. Araya*, 2015 SCC 11, [2015] 1 S.C.R. 581, at para. 31; S. N. Lederman, M. K. Fuerst and H. C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (6th ed. 2022), at ¶2.93). The appellate court's approach on appeal must respect this reality while giving effect to Parliament's decision to deem s. 278.94 determinations questions of law. Justice MacKenzie in *R. v. Clayton*, 2021 BCCA 24, 399 C.C.C. (3d) 283, at paras. 50-51, astutely articulated how an appellate court should approach a trial judge's admissibility determination:

The parties disagree on the standard of review. The appellant says the standard is correctness as it is a question of law whether the judge erred in taking an overly restrictive view of relevance in the context of cross-examination. The Crown's position is that the judge's assessment of the probative value and prejudicial effects of the evidence, and his management of cross-examination, is owed deference on appeal. In my view, both parties are correct.

Whether the threshold requirement of relevance is met is a question of law reviewable on a correctness standard; it would be a legal error to admit irrelevant evidence. However, not all relevant evidence is necessarily admissible. A judge's decision to exclude relevant evidence where its probative value is outweighed (or, for defence-led evidence, substantially outweighed) by its prejudicial effect involves the exercise of discretion. Absent reliance on improper legal principles, the judge's conclusion in this regard is owed deference. [Citations omitted.]

[22] I agree. An appellate court must ensure that the trial judge applied the correct legal principles, considered all the evidence they should have, did not admit irrelevant evidence, and did not otherwise err in law; no deference is owed in this regard. However, as to the trial judge's determination that the evidence's prejudicial effect substantially outweighed its probative value, appellate courts should defer.

[23] Finally, in reviewing a trial judge's initial s. 276 ruling, the appellate court must only consider the evidence that was before the trial judge at the time of their determination on admissibility (*R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, at paras. 63 and 101).

B. *The Use of Other Sexual Activity Evidence for Credibility and Context*

[24] In 1982, to address the detrimental and truth-distorting uses of other sexual activity evidence that permeated the jurisprudence, Parliament chose to set parameters for when evidence of other sexual activity can be introduced at trial. Either the Crown or the defence can bring an application for a *voir dire* or a s. 278.94 hearing where it seeks to adduce “evidence that the complainant has engaged in sexual activity” (s. 276). There is no need to do so where the parties only seek to establish that a relationship existed between the accused and the complainant, unless the very nature of that relationship is sexual, as was the case in *Goldfinch*.

[25] Over time, those parameters have been further refined to create a rigorous statutory regime that prohibits entirely the use of other sexual activity evidence to support twin-myth reasoning — that is, the reliance on inferences that, based on the other sexual activity evidence, the complainant is more likely to have consented to the impugned sexual activity or that they are less worthy of belief. Under the s. 276 regime, a trial judge may only admit evidence of other sexual activity when it is not used to support twin-myth reasoning; is adduced for specific, relevant and permissible purposes; and when its probative value to the trial is not substantially outweighed by the prejudice it might occasion (s. 276(2)). The proper application of this regime ensures that “the right to present one’s case [is not] curtailed in the absence of an assurance that the curtailment is clearly justified by even stronger contrary considerations” (*R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 621). The statutory regime therefore requires trial judges to ensure that evidence that is misleading, irrelevant, or substantially more prejudicial than probative is excluded to avoid tainting the trial’s

fairness (*R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443, at paras. 37 and 42-43; *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 74; D. Brown and J. Witkin, *Prosecuting and Defending Sexual Offence Cases* (2nd ed. 2020), vol. 4, at p. 354).

[26] Evidence of other sexual activity can be adduced for permissible reasoning: “The phrase ‘by reason of the sexual nature of that activity’ in s. 276 is a clarification by Parliament that it is inferences from the sexual nature of the activity, as opposed to inferences from other potentially relevant features of the activity, that are prohibited” (*Darrach*, at para. 35 (emphasis in original)). However, as I will elaborate below, it is incumbent on the accused to identify in a detailed manner how the evidence is necessary for that permissible reasoning without relying on twin-myth reasoning. The need for precision is especially important where the proposed uses are for credibility and context, two issues that not only exist in nearly every criminal case but have broad and, at times, vague spectrums of use.

(1) Witness Credibility, Context, and the Permissible Uses of Other Sexual Activity Evidence

[27] Other sexual activity evidence may be admissible for issues of credibility or context, but the applicant must establish a specific use for this information that is permitted by the s. 276 regime. *Goldfinch* instructs that “[b]are assertions that such evidence will be relevant to context, narrative or credibility cannot satisfy s. 276(2)” (para. 51; see also para. 65), and the same caution applies to probative value. In order to be potentially admissible, the relevance and probative value of the evidence in each

case must go beyond a general ability to undermine the complainant's credibility or to add helpful context to the circumstances of the case; it must respond to a specific issue at trial that could not be addressed or resolved in the absence of that evidence (Brown and Witkin, at pp. 379-81). The applicant also bears the burden of establishing that any such probative value is not substantially outweighed by prejudicial effect.

[28] Trial judges must guard against improperly widening the scope of when other sexual activity evidence should be admitted given that, as Karakatsanis J. noted in *Goldfinch*, “[c]redibility is an issue that pervades most trials” (para. 56); the same is true of the significance of context. Too broad an approach to credibility and context would cast open the doors of admissibility, overturning Parliament’s specific intention and this Court’s longstanding jurisprudence that evidence of other sexual activity will be admitted only in cases where it is sufficiently specific and essential to the interests of justice. Given the specific thresholds set by Parliament and their underlying objectives, something more is required to show that admission is justified. The applicant must demonstrate with particularity not only that credibility or context is relevant to an issue at trial but that, in the absence of the evidence, their position would be “untenable” or “utterly improbable” (see *Goldfinch*, at para. 68).

[29] The appellant raised three cases where prior sexual activity evidence was admitted to challenge a complainant’s credibility or to provide necessary context. Each is illustrative of the instructions in *Goldfinch* on the proper use of prior sexual activity evidence for context or challenging credibility.

[30] The first case the appellant raises is *R. v. Crosby*, [1995] 2 S.C.R. 912, where the complainant told police that she had visited the accused with the intention of having sex; however, at the preliminary inquiry she testified that she did not intend to have sex with the accused when she visited him. The trial judge excluded the complainant's statement to the police under s. 276. When the complainant testified again on cross-examination that she did not intend to have sex with the accused when she visited him, the earlier ruling barred defence counsel from challenging this testimony as inconsistent with her statement to police.

[31] Justice L'Heureux-Dubé, writing for a majority of this Court, held that the trial judge erred in excluding the evidence because the starkly opposing versions of events testified to by the complainant and the accused placed credibility as the central issue at trial, and the complainant's statements presented a material inconsistency. Balancing the evidence's probative value against its prejudicial effect, the interests of justice favoured admitting the evidence.

[32] Justice L'Heureux-Dubé's comments were cited two years later in *R. v. Harris* (1997), 118 C.C.C. (3d) 498 (Ont. C.A.). The accused and the complainant met at a bar several days before the alleged assault. The complainant testified in chief that her relationship with the appellant was platonic, that they had not engaged in any sexual activity, and that she told him she did not want a sexual relationship. The accused sought to adduce evidence of an alleged consensual sexual encounter several days before the sexual assault.

[33] Justice Moldaver held that the prior sexual activity evidence was necessary to the appellant's ability to make full answer and defence because it could rebut the complainant's claim that their relationship was strictly platonic. Justice Moldaver succinctly summarized the implications of the exclusion of this evidence:

By failing to permit the appellant to lead evidence of the Tuesday night incident, the jury was deprived of the tools needed to fully and fairly assess the conduct of the parties and the believability of their respective positions. Left unchallenged, the complainant's testimony concerning her relationship with the appellant was potentially devastating to his position. [para. 49]

[34] *R. v. Temertzoglou* (2002), 11 C.R. (6th) 179 (Ont. S.C.J.), is another case where prior sexual activity evidence was admitted for credibility and context. The complainant had made inconsistent statements about whether her relationship with the accused was sexual, and the evidence was essential to the defence's ability to make full answer and defence by challenging the complainant's credibility.

[35] Read in light of the current statutory regime and the jurisprudence since these cases were decided, these decisions serve as examples of when evidence of other sexual activity evidence may be relevant to credibility 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 (*Goldfinch*, at paras. 63 and 65-66). The admission of the evidence in each of these cases was held to be necessary to the ability of the accused to make full answer and defence.

[36] It bears repeating that the applicant is tasked with establishing with clarity and precision the use to be made of the other sexual activity evidence sought to be adduced. Before a trial judge may grant an application for an admissibility hearing, they must be satisfied that the application “set[s] out detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial” (*Criminal Code*, s. 278.93(2)). As the majority noted on appeal below, “[s]pecificity is required so judges can apply the scheme in a way that protects the rights of the complainant and ensures trial fairness” (para. 97, quoting *Goldfinch*, at para. 53). The applicant need not include so many details that the witness’s privacy is unnecessarily intruded upon, but there must be a sufficient factual and evidentiary basis for the trial judge to properly consider and weigh the factors set out in s. 276.

(2) Application to This Case

[37] The appellant argues that the trial judge erred in denying the application to introduce prior sexual activity evidence. He argues the evidence was not being proffered for twin-myth reasoning but rather on the basis that it was relevant to challenging the complainant’s credibility and to the context required for his defence. The complainant’s credibility was put in issue because her evidence about whether the nature of her relationship to the appellant was sexual was equivocal. The nature of the complainant’s relationship to the appellant could either prove or disprove the Crown’s argument that the sexual assault occurred after their marriage broke down, which was critical to the appellant’s ability to make full answer and defence to the Crown’s case.

[38] I disagree. Ultimately, and particularly in light of the “chaotic” way in which the s. 276 application was presented (C.A. reasons, at para. 94, per Fitch J.A.), the appellant was unable to discharge his burden of satisfying the conditions for admissibility of the prior sexual activity evidence. In this case, the prior sexual activity evidence had no permissible purpose for either context or credibility. The regime under s. 276 requires trial judges to first consider whether the evidence is inadmissible because it supports an inference relying upon one or both of the twin myths. It is an error of law to admit evidence that supports twin-myth reasoning. I agree with the majority that the trial judge did not err by finding that the evidence would invoke twin-myth reasoning. The fact that the parties here previously had a sexual relationship is uncontested and is admitted. For this reason, there could be no use for the April 1 evidence beyond twin-myth reasoning. As the majority noted, the proposed evidence could not provide any greater context for understanding the complainant’s actions on April 2, or whether she did or did not consent beyond unequivocally impermissible reasoning: that if they had had consensual sex on April 1, they did so again on April 2; or, that her denials of consent should not be believed based on their prior consensual intercourse (para. 180).

[39] I agree with the majority that the proposed evidence held little relevance to either context or challenging the complainant’s credibility. As explained above, the question of relevance is reviewed on a correctness standard. With respect to context, the appellant’s application must fail for the same reason as in *Goldfinch*: “. . . the difficulty here was not that Goldfinch and the complainant had a relationship, but that

Goldfinch could point to no relevant use for evidence of the *sexual* nature of the relationship” (para. 47 (emphasis in original)). The complainant here did not dispute that her marriage to the accused involved sexual activity, and therefore the prior sexual evidence was not needed to establish this. In this regard, the present case is unlike *Harris* and *Temertzoglou*, where the nature and origin of the relationships were central to the inconsistencies in the complainants’ testimonies that formed the basis for admitting the evidence. Here, there was no inconsistency in the complainant’s testimony and therefore no risk that the trial judge would not understand the nature of their relationship (see C.A. reasons, at para. 190, per Fitch J.A.).

[40] With respect to the appellant’s argument on the evidence’s relevance to credibility, the trial judge and majority on appeal found the complainant did not give inconsistent statements about the nature of her relationship with the appellant. I see no reason to interfere with this conclusion. I agree with the majority that the complainant did not give any inconsistent statements about whether their relationship was sexual or not (see paras. 185-89). The Attorney General of Alberta, intervening before this Court, rightly points out that it does not follow that the end of a marriage or other romantic relationship signals the end of a sexual relationship. Therefore, it was not inconsistent for the complainant to have stated that their marriage was over but that there was other consensual sexual activity after their separation. In the absence of any inconsistent statements by the complainant, *Crosby* offers no support to the appellant.

[41] Even if the evidence had some relevance to either context or credibility, I am not convinced the trial judge made any error in weighing its probative value against its prejudicial effect, and I would defer to his conclusion on this point. The appellant could not explain why the evidence's probative value outweighed its prejudicial effect. As noted in *Goldfinch*, "the relative value of sexual history evidence will be significantly reduced if the accused can advance a particular theory *without* referring to that history" (para. 69 (emphasis in original); *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237, at para. 64; see also *Brown and Witkin*, at p. 389).

[42] In the present case, nothing turned on whether they had engaged in consensual sex the prior night. The appellant's theory was that their marriage had not broken down and consequently they engaged in consensual sex on April 2. As stated above, whether the relationship had ended did not determine the matter. Without any specific evidence on the materiality of the severance of this relationship in the specific circumstances of this case, this alone could not establish significant probative value of the prior sexual activity evidence. In contrast, the prejudicial effect of the proposed evidence was clear: as the trial judge held, the admission of the evidence would invoke and rely on twin-myth reasoning and would prejudice the complainant's personal dignity and right of privacy. There was no benefit to the truth-seeking function of the trial to be gained.

[43] Two points of correction are necessary with respect to the dissenting judge's approach to this matter. First, as stated above, the review of a s. 278.94

determination is based only on the record that was before the trial judge at the time of the admissibility hearing. The dissenting judge, despite stating that his conclusion was “based on the position advanced by [the appellant] on the application” (para. 58), referred to the complainant’s testimony at trial and the Crown’s closing submissions, neither of which formed part of the trial judge’s pre-trial ruling. This was improper and employed hindsight reasoning. Appellate courts must not widen the record available to review the trial judge’s determination.

[44] Second, I would also reject the dissenting judge’s analysis of possible prejudice to the complainant if the prior sexual activity evidence were admitted. In assessing the factors under s. 276(3), the dissenting judge stated that concerns about the potential for prior sexual activity evidence to jeopardize the privacy and dignity of the complainant were “minimized by the fact that she disclosed the activity in issue to the police and there is a publication ban concerning her identity” (para. 79). This reasoning contradicts the animating purposes of the s. 276 regime, which includes encouraging the reporting of sexual offences by complainants and to do so by “eliminating to the greatest extent possible those elements of the trial which cause embarrassment or discomfort to the complainant” (*Seaboyer*, at p. 605 (emphasis added)); see also *Darrach*, at paras. 19 and 25; *Criminal Code*, s. 276(3)(b)). As the majority of the Court of Appeal correctly observed, at paras. 194-95, the fact that an individual has reported a sexual assault to the police, or that their identity is subject to a publication ban, cannot disentitle them to the full protective benefit of s. 276. To hold

otherwise would automatically diminish the scope of protection afforded by the legislature under s. 276 in almost every sexual assault case.

(3) Reconsideration of the Pre-trial Ruling

[45] My colleagues take the position that the trial judge fell into error by failing to reconsider his pre-trial ruling in light of how the complainant's testimony evolved between her statement to police and her trial testimony. With respect, this question is beyond the proper scope of this appeal.

[46] Appeals to this Court from conviction by an accused person are governed by s. 691(1) of the *Criminal Code*, which limits the scope of appeal not simply to questions of law, but specifically to those questions of law on which a judge of the court of appeal dissents (see also *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 84, per Fish J., dissenting, but not on this point).

[47] My colleagues' approach to the question of jurisdiction relies in part on the instruction in *Dunlop v. The Queen*, [1979] 2 S.C.R. 881, that "[i]n ascertaining the real ground upon which dissent is based, if the formal judgment fails to make that clear, this Court may look to the written reasons of the dissenting judges" (p. 889). In *Dunlop*, the formal judgment did not specifically set out the grounds of dissent. In order for the Court to determine whether a specific ground raised a question of law, it was necessary to look at the dissenting judge's written reasons. Doing so revealed that the crux of the

dissenting judge's concern was whether the jury should have been instructed on party liability at all, a clear question of law.

[48] In contrast, here the formal judgment plainly states the issue of dissent is whether there was an error in the pre-trial ruling. Even when one looks at the written reasons, as instructed in *Dunlop*, the issue dissented on was not whether the trial judge should have revisited his initial ruling. Unlike in *Dunlop*, neither the majority nor the dissent address this issue in their reasons. Whether the trial judge erred by failing to revisit his pre-trial ruling is a separate question from whether he erred in the pre-trial ruling itself, and these questions are assessed on different evidentiary records. The dissenting judge's references to evidence adduced at trial were not directed to the question of whether the trial judge should have revisited the pre-trial ruling but rather to whether the pre-trial ruling itself was correct. Accordingly, the issue of whether the trial judge ought to have revisited his pre-trial ruling is not a question of law on which a judge of the Court of Appeal below dissented.

[49] This question was also not raised by the parties before this Court: the notice of appeal does not raise the issue; the appellant did not raise the issue in his factum; and this Court received no meaningful submissions on it at the hearing. Had the appellant wished to argue this issue on appeal, he could have sought leave (see *R. v. Keegstra*, [1995] 2 S.C.R. 381, at paras. 23-24). He did not.

[50] Even if the trial judge revisited his pre-trial ruling, I disagree with my colleagues that the complainant's trial testimony required the trial judge to reconsider

his pre-trial ruling and that the admission of the prior sexual activity evidence became necessary in light of the complainant's trial testimony. My colleagues suggest that the complainant's protests at the time of the sexual assault that she was no longer the appellant's wife suggested that their separation was a factor in her lack of consent, and that the admission of the prior sexual activity evidence was necessary to respond to this suggestion and test the complainant's credibility.

[51] My colleagues and I are in agreement that the relevance and probative value of prior sexual activity evidence may not crystallize until witnesses have begun their testimony and the evidence, or the inconsistency or materiality thereof, becomes apparent. Where the evolution of a witness' testimony at trial results in a material change in circumstances, the trial judge may, either on their own initiative or by request from either party, revisit an earlier s. 276 ruling in light of the new evidence or information (*R.V.*, at paras. 72-75; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 65).

[52] The possibility of reconsideration of a pre-trial ruling in no way relieves the defence of its responsibility not only to make out the application at first instance, but also, in the majority of cases, to make a request for reconsideration and articulate the permissible purposes of the evidence in light of the changed circumstances. Generally speaking, absent a request at trial for reconsideration, appellate courts should review the merits of a trial judge's s. 276 pre-trial ruling in the context of the record on which it was made. However, if the nature of the evidence at trial "cried out for a

reconsideration”, an appellate court may find that a trial judge was required to revisit their prior s. 276 ruling of their own motion even without being specifically asked to do so by counsel (*R. v. L.S.*, 2017 ONCA 685, 354 C.C.C. (3d) 71, at paras. 63-64; *Harris*, at paras. 50-51). The power of a trial judge to reconsider their own s. 276 ruling of their own motion is limited, and must be exercised in a manner that is consistent with the s. 276 regime, specifically that the accused specify the use for which the evidence is proposed and that the complainant has standing.

[53] I am not of the view that the evidence in this case cried out for reconsideration. If the appellant was concerned that the complainant’s testimony linked her lack of consent to the parties’ separation, it was open to him to ask the trial judge to reconsider his pre-trial ruling and permit him to argue the relevance of the evidence on this basis. There was the opportunity to do so when, mid-trial, the defence argued that he should be permitted to cross-examine the complainant about further sexual activity that occurred on April 2, after the alleged assault, because the appellant would be advancing an opposing version of events. Furthermore, there was ample opportunity for the appellant to take an approach along the lines of what my colleagues suggest, and he made the tactical decision to proceed otherwise. At the mid-point of the trial, the defence did not seek the admission of the April 1 evidence because the complainant’s evidence on the separation had evolved. Rather, in the defence’s submission, the April 1 evidence was essential pursuant to the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.), because he anticipated the accused would be testifying to *further* sexual activity that occurred on April 2, after the alleged assault. He also suggested

that, due to the wording of the charge before the court, all sexual activity between April 1 to April 2 could be seen as the “subject-matter of the charge” and therefore not subject to s. 276 at all. After obtaining an adjournment to consider his position, defence counsel did not pursue the admission of the prior sexual activity evidence from April 1.

[54] It is not the role of this Court to speculate as to defence counsel’s reasons for approaching the issue in this manner or to substitute its own view of what he should have done differently. Such decisions are protected by solicitor-client privilege and are often made for entirely valid strategic purposes.

C. *Limitations on Court Openness on Appeals of Section 276 Determinations*

[55] The Crown brought a motion before this Court requesting orders “necessary in light of sections 278.93 to 278.95 of the *Criminal Code*” (p. 1), namely that the appeal proceed *in camera*, that the parties’ factums be sealed and only redacted versions made public, and any other order deemed necessary. The appellant opposed only the obligation to further redact his factum beyond information covered under ss. 276 and 278.93 to 278.95, arguing that certain unredacted information was already published in the judgment of the Court of Appeal. On an interim basis, the Court accepted the filed materials under seal and held the hearing *in camera* pending its final disposition of the motion.

[56] The Crown’s motion requires this Court to consider the source of its powers to make orders limiting court openness on appeals of s. 276 determinations. This issue

engages an exercise in statutory interpretation. The modern approach to be taken is well known: “. . . the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, as cited in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21).

[57] The Crown argues that s. 278.95 and the discretion it affords applies to this Court; or, if it does not, then this Court can make certain orders for the conduct of the hearing and publication of their reasons pursuant to its implied jurisdiction. Section 278.95 reads as follows:

Publication prohibited

278.95 (1) A person shall not publish in any document, or broadcast or transmit in any way, any of the following:

- (a) the contents of an application made under subsection 278.93;
- (b) any evidence taken, the information given and the representations made at an application under section 278.93 or at a hearing under section 278.94;
- (c) the decision of a judge or justice under subsection 278.93(4), unless the judge or justice, after taking into account the complainant’s right of privacy and the interests of justice, orders that the decision may be published, broadcast or transmitted; and
- (d) the determination made and the reasons provided under subsection 278.94(4), unless
 - (i) that determination is that evidence is admissible, or

(ii) the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the determination and reasons may be published, broadcast or transmitted.

Offence

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

Section 278.95 thus prohibits the publication of information and evidence adduced for applications and admissibility hearings pursuant to ss. 278.93 and 278.94, but provides trial judges with a discretion to permit the publication of their decision or determination under s. 278.93(4) or 278.94 by others after considering the complainant's right of privacy and the interests of justice.

[58] As I will explain, this Court's implied jurisdiction grants it authority to make orders for the conduct of its hearings and publication of its reasons, not s. 278.95. I begin first by summarizing the history and purpose of the prohibition on publication under s. 278.95 before considering its application to this Court.

(1) History and Purpose of Section 278.95

[59] Following this Court's decision in *Seaboyer*, Parliament passed Bill C-49, *An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38, introducing a suite of reforms to sexual offence provisions and procedures in the *Criminal Code*. This included a prohibition on publication (at the time under s. 276.3 and now contained in s. 278.95). The statutory scheme governing s. 276 applications today balances, on the

one hand, the constitutional right of the accused to make full answer and defence and, on the other hand, the complainant's right not to have irrelevant, highly sensitive details of their sexual history dredged up before the court (*Seaboyer*, at pp. 620-21; *Crosby*, at para. 11; *Darrach*, at para. 19; *Mills*, at paras. 17 and 61). Neither interest is absolute nor overriding; instead, the statutory regime requires trial judges to balance these interests against each other, bearing in mind the objectives of protecting the integrity of the trial, the accused's trial rights, the security and privacy of complainants, and equality rights (*Seaboyer*, at p. 606; *Darrach*, at para. 19; *R. v. Kruk*, 2024 SCC 7, at para. 40).

[60] In the first draft of the bill, trial judges had no discretion to publish their decision or reasons on applications to adduce evidence of other sexual activity. As the Honourable Kim Campbell explained at the Committee meeting on the bill, “[w]hen Bill C-49 was drafted, I viewed the inclusion of a provision banning publication as essential to protect the privacy interests of complainants and to encourage them to come forward with their reports of sexual assault” (House of Commons, Legislative Committee on Bill C-49, *Minutes of Proceedings and Evidence of Legislative Committee on Bill C-49, An Act to amend the Criminal Code (sexual assault)*, No. 6, 3rd Sess., 34th Parl., June 2, 1992, at p. 46). At the same time, there were countervailing factors that favoured publication of admissibility decisions. Judicial accountability, not only for the decisions themselves but the manner in which they were made, was a concern raised by the National Association of Women and the Law as well as the British Columbia Civil Liberties Association (see Legislative Committee on Bill C-49,

No. 4, 3rd Sess., 34th Parl., May 20, 1992, at pp. 25 and 46). Ensuring the consistent application of the law across the country was another concern that justified the possibility of publication (see Legislative Committee on Bill C-49, No. 5, 3rd Sess., 34th Parl., May 21, 1992, at p. 18 (Stephen Bindman); see also *House of Commons Debates*, vol. VIII, 3rd Sess., 34th Parl., April 8, 1992, at p. 9528 (George S. Rideout)). Accordingly, subsequent amendments to the bill added a discretion for trial judges to publish their decision and reasons on inadmissibility after taking into account a complainant's privacy and dignity and the interests of justice.

[61] Further amendments to the regime were made in 2018 through Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, S.C. 2018, c. 29, though the publication prohibition remained largely the same. The debates at that time again highlighted the dual interests of an accused's fair trial rights and a complainant's privacy interests:

First, [the regime] respects the fair trial rights of the accused in that it does not prevent relevant evidence from being used in court. The Supreme Court has already recognized that an accused's right to full answer and defence does not include a right to defence by ambush.

Second, it acknowledges the privacy interests of a complainant. While privacy interests do not trump all else, the regime seeks to acknowledge that victims of sexual assault and other related crime, even when participating in a trial, have a right to have their privacy considered and respected to the greatest extent possibly.

Finally, the regime seeks to facilitate the truth-seeking function of the courts by ensuring that evidence that is clearly irrelevant to an issue at trial is not put before the courts, with its potential to obfuscate and distract the trier of fact.

(*House of Commons Debates*, vol. 148, No. 249, 1st Sess., 42nd Parl., December 11, 2017, at pp. 16218-19 (Marco Mendicino))

The factors a trial judge must consider in exercising their discretion to lift the prohibition on publication thus reflect two key policy values underlying sexual assault trials: the accused's right to make full answer and defence and the complainant's right of privacy.

[62] However, even at the inception of what is now s. 278.95, it was unclear whether the wording of the provision captured appellate proceedings:

. . . Mr. Borovoy wants to guarantee a right of appeal. We are not sure, as the legislation is currently drafted, if a case on this point is appealed to the appeal court if this publication ban is still in effect. For example, in the Seaboyer case, the entire media in the country probably breached the publication ban imposed when the evidence was originally sought to be admitted and as it worked its way up. So I think that certainly needs clarification.

(Legislative Committee on Bill C-49, No. 5, at p. 17 (Stephen Bindman))

As is evident, no clarification was made to the provision's application to appellate proceedings before its enactment.

(2) Text and Legislative Scheme of Section 278.95

[63] The Crown suggests that the mandatory ban under s. 278.95 of the *Criminal Code* extends to appellate proceedings and allows the Court to order that this appeal

hearing proceed *in camera* (as it did at trial, pursuant to s. 278.94) and to seal the filed materials. The corollary of this argument is that the Court may also displace the presumptive prohibition on publication under s. 278.95 and permit the publication, broadcast or transmission of the trial judge's decision under s. 278.93 or determination under s. 278.94, after balancing the complainant's privacy and dignity and the interests of justice.

[64] In my view, there are several reasons s. 278.95 does not support the Crown's proposition. First, a plain reading of the text suggests that it is aimed not at courts but at other entities who would otherwise publish a court's decisions, such as law reporters, media outlets and reporters, and the general public. Section 278.95(1) prohibits publication by "[a] person" while s. 278.95(2) creates an offence for "[e]very person" who contravenes subs. (1). The definition of "every person" in the *Criminal Code*, while specifically including His Majesty and organizations, does not mention courts (see s. 2). "Person" is not a defined term in the *Criminal Code*, and is defined in the *Interpretation Act*, R.S.C. 1985, c. I-21, simply as including a corporation (s. 35(1)). Applying the ordinary sense of the word "person", this clearly would not include a court. It is notable that some neighbouring provisions to s. 278.95 make specific reference to a "judge, provincial court judge or justice" (see ss. 278.92 and 278.93) and that a "court of appeal" is a defined term in the *Criminal Code* that is used throughout (s. 2). Importantly, a court cannot be found guilty of the offence created by s. 278.95(2). It is thus not evident on a plain reading that "a person" could reasonably be expanded to include judges, justices, or courts of appeal. The wording of s. 278.95 also states that

it is only “the judge or justice” who made a decision under s. 278.93(4) or 278.94(4) who may order the publication, broadcast or transmission of otherwise prohibited information. This indicates that the power to displace the presumptive statutory prohibition is limited to trial judges who have the ability to make such orders in trial proceedings.

[65] The scope and application of s. 278.95 must also be interpreted in light of its scheme and object. Section 278.95 is situated among a series of provisions dictating the procedural requirements where the accused seeks to obtain or adduce evidence relating to a complainant in which there is a privacy and personal dignity interest (see *Criminal Code*, ss. 278.1 to 278.98). These issues are matters of evidentiary admissibility, an issue which does not typically arise in appellate proceedings. The purpose of these procedural provisions as a whole is to provide a means of ensuring that the substantive protections against improper use of other sexual activity evidence are enforced (*Darrach*, at para. 20); their primary focus is aimed at thwarting attempts to bring distorting evidence into the trial in the first place. Read in this context, the objects of s. 278.95 can be understood as furthering the goal of keeping improper evidence out of trial proceedings by restricting the publication of evidence and information that would ordinarily occur in the normal course of a trial, and entrusting the decision as to whether publication of the s. 278.93(4) decision or s. 278.94(4) determination is appropriate to the judge or justice who has had the benefit of hearing all submissions on the admissibility of the proposed information or evidence. In this respect, too, s. 278.95 seems primarily concerned with the conduct of trial proceedings.

[66] Finally, the provisions relating to the admissibility of other sexual activity evidence contemplate the appeal of such determinations (see s. 278.97) but do not explicitly extend the trial protections to appellate proceedings or otherwise indicate the appropriate procedure on appeal. Had Parliament intended for s. 278.95 to apply to reviewing courts, it could have explicitly stated so.

[67] For these reasons, I am not convinced that s. 278.95 applies to this appeal, as the Crown suggests. In the absence of a legislatively imposed exception to the open court principle, the presumption of court openness persists.

(3) The Court Has Implied Jurisdiction To Make Orders Limiting Court Openness

[68] The Court's power to make an order limiting court openness in this case is derived from the implied jurisdiction of courts to control their own processes and records (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 ("*C.B.C. v. New Brunswick*"), at para. 37; *R. v. Garofoli*, [1990] 2 S.C.R. 1421, at p. 1457; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 189). Pursuant to this implied jurisdiction, a court may exercise its discretion to make orders for the conduct of a hearing, including orders that a hearing proceed *in camera*, and for the sealing of filed materials. Accordingly, this Court may consider whether this is an appropriate case to exercise its discretion in this manner.

[69] I note at the outset that a court's discretion to make orders that limit court openness is not to be exercised lightly. This Court has long recognized the importance of the open court principle as a vehicle to give effect to freedom of expression and fair trial rights under the *Canadian Charter of Rights and Freedoms*, as well as to promote confidence and integrity in the administration of justice (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at pp. 876-77 and 882; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at para. 29; *MacIntyre*, at p. 185; *C.B.C. v. New Brunswick*, at paras. 21-22; *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 75, at paras. 30 and 39). But while court openness is the rule, it is not an absolute or overriding principle. It is balanced against other interests that are worth protecting, such as the legislative objectives underlying the s. 276 regime. The exercise of this Court's discretion must give effect to these legislative objectives, notwithstanding that, in this case, they do not operate through the vehicle of s. 278.95. In this regard, I echo the observation by the court in *R. v. Davies*, 2022 BCCA 103, 412 C.C.C. (3d) 375, that while the legislative provisions governing the disclosure and use of personal and private information in sexual offence cases do not apply on appeal, their "substantive purpose, protecting the dignity and privacy of complainants, is not limited to the trial process" (para. 18 (emphasis added)). The complainant's personal interest in privacy and dignity, and the public's shared interest in the same, are still present on appeal, though the interests of justice that are weighed against privacy and dignity interests are informed by the particular function of this Court as the apex appellate court.

[70] Further, when considering restrictions on appellate court openness, a court of appeal should also consider what orders were previously made in relation to the trial. As courts of second or third instance, appellate courts act in sequence and have a unique position: not only do they have the ability to uphold or overturn prior decisions about court openness restrictions, but whether and what restrictions were imposed in the proceedings below may impact an appellate court's decision to add, remove, or modify such restrictions on appeal. This may be especially salient when Parliament has imposed mandatory restrictions at the trial level in an attempt to encourage the reporting of sexual offences (see *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122, at para. 15).

(4) Limiting Court Openness in This Case

[71] In my view, in the circumstances of this case, the Crown has not established that the Court should exercise its discretion to make all of the requested orders. My analysis is guided by the test articulated by Kasirer J. in *Sherman Estate* at para. 38, affirming the test set out in *Dagenais* and *Mentuck*:

In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

- (1) court openness poses a serious risk to an important public interest;
- (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
- (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

(See also, generally, *Dagenais*, at p. 878; *Mentuck*, at para. 32.)

[72] As this appeal concerns a sexual offence, I have applied the *Sherman Estate* test drawing on the legislative context and objectives of the s. 276 regime and the two analytical factors set out under s. 278.95 — the complainant’s right of privacy and the interests of justice — which the Crown relied on in its submissions. This approach allows for the analysis in this case to meaningfully balance the open court principle with Parliament’s intentions of protecting the fairness and integrity of sexual offence trials for accused persons and complainants’ privacy and security.

[73] The threshold to satisfy this test remains high. As Kasirer J. went on to note in *Sherman Estate*, at para. 63:

. . . in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. [Emphasis added.]

(See also *MacIntyre*, at p. 189; *C.B.C. v. New Brunswick*, at para. 22.)

[74] I am satisfied that the sexual nature of the evidence in this case touches on the complainant’s dignity and right of privacy, and that publication of this type of information gives rise to a serious risk of affront to the public interests of personal privacy and dignity (*Sherman Estate*, at para. 77; *Fedeli v. Brown*, 2020 ONSC 994, 60 C.P.C. (8th) 417, at para. 9). Privacy and personal dignity are public interests that

have been recognized in our jurisprudence (see *MacIntyre*, at pp. 185-87; *C.B.C. v. New Brunswick*) including in cases involving sexual offences (see *R. v. Jarvis*, 2019 SCC 10, [2019] 1 S.C.R. 488, at para. 82). Protecting the complainant’s privacy and personal dignity, as far as practicable, promotes the objectives of the *Criminal Code*’s statutory protections for complainants in encouraging reporting of offences, participation in the process, and overall confidence in the administration of justice (*R. v. Kirkpatrick*, 2022 SCC 33, at para. 30).

[75] However, I am not persuaded that this risk can only be addressed through the requested orders. An applicant seeking a limiting order must articulate why the serious risk to the complainant’s privacy and dignity warrants a greater restriction on court openness than would be occasioned by an alternative measure. The Crown has not established that the risk to the complainant’s privacy and dignity requires a sealing order or *in camera* hearing. Sealing orders and *in camera* hearings are greater incursions on court openness compared to publication bans, because they more absolutely limit public discourse on the subject information by preventing access to the protected material entirely (see J. Rossiter, K.C., *Law of Publication Bans, Private Hearings and Sealing Orders* (loose-leaf), at §§ 1:11-1:12).

[76] I am not persuaded that the circumstances of this case justify these measures. I am mindful of the fact that the trial proceedings were sealed and held *in camera*, as required by ss. 278.94 and 278.95, and that the bulk of the file in the Court of Appeal was also under seal and the hearing held *in camera*, with public reasons.

However, in my view, there are alternative measures that sufficiently protect the complainant's privacy and dignity.

[77] With respect to the request for a sealing order, the full contents of the Court's file do not need to be sealed in order to protect the complainant's privacy and dignity. This can be accomplished in this case by banning publication of any information about or reference to the nature of the sexual activity other than that which forms the subject-matter of the charge, and I would make such an order. This balances respect for the goal of restricting publication of the details of s. 276 applications with this Court's task as an appellate court to provide guidance to lower courts. The request to hold the hearing *in camera* is also a greater restriction than is necessary. Proceeding *in camera* at the trial level pursuant to s. 278.94 permits counsel in all cases to freely and vigorously argue the merits of the application where the information and evidence sought to be adduced may be highly prejudicial and its value is untested. In contrast, this appeal deals with a question of law and counsel are able to argue their case without heavy reliance on information and evidence that is mandatorily protected under s. 278.95. The publication ban that I would impose under the Court's implied jurisdiction, the statutory one imposed under s. 486.4, and the use of initials for the appellant are further measures that protect the complainant's privacy and dignity on this appeal.

[78] Additionally, I do not find that the benefits of the requested orders outweigh their negative effects, bearing in mind the interests of justice in this case. The scope of "the interests of justice" within the open court principle is broad: in the

jurisprudence, it has included an accused's fair trial rights and right to make full answer and defence; the truth-seeking function of the trial process; the importance of freedom of the press to report on matters and the right of the public to receive such information; the proper administration of justice; and others (see, e.g., *Crosby*, at para. 12; *Mills*, at paras. 73-74; *Mentuck*, at paras. 23-24; *C.B.C. v. New Brunswick*, at paras. 23-25 and 39). In this case, the interests of justice include Parliament's goal of protecting the integrity of sexual offence trials. As this Court observed in *Mills*, "[i]f constitutional democracy is meant to ensure that due regard is given to the voices of those vulnerable to being overlooked by the majority, then this court has an obligation to consider respectfully Parliament's attempt to respond to such voices" (para. 58).

[79] I have also considered the responsibility of this Court to provide clear and authoritative statements of law and guidance to lower courts, which supports judicial accountability in sexual offence trials. Reasons from, and hearings before, this Court provide not only an explanation of an appeal's resolution to the parties but also give meaning to the judgment's precedential value which, through the principle of *stare decisis*, binds and guides lower courts in the consistent application of the law. The interests of justice weigh in favour of court openness in this case because this appeal asks the Court to clarify the appropriate use of prior sexual activity evidence for context and credibility purposes. The law on sexual offences is quickly and ever-evolving, and guidance from appellate courts is important for the proper adjudication of these cases and to fulfill Parliament's objectives to ensure fair sexual offence trials. In view of the

alternative measures available, the benefits of the requested orders do not outweigh their negative effects on court openness.

[80] For these reasons, I would allow the Crown's motion in part by making less restrictive orders than those requested.

VI. Disposition

[81] For the foregoing reasons, I would dismiss the appeal. The trial judge made no errors in his determination that the applicant had not identified a use for the prior sexual activity evidence that did not rely on twin-myth reasoning and that was relevant to an issue at trial.

[82] I would allow the Crown's motion in part. The circumstances of this case do not justify all of the orders requested. I would order that:

- a) Any information about or reference to the nature of sexual activity of the complainant which is at issue in this proceeding, other than that which forms the subject-matter of the charge, shall not be published, broadcast, or transmitted; and
- b) The parties shall file, within 30 days, versions of their factums for posting on the Court's website in which any information about or reference to the nature of sexual activity of the complainant at issue in

this proceeding, other than that which forms the subject-matter of the charge, and any information that could identify the complainant, shall be redacted.

The following are the reasons delivered by

CÔTÉ AND MOREAU JJ. —

I. Introduction

[83] We agree with our colleague's disposition of the Crown's pre-hearing motion. We take no issue with her conclusion that courts have implied jurisdiction to control their own processes. We further agree that the trial judge did not err in his initial pre-trial determination on the *voir dire* under s. 276 of the *Criminal Code*, R.S.C. 1985, c. C-46. The trial judge made appropriate findings on the evidentiary record available to him at the time of the *voir dire*.

[84] However, we are of the view that this conclusion does not end the analysis. In the instant case, the central issue in the trial was credibility. The complainant's testimony evolved from her first statement to the police to her trial testimony — following the trial judge's ruling on the s. 276 *voir dire* — and would have left the trier of fact with the mistaken impression that the circumstances of the separation and her belief that the appellant was in a relationship with another woman made it unlikely and improbable for her to consent to sexual activity with him.

[85] This evolution of the evidence should have prompted the trial judge to revisit the *voir dire* ruling made at the pre-trial stage. As we will explain, trial judges have an obligation to revisit their previous rulings when there is a material change in circumstances. In light of the complainant's trial testimony-in-chief, the trial judge should have allowed the appellant to cross-examine her about the consensual sexual activity that took place between her and the appellant the previous evening for the limited purposes of neutralizing the suggestion that she was unlikely to consent to sexual activity after their separation and testing her credibility on this point. In failing to do so, the trial judge committed a reviewable error.

[86] As we explain below, we are of the view that the issue is within our Court's jurisdiction. We would therefore allow the appeal, quash the conviction, and order a new trial.

II. Evolution of the Evidence and the Record

A. *The Evolution of the Complainant's Evidence*

[87] The complainant reported to the police on April 9, 2018 that the appellant had sexually assaulted her one week before. She told the police that she and the appellant had separated in February 2018 after a trip they took. She also mentioned that she and the appellant had consensual sexual intercourse on April 1 because he had asked nicely and because she did not want her son to overhear an argument. During the preliminary inquiry, the complainant indicated that the two separated in February 2018,

following which the appellant moved into the basement. She said that the relationship ended that same month.

[88] In support of his pre-trial application under s. 276, the appellant highlighted the complainant's statement to the police, where she indicated that she had consensual sexual intercourse with the appellant both during their trip in February and on April 1. He also referred to her preliminary inquiry testimony where she said that the relationship ended over a week after their February trip.

[89] We agree with our colleague that there is no inconsistency between the complainant's statements that she consented to sexual activity with the appellant on April 1 and that the parties had separated in February. Had this been the extent of the complainant's evidence regarding the separation, there would be no basis upon which to admit the April 1 evidence which was at the heart of the pre-trial application under s. 276.

[90] The situation changed, however, when the complainant testified at trial.

[91] The complainant's trial testimony suggested that the separation factored into her lack of consent on April 2. She testified that when the appellant grabbed her, she responded, "I am not your wife anymore" (A.R., vol. I, at p. 96). When the appellant called her name and told her that she was his wife, she answered, "[t]here is a real certificate already, I'm not your wife anymore and you already got a girlfriend" (p. 97). When the appellant touched her shoulder, she said, "[d]on't touch me, I'm not –

– I’m no longer your wife” (p. 98). When he responded that they were still husband and wife, having not yet signed the divorce papers, she disagreed and said “[n]o, it’s not the case, you have already got [a] wife” (p. 98).

[92] Considered in isolation, these statements suggest that it was unlikely that the complainant would consent to sex with the appellant in light of their separation and his relationship with another woman. The April 1 evidence provides crucial context to these statements, as the complainant had reported to the police that the two had in fact had consensual sex during their separation, just hours before the April 2 events which formed the basis of the allegations against the appellant.

B. *Discussions at Trial*

[93] While defence counsel did not bring this evolution in the complainant’s evidence to the trial judge’s attention, there were further discussions of the April 1 evidence after the complainant testified. The focal point of these discussions was not the evening before April 2, but rather the afternoon of April 2. The appellant denied that any sexual activity occurred on the morning of April 2 and claimed that he and the complainant had consensual sex later in the afternoon.

[94] Defence counsel sought to cross-examine the complainant about this version of events. The sexual activity on April 1 was relevant to this line of inquiry insofar as defence counsel sought to adduce evidence to demonstrate that the complainant and the appellant had spent the evening of April 1 together in the

appellant's bedroom (see A.R., vol. I, at pp. 123 et seq.). The trial judge refused to admit this evidence (p. 142).

III. Standard of Review

[95] In our view, the standard of review on the question of whether sexual activity evidence is admissible under s. 276 is correctness. On this issue, we agree with Moldaver J.'s position in his concurring reasons in *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, at para. 101: "The determination of whether sexual activity evidence is admissible under s. 276 raises a question of law A ruling on this matter is therefore reviewable on a standard of correctness."

[96] While appellate courts owe deference to the factual conclusions that underpin the analysis, the overarching question of whether the trial judge erred in determining whether or not to admit the evidence is reviewable on a standard of correctness. We come to this conclusion based on s. 278.97 of the *Criminal Code*, where Parliament has explicitly stated that such a determination "shall be deemed to be a question of law". Indeed, excerpts from the parliamentary debates regarding this provision, while scarce, support an interpretation that would give appellate courts a more active role in overseeing decisions made under s. 276. Before the Standing Senate Committee on Legal and Constitutional Affairs, Senator Dalphond highlighted some advantages to treating these decisions as ones that raise a question of law. In particular, doing so would give appellate courts "broader jurisdiction", allowing them to "step in more easily to give the proper interpretation to these provisions" and to "come to the

right result” (*Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 48, 1st Sess., 42nd Parl., September 20, 2018, at p. 73).

[97] The case before us illustrates the benefits of Parliament’s decision to deem s. 276 determinations as questions of law, because the standard of correctness allows us to fully engage with the evolution of the evidence. As we will explain, a careful review of the record reveals elements that are fundamental to the appellant’s right to make full answer and defence. In this particular case, these elements should have prompted the trial judge to revisit his pre-trial dismissal of the appellant’s s. 276 application following the complainant’s testimony-in-chief at trial.

IV. The Trial Judge’s Ability To Revisit a Pre-trial Ruling

[98] In enacting s. 276 of the *Criminal Code*, Parliament sought to “stri[k]e a balance between the rights of the accused and those of the complainant” by codifying rules pertaining to the admission of evidence regarding a complainant’s sexual history (see *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237, at para. 35). This regime categorically bars the admission of such evidence for twin-myth reasoning and “affirms the equality and dignity rights of complainants” (*Goldfinch*, at para. 43).

[99] The evidence captured by s. 276 is presumptively inadmissible. That said, this presumption is rebuttable. To tender evidence of a complainant’s sexual history at trial, the accused must establish, on a *voir dire*, that the evidence (a) is not being adduced for the purpose of supporting twin-myth reasoning; (b) is relevant to an issue

at trial; (c) is of specific instances of sexual activity; and (d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice (see *Criminal Code*, s. 276(2)). In balancing the probative value against the danger of prejudice, the trial judge is tasked with considering a list of factors in s. 276(3). If a trial judge ultimately determines that the danger of prejudice substantially outweighs the probative value, the evidence cannot be tendered at trial and the application made under s. 276 is denied.

[100] Throughout the trial, trial judges must remain attentive to the evolving nature of the evidence. Even when trial judges have decided not to admit evidence in a ruling under s. 276, their role with respect to this evidence does not end there.

[101] Trial judges may revisit pre-trial rulings on their own motion as the evidence evolves during trial, provided, of course, that they give the parties an opportunity to make submissions on the issue (see, e.g., *R. v. Arens*, 2016 ABCA 20, 334 C.C.C. (3d) 379; *R. v. Farrah*, 2011 MBCA 49, 87 C.R. (6th) 93). Pre-trial rulings are not set in stone; indeed, trials are dynamic and often unpredictable processes. Consequently, as Sopinka J. wrote in *R. v. Adams*, [1995] 4 S.C.R. 707, at para. 30, “[a]s a general rule, any order relating to the conduct of a trial can be varied or revoked if the circumstances that were present at the time the order was made have materially changed.” Where the evidence develops in such a way as to warrant revisiting a pre-trial ruling, it is important that the trial judge or counsel raise these issues on the record.

[102] Our Court’s jurisprudence demonstrates that the trial judge has a particularly important role to play with respect to evidentiary rulings in the context of sexual assault trials. As our Court recently noted in *R.V.*, at para. 74, “an order related to the conduct of trial may be varied or revoked if there is a material change of circumstances”. In *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, our Court provided an example of the type of evidentiary shift that would make it appropriate for a trial judge to revisit a ruling made under s. 276:

. . . where a complainant makes a statement to the police that prior sexual activity occurred but later contradicts that evidence in her testimony at trial, that contradictory testimony would open the door to the defence bringing a renewed s. 276 application seeking to have the prior sexual activity evidence admitted for credibility purposes, despite an initial ruling of inadmissibility. [Citations omitted; para. 65.]

[103] Counsel plays an important role in bringing such evidentiary shifts to the trial judge’s attention. When there is a material change in circumstances, “either party may request that a previous evidentiary ruling be re-visited” (*R.V.*, at para. 74).

[104] Nevertheless, this role does not fall exclusively on counsel’s shoulders. Trial judges have the ability to revisit s. 276 rulings even in cases where counsel has not made a formal request or application. In the excerpt from *Barton* cited above, our Court went on to expressly recognize that “[t]here may be circumstances in which it would be appropriate for the trial judge to reopen a s. 276 ruling and hold a new hearing to reconsider the admissibility of prior sexual activity evidence” (para. 65 (emphasis added)). While this passage does not explicitly address the issue of whether trial judges

can raise the issue on their own motion, its wording suggests that they have an active role to play in this respect.

[105] Trial judges have an obligation to remain alert to the evidentiary developments that warrant revisiting s. 276 rulings, particularly those made prior to trial. As our Court explained in *R.V.*, at para. 72:

Section 276 continues to operate even after an initial evidentiary ruling has been rendered. Trial judges must therefore remain vigilant in ensuring the objectives of the provision are upheld as the trial unfolds. Cross-examination about the complainant’s sexual history, where permitted, should be closely monitored to ensure it remains within the permissible limits. And as evidence emerges, it may become necessary to re-consider prior s. 276 rulings. [Emphasis added.]

[106] There are circumstances in which the evidence “crie[s] out for a reconsideration” of a prior ruling (see *R. v. L.S.*, 2017 ONCA 685, 354 C.C.C. (3d) 71, at para. 63). Even where counsel fails to raise this material change in circumstances, the trial judge has an obligation to, at the very least, invite submissions on the issue. As noted in the excerpt above from *R.V.*, some cases will make it *necessary* — rather than merely appropriate — to revisit a prior ruling. This approach may impose a high standard on trial judges. That said, it is already established in our jurisprudence that they have a duty “to ensure that the accused’s rights with regard to cross-examination, which are so essential to the defence, are protected” (*R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 673, per Cory J.).

[107] We would draw a parallel with this Court’s comments in *R. v. Hodgson*, [1998] 2 S.C.R. 449, at para. 41 (in relation to the need to conduct a *voir dire* on the voluntariness of an accused’s statement):

However, where the defence has not requested a *voir dire* and a statement of the accused is admitted into evidence, the trial judge will only have committed reversible error if clear evidence existed in the record which objectively should have alerted him or her to the need for a *voir dire* notwithstanding counsel’s silence. Thus, the test for holding a *voir dire* is assessed by an appellate court’s objective review of the evidence in the record to determine whether something should have triggered the trial judge’s obligation to conduct an inquiry.

[108] The logic underlying this passage is transposable to the context of s. 276. As a general rule, trial judges have a duty to “conduct [a] trial judicially quite apart from lapses of counsel” (see *R. v. Swezey* (1974), 20 C.C.C. (2d) 400 (Ont. C.A.), at p. 417 per Martin J.A., endorsed in *Hodgson*, at para. 41). Like the trial judge’s obligation to direct that a *voir dire* be held, revisiting a ruling contributes to maintaining trial fairness and avoiding a miscarriage of justice. The accused’s right to a fair trial is constitutionally protected (see *R. v. Kahsai*, 2023 SCC 20, at para. 35), and the trial judge has a duty to uphold that right (see *Amell v. The Queen*, 2013 SKCA 48, 2013 D.T.C. 5102, at para. 25; *R. v. Harris* (1997), 118 C.C.C. (3d) 498 (Ont. C.A.), at para. 51).

[109] Specifically, with respect to s. 276, our Court has stated that “[t]he ultimate responsibility for enforcing compliance with the mandatory s. 276 regime lies squarely with the trial judge, not with the Crown. After all, it is the trial judge, not the Crown,

who is the gatekeeper in a criminal trial” (*Barton*, at para. 68). Thus, trial judges’ “ongoing task” to revisit their rulings is “particularly acute under the s. 276 regime” (see *R. v. Edmundson*, 2023 ONSC 4236, at para. 22 (CanLII), citing *Barton*, at para. 65). Our colleague suggests that the trial judge’s powers in this regard must be informed by the fact that s. 276 requires that the accused specify the use for which the evidence is proposed and that the complainant has standing. However, the accused’s constitutionally protected right to make full answer and defence is also a vital component of the provision’s framework. This dimension of s. 276 also informs the scope of the trial judge’s power to revisit their own rulings. Section 276 “stri[k]es a balance” between the accused’s right to make full answer and defence and the dignity and privacy of complainants (see *Goldfinch*, at para. 39). It follows that trial judges’ responsibility to ensure that s. 276 is properly applied is crucial not only to evidence that may need to be screened out, but also to evidence that may need to be admitted for the accused to be afforded the opportunity to make full answer and defence.

[110] While pre-trial rulings are useful for streamlining and focusing the trial process, they should not hinder the accused’s ability to make full answer and defence in a criminal trial.

V. Jurisdiction

[111] We begin by maintaining that our Court has jurisdiction to consider this issue.

[112] We acknowledge that an appeal under s. 691(1)(a) of the *Criminal Code* is limited to the questions of law on which a judge of a court of appeal dissents, unless the appellant seeks leave to address other issues (see *R. v. Keegstra*, [1995] 2 S.C.R. 381, at paras. 23-24; see also *R. v. Downes*, 2023 SCC 6, at para. 56, regarding s. 693(1)(a)).

[113] Having said that, it is important to maintain some flexibility in identifying what is at the heart of the dissent. For instance, “[i]n ascertaining the real ground upon which dissent is based, if the formal judgment fails to make that clear, this Court may look to the written reasons of the dissenting judges” (*Dunlop v. The Queen*, [1979] 2 S.C.R. 881, at p. 889, per Dickson J. (as he then was); see also p. 908, per Pratte J.; M. Vauclair, T. Desjardins and P. Lachance, *Traité général de preuve et de procédure pénales 2023* (30th ed. 2023), at para. 51.332, citing *Dunlop*). While the situation in *Dunlop* is not identical to the one before us, this example demonstrates that appellate courts need not take an overly formalistic approach in assessing the substance of a dissent. It is worth bearing in mind that “[c]riminal appeals on questions of law are based in part on the desire to ensure that criminal convictions are the product of error-free trials” (*R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 26). An unduly rigid approach to characterizing the question on which a judge dissents would prevent the Court from addressing the substance of their disagreement.

[114] In the case before us, the question on which Frankel J.A. dissented is whether or not the trial judge erred in refusing to admit the evidence of the parties’

sexual activity on April 1. We are responding to that same question; the trial judge's obligation to revisit the s. 276 ruling is simply the mechanism through which we do so. It is not a separate or standalone question. We also note that, as our colleague mentions, Frankel J.A. referred to the complainant's trial testimony and to the Crown's closing submissions. We agree with our colleague that the way in which he considered this evidence was improper; as she notes at para. 43 of her reasons, the pre-trial ruling should be assessed on the basis of the record that was available to the judge at that time. Nevertheless, Frankel J.A.'s failure to identify the basis upon which an appellate court could legitimately consider the trial evidence should not prevent this Court from doing so in responding to the overarching question of whether the trial judge erred in refusing to admit the April 1 evidence.

[115] Furthermore, our reasons do not raise any new issues. It is true that an appellate court that raises new issues on appeal must allow the parties to make submissions on those matters. This requirement only comes into play, however, when the issue is truly a new one. In *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 35, our Court determined that “an appellate court will be found to have raised a new issue when the issue was not raised by the parties [or] cannot reasonably be said to stem from the issues as framed by the parties” (emphasis added). In our view, the question of whether the trial judge should have revisited the pre-trial ruling can be said to stem from the issues as framed by the appellant and respondent, in this case, the admissibility of their prior consensual sexual activity. It is clear from our jurisprudence that a pre-trial ruling, including a ruling under s. 276, may need to be revisited during

the trial. A determination of whether the trial judge erred in failing to do so must consider how the evidence in respect of the pre-trial ruling unfolded at trial.

[116] We would add to this that the trial judge had an opportunity to address the events of April 1 *during the course of the trial*. This aspect of the proceedings lends further support to our conclusion that the issue we are addressing is not a new one. As noted by Frankel J.A., dissenting, when defence counsel attempted to cross-examine the complainant on whether she had spent the evening of April 1 in the appellant's bedroom, Crown counsel objected and the trial judge excused the complainant from the courtroom (2022 BCCA 312, 418 C.C.C. (3d) 169, at para. 28). It is true that the focal point of these discussions was not the precise issue we are addressing. Nevertheless, since those discussions concerned the parties' interactions on April 1, they provided the trial judge with an opportunity to consider the significant impact of the complainant's in-chief trial testimony on his pre-trial ruling. The trial judge failed to take this opportunity to revisit that ruling.

[117] This sequence of events also suggests that defence counsel's failure to explicitly raise the issue was not, as our colleague says, a strategic decision. Defence counsel *did* indeed try to circle back to April 1 and was met with opposition from the trial judge and Crown counsel. We fail to understand what tactical advantage the appellant could have gained by not expressly flagging the evolution of the complainant's testimony. Defence counsel's failure to address this specific aspect of the proceedings appears to be a lapse — the consequences of which should not fall on

the appellant — rather than a deliberate strategic choice. He obtained an adjournment for the specific purpose of seeking guidance on the *Browne v. Dunn* (1893), 6 R. 67 (H.L.), issue (A.R., vol. I, at pp. 130-36); there is nothing on the record to suggest that he considered and rejected the possibility of invoking the evolution of the complainant's trial testimony.

VI. Application

[118] In our view, the complainant's trial testimony should have prompted the trial judge to revisit the pre-trial ruling under s. 276.

[119] Having established that this Court has jurisdiction to consider the effect of the evolution of the trial evidence, we would conclude that the trial judge ought to have permitted cross-examination of the complainant on the events of April 1.

[120] The complainant's trial testimony left the trier of fact with the impression that she was unlikely to consent to sex with the appellant after their separation. To be clear, we are not suggesting that the mere fact of separation makes consent more or less likely. Rather, the complainant's trial testimony suggests that, according to *this particular complainant*, consent was improbable in the context of separation. In other words, her testimony transformed the neutral fact of separation into an element that supported the conclusion that she did not consent to the sexual activity.

[121] The testimony should have opened the door to cross-examination of the complainant regarding her consensual sexual activity with the appellant on April 1 for two limited purposes: (1) to neutralize the suggestion that the complainant was unlikely to consent after the separation, and (2) to test her credibility on this point.

[122] Thus, the April 1 evidence does not derive its relevance from twin-myth reasoning. Its purpose would not be to suggest that the complainant was more likely to consent to sexual activity on April 2 because she consented under similar circumstances — i.e., those of the separation — on April 1. Nor would it suggest that she is inherently less worthy of belief because she and the appellant engaged in other sexual activity. Rather, the purpose of the evidence would be to dispel the impression — created by the complainant’s trial testimony — that she would not have consented to sex with the appellant given their separation and his relationship with another woman.

[123] Once the complainant testified at trial, the April 1 evidence became relevant. We would draw a parallel with *Harris*. In that case, a pre-trial ruling had excluded evidence of alleged consensual sexual activity between the complainant and the appellant. At trial, the complainant testified that the two did not have a sexual relationship and that she had made it known to the appellant that she was not interested in one. For the court, Moldaver J.A. (as he then was) concluded that by testifying as she did, the complainant placed the nature of her relationship with the appellant in

issue. As a result, the appellant was entitled to lead evidence to rebut the complainant's testimony (see *Harris*, at para. 42).

[124] The decision in *Harris* illustrates that, in some situations, evidence of prior sexual activity becomes relevant to challenging a complainant's depiction of the relationship because it is "fundamental to the coherence of the defence narrative" (see *Goldfinch*, at para. 66). There need not be inconsistent statements in order for this to be the case. For instance, when the complainant suggests that her relationship with the accused has hitherto been platonic because of their separation, she herself is putting the sexual nature of the relationship at issue. In some cases, the complainant's depiction of the relationship may make the accused's claim that the complainant consented to sex "untenable or utterly improbable" (to borrow the language used in *Goldfinch*, at para. 68). It may be that the only way for the accused to test this depiction would be to demonstrate that the relationship had previously included a sexual dimension.

[125] Of course, a mere assertion that evidence of prior sexual activity is relevant to the context of a relationship or to credibility is not sufficient. In general, whether or not a relationship has previously included a sexual component is not relevant to determining whether a complainant has consented to a particular instance of sexual activity. We stress that the accused must not be allowed to suggest that the complainant was more likely to have consented to the sexual activity in question because she had previously consented in the context of the same relationship. Trial judges must remain

vigilant in ensuring that relationship evidence does not serve this prohibited purpose, which would fall squarely within twin-myth territory.

[126] However, the situation changes when the evidence suggests that, *because* of the platonic nature of a particular relationship, the complainant would be unlikely to consent. In such circumstances, when “[l]eft unchallenged”, the complainant’s testimony regarding their relationship with the accused could become “potentially devastating to [the accused’s] position” (see *Harris*, at para. 49).

[127] This is one such case. Without the April 1 evidence, the complainant’s testimony would leave the trier of fact with the impression that the separation and the appellant’s relationship with another woman made his narrative “untenable or utterly improbable” (*Goldfinch*, at para. 68). The complainant herself brought the sexual nature of the relationship into question, by implying that she was unlikely to consent to sex with the appellant during their separation. As we know from the complainant’s police statement, this implication was not accurate; she had told the police that the two had consensual sexual intercourse on April 1, a couple of months after they separated. Before the complainant’s trial testimony, the April 1 evidence was not relevant. However, her testimony created a material change in circumstances that triggered the trial judge’s obligation to revisit his pre-trial ruling. As was the case in *Harris*, defence counsel’s failure to raise this particular issue is not fatal.

[128] In our view, the trial judge should have allowed the appellant to cross-examine the complainant about the consensual sexual activity of April 1, as this

evidence satisfies the criteria set out in s. 276. As we have explained, it is not being adduced for the purpose of supporting one of the twin myths and is relevant for two specific purposes. The evidence also pertains to specific instances of sexual activity.

[129] Moreover, the evidence has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. This balancing exercise “depend[s], in part, on how important the evidence is to the accused’s right to make full answer and defence” (*Goldfinch*, at para. 69). Unlike in *Goldfinch*, excluding the evidence in the case before us would compromise the appellant’s right to do so: without this evidence, the appellant would be unable to challenge evidence that severely undermined his own narrative with respect to the central issue of consent. With respect to the danger of prejudice, we strongly disagree with Frankel J.A.’s statement that the complainant’s disclosure to the police diminishes the impact of the admission of the evidence on her dignity and right to privacy. On this point, we are in complete agreement with our colleague’s comments that his statement “contradicts the animating purposes of the s. 276 regime” (para. 44).

[130] Nonetheless, in this case, the appellant’s right to make full answer and defence tilts the balance in favour of admitting the evidence. Moreover, a limiting self-instruction outlining the evidence’s permissible uses — which are narrowly circumscribed — would mitigate the potential prejudice.

[131] Consequently, we would allow the appeal, quash the conviction, and order a new trial.

Appeal dismissed, CÔTÉ and MOREAU JJ. dissenting.

Solicitors for the appellant: Helps Law Corporation, Vancouver.

*Solicitor for the respondent: Ministry of Attorney General, B.C.
Prosecution Service, Vancouver.*

*Solicitor for the intervener: Alberta Crown Prosecution Service — Appeals
and Specialized Prosecutions Office, Edmonton.*